

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

Order pronounced on: 21.12.2023

NAME OF THE BUILDER		M/s Anand Divine Developers Private Limited	
PROJECT NAME		"ATS TRIUMP"	
S. No.	Case No.	Case title	APPEARANCE
1.	CR/880/2022	Mr. Yashwant Joshi and Mrs. Anupama Jishi V/S M/s Anand Divine Developers Private Limited	Shri Saumyen Advocate and Shri Gaurav Bhardwaj Advocate
2.	CR/5283/2022	Mrs. Parmeet Kaur Ghawla V/S M/s Anand Divine Developers Private Limited	Shri Lzafeer Ahmed Advocate and Shri Gaurav Bhardwaj Advocate

**CORAM:**

Shri Vijay Kumar Goyal

Member

**ORDER**

1. This order shall dispose of both the complaints titled as above filed before the authority under section 31 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred as "the Act") read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (hereinafter referred as "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 its obligations, responsibilities and functions to the allottee as per the agreement for sale executed inter se between parties.
2. The core issues emanating from them are similar in nature and the complainant(s) in the above referred matters are allottees of the project, namely, "**ATS TRIUMP**" (group housing colony) being developed by the same

respondent/promoter i.e., M/s Anand Divine Developers Private Limited. The terms and conditions of the buyer's agreement against the allotment of units in the upcoming project of the respondent/builder and fulcrum of the issues involved in both the cases pertains to failure on the part of the promoter to deliver timely possession of the units in question, seeking award of handover the physical possession of the allotted unit along with delayed possession charges and others.

3. The details of the complaints, reply to status, unit no., date of agreement, possession clause, due date of possession, total sale consideration, total paid amount, and relief sought are given in the table below:

<b>Project Name and Location</b>	<b>M/s Anand Divine Developers Private Limited at "ATS TRIUMP", Sector - 104, Gurugram.</b>
<b>Occupation Certificate: -</b>	<b>28.05.2019</b>
<b>Possession Clause: -</b>	<p><b>18. Time of Handing Over Possession:</b>  <i>Barring unforeseen circumstances and force majeure events as stipulated hereunder, possession of the said apartment is proposed to be, offered by the company to the allottee within a period of 36(thirty six) months with a grace period of 6(six) months from the date of actual start of the construction of a particular tower building in which the registration for allotment is made, such date shall hereinafter referred to as "stipulated date", subject always to timely payment of all amounts including the basic sale price, EDC/IDC, IFMS, stamp duty, registration fees and other charges as stipulated herein or as may be demanded by the company from time to time in this regard. The date of actual start of construction shall be the date on which the foundation of the particular building in which the said apartment is allotted shall be laid as per certification by the company's architect/engineer-in-charge of the complex and the said certification shall be final and binding on the allottee.</i></p>

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Sr. No	Complaint No., Case Title, and Date of filing of complaint	Reply status	Unit No.	Date of execution of agreement to sell and Offer of possession	Due date of possession	Total Consideration /Total Amount paid by the complainants in Rs.
1.	CR/880/2022  Mr. Yashwant Joshi and Mrs. Anupama Jishi V/S M/s Anand Divine Developers Private Limited  Date of Filing of complaint 15.03.2022	Reply not received	6151 on 15 <sup>th</sup> floor, tower 6,  Area admeasuring 3150 sq. ft. (super area)  [As per annexure- P1 on page no. 30 of the complaint]	07.03.2014  (As per annexure- 2 at page no. 27 of the complaint)  <b>Offer of possession: - 30.05.2019</b>  (Page no. 53 of the complaint)	07.09.2017  [Calculated from the date of agreement i.e., 07.03.2014 as date of commencement of construction tower is not provided on record]  (Grace period of 6 months are allowed)	TSC: - 1,76,31,250/-  (As per payment plan on page no. 50 of the complaint)  AP: - 1,85,46,777/-  (As alleged by the complainant on page no. 16 of complaint)
2.	CR/5283/2022  Mrs. Parmeet Kaur Chawla V/S M/s Anand Divine Developers Private Limited  Date of Filing of complaint 26.07.2022	Reply received on 03.10.2022	1141 on 14 <sup>th</sup> floor, tower 1  Area admeasuring 2290 sq. ft. (super area)  (As per annexure- P1 on page no. 25 of the complaint)	10.04.2013  (As per annexure- P1 on page no. 23 of the complaint)  <b>Offer of possession: - 30.05.2019</b>  (as per annexure P/2, at page no. 49 of the complaint)	10.10.2016  [Calculated from the date of agreement i.e., 10.04.2013 as date of commencement of construction tower is not provided on record]  (Grace period of 6 months are allowed)	TSC: - 1,30,08,750/-  (As per payment plan on page no. 47 of the complaint)  AP: - 1,36,40,706/-  (As alleged by the complainant on page no. 20 of complaint)

**The complainant in the above complaints have sought the following reliefs:**

1. Direct the respondent to handover the physical possession of the said apartment.



2. Direct the respondent to pay interest @18% calculated from 10.10.2016, i.e., 42 months from the date of the agreement, by when construction ought to have been completed and possession handed over.
3. Direct the respondent not to charge any holding charges.
4. Direct the respondent not to charge any maintenance charges till the physical possession is handed over to the complainants.
5. Direct the respondent to pay cost of litigation.

**Note: In the table referred above, certain abbreviations have been used. They are elaborated as follows:**

**Abbreviation Full form**

TSC Total Sale consideration

AP Amount paid by the allottee(s)

4. The aforesaid complaints were filed against the promoter on account of violation of the buyer's agreement against the allotment of units in the upcoming project of the respondent/builder and for not handing over the possession by the due date, seeking award of handover the physical possession of the allotted unit along with delayed possession charges and others.
5. It has been decided to treat the said complaints as an application for non-compliance of statutory obligations on the part of the promoter/ respondent in terms of section 34(f) of the Act which mandates the authority to ensure compliance of the obligations cast upon the promoters, the allottee(s) and the real estate agents under the Act, the rules and the regulations made thereunder.
6. The facts of both the complaints filed by the complainant(s)/allottee(s) are also similar. Out of the above-mentioned case, the particulars of lead case **CR/5283/2022 titled as Mrs. Parmeet Kaur Chawla V/S M/s Anand Divine Developers Private Limited** are being taken into consideration for determining the rights of the allottee(s) qua of handover the physical possession of the allotted unit along with delayed possession charges and others.

**A. Project and unit related details**

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

**CR/5283/2022 titled as Mrs. Parmeet Kaur Chawla V/S M/s Anand Divine Developers Private Limited.**

S. No.	Heads	Information
1.	Name and location of the project	"ATS Triump", Sector 104, Village-Dhanwapur, Gurugram
2.	Nature of the project	Group housing colony
3.	Project area	14.093 acres
4.	DTCP License	63 of 2011 dated 16.07.2011 valid till 15.07.2019 10 of 2012 dated 03.02.2012 valid till 02.02.2020
	Name of the licensee	M/s Great Value HPL Infratech Private Limited M/s Kaanha Infrastructure private Limited
5.	HRERA registered/ not registered	<b>Not registered</b>
6.	Allotment letter dated	Not placed of record
7.	Date of execution of flat buyer's agreement	<b>10.04.2013</b> (As per annexure- P1 on page no. 23 of the complaint)
8.	Unit no.	1141 on 14 <sup>th</sup> floor, tower 1 (As per annexure- P1 on page no. 25 of the complaint)
9.	Super Area	2290 sq. ft. (As per annexure- P1 on page no. 25 of the complaint)
10.	Possession clause	<b>As per clause 18 of the agreement: Time of handing over possession Barring unforeseen circumstances and force</b>

		<p><i>majeure events as stipulated hereunder, possession of the said apartment is proposed to be, offered by the company to the allottee within a period of 36(thirty six) months with a grace period of 6(six) months from the date of actual start of the construction of a particular tower building in which the registration for allotment is made, such date shall hereinafter referred to as "stipulated date", subject always to timely payment of all amounts including the basic sale price, EDC/IDC, IFMS, stamp duty, registration fees and other charges as stipulated herein or as may be demanded by the company from time to time in this regard. The date of actual start of construction shall be the date on which the foundation of the particular building in which the said apartment is allotted shall be laid as per certification by the company's architect/engineer-in-charge of the complex and the said certification shall be final and binding on the allottee.</i></p>
11.	Date of commencement of construction of the tower	Not provided
12.	Due date of delivery of possession	10.10.2016 [Calculated from the date of agreement i.e., 10.04.2013 as date of commencement of construction tower is not provided by both the parties]
13.	Payment plan	Down payment plan (As per payment plan on page no. 48 of the complaint)
14.	Total consideration	Rs.1,30,08,750/-

		(As per payment plan on page no. 47 of the complaint)
15.	Total amount paid by the complainants	Rs.1,36,40,706/- (As alleged by the complainant on page no. 20 of complaint)
16.	Occupation Certificate	28.05.2019 (As per page no.45 of reply)
17.	Offer of possession	30.05.2019 (As per Annexure- P2 on page no. 49 of the complaint)
18.	Request made by complainant to handover the possession of the allotted unit	08.07.2019 & 16.09.2021 (As per page no. 59 & 61 of the complaint)
19.	Email by respondent-acknowledging that work is going on at slow pace due to COVID	17.09.2021 (As per page no. 62 of complaint)

### B. Facts of the complaint

8. The complainant has made the following submissions in the complaint: -
- That while searching for a residential apartment, the complainant came across the project namely "ATS Triumph", being developed by the respondent company, and situated at Sector 104, Gurugram. Based upon the claims of the respondent including timely handover of possession, the complainant invested and purchased an apartment in the project. As per the agreement, the total consideration was Rs.1,30,08,750/- out of which the complainant as on the date of the agreement have already paid Rs.1,13,87,549/-, i.e., nearly 85% of the total sale consideration and the balance amount was payable on demand at the time of possession.

- b. That both the parties entered into a buyer's agreement on 10.04.2013. As per clause 10 of the agreement, the respondent levied interest at the rate of 18% p.a. on delayed payments. Further, as per the clause 18 of the buyer's agreement, possession was to be handed over within 36 months from the date of commencement of construction with a grace period of 6 months.
- c. That, to best knowledge of the complainant, commencement of construction started in or around 2013-14. However, despite repeated follow-ups and requests, the respondent did not provide any information regarding the completion and possession of the apartment to the complainant. On 30.05.2019, the respondent raised demand of the final instalment amount of Rs.8,10,500/-, and stated that upon payment of the same, the possession would be handed of the said apartment.
- d. As there was substantial delay in offer of possession, the complainant contacted the respondent through email on 07.06.2019, seeking information about the status of construction and further demanded that he be given delayed possession charges. The respondent acknowledged the receipt of the email and sought time to respond to the same. However, till date, i.e., more than 3 years after the said communication the respondent has not provided any information regarding the delay possession charges. The complainant has fulfilled all his obligations and cleared all the dues yet has not been granted possession.
- e. That the respondent made offer of possession on 30.05.2019 but till date possession has not been given to the complainant and the respondent have also not offered any compensation for delay in possession. In fact,



after repeated and multiple reminders, the respondent vide email dated 17.09.2021 had stated that it was still preparing the unit for handover of possession to the complainant, i.e., more than 3 years after the respondent had offered paper possession.

- f. That the buyer's agreement stipulated an interest at the rate of 18% p.a. for delayed instalments and the Hon'ble Supreme Court as well as this authority and the consumer forums have on multiple occasions held that the promoters/builder/developer shall be liable to pay delay compensation at the same rate at which it levies interest on project from the allottee for delayed instalment.
- g. That repeated reminders were sent by the complainant to the respondent seeking possession of the apartment along with the details of the delay compensation and construction milestones, the respondent chose not to provide any information to the complainant. The complainant has made full and final payment of the final demand raised by the respondent.
- h. That throughout the entire correspondence exchanged between the parties regarding stage of construction and completion of the project, the complainant has dutifully performed his obligations whereas the respondent has miserably failed to comply with the terms of the buyer's agreement and the obligations thereunder.

**C. Relief sought by the complainant: -**

9. The complainant has sought following relief(s)
- a. Direct the respondent to handover the physical possession of the apartment.



- b. Direct the respondent to pay interest @18% calculated from 10.10.2016, i.e., 42 months from the date of the agreement, by when construction ought to have been completed and possession handed over.
  - c. Direct the respondent not to charge any holding charges.
  - d. Direct the respondent not to charge any maintenance charges till the physical possession is handed over to the complainants.
  - e. Direct the respondent to pay cost of litigation.
10. On the date of hearing, the authority explained to the respondent/promoter about the contraventions as alleged to have been committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.

**D. Reply by the respondent**

11. The respondent contested the complaint on the following grounds: -
- i. That the complaint is neither maintainable nor tenable and is liable to be out-rightly dismissed. The complainants are estopped from filing the present complaint by their acts, omissions, admissions, acquiescence and laches.
  - ii. That the complaint is not maintainable for the reason that the agreement contains an arbitration clause which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute.
  - iii. That the complainant has not approached this authority with clean hands and has intentionally suppressed and concealed the material facts in the present complaint. The complaint has been filed by him maliciously with

an ulterior motive and it is nothing but a sheer abuse of the process of law. The true and correct facts are as follows:

- That the respondent is a reputed real estate company having immense goodwill, comprised of law abiding and peace-loving persons and has always believed in satisfaction of its customers. The respondent has developed and delivered several prestigious projects in and around NCR region such as ATS Greens-I, ATS Greens- II, ATS Village, ATS Paradiso, ATS advantage phase I & II, ATS one Hamlet, ATS Pristine, ATS Prelude & ATS Dolce and in these projects large number of families have already shifted after having taken possession and resident welfare associations have been formed which are taking care of the day to day needs of the allottees of the respective projects.
- That the buyer's agreement was executed on 10.04.2013. It is pertinent to mention herein that the Real Estate (Regulation and Development) Act, 2016 was not in force when the agreement was entered into between the complainants and the respondent. The provisions of the Real Estate (Regulation and Development) Act, 2016 thus cannot be enforced retrospectively.
- That the possession of the unit was supposed to be offered to the complainants in accordance with the agreed terms and conditions of the buyer's agreement. It is submitted that clause 18 of the buyer's agreement. That the possession of the unit was subject to the

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occurrence of the force majeure events. The relevant clause of the agreement pertaining to force majeure event is clause 22.

- That it is pertinent to mention herein that the implementation of the said project was hampered due to non-payment of instalments by allottees on time and also due to the events and conditions which were beyond the control of the respondent and which have affected the materially affected the construction and progress of the project. Some of the force majeure events/conditions which were beyond the control of the respondent and affected the implementation of the project and are firstly, inability to undertake the construction for approx. 7-8 months due to Central Government's Notification with regard to Demonetization secondly Orders Passed by National Green Tribunal thirdly non-payment of instalments by allottees lastly, inclement weather conditions viz. Gurugram.
- iv. That the respondent after completing the construction of the unit in question, applied for the grant of the occupation certificate on 03.10.2016 and the same was granted by the concerned authorities on 28.05.2019. The respondent offered the possession of the unit to the complainant vide letter dated 30.05.2019. The complainant was intimated to remit the outstanding amount on the failure of which the delay penalty amount would accrue. The photographs of the tower in question are also attached. The complainants are not coming forward to take the

possession of the unit after remitting the due amount. The complainants are bound to take the physical possession of the unit after making payment towards the due amount along with interest and holding charges.

- v. That the complainant is real estate investor who has invested his money in the project of the respondent with an intention to make profit in a short span of time. However, his calculations have gone wrong on account of slump in the real estate market and he is now deliberately trying to unnecessarily harass, pressurize and blackmail the respondent to submit to the unreasonable demands.

12. In complaint bearing no. **CR/880/2022**, titled as **Mr. Yashwant Joshi and Mrs. Anupama Jishi V/s M/s Anand Divine Developers Private Limited**. Despite proper service of notice, no written reply has yet been filed. Moreover, the service is also confirmed from the fact that on the last date of hearing, i.e., 29.07.2022 and 20.07.2023, Shri Raghav Gakhar advocate and Ms. Barkha Jain Advocate, Proxy counsel for the respondent company appeared and was directed to file the reply within two weeks. Despite specific direction it has failed to comply with the orders of the authority. It shows that the respondent is intentionally delaying the proceedings of the authority by non-filing of written reply. Therefore, in view of above, vide order dated 28.09.2023, the defence of the respondent was struck off.

13. Copies of all the relevant documents have been filed 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 written submissions made by the parties.

**E. Jurisdiction of the authority**

14. The authority has complete territorial and subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

**E.I. Territorial jurisdiction**

15. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana the jurisdiction of Haryana Real Estate Regulatory Authority, Gurugram shall be entire Gurugram district for all purposes. 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**

16. 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) The promoter shall-

(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

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*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;*

**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.*

17. So, in view of the provisions of the Act of 2016 quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

**F. Findings on the objections raised by the respondent:**

**F.I Objection regarding complainant is in breach of agreement for non-invocation of arbitration.**

18. The respondent has raised an objection that the complainant has not invoked the arbitration proceedings as per the provisions of buyer's agreement which contains provisions regarding initiation of arbitration proceedings in case of breach of agreement. The following clause has been incorporated w.r.t arbitration in the buyer's agreement:

**"Clause 39. Settlement of Dispute and Arbitration:**

*All or any dispute arising out of or touching upon or in relation to the terms of this Agreement or its termination, including the interpretation and validity thereof and the respective rights and obligations of the Parties shall be settled amicably by mutual discussion, failing which the same shall be settled through arbitration. The arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 as amended up to date. A sole arbitrator who shall be nominated by the Board of Directors of the company shall hold the arbitration proceedings at the office of the Company at Noida. The allottee hereby confirms that he shall have no objection to this appointment, more particularly on the ground that the Sole Arbitrator being appointed by the*

*Board of Directors of the company likely to be biased in favour of the company. The Courts at Noida, Uttar Pradesh shall to the specific exclusion of all other courts alone have the exclusive jurisdiction in all matters arising out of/touching and/or concerning this Agreement regardless of the place of execution or subject matter of this Agreement. Both the parties in equal proportion shall pay the fees of the Arbitrator"*

19. The respondent contended that as per the terms & conditions of the agreement dated 10.04.2013 duly executed between the parties, it was specifically agreed that in the eventuality of any dispute, if any, with respect to the provisional booked unit by the complainant, the same shall be adjudicated through arbitration mechanism. The authority is of the opinion that the jurisdiction of the authority cannot be fettered by the existence of an arbitration clause in the buyer's agreement as it may be noted that section 79 of the Act bars the jurisdiction of civil courts about any matter which falls within the purview of this authority, or the Real Estate Appellate Tribunal. Thus, the intention to render such disputes as non-arbitrable seems to be clear. Also, section 88 of the Act says that the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. Further, the authority puts reliance on catena of judgments of the Hon'ble Supreme Court, particularly in ***National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506***, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, consequently the authority would not be bound to refer parties to





arbitration even if the agreement between the parties had an arbitration clause.

20. Therefore, in view of the above judgements and considering the provisions of the Act, the authority is of the view that complainants are well within the right to seek a special remedy available in a beneficial Act such as the Consumer Protection Act and Act of 2016 instead of going in for an arbitration. Hence, there is no hesitation in holding that this authority has the requisite jurisdiction to entertain the complaint and that the dispute does not require to be referred to arbitration necessarily.

**F.II. Objection regarding delay due to force majeure events.**

21. The respondent-promoter raised the contention that the construction of the project was delayed due to force majeure conditions such as various orders passed by Hon'ble Supreme Court and other Authorities to curb the pollution in NCR and outbreak of Covid-19 pandemic. It further requested that the said period be excluded while calculating due date for handing over of possession. The Authority observes that the respondent has placed reliance on orders dated 01.11.2019 and 04.11.2019 of Environment Pollution (Prevention & Control) Authority and Hon'ble Supreme Court of India to curb the pollution in the NCR. Further, in the instant complaint, as per clause 18 of agreement dated 10.04.2013 executed between the parties, the due date of handing over of possession was provided as 10.10.2016. Grace period of 6 months is allowed being unconditional. The respondent-builder in the instant matter

has already obtained the occupation certificate of the complainant unit from the competent authority on 28.05.2019. Hence, the plea regarding admissibility of any further grace period on account of aforesaid circumstances is untenable and does not require any further explanation.

**F. III Objection regarding the delay in payment.**

22. Another objection raised by the respondent regarding delay in payment by many allottees is totally invalid because the allottees have already paid the amount of Rs.1,36,40,706/- against the total sale consideration of Rs.1,30,08,750/- to the respondent. The complainant has already paid more than the total consideration. The fact cannot be ignored that there might be certain group of allottees that defaulted in making payments but upon perusal of documents on record it is observed that no default has been made by the complainants in the instant case. Section 19(6) of Act lays down an obligation on the allottee(s) to make timely payments towards consideration of allotted unit. As per documents available on record, the complainant has paid all the installments as per payment plan duly agreed upon by the complainants while signing the agreement and the same is not disputed by the respondent. The respondent has not gone through the facts of the complaint carefully. Moreover, the stake of all the allottees cannot put on stake on account of non-payment of due installments by a group of allottees. Hence, the plea advanced by the respondent is rejected.

**F.IV. Objection regarding entitlement of DPC on ground of complainants being investor.**

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22. The respondent has taken a stand that the complainant is the investor and not consumers and therefore, she is not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority observes that the respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time the preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if the promoter contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the apartment buyer's agreement, it is revealed that the complainant is buyer and she has paid total price of Rs.1,36,40,706/- to the promoter towards purchase of an apartment in its project. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

*"2(d) "allottee" in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;"*

In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment buyer's agreement executed between promoter and complainant, it is crystal clear that they are allottee(s) as the subject unit was allotted to them by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". Thus, the contention of promoter that the allottee being an investor is not entitled to protection of this Act also stands rejected.

**G. Findings on the relief sought by the complainant.**

**G.I Direct the respondent to handover the physical possession of the apartment.**

23. As per documents available on record, the respondent has offered the possession of the allotted unit on 30.05.2019 after obtaining occupation certificate from competent authority on 28.05.2019. The complainant took a plea that offer of possession was made in 2019, but the respondent has failed to handover the physical possession of the allotted unit. She wrote various reminders as detailed above in the table seeking handover of physical possession of the allotted unit.
24. In view of the above, the respondent/promoter is directed to complete the work of the subject unit in all aspect and handover physical possession of the unit to the complainant within a period of one month from the date of this order.

G.II Direct the respondent to pay interest @18% calculated from 10.10.2016, i.e., 42 months from the date of the agreement, by when construction ought to have been completed and possession handed over.

25. In the present complaint, the complainant intends to continue with the project and is seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under:

**Section 18: - Return of amount and compensation**

*"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."*

26. As per clause 18 of the buyer's agreement dated 10.04.2013, the possession of the subject unit was to be handed over by 10.10.2016. Clause 18 of the buyer's agreement provides for handover of possession and is reproduced below:

**18. Time of handing over possession**

*"Barring unforeseen circumstances and force majeure events as stipulated hereunder, possession of the said apartment is proposed to be, offered by the company to the allottee within a period of 36(thirty six) months with a grace period of 6(six) months from the date of actual start of the construction of a particular tower building in which the registration for allotment is made, such date shall hereinafter referred to as "stipulated date", subject always to timely payment of all amounts including the basic sale price, EDC/IDC, IFMS, stamp duty, registration fees and other charges as stipulated herein or as may be demanded by the company from time to time in this regard. The date of actual start of construction shall be the date on which the foundation of the particular building in which the said apartment is allotted shall be laid as per certification by the company's architect/engineer-in-charge of the complex and the said certification shall be final and binding on the allottee."*

27. At the outset, it is relevant to comment on the pre-set 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 promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter 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's agreement by the promoter 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.

28. **Admissibility of grace period:** The respondent/promoter has proposed to complete the construction of the said building/unit by 10.04.2016. In the present case, the promoter is seeking 6 months' time as grace period. The said period of 6 months is allowed to the promoter being unconditional. Therefore, the due date of possession comes out to be 10.10.2016. (**Note:** - During proceeding dated 21.12.2023, grace period on account of Covid- 19 was inadvertently allowed to the respondent, as the respondent has already

obtained the occupation certificate on 28.05.2019 from the competent authority.)

29. **Validity of offer of possession:** - In the present complaint, the complainant has paid an amount of Rs.1,36,40,706/- against the total sale consideration of Rs.1,30,08,750/- and the respondent company has offered the possession of the allotted unit on 30.05.2019 after obtaining the occupation certificate from the competent authority. Thereafter the complainant has send an email to the respondent company on 08.07.2019 & 16.09.2021 respectively with regard to handing over the possession of the allotted unit. The respondent has replied on the said mail on 17.09.2021, and the relevant portion of the said mail is reproduce as under for ready reference: -

*Dear Sir,  
Greetings from ATS Infrastructure Ltd.!!  
With reference to your mail below, Enclosed are the Payment receipts for your reference.  
In regards to the Possession, this is to inform you that we have informed the site team to get the said unit ready on priority.  
They are working on the same. Due to the current situation of COVID the work is going on at a slow pace at the site.  
However, we are in constant follow-ups with the site team and the said unit is **expected to get completed by December.**  
Should you need any further clarifications, feel free to get in touch with us at the below mentioned number.  
Thanks & Regards  
Divya Negi  
Sr. Manager-Customer Relations Department*

30. This implies that the development work is still pending, and because of aforesaid reasons, the respondent was not in position to handover the physical possession of the said unit to the complainant. It is well settled that for constituting a valid offer of possession, the project in which the allotted

unit is situated should be complete in all aspect and must be in a habitable condition, so that an allottee may be able to occupy the same. But while replying the email on 17.09.2021, it was admitted by the respondent/builder that besides development works, other works of the allotted unit could not be completed due to current situation of Covid the work is going on at a slow pace at the site and we are in constant follow-ups with the site team and the said unit is expected to get completed by December. In view of the above, the said offer of possession dated 30.05.2019 cannot be considered as valid offer of possession in the eyes of law. As mere offer of possession of unit has no meaning and serves no purpose if actual possession of the unit cannot be handed over in view of own admission made by the respondent vide above said email dated 17.09.2021.

31. During proceeding dated 16.11.2023, the respondent was directed to submit whether after completing the unit the subsequent offer of possession was made to the complainant or not ? If any such information or offer after completing the said unit has been made, then the same shall be filed within 10 days failing which it shall be presumed that the unit is still not ready and no valid offer of possession has been made to the complainant after completing the unit despite assurance made vide email dated 17.09.2021. However, the respondent has failed to provide any such letter on record till date. Therefore, in view of order dated 16.11.2023, the Authority is



presuming that the unit is still not ready and no valid offer of possession has been made to the complainant.

32. **Admissibility of delay possession charges at prescribed rate of interest:**

The complainant is continue with the project and seeking delay possession charges. However, 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.

33. 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.

34. 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., 21.12.2023 is **8.85%**. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **10.85%**.

35. 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;"*

36. 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 complainants in case of delayed possession charges.

37. On consideration of the documents available on record and submissions made by the parties regarding contravention as per 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 18 of the buyer's agreement executed between the parties on 10.04.2013, and the due date of possession was specifically mentioned in the apartment buyer agreement as 10.10.2016. Occupation

certificate was granted by the concerned authority on 28.05.2019 and thereafter, the possession of the subject flat was offered to the complainant on 30.05.2019. Copies of the same have been placed on record. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the subject flat and it is failure on part of the promoter to fulfil its obligations and responsibilities as per the buyer's agreement dated 10.04.2013 to hand over the physical possession within the stipulated period.

38. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 28.05.2019. The respondent offered the possession of the unit in question to the complainant only on 30.05.2019, so it can be said that the complainant came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the complainant should be given 2 months' time from the date of offer of possession. These 2 months' of reasonable time is being given to the complainant keeping in mind that even after intimation of possession practically she has to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. In the present complaint the complainant has send

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an email to the respondent company on 08.07.2019 & 16.09.2021 respectively with regard to handing over the possession of the allotted unit. The respondent has replied on the said mail on 17.09.2021 and stated that *they are working on the same. Due to the current situation of COVID the work is going on at a slow pace at the site. However, we are in constant follow-ups with the site team and the said unit is expected to get completed by December.*

39. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainant is entitled to delayed possession at prescribed rate of interest i.e., 10.85 % p.a. w.e.f. 10.10.2016 till the handing over of possession of the allotted unit after completion of development work as per provisions of section 18(1) of the Act read with rule 15 of the rules and section 19(10) of the Act.

**G.III Direct the respondent not to charge any holding charges.**

40. As far as holding charges are concerned, the developer having received the sale consideration has nothing to lose by holding possession of the allotted flat except that it would be required to maintain the apartment. Therefore, the holding charges will not be payable to the developer. Even in a case where the possession has been delayed on account of the allottee having not paid the entire sale consideration, the developer shall not be entitled to any holding charges though it would be entitled to interest for the period the payment is delayed

41. Moreover, the respondent is not entitled to claim holding charges from the complainant/allottee at any point of time even after being part of the buyer's agreement as per law settled by Hon'ble Supreme Court in Civil appeal nos. 3864-3899/2020 decided on 14.12.2020 (supra).

**G.IV. Direct the respondent not to charge any maintenance charges till the physical possession is handed over to the complainant.**

42. As per letter of offer of possession dated 30.05.2019, the respondent has demanded an amount of Rs.50,000/- in lieu of interest free maintenance security. In this regard the relevant clause from the agreement is reproduced as under:-

*26. IFMS (Interest Free Maintenance Security)*

*26.1 The Allottee shall pay to the Company/nominated maintenance agency or any other nominee an Interest Free Maintenance Security (hereinafter referred to as the "IFMS"). amounting to Rs.50,000/- (Rupees Fifty Thousand only). The payment of above referred IFMS shall be a condition precedent to grant of the physical possession of the aforesaid Apartment*

*26.2 It is clearly understood by and between the Company and the Allottee that the aforesaid IFMS may be utilized by the Company towards capital expenditure for the aforesaid complex. In addition the aforesaid Allottee undertake(s) to perpetually maintain the IFMS at level, which is equivalent amounting to Rs.50,000/-*

*26.3 In case of failure of the Allottee to pay the maintenance bill, other charges on or before the due date, the Allottee in addition to permitting the maintenance agency to deny him/her the maintenance services, also authorizes the Company to adjust the amount of the IFMS against such defaults. If due to such adjustments, the IFMS falls below the agreed sum of Rs.50,000/-, then the Allottee(s) here by undertake(s) to make good the resultant shortfall within fifteen (15) days of demand made by the Company. In case of delay interest @18% Per annum shall be charged for the period of delay. Further, the Company reserves the right to increase IFMS from time to time in keeping with the increase in the cost of maintenance services and the Allottee agrees to pay such increases within fifteen days (15) of demand by the Company. If the Allottee fails to pay such increase in the IFMS or to make good the short fall as aforesaid on or before due date, then the Allottee authorize(s) its the Company to treat the allotment as cancelled without any notice to the Allottee and to recover the shortfall from the sale proceeds of the said Apartment and to refund to the Allottee only the balance of them one*

*realized from such sale after deducting there from the entire earnest money, interest on delayed payments, any interest paid, due or payable and all other dues as set out in the payment plan. It is made specifically clear and so agreed by the Allottee that the condition relating to IFMS as stipulated in this clause shall survive the conveyance of title in favor of the Allottee and the Company shall have first charge/lien on the said Apartment.*

43. It is held that the promoter may be allowed to collect a reasonable amount from the allottee under the head "IFMS". However, the authority directs that the promoter must always keep the amount collected under this head in a separate bank account and shall maintain that account regularly in a very transparent manner. If any allottee of the project requires the promoter to give the details regarding the availability of IFMS amount and the interest accrued thereon, the promoter must provide details to the allottee. It is further clarified that out of this IFMS/IBMS, no amount can be spent by the promoter for the expenditure it is liable to incur to discharge its liability and obligations as per the provisions of section 14 of the Act.

**G.V. Direct the respondent to pay cost of litigation.**

44. The complainant is seeking above mentioned relief w.r.t. compensation. Hon'ble Supreme Court of India in case titled as *M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP & Ors. 2021-2022(1) RCR (C), 357* held that an allottee is entitled to claim compensation & litigation charges 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 & litigation expense shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has

exclusive jurisdiction to deal with the complaints in respect of compensation & legal expenses.

#### **H. Directions of the authority**

45. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

- i. The respondent is directed to pay interest, each of the complainant against the paid-up amount at the prescribed rate i.e., 10.85% per annum for every month of delay on the amount paid by the complainant from due date of possession i.e. 10.10.2016 till the handing over of possession of the allotted unit after completion of the development work as per provisions of section 18(1) of the Act read with rule 15 of the rules and section 19(10) of the Act.
- ii. The arrears of such interest accrued from 10.10.2016 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 10<sup>th</sup> of the subsequent month as per rule 16(2) of the rules.
- iii. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 10.85% by the respondent/promoter which is the same rate of interest which the

- promoter 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.
- iv. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period within 30 days and the respondent shall handover the possession in next 30 days to the complainant/allottee and to get the conveyance deed of the allotted unit executed in the favour of complainant in term of section 17(1) of the Act of 2016 on payment of stamp duty and registration charges as applicable.
- v. The respondent is also not entitled to claim holding charges from the complainant 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.
46. This decision shall mutatis mutandis apply to cases mentioned in para 3 of this order.
47. Complaints stand disposed of. True certified copy of this order shall be placed in the case file of each matter.
48. File be consigned to registry.

Dated: 21.12.2023

v.1 - 3  
**(Vijay Kumar Goyal)**  
Member  
Haryana Real Estate  
Regulatory Authority,  
Gurugram