



HARERA
GURUGRAM

Complaint no. 4865 of 2022

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

Complaint no.: 4865 of 2022
Date of decision : 19.04.2024

1. K Rama Rao Subudhi
2. Pratibha Subudhi
Both RR/o: - T-3-1504 Windchants Sector - 112,
Gurugram Haryana

Complainants

Versus

M/s Experion Developers Pvt. Ltd.
Office address: F-9, First floor, Manish Plaza, Plot no.
7, M.L.U., Sector - 10, New Delhi - 110075

Respondent

CORAM:

Shri Sanjeev Kumar Arora

Member

APPEARANCE:

Shri Dhruv Lamba

Shri Sanjeet Kumar Thakur AR

Complainants
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:

Sr. No.	Particulars	Details	
1.	Name of the project	"Windchants ", Sector 112 , District gurugram , Gurgaon	
2.	Nature of the project	Residential	
3.	RERA Registered / not registered	Registered bearing no. 64 of 2017 dated 18.08.2017 Valid till 17.08.2018	
4.	Allotment Letter	31.07.2012 (Page no. 19 of the complaint)	
5.	Unit no.	WT -03/1504 (Page no. 19 of the complaint)	
6.	Unit admeasuring	2650 sq. ft.	Increased to 2802 sq. ft.



7.	Date of execution of Flat buyer agreement	26.12.2012 (Page 25 of the complaint)
8.	Possession clause taken from provisional allotment letter	Clause 10.1 42 months from the date of approval of the building plans or the date of receipt of the approval of ministry of environmental and forest, govt. of India for the project or execution of this agreement whichever is later. (Emphasis supplied).
9.	Due date of delivery of possession	26.12.2016 26.06.2016 + 6 months grace period Calculated from date of agreement
10.	Total sale consideration	Rs1,74,94,483 /- (As per customer ledger - page 55 of complaint)
11.	Total amount paid by the complainant	Rs1,74,94,483 /- (As per customer ledger - page 55 of complaint)
12.	Occupation certificate	23.07.2018 (page 97 of reply)



13.	Offer of possession	24.07.2018 (Page 49 of complaint)
14.	Conveyance deed	14.09.2018 (page 59 of the reply)
15.	Possession letter	14.09.2018 (page 84 of reply)

B. Facts of the complaint

3. The complainants have made the following submissions: -

- a. That relying on the assurances and promises of the respondent, on 21.06.2012, the complainants made an application for allotment of the unit in the said project and in lieu of the same paid an amount of Rs. 11,00,000/-. That on 31.07.2012, a provisional allotment letter was issued by the respondent company in the name of the present complainants vide which a residential unit bearing no. WT-03/1504, having a super area of 2650 sq. ft. was allotted against a total sale consideration of Rs. 1,59,99,141/-The complainant allottees opted a construction linked payment plan to make the payments.
- b. That as per the clause 10.1 of the apartment buyer's agreement executed inter se both the parties, the respondent company has proposed to handover the possession of the subject unit within a period of 42 months from the date of approval of building plans or

the date of receipt of the approval of MoEF, Government of India for the project or execution of this agreement whichever is later.

- c. It is a matter of fact that the date of execution of the ABA is 26.12.2012 and therefore the due date of possession comes out to be 27.06.2016. Further, a grace period of 180 should not be allowed in the present case, as the respondent has failed to complete the construction of the subject unit and to deliver the possession of the same in promised time frame and it is a well settled law that "No one can take benefit out of his own wrong".
- d. That the complainants for the first time after more than four years from the execution of the said agreement received a communication from the respondent w.r.t purported increase of the sale area of the subject apartment by 152 sq. ft. i.e., from 2650 sq. ft. to 2802 sq. ft. without specifying any justification for the same.
- e. That on 24.07.2018, an intimation of offer of possession was sent by the respondent company to the present complainants along with final statement of account. That the present complainants had made all the payments well on time as and when demanded by the respondent builder. It is a matter of fact that the complainants had made a payment of Rs. 1,74,94,482/-towards the total sale consideration of the subject apartment.
- f. That the respondent had wrongly charged the "ADHOC charges" under the head of dual meter charges (Rs. 16,800/-), PHE charges (Rs.15,066/-), FTTH charges (Rs.21,150/-), solar power charges

(Rs.7,528/-), ECC charges (Rs.1,62,804/-) from the present complainants as the same were not part of "Schedule-V" as agreed upon between the parties at the time of execution of the ABA. The Hon'ble Authority has ordered to refund the "ADHOC charges" in Complaint no. 5577 of 2019 in its decision dated 22.12.2021.

- g. That the respondent had also wrongly charged GST from the complainants. It is a matter of fact that the due date of possession w.r.t the subject apartment comes out to be 26.06.2016 and the delay in the construction and handing over of possession
- h. That on 14.09.2018, the sale deed was executed in favour of complainants w.r.t the subject apartment. That vide clause 4.8 of the said agreement, the respondents have to charge interest on delayed payment from the buyer @ 18 % P.A. on the delayed payment for the period of delay. However, if there is any delay in offer of possession ie., delay on the part of the respondent, the company vide clause 13 of the said agreement is liable to pay a compensation of Rs. 7.50/- per sq. ft. of the sale area as the full and final settlement of any loss of whatsoever nature for every month of delay which is totally one-sided, illegal, arbitrary and unilateral as there is no parity between the two parties. This is just to bring to the notice of this Hon'ble Authority that how the builders are misusing their dominant position and harassing the poor allottees.

C. Relief sought by the complainants:

4. The complainants have sought following relief:

- a. Direct the respondent to pay delay possession charges.
- b. Direct the respondent to refund the wrongly charged amount of GST
- c. Direct the respondent to refund the wrongly charged ADHOC charges
- d. Direct the respondent to refund the amount charged for the increase in sale area.

D. Reply filed by the respondent:

5. The respondent has contested the complaint on the following grounds:
 - a. The Project "Windchants" is a Group Housing colony being developed by the respondent in sector-112, District Gurugram, Haryana. (hereinafter referred to as the "Project"). It is submitted that after the enforcement of the Act, each developer was required to register its project if the same was an "ongoing project" and give the date of completion of the said ongoing project in terms of Section 4(2)(l)(c) of the Act. Accordingly, the Respondent had registered the relevant phase of the said project, which was valid till 17.08.2018. The Respondent has duly registered the phase of the project in which the apartment in question is situated having Registration No 64 of 2017 dated 18.08.2017. The respondent, in terms of the Act, had accordingly offered possession to them much prior to the date specified during registration of the project under the Act. The respondent



has obtained the occupation certificate for the phase in which the apartment in question is situated on 23.07.2018 and offered the possession to them vide notice of possession dated 24.07.2018 i.e., prior to the agreed date of completion i.e.17.08.2018, under the Act and Rules.

- b. As such, it is clear that the respondent is not liable to pay interest and/or delay possession compensation under the Act, read with the Rules, since the respondent would be liable to pay the same as per the provisions of the Act/Rules only after the expiry of the date of completion of the phase, as provided during the registration of the relevant phase of the Project, with RERA Authority, in which the apartment in question is situated. However, without prejudice, it is submitted that as per agreed terms of the apartment buyer agreement the respondent has paid/adjusted an amount of Rs. 3,48,849/- to the them on account of delayed possession compensation.
- c. In the present case, they are seeking delay possession interest. It is pertinent to mention that their prayer of in the present complaint is not maintainable in the eyes of law as well as on the basis of principle of natural justice, as the complainants took possession of the unit in question in 2018 i.e. pursuant to offer of possession made vide letter dated 24.07.2018 and the sale deed had also been executed in favour of the complainants with respect to the unit in question on 14.09.2018. It is noteworthy to

mention here that the respondent had discharged its obligations, in full, after handover of the allotted unit to the complainants and lastly by getting the sale deed executed in favour of the complainants. Hence there does not exist relationship of promoter and allottees between the parties.

- d. That it is noteworthy to mention here that after completion of all the formalities with respect to the taking over of the actual physical possession of the flat in question, the conveyance deed had been executed between the parties on 14.09.2018. It is submitted that the complainants have executed the conveyance deed/sale deed on 14.09.2018 after thorough reading and understanding of the same and wherein the dimensions / area of the unit in question were clearly mentioned. As such after the execution of the conveyance deed they are estopped by the principle of "estoppel by conduct" to deny the contents of the deed. Further it is important to note here that the conveyance deed was executed on 14.09.2018 without any protest and the complainants have filed the instant complaint in June 2022 i.e. after enjoying peaceful possession of the flat in question for more than three years that is credence that the present complaint is the afterthought and has been filed with an ulterior motive to settle the personal vendetta, to harass the respondent and to enrich themselves wrongfully under the garb of delay possession interest.



e. The complaint is liable to be dismissed as it is barred by the principle of delay and laches. They had been offered possession four year back i.e. on 24.07.2018 and sale deed had also been executed in favour of the complainants on 14.09.2018.

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 complainants.

F.I. To direct the respondent to pay delay possession charges till actual offer of possession of the said unit along with prescribed rate of interest as per RERA.

11. In the present complaint, the complainants intend 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.



12. As per clause 10.1 of the buyer's agreement dated 26.12.2012, provides for handover of possession and is reproduced below:

"42 months from the date of approval of the building plans or the date of receipt of the approval of ministry of environmental and forest, govt. of India for the project or execution of this agreement whichever is later.."

13. 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.

14. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the apartment within a period of within 42 months from the date of receipt of approval of Ministry of Environment and forests or from the execution of buyer's agreement whichever is later plus grace period of 6 months for unforeseen and unplanned project realities . The authority calculated due date of possession according to clause 10.1 of the agreement dated 26.12.2012 i.e., within 42 months from date of receipt of approval of Ministry of Environment and forests or from the execution of buyer's agreement whichever is later. The period of 42 months expired on 26.06.2016. As per the settled proposition the clause for grace period is unconditional accordingly, this grace period of 6 months be allowed to the promoter at this stage
15. **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."

16. 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.
17. 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., 19.04.2024 is 8.85%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.85%.
18. 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 10.1 of the agreement executed between the parties on 26.12.2012, the possession of the subject apartment was to be delivered within forty two months from the date of execution of this agreement. The period of 36 months expired on 26.06.2016. 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 comes out



to be 26.12.2016. The respondent has offered the possession of the subject apartment on 24.07.2018 after receiving OC from the competent authority on 23.07.2018. 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., 26.12.2016 till offer of possession(24.07.2018) plus two months i.e., 24.09.2018 or actual handover of possession(14.09.2018) whichever is earlier 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 after deduction of the delayed compensation already paid by the respondent.

F.II. Direct the respondent to refund the wrongly charged amount of GST

F.III Direct the respondent to refund the wrongly charged ADHOC charges

F.IV Direct the respondent to refund the amount charged for the increase in sale area.

19. The financial liabilities of the allottee and the promoter comes to an end after the execution of conveyance deed. The complainant could have asked for the claim before the conveyance deed got executed between the parties. Therefore after execution of conveyance deed the complainant-allottee cannot seek any refund of charges other



than statutory benefits if any pending. Once conveyance deed is executed and accounts has been settled, no claim remains and also increase in area is less than 5%. So, no directions in this regard can be effectuated at this stage.

20. An application for appointment of LC was filed by respondent on 11.08.2023 to measure the built-up areas in the entire project and to assess the sale area of each category and unit. However, the same was not pressed during proceedings by the respondent to hear the same which clearly states that the respondent was not concerned for the said application. Moreover, appointment of LC would not have brought any change to the present case anyhow.
21. Also, vide proceeding dated 16.02.2024, the counsel for the respondent stated at bar that GST credit was passed on to the complainant and complainant has not rebutted the same.
22. Separate proceeding to be initiated by the planning department of the Authority for taking an appropriate action against the builder as the registration of the project has been expired.
23. Inadvertently, vide proceeding of the day dated 19.04.2024, it has been recorded that the delayed possession charges are allowed till offer of possession plus two months but it has to be correctly mentioned as 26.12.2016 till offer of possession(24.07.2018) plus two months i.e., 24.09.2018 or actual handover of possession(14.09.2018) whichever is earlier.

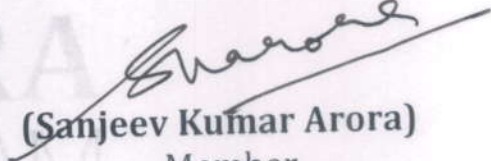
G. Directions of the authority

24. 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 promoter as per the functions entrusted to the authority under section 34(f) of the Act:

a. The respondent is directed to pay interest at the prescribed rate of 10.85% p.a. for every month of delay from due date of possession i.e., 26.12.2016 till offer of possession (24.07.2018) plus two months i.e., 24.09.2018 however since possession was taken over by allottee on 14.09.2018. Hence, delayed possession charges be calculated up to that date(14.09.2018), after deduction of the delayed compensation already paid by the respondent.

25. Complaint stands disposed of.

26. File be consigned to registry.


(Sanjeev Kumar Arora)
Member
Haryana Real Estate Regulatory Authority, Gurugram

Dated: 19.04.2024