

**BEFORE THE HARYANA REAL ESTATE REGULATORY
AUTHORITY, GURUGRAM**

Complaint no.:	322 of 2023
Date of decision:	03.01.2024

Mr. Narender Kumar

Address:- H. No. 547/21 om Nagar, Gurugram

Complainant

Versus

Ansal Housing and Construction Ltd.

Office address: 15, UGF, Indra Prakash, 21,
Barakhamba Road, New Delhi-110001

Respondent

CORAM:

Shri Ashok Sangwan

Member

APPEARANCE:

Shri Ashish Budhiraja (Advocate)

Complainant

None

Respondent

ORDER

1. The present complaint dated 20.01.2023 has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is *inter alia* prescribed that the promoter shall be responsible for all obligations, responsibilities and functions as provided under the provision of the Act or the Rules and regulations made there under or to the allottee as per the agreement for sale executed *inter se*.

A. Unit and project related details

2. The particulars of unit details, sale consideration, the amount paid by the complainant, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

Sr. No.	Particulars	Details
1.	Name of the project	"Ansal Highland Park", Sector 103, Gurugram
2.	Total area of the project	11.70 acres
3.	Nature of the project	Group housing project
4.	DTCP license no.	32 of 2012 dated 12.04.2012 valid up to 11.04.2020
5.	Name of licensee	M/s Identity Buildtech Pvt. Ltd. M/s Agro Gold Chemicals India LLP
6.	Registered/not registered	Registered Vide registration no. 16 of 2019 dated 01.04.2019 valid up to 30.11.2021
7.	Unit no.	IN RES-1103 [pg. 27 of complaint]
8.	Area of the unit	1762 sq. ft. [pg. 27 of complaint]
9.	Date of execution of buyer's agreement	15.06.2013

10.	Possession clause	<p>Clause 31.</p> <p>31. The developer shall offer possession of the unit any time, within a period of 48 months from the date of execution of the agreement or within 48 months from the date of obtaining all the required sanctions and approval necessary for commencement of construction, whichever is later subject to timely payment of all dues by buyer and subject to force majeure circumstances as described in clause 32. Further, there shall be a grace period of 6 months allowed to the developer over and above the period of 48 months as above in offering the possession of the unit.</p> <p><i>(Emphasis supplied)</i></p> <p><i>[pg. 33 of complaint]</i></p>
11.	Due date of possession	15.12.2017 (Note: 48 months from date of execution of BBA i.e., 15.06.2013)
12.	Basic sale consideration	₹ 93,68,475/-
13.	Total amount paid by the complainant as per account ledger dated 28.01.2023 at page 60 of complaint.	₹ 65,05,637/-
14.	Offer of possession	Not offered
15.	Occupation certificate	Not obtained

B. Facts of the complaint

3. The complainant pleaded the complaint on the following facts:

- a. That the complainant applied through application dated 20-12-2013 for a unit in the said project. The complainant is allotted with a unit INVES 1103 having sale area 1762 sq. ft. and an Apartment buyer agreement has been executed between the respondent and complainant on dated 15 June 2013 with the respondent on 15th October 2013, At the time of signing of the Apartment buyer Agreement complainant had paid the booking amount of Rs. 12,72,443/-.
- b. As per the agreement total consideration of Rs. 93,68,575/- was agreed to be paid to the respondent by the complainant and as on this day Rs. 65,05,637/- was already paid to the respondent.
- c. That as per the Apartment buyer agreement it had been agreed that the possession of the said Apartment shall be offered 48 months of date of execution of apartment buyer agreement which comes 15th of June 2017 and 6 months extension which comes to 15 December 2017, but the respondent miserably failed to deliver the possession of the apartment within agreed time frame.
- d. That the complainant took a loan from Axis bank Ltd in lieu of the above apartment and a tripartite agreement has been executed between the Bank, Complainant and the respondent dated 24-02-2014. The amount sanctioned by the bank is Rs. 61,30,293/- through a sanction letter dated 08-01-2014.
- e. That as per clause 2 of the tripartite agreement the bank will directly pay the amount to the respondent i.e is builder. That the complainant has made 70% of the payment with regard to the sale consideration of the said unit and the same has been reflected in

the statement of accounts.

- f. That as of now there has been a delay of more than 5 years but the possession of the said unit has not been offered by the respondent. Such delay on part of the respondent has neither been explained or justified.

C. Relief sought by the complainant:

4. The complainant has sought following reliefs:

- a. Direct the respondent to hand over the legal and rightful possession of the Flat to the Complainant, after completing the construction of the Flat and common area amenities and facilities.
- b. Direct the Respondent to pay legal expenses of Rs.1,00,000/- incurred by the Complainant.

D. Reply filed by the respondent

5. The respondent had contested the complaint on the following grounds:
- a. The answering Respondent is a developer and has built multiple residential and commercial buildings within Delhi/NCR with a well-established reputation earned over years of consistent customer satisfaction.
- b. That the complainants had approached the answering Respondent for booking a Flat no. INVES-1103 in an upcoming project Ansal Highland Park, Gurugram. Upon the satisfaction of the complainant regarding inspection of the site, title, location plans, etc. an agreement to sell dated 15.06.2013 was signed between the parties.
- c. That the current dispute cannot be governed by the RERA Act, 2016 because of the fact that the builder buyer agreement signed between the complainant and the answering Respondent was in

the year 2013. It is submitted that the regulations at the concerned time period would regulate the project and not a subsequent legislation i.e., RERA Act, 2016. It is further submitted that Parliament would not make the operation of a statute retrospective in effect.

- d. That the complaint specifically admits to not paying necessary dues or the full payment as agreed upon under the builder buyer agreement. It is submitted that the complainant cannot be allowed to take advantage of his own wrong. That even if for the sake of argument, the averments and the pleadings in the complaint are taken to be true, the said complaint has been preferred by the complainant belatedly. The complainant has admittedly filed the complaint in the year 2023 and the cause of action accrue on 15.06.2017 as per the complaint itself.
- e. Therefore, it is submitted that the complaint cannot be filed before the HRERA Gurugram as the same is barred by limitation. That even if the complaint is admitted to be true and correct, the agreement which was signed in the year 2013 without coercion or any duress cannot be called in question today. It is submitted that the builder buyer agreement provides for a penalty in the event of a delay in giving possession. It is submitted that clause 37 of the said agreement provides for Rs. 5/- sq. ft. per month on super area for any delay in offering possession of the unit as mentioned in Clause 31 of the agreement. Therefore, the complainant will be entitled to invoke the said clause and is barred from approaching the Commission in order to alter the penalty clause by virtue of this

complaint more than 10 years after it was agreed upon by both parties.

- f. That the complaint itself discloses that the said project does not have a RERA approval and is not registered. It is submitted that if the said averment in the complaint is taken to be true, the Authority does not have the jurisdiction to decide the complaint.
- g. That the Respondent had in due course of time obtained all necessary approvals from the concerned authorities. It is submitted that the permit for environmental clearances for proposed group housing project for Sector 103 Gurugram, Haryana on 20.02.2015. Similarly, the approval for digging foundation and basement was obtained and sanctions from the department of mines and geology were obtained in 2012. Thus, the Respondent have in a timely and prompt manner ensured that the requisite compliances be obtained and cannot be faulted on giving delayed possession to the Complainant.
- h. That the answering Respondent has adequately explained the delay. It is submitted that the delay has been occasioned on account of things beyond the control of the answering Respondent. It is further submitted that the builder buyer agreement provides for such eventualities and the cause for delay is completely covered in the said clause. The Respondent ought to have complied with the orders of the Hon'ble High Court of Punjab and Haryana at Chandigarh in CWP No. 20032 of 2008, dated 16.07.2012, 31.07.2012, 21.08.2012. The said orders banned the extraction of water which is the backbone of the construction process.

- i. Similarly, the complaint itself reveals that the correspondence from the Answering Respondent specifies force majeure, demonetization and the orders of the Hon'ble NGT prohibiting construction in and around Delhi and the COVID -19 pandemic among others as the causes which contributed to the stalling of the project at crucial junctures for considerable spells. That the answering respondent and the complainant admittedly have entered into a builder buyer agreement which provides for the event of delayed possession.
 - j. It is submitted that clause 32 of the builder buyer agreement is clear that there is no compensation to be sought by the complainant/prospective owner in the event of delay in possession. That the answering Respondent has clearly provided in clause 35 the consequences that follow from delayed possession. It is submitted that the Complainant cannot alter the terms of the contract by preferring a complaint before the HRERA Gurugram.
6. Copies of all the relevant documents have been files and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submissions made by the complainant.

E. Jurisdiction of the authority

7. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I. Territorial jurisdiction

8. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate

Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram District, therefore this authority has complete territorial jurisdiction to deal with the present complaint.

E. II. Subject matter jurisdiction

9. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

Section 11(4)(a)

Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

Provided that the responsibility of the promoter, with respect to the structural defect or any other defect for such period as is referred to in sub-section (3) of section 14, shall continue even after the conveyance deed of all the apartments, plot or buildings, as the case may be, to the allottees are executed.

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

10. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as per provisions of section 11(4)(a) of the Act leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

F. Findings on the objections raised by the respondent:

F.I Objections regarding force majeure circumstances.

11. The respondents-promoter has raised the contention that the construction of the tower in which the unit of the complainant is situated, has been delayed due to force majeure circumstances such as orders passed by National Green Tribunal to stop construction, demonetization, and Covid- 19. The plea of the respondent regarding various orders of the NGT and demonetisation and all the pleas advanced in this regard are devoid of merit. The orders passed by NGT banning construction in the NCR region was for a very short period of time and thus, cannot be said to impact the respondent-builder leading to such a delay in the completion. Thus, the promoter respondent cannot be given any leniency on based of aforesaid reasons and it is well settled principle that a person cannot take benefit of his own wrong.

F. II. Objection regarding delay in completion of construction of project due to outbreak of Covid-19.

12. The Hon'ble Delhi High Court in case titled as *M/s Halliburton Offshore Services Inc. V/S Vedanta Ltd. & Anr. bearing no. O.M.P (1) (Comm.) no. 88/2020 and LAS 3696-3697/2020* dated 29.05.2020 has observed as under:

69. The past non-performance of the Contractor cannot be condoned due to the COVID-19 lockdown in March 2020 in India. The Contractor was in breach since September 2019. Opportunities were given to the Contractor to cure the same repeatedly. Despite the same, the Contractor could not complete the Project. The outbreak of a pandemic cannot be used as an excuse for non-performance of a contract for which the deadlines were much before the outbreak itself."

13. In the present case also, the respondents were liable to complete the construction of the project and handover the possession of the said unit by 15.12.2017. It is claiming benefit of lockdown which came into effect on 23.03.2020 whereas the due date of handing over of possession was



much prior to the event of outbreak of Covid-19 pandemic. Therefore, the authority is of the view that outbreak of a pandemic cannot be used as an excuse for non-performance of a contract for which the deadlines were much before the outbreak itself and for the said reason, the said time period cannot be excluded while calculating the delay in handing over possession.

G. Findings on the relief sought by the complainant

G.I. Relief sought by the complainant: Direct the respondent to hand over the legal and rightful possession of the Flat to the Complainant, after completing the construction of the Flat and common area amenities and facilities.

14. On hearing dated 11.10.2023, the counsel for the complainant stated that the complainant is seeking delay possession charges and handing over of physical possession of the unit allotted by the respondent. By virtue of proviso to section 18(1), the Act has created statutory right of delay possession charges in favour of the allottee. Proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules.

"Section 18: - Return of amount and compensation

18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building, —

.....

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."



15. Clause 31 of the flat buyer agreement (in short, agreement) provides for handing over of possession and is reproduced below: -

"31. The Developer shall offer possession of the Unit any time, within a period of 48 months from the date of execution of Agreement or within 48 months from the date of obtaining all the required sanctions and approval necessary for commencement of construction, whichever is later subject to timely payment of all dues by Buyer and subject to force-majeure circumstances as described in clause 32. Further, there shall be a grace period of 6 months allowed to the Developer over and above the period of 48 months as above in offering the possession of the Unit."

16. At the outset, it is relevant to comment on the present possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and application, and the complainant not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoters. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favor of the promoters and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoters may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the flat buyer agreement by the promoters are just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.



17. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the subject unit within a period of 48 months from date of agreement or the date of commencement of construction which whichever is later plus grace period of 6 months. As no approval/sanction has been placed on record by the respondent therefore, the due date of possession has been calculated from date of execution of builder buyer agreement i.e., 15.06.2013. The period of 48 months expires on 15.06.2017. Since in the present matter the BBA incorporates unqualified reason for grace period/extended period in the possession clause. Accordingly, the authority allows this grace period of 6 months to the promoter at this stage, accordingly the due date of possession comes out to be 15.12.2017.
18. **Admissibility of delay possession charges at prescribed rate of interest:** Proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:
- "Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]*
(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.
- Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public."*
19. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is



reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.

20. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., **03.01.2023** is 8.85%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.85%.

21. Rate of interest to be paid by complainant for delay in making payments: The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.

Explanation. —For the purpose of this clause—

(i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default.

(ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"

22. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., **10.85%** by the respondent /promoter which is the same as is being granted to the complainant in case of delayed possession charges.

23. On consideration of the documents available on record and submissions made regarding contravention of provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the



agreement. By virtue of clause 31 of the agreement executed between the parties on 15.06.2013, the possession of the subject unit was to be delivered within a period of 48 months from date of agreement or the date of commencement of construction which whichever is later plus grace period of 6 months. As no approval/sanction has been placed on record by the respondent, therefore, the due date of possession has been calculated from date of execution of builder buyer agreement i.e., 15.06.2017. As far as grace period is concerned, the same is allowed for the reasons quoted above. Therefore, the due date of handing over possession is 15.12.2017. The respondent has not offered the possession of the subject unit till date. Accordingly, it is the failure of the respondent /promoter to fulfil its obligations and responsibilities as per the builder buyer's agreement to hand over the possession within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with proviso to section 18(1) of the Act on the part of the respondent no.1 is established. As such the allottee shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 15.12.2017 till actual handing over of possession or offer of possession plus two months after obtaining occupation certificate from the competent authority whichever is earlier, as per section 18(1) of the Act 2016 read with Rule 15 of the Rules.

- G.II Direct the Respondent to pay legal expenses of Rs. 1,00,000/- incurred by the Complainant.
24. The complainant is seeking compensation in this regard the Hon'ble Supreme Court of India, in case titled as ***M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP & Ors.*** (civil appeal nos. 6745-



6749 of 2021, decided on 11.11.2021), has held that an allottee is entitled for claiming compensation under sections 12, 14, 18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. Therefore, the complainant is at liberty to approach the adjudicating officer for seeking compensation, if any.

H. Directions of the authority

25. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligations casted upon the promoters as per the functions entrusted to the authority under section 34(f):
- The respondent is directed to pay interest at the prescribed rate of 10.85% p.a. for every month of delay from the due date of possession i.e., 15.12.2017 till actual handing over of possession or offer of possession plus two months after obtaining occupation certificate from the competent authority whichever is earlier, as per section 18(1) of the Act 2016 read with Rule 15 of the Rules.
 - The arrears of such interest accrued from 15.12.2017 till the date of order by the authority shall be paid by the promoter to the allottee within a period of 90 days from date of this order and interest for every month of delay shall be paid by the promoter to the allottee before 10th of the subsequent month as per rule 16(2) of the rules.
 - The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.



- d. The rate of interest chargeable from the complainant-allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 10.85% by the respondent /promoters which is the same rate of interest which the promoters shall be liable to pay the allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.
- e. The respondent shall not charge anything from the complainant which is not the part of the buyer's agreement. The respondent shall not demand/claim holding charges from the complainant/allottee at any point of time even after being part of the builder buyer's agreement as per law settled by Hon'ble Supreme Court in civil appeal nos. 3864-3889/2020 decided on 14.12.2020.
26. Complaint stands disposed of.
27. File be consigned to registry.

Ashok Sangwan
(Member)

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 03.01.2024