BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	:	**929 of 2023**
Date of complaint	:	**10.03.2023**
Date of order	:	**14.08.2024**

1. Amit Tiwari,
2. Arpita Tiwari,

Both R/o: - C/41, Sector 50, Noida. **Complainants**

Versus

1. M/s Tashee Land Developers Private Limited.
2. M/s KNS Infracon Private Limited.

Both Having Registered Office at: -
18th Floor pent house, Narain Manzil, 23,
Barakhamba Road, Connaught Place, New Delhi. **Respondents**

CORAM:
Ashok Sangwan **Member**

APPEARANCE:
Amit Garg (Advocate) Complainants
Abhay Jain & Rishabh Jain (Advocates) Respondents

ORDER

1. This complaint has been filed by the complainant/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 under the provision of the Act or the Rules and regulations made thereunder or to the allottees as per the agreement for sale executed *inter se*.

A. Unit and project related details

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

S. No.	Heads	Information
1.	Project name and location	Capital Gateway, Sector-111, Gurugram
2.	Project area	10.462 acres
3.	Nature of the project	Group Housing Colony- Residential
4.	DTCP license no. and validity status	34 of 2011 dated 16.04.2011 valid upto 15.04.2024
5.	Name of licensee	KNS Infracon Pvt. Ltd. and 4 others
6.	RERA registered/ not registered	Registered vide no. 12 of 2018 dated 10.01.2018 valid upto 31.12.2020 for phase-I (tower A - G) and 31.12.2021 for phase- II (tower H - J)
7.	Unit no.	1102, 11th floor, tower J (pg. 34 of complaint)
8.	Unit area admeasuring	3350 sq. ft. (pg. 34 of complaint)
9.	Date of execution of buyers' agreement	02.09.2016 (pg. 30 of complaint)
10.	Possession Clause	**Clause 2.1** *"2. Possession* *2.1 ....., the First Party/Confirming Party proposes to handover the possession of the flat to the purchaser within approximate period of* ***48 months from the date of sanction of the building plans of the said colony****. The Purchaser agrees and understands that the First Party/Confirming Party* ***shall be entitled to a grace period of 180 (one hundred and eighty) days, after expiry of 48 months, for applying and obtaining occupation certificate in respect of the Colony***

		from the concerned authority....." (Emphasis supplied) (BBA at page 39 of complaint)
11.	Payment plan	Construction linked
12.	Date of sanction of building plans	07.06.2012 (As per information obtained from planning branch)
13.	Environmental Impact Assessment (EIA) NOC	17.06.2013 (As per information obtained from planning branch)
14.	Due date of delivery of possession	17.12.2017 (Due date of possession has been calculated from the date of obtaining EIA NOC as agreed between the parties on proceedings dated 22.05.2024 inclusive of 180 days grace period)
15.	Total sale consideration	Rs. 2,23,54,400/- (pg. 34 of complaint)
16.	Total amount paid by the complainant	Rs. 1,85,95,000/- (as per SOA dated 01.09.2022 on page 18 of complaint)
17.	Offer of possession	Not offered
18.	Occupation certificate	Not obtained

B. Facts of the complaint

3. The complainants have made the following submissions: -

I. That the complainants were allotted a unit bearing no. 1102, Tower J, admeasuring 3350 sq. ft, along with one car parking in the project of the respondent named "Capital Gateway", situated at Sector-111 Gurgaon vide flat buyer's agreement dated 02.09.2016.

II. That according to builder buyer agreement possession of the flat would be delivered within 54 months of the date of sanction of the building plans and other necessary government approvals. The

complainants have already released the payment as per demand raised by the respondents from time to time and till December, 2018 the complainants have already paid Rs.1,85,95,000/- against the said flat. The respondent never raised any objection with respect to any delay in payment.

III. That the complainants made timely visits at the project and there was very slow progress in the construction. On this, complainants visited the respondent's office and explained that with this slow progress on the implementation of the project, there is every apprehension that it will not be quite possible for the respondent to offer the possession of the flat within the prescribed period. However, respondent reiterated and promised that respondent will offer the possession of the flat strictly according to the buyer's agreement and there will not be any violation of the same from respondent side.

IV. That it was unanimously agreed by the respondents that the possession would be delivered during December 2016 but till date no possession has been delivered.

I. That the complainants visited the site at number of times and contacted the representative of the respondents and stunned to know that the progress of the construction is going on very slow and when the complainants asked for the compensation/delay interest then it was specifically pointed out by the respondents that the same will be adjusted/paid at the time of possession.

C. Relief sought by the complainants:

4. The complainants have sought following relief(s):

I. Direct the respondent to deliver possession of the flat in question alongwith prescribed rate of interest on the amount paid.

D. Reply by the respondents.

5. The respondents have contested the complaint on the following grounds:

i. That the respondents had applied for environment clearance on 20.10.2011. However, the decision and issuance of certificate to the promoter/developer remained in abeyance for a long time due to sudden demise of the Chairman of Environmental Impact Assessment (EIA) Committee in an unfortunate road accident. The developer finally got the environment clearance on 17.06.2013. Owing to this, the construction work of the project itself started late.

ii. That the respondents had applied for the revision in building plans of the said project before the appropriate authority. However, for no fault of the respondents, the plans were approved by the department only after a delay of 2 years. Owing to this, the construction of project could not be started in a timely manner.

iii. That the complainants in the present case are not consumers rather 'investors' who falls outside the purview of the Act, 2016 more specifically in view of the preamble of the Act, 2016 which states to protect the interest of the consumers.

iv. That on 02.09.2016, the flat buyer's agreement was executed between the parties, wherein flat bearing no.1102, 11th Floor, J Tower was allotted to the complainants.

v. That the structure of the said project in question is complete and few instalments are due and payable on account of the complainants. Moreover, it is pertinent to state that the respondents have applied for obtaining occupation certificate for Phase-I of the said project as all the construction and development activities are complete.

vi. That for the reasons beyond the control of the respondents, the said project has been delayed. As a matter of fact, economic meltdown,

financial crisis, delay in granting sanctions and approvals from the concerned government departments, sluggishness in the real estate sector, increase in cost of construction, default by allottees in making timely payments, multiple disputes between the workforce, labour and contractors resulting into shortage of labour and workforce and change in contractors, non-availability of sufficient water for construction due to restrictions imposed by local administration, restricted construction activities towards protection of the environment as directed by the local administration and the NGT and moreover, obstruction in construction due to Covid-19 outbreak are some of the impeding reasons beyond the control of the respondents.

vii. That simultaneously, the respondents are aware of the obligations and duties to complete the said project and that is why promoter approached the 'SWAMIH Investment Fund I' of SBICap Ventures Limited. The project is a sick project wherein imposition of compensation will put a lot of burden over the project and its proponents including the promoter. Moreover, the hands of the respondents are tied with regard to management of funds for the said project. After the receipt of the SWAMHI Investment Fund, any amount of money received towards the said project is being monitored by the Investment Committee of the said fund. As a result, the funds cannot be used for compensation purposes in any manner whatsoever and the money so collected has to be utilised for the purposes of construction only. Further, due to financial crunches the respondents are not in a position to pay money for compensation and/or delayed possession interest. At present, the first priority of the respondents is to complete the said project and deliver homes to the restive allottees. Thus, it is germane to state that there is no further deficiency as claimed by the

complainants against the respondents and no occasion has occurred deeming indulgence of the Hon'ble Authority. Hence, the present complaint is liable to be dismissed.

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 submission made by the parties.

E. Jurisdiction of the authority

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

E.I Territorial jurisdiction

7. 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

8. 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 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.

9. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter.

F. Findings on the objections raised by the respondents.

F. I Objection regarding the complainants being investor.

10. The respondents have taken a stand that the complainants are investor and not a consumer. Therefore, they are not entitled to the protection of the Act and are not entitled to file the complaint under section 31 of the Act. The respondents 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. 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 agreement, it is crystal clear that the complainants are allottees as the subject unit was allotted to them by the promoter. Further, the concept of investor is not defined or referred in the Act. Moreover, the Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled as ***M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P)***

Lts. And anr. has also held that the concept of investor is not defined or referred in the Act. In view of the above, the contention of promoter that the allottees being investor are not entitled to protection of this Act stands rejected.

F.II Objections regarding force majeure.

11. The respondents/promoter have raised the contention that the construction of the tower in which the unit of the complainants is situated, has been delayed due to force majeure circumstances such as delay on part of govt. authorities in granting approvals and other formalities, shortage of labour force in the NCR region, ban on the use of underground water for construction purposes, default by allottees in making timely payments, various orders passed by NGT, major spread of Covid-19 across worldwide, etc. However, all the pleas advanced in this regard are devoid of merit. First of all, the possession of the unit in question was to be offered by 17.12.2017. Moreover, time taken in governmental clearances cannot be attributed as reason for delay in project. Further, the events alleged by the respondents do not have any impact on the project being developed by the respondent. Furthermore, some of the events mentioned above are of routine in nature happening annually and the promoter is required to take the same into consideration while launching the project. Thus, the promoter/respondents cannot be given any leniency on based of aforesaid reasons and it is well settled principle that a person cannot take benefit of his own wrong.

G. Findings on the relief sought by the complainants.

G. I Direct the respondent to hand over the possession of the said unit and to pay interest on the paid-up amount at prescribed rate of interest.

12. The complainants intend to continue with the project and are 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***
> *18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building, —*
> .....
> *Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.""*
> *(Emphasis supplied)*

13. Clause 2.1 of the apartment buyer's agreement dated 02.09.2016 (in short, agreement) provides for handing over of possession and is reproduced below:

> ***2.1 Possession***
> *"Subject to clause 9 or any other circumstances not anticipated and beyond control of the first party/conforming party and any restraints/restrictions from any court/authorities and subject to the purchaser having complied with all the terms of this agreement including but not limited timely payment of total sale consideration and stamp duty and other charges and having complied with all provisions, formalities documentation etc. as prescribed by the* ***first party/conforming party proposes to handover the possession of the flat to the purchaser within approximate period of 48 months from the date of sanction of building plans of the said colony. The purchaser agrees and understands that the first party/conforming party shall be entitled to a grace period of 180 days after the expiry of 48 months for applying and obtaining OC in respect of the colony from the concerned authority..."***
> *(Emphasis supplied)*

14. At the outset, it is relevant to comment on the preset 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 these agreements 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 allottees that even a single default by the allottees in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottees and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottees of their 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 allottees are left with no option but to sign on the dotted lines.

15. **Due date of possession and admissibility of grace period:** The respondents/promoter proposed to hand over the possession of the said unit within a period of 48 months from the date of sanction of building plans. The building plans were approved on 07.06.2012. However, on proceeding dated 22.05.2024, the counsel for the respondent has submitted that the due date for handing over of possession needs to be reckoned from the date of approval of environment clearance i.e. 17.06.2013, to which the counsel for the complainant has no objection. Therefore, in this case, the due date of handing over possession is being calculated as 48 months from the date of grant of EIA NOC which comes out to be 17.06.2017. It is further provided in agreement that promoters shall be entitled to a grace period of 180 days for applying and obtaining the occupancy certificate in respect of the colony from the concerned authority. The said grace period is allowed in terms of order dated 08.05.2023 passed by the Hon'ble Appellate Tribunal in ***Appeal No. 433 of 2022 tilted as Emaar MGF Land Limited Vs Babia Tiwari and Yogesh Tiwari*** wherein it has

been held that if the allottee wishes to continue with the project, he accepts the term of the agreement regarding grace period of three months for applying and obtaining the occupation certificate. The relevant portion of the order dated 08.05.2023, is reproduced as under:

> *"As per aforesaid clause of the agreement, possession of the unit was to be delivered within 24 months from the date of execution of the agreement i.e. by 07.03.2014. As per the above said clause 11(a) of the agreement, a grace period of 3 months for obtaining Occupation Certificate etc. has been provided. The perusal of the Occupation Certificate dated 11.11.2020 placed at page no. 317 of the paper book reveals that the appellant-promoter has applied for grant of Occupation Certificate on 21.07.2020 which was ultimately granted on 11.11.2020. It is also well known that it takes time to apply and obtain Occupation Certificate from the concerned authority. As per section 18 of the Act, if the project of the promoter is delayed and if the allottee wishes to withdraw then he has the option to withdraw from the project and seek refund of the amount or if the allottee does not intend to withdraw from the project and wishes to continue with the project, the allottee is to be paid interest by the promoter for each month of the delay. In our opinion if the allottee wishes to continue with the project, he accepts the term of the agreement regarding grace period of three months for applying and obtaining the occupation certificate.* ***So, in view of the above said circumstances, the appellant-promoter is entitled to avail the grace period so provided in the agreement for applying and obtaining the Occupation Certificate.*** *Thus, with inclusion of grace period of 3 months as per the provisions in clause 11 (a) of the agreement, the total completion period becomes 27 months. Thus, the due date of delivery of possession comes out to 07.06.2014."*

16. In view of the above judgement and considering the provisions of the Act, the authority is of the view that, the promoter is entitled to avail the grace period so provided in the agreement for applying and obtaining the occupation certificate. Therefore, including a grace period of 180 days, the due date of handing over of possession comes out to be 17.12.2017.

17. **Admissibility of delay possession charges at prescribed rate of interest:** Proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at

such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

> ***Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]***
>
> *(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.:*
>
> *Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.*

18. 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.

19. 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., 14.08.2024 is **9%.** Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **11%.**

20. 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 allottees, 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;"

21. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 11% by the respondents/promoter which is the same as is being granted to the complainants in case of delayed possession charges.

22. On consideration of the documents available on record and submissions made by both the parties, 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. The possession of the subject apartment was to be delivered by 17.12.2017. However, the respondents have failed to handover possession of the subject apartment till date of this order. 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. Further, the authority observes that there is no document on record from which it can be ascertained as to whether the respondent has applied for occupation certificate/part occupation certificate or what is the status of construction of the project. Hence, this project is to be treated as on-going project and the provisions of the Act shall be applicable equally to the builder as well as allottees.

23. Accordingly, it is the failure of the promoter to fulfil its obligations and responsibilities as per the agreement dated 02.09.2016 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 allottees shall be paid, by the promoter, interest for every month of delay from due date of possession i.e.,

17.12.2017 till offer of possession plus 2 months after obtaining occupation certificate from the competent authority or actual handing over of possession whichever is earlier, as per section 18(1) of the Act of 2016 read with rule 15 of the rules.

H. Directions of the authority

24. 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 respondents/promoter are directed to pay interest to the complainants against the paid-up amount of Rs.1,85,95,000/- at the prescribed rate i.e., 11% p.a. for every month of delay from the due date of possession i.e., 17.12.2017 till valid offer of possession plus 2 months after obtaining occupation certificate from the competent authority or actual handing over of possession, whichever is earlier, as per section 18(1) of the Act of 2016 read with rule 15 of the rules;

ii. The respondents/promoter shall handover possession of the flat/unit to the complainants in terms of section 17(1) of the Act of 2016.

iii. The arrears of such interest accrued from 17.12.2017 till the date of order by the authority shall be paid by the promoter to the allottees 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 allottees before 10th of the subsequent month as per rule 16(2) of the rules.

iv. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.

v. The respondents/promoter shall not charge anything from the complainants which is not the part of the apartment buyer's agreement.

vi. The rate of interest chargeable from the allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 11% by the respondents/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.

25. Complaint stands disposed off.

26. File be consigned to registry.

(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 14.08.2024