

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

Complaint no.: 2631 of 2021
Date of filing : 28.07.2021
Date of decision : 22.03.2024

Sheilesh Kumar Agarwal

R/o: 19/107 Satyam Khand Vasundhara, Ghaziabad

Complainant

Versus

Anand Divine Developers Private Limited

Regd. office: 711/92, Deepali Nehru Place, New Delhi
- 110019

Also At:- ATS Tower, Plot No 16, Sector 135, Noida -
201301

Respondent

CORAM:

Shri Sanjeev Kumar Arora

Member

APPEARANCE:

Shri. Yogesh Kumar Goyal (CA)

None

Complainant
Respondent

ORDER

1. The present complaint has been filed by the complainants/allottees 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 to the allottees as per the agreement for sale executed inter-se them.

A. Unit and Project related details:

2. The particulars of the project, the details of sale consideration, the amount paid by the complainants, date of proposed handing over the

possession, delay period, if any, have been detailed in the following tabular form:

S. N.	Particulars	Details
1.	Name of the project	ATS Triumph
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
5.	Name of the licensee	M/s Great Value HPL Infratech Private Limited M/s Kaanha Infrastructure private Limited
6.	HRERA registered/ not registered	Not registered Registration branch may take necessary action for non-registration as per the provisions of the Act
7.	Unit no.	1192 on 19 th floor, tower 01 (As per page no. 32 of the complaint)
8.	Super area admeasuring	2290 sq. ft. (As per page no. 32 of the complaint)
9.	Date of builder buyer agreement	22.07.2014 (page no. 29 of the complaint)
10.	Possession clause	18. Time of handing over possession <i>Barring unforeseen circumstances and force majeure events as stipulated hereunder, the possession of the said</i>

		<p><i>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 construction of a particular tower building in which the registration for allotment is made, such date hereinafter referred to as "stipulated date", subject always to timely payment of all charges including the basic sale price, 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 shall be final and binding on the allottee.</i></p>
11.	Date of start of construction	24.12.2013 which is date of completion of basement as the date of start of construction is not placed on record.
12.	Due date of possession	24.06.2017 [Grace period of 6 months allowed being unqualified]
13.	Total sale consideration as per BBA at page 52 of complaint	₹ 2,03,36,750/-
14.	Amount paid by the complainant	₹ 28,16,700/- (As per BBA at page no. 33 of complaint) Loan disbursed by the ICICI Bank

		₹ 1,50,40,000/- (pg 56 of complaint)
15.	Amount paid as alleged by the complainant during the course of hearing dated 22.03.2024 corroborated by the SOA dated 05.02.2024	₹ 1,87,52,798/-
16.	Offer of possession	10.02.2021 (page no. 132 of the complaint)

B. Facts of the complaint

3. The complainant has made the following submissions: -

- a. That the complainant had booked a residential flat No. 1192 in the project "ATS Triumph" in Sector 104, Dwarka Expressway, Gurugram, Haryana Pin-122006 of the Respondent M/S Anand Divine Developers Pvt. Ltd. on 09.04.2013 with a total price of Rs. 1,82,33,000/- (Rs. One Crore Eighty Two Lakh Thirty Three Thousand Only) and opted for construction link payment plan. The builder buyer agreement was executed on 23.08.2013 between the complainant and respondent in respect to this flat. The complainant had taken finance from ICICI Bank Ltd. And had made a total payment of Rs. 85,94,812/- (including Service Tax) to the respondent, Rs. 54,86,049/- from own sources and balance of Rs. 31,08,763/- through loan taken form ICICI Bank Ltd. The respondent had issued a scheme under subvention payment plan and the complainant had accepted this plan and a new application form dated 19.07.2014 was filed for same flat no. 1192 on 19TH Floor in Tower / Building -1 having Super Area of 2290 Sq. Ft., in the

project "ATS THIUMPH" of the respondent. The new "Buyer Agreement" dated 22.07.2014 was also executed between the complainant and the respondent for the same flat along with Exclusive right to use of the Two parking space(s). The total cost of the flat including EDC/IDC, Power back up, IFMS etc. was Rs. 2,03,36,750/- (Rs. Two Crore Three Lakh Thirty Six Thousand Seven Hundred Fifty Only). The respondent had adjusted Rs. 29,21,143/- (Inclusive of Service Tax) (Rs. Twenty Nine Lakh Twenty One Thousand One Hundred Forty Three Only) under new plan and had promised that balance amount of Rs. 25,64,906/- (Rs. Twenty Five Lakh Sixty Four Thousand Nine Hundred Six Only) will be refunded to the complainant, and the old bank loan account will be merged in new loan form ICICI. As per the agreement the period of possession of the flat was 36 Months with a grace period 6(six) months from the date of actual start of construction of a particular tower. The construction of the Tower was started before the earlier booking so the possession was required to be given to 08.10.2016. The complainant had paid Rs. 1,95,05,564/- (Rs. One Crore Ninety Five Lakh Five Thousand Five Hundred Sixty Four Only) till date. The respondent failed to pay the refund of amount Rs. 25,64,906/- (Rs. Twenty Five Lakh Sixty Four Thousand Nine Hundred Six Only) and with rigorous follow up Rs. 10,20,486/- was adjusted in other booking with the respondent in the month of April, 2018. Also Rs. 15,44,421/- (Rs. Fifteen Lakh Forty Four Thousand Four Hundred Twenty One Only) was adjusted in the final demand raised by the respondent. The possession of the flat was required to be given till 08.10.2016. The respondent has not given possession of the flat till date to the complainant even after taking a hefty amount from the

complainant. Thereby, the Respondent was required to hand-over the possession of the flat latest by 08.04.2016 in normal conditions or latest by 08.10.2016 after allowing 6 month grace period. The Complainant has already suffered an unnecessary delay of 56 months till date. The respondent had send offer of possession but no occupancy and completion certificate copy is made available to the complainant. Therefore, the Complainant has filed the present Complaint before this Hon'ble Authority for possession of flat along with occupancy and completion certificate, delayed interest and interest on money not refunded by the respondent at the time of change in payment plan as per Rera Act, 2016.

C. Relief sought by the complainant:

4. The complainant has sought following relief:

- a. Direct the respondent to complete legal possession of the property along with occupancy and completion certificate.
- b. Direct the respondent to pay delay possession charges from the due date of possession till actual handing over of possession.
- c. Direct the respondent to file the status report with regard to the status of the project.
- d. Direct the respondent to charge interest on delayed payment at equitable rate of interest.
- e. Direct the respondent not to charge holding charges.

D. Reply filed by the respondent:

5. The respondent put in appearance through it's Advocate and marked attendance on 02.09.2021, 03.12.2021, 09.02.2022 & 22.04.2022. Despite specific directions it failed to comply with the orders of the authority. It shows that the respondent is intentionally delaying the procedure of the court by avoiding to file written

reply. Therefore, in view of order dated 02.02.2024, the defence of the respondents was struck off.

6. 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 submissions made by the complainants.

E. Jurisdiction of the authority

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

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 allottee as per the agreement for sale, or to the association of allottee, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottee, or the common areas to the association of allottee or the competent authority, as the case may be;

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottee 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 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 regarding relief sought by the complainant.

F.I Direct the respondent to complete legal possession of the property along with occupancy and completion certificate.

11. The respondent has offered the possession of the unit on 10.02.2021 which was not enclosed with the copy of occupation certificate received from the competent authority..

Validity of offer of possession

12. At this stage, the authority would express its views regarding the concept of 'valid offer of possession'. It is necessary to clarify this concept because after valid and lawful offer of possession liability of promoter for delayed offer of possession comes to an end. On the other hand, if the possession is not valid and lawful, liability of promoter continues till a valid offer is made and allottee remains entitled to receive interest for the delay caused in handing over valid possession. The authority after detailed consideration of the matter has arrived at the conclusion that a valid offer of possession must have following components:

- i. **Possession must be offered after obtaining occupation certificate-** The subject unit after its completion should have received occupation certificate from the department concerned certifying that all basic infrastructural facilities have been laid and are operational. Such infrastructural facilities include water

supply, sewerage system, storm water drainage, electricity supply, roads and street lighting.

- ii. **The subject unit should be in habitable condition-** The test of habitability is that the allottee should be able to live in the subject unit within 30 days of the offer of possession after carrying out basic cleaning works and getting electricity, water and sewer connections etc from the relevant authorities. In a habitable unit all the common facilities like lifts, stairs, lobbies, etc should be functional or capable of being made functional within 30 days after completing prescribed formalities. The authority is further of the view that minor defects like little gaps in the windows or minor cracks in some of the tiles, or chipping plaster or chipping paint at some places or improper functioning of drawers of kitchen or cupboards etc. are minor defects which do not render unit uninhabitable. Such minor defects can be rectified later at the cost of the developers. The allottees should accept possession of the subject unit with such minor defects under protest. This authority will award suitable relief for rectification of minor defects after taking over of possession under protest.
- However, if the subject unit is not habitable at all because the plastering work is yet to be done, flooring works is yet to be done, common services like lift etc. are non-operational, infrastructural facilities are non-operational then the subject unit shall be deemed as uninhabitable and offer of possession of an uninhabitable unit will not be considered a legally valid offer of possession.
- iii. **Possession should not be accompanied by unreasonable additional demands-** In several cases additional demands are made and sent along with the offer of possession. Such additional

demands could be unreasonable which puts heavy burden upon the allottees. An offer accompanied with unreasonable demands beyond the scope of provisions of agreement should be termed an invalid offer of possession. Unreasonable demands itself would make an offer unsustainable in the eyes of law. The authority is of the view that if respondent has raised additional demands, the allottees should accept possession under protest

13. The complainant stated that till date they have not taken the possession of the unit since the offer of possession was not accompanied with the occupation certificate and the defence of the respondent has already been struck off accordingly, no copy of OC is placed on record accordingly the authority presumes the said offer of possession is not valid being not accompanied by the OC. Therefore, applying above principle on facts of this case, the respondent is directed to issue fresh offer of possession within 2 months from the date of this order and at the same time the complainants are directed to take possession of the said unit after a valid offer of possession within 60 days from the date of issuance of valid offer of possession.

F.II. Direct the respondent to pay delay possession charges from the due date of possession till actual handing over of possession.

F.III. Direct the respondent to charge interest on delayed payment at equitable rate of interest.

14. 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.

15. As per clause 18 of the buyer's agreement dated 22.07.2014, the possession of the subject unit was to be handed over by 24.06.2017. 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, the 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 agreement of particular tower of 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 charges including the basic sale price, 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."

16. 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 complainants 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 favour 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 apartment within 36 months from the date of start of construction which shall be treated as the date of completion of basement i.e., 24.12.2013 as the date of construction is not held on record with a grace period of 6 months. Since in the present matter the BBA incorporates unqualified reason for grace period/extended period of 6 months in the possession clause. Accordingly, the authority literally interpreting the same allows this grace period of 6 months to the promoter at this stage.
18. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges as one of the reliefs. 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."

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., 22.03.2024 is **8.85%**. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **10.85%**.
21. 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 complainants shall be charged at the prescribed rate i.e., 10.75% by the respondent/promoter which is the same as is being granted to the complainants 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 18 of the agreement executed between the parties on 22.07.2014, the possession of the subject apartment was to be delivered within 36 months from the date of start of construction which shall be treated as the date of completion of basement i.e., 24.12.2013 as the date of construction is not held on record. The period of 36 months expired on 24.12.2016. As far as grace period of 6 months is concerned, the same is allowed for the reasons quoted above. Therefore, the due date of handing over possession is 24.06.2017. The respondent has offered the possession of the subject apartment on 10.02.2021 however, this offer is not a valid offer of possession for the reasons quoted above. Accordingly, it is the failure of the respondent/promoter to fulfil its obligations and responsibilities as per the 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 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., 24.06.2017 till actual handing over of possession or valid offer of possession plus two months at prescribed rate i.e., 10.85% p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules.

F.IV. Direct the respondent not to charge holding charges.

24. The respondent shall not charge anything from the complainants which is not the part of the agreement. However, holding charges shall not be charged by the promoters at any point of time even after being part of agreement as per law settled by Hon'ble Supreme Court in civil appeal no. 3864-3889/2020.

G. 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 cast upon the promoter as per the function entrusted to the authority under section 34(f):

- a. The respondent is directed to pay interest to the complainants 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., 24.06.2017 till actual handing over of possession or valid offer of possession plus two months. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order as per rule 16(2) of the rules.
- b. The rate of interest chargeable from the allottees 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 allottees, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.
- c. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period within 30 days from the date of this order and the respondent shall


handover the possession in next 60 days to the complainants/allottees.

- d. The respondent shall not charge anything from the complainants which is not the part of the agreement. However, holding charges shall not be charged by the promoters at any point of time even after being part of agreement as per law settled by Hon'ble Supreme Court in civil appeal no. 3864-3889/2020.

26. Complaint stands disposed of.

27. File be consigned to registry.




(Sanjeev Kumar Arora)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 22.03.2024

HARERA
GURUGRAM