

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

Complaint no. : 5957 of 2023
Date of complaint : 22.01.2024
Date of order : 23.10.2024

Sushma Rani

R/o: - OC- 405, Sukh Sagar Apartments,
Plot no. 12, Sector-9, Dwarka, New Delhi-110077.

Complainant

Versus

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

Both Having Registered Office at: -
517 A, Narain Manzil, 23 Barakhamba Road,
Cannaught Place, New Delhi- 110001.

Respondents

CORAM:

Ashok Sangwan

Member

APPEARANCE:

Pankaj Kumar Yadav (Advocate)
Abhay Jain & Rishabh Jain (Advocates)

Complainant
Respondents

ORDER

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



A. Unit and project related details

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

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	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 others
6.	RERA registered/ not registered	Registered vide regd. No. 12 of 2018 dated 10.01.2018
7.	Unit no.	202, 2 nd floor, tower C, (pg. 22 of complaint)
8.	Date of execution of buyers' agreement	30.08.2013 (pg. 20 of complaint)
9.	Payment plan	Construction linked
10.	Basic sale price	Rs. 56,41,650/- (pg. 24 of complaint)
11.	Total amount paid by the complainant	Rs. 76,17,200/- (as per demand notice dated 29.01.2021 on page 52 of complaint)
12.	Possession Clause	Clause 2.1 "Subject to Clause 9 herein or other circumstances....., the First Party/Confirming Party proposes to handover the possession of the flat to the purchaser within approximate period of 36 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,



		<i>after expiry of 36 months, for applying and obtaining occupation certificate in respect of the Colony from the concerned authority....."</i> (Emphasis supplied) (page 26 of complaint)
13.	Date of sanction of building plans	07.06.2012 (As per information obtained from planning branch)
14.	Due date of delivery of possession	07.12.2015 (Calculated from the date of sanction of building plans + Grace period of 6 months is allowed to the respondent in view of order dated 08.05.2023 passed by the Hon'ble Appellate Tribunal in <i>Appeal No. 433 of 2022 tilted as Emaar MGF Land Limited Vs Babia Tiwari and Yogesh Tiwari</i>)
15.	Offer of possession	Not offered
16.	Occupation certificate	Not obtained

B. Facts of the complaint

3. The complainant has made the following submissions: -

- I. That the complainant was allotted an apartment/flat bearing no. 202, 2nd floor, Tower C measuring 1990 sq. ft. in project of the respondents named "Capital Gateway", Sector 111, Gurgaon vide flat buyer's agreement dated 30.08.2013 for a basic sale consideration of Rs.56,41,650/- against which the complainant has made a payment of Rs. 76,17,200/- to the respondents in all as and when demanded by the respondents.
- II. That as per clause 2.1 of the agreement, the respondents had agreed to deliver the possession of the flat within 36 months from sanctioning of building plan of the said residential project i.e. 07.06.2012.

- III. That the respondents contrary to the schedule of construction linked plan furnished to the complainant raised new demand of Rs.491364/- 'on or before offer of possession' on 29.01.2021, in spite of the fact that concrete has been done in the last five-six years to meet the requirements of occupancy certificate. In the absence of the occupancy certificate, the respondents cannot raise the demand which is subject to obtention of occupancy certificate issued by the competent authority.
- IV. That the complainant came to know about the fact that the respondents had no intention to deliver the project and was dragging their feet by indulging into delaying and dilatory tactics unfairly to fleece the complainant not caring for completing the project in promised time span.
- V. That the respondents have acted in an unlawful manner to derive unlawful gains and cause huge losses to the other buyers similarly like complainant. Initially, by making false representations, the respondents convinced the complainant to purchase a flat and thereafter failed to complete the project within promised time. Therefore, due to the said unlawful acts of the respondents, the complainant is constrained to approach this Authority for justice and exercise the legal remedy available.

C. Relief sought by the complainant:

4. The complainant has sought following relief(s):
- I. Direct the respondent to pay delay possession charges.
 - II. Direct the respondent to pay Rs.50,000/- towards expenses incurred for getting loan sanctioned from bank.
 - III. Direct the respondent to pay an amount of Rs.5,00,000/- towards harassment, agony suffered by the complainant and Rs.50,000/- towards litigation charges.



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 13.08.2013, the flat buyer's agreement was executed between the parties, wherein flat bearing no.202, 2nd Floor, C Tower was allotted to the complainant.
 - v. That the development activities in the said project has been vastly affected due to people like complainant who have failed to pay their dues in timely manner.
 - vi. That the provisions of the Act, 2016 have been propagated for the benefit of innocent customers and not the investors like the complainant in the present complaint.
 - vii. All other averments made in the complaint are denied in toto.

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 complainant being investor.

10. The respondents have taken a stand that the complainant is an investor and not a consumer. Therefore, she is not entitled to the protection of the Act and is not entitled to file the complaint under section 31 of the Act. The Authority observes 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 flat buyer's agreement dated 30.08.2013, it is revealed that the complainant is a buyer, and she has paid total price of Rs.76,17,200/- 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 agreement, it is crystal clear that the complainant is an allottee as the subject unit was allotted to her 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 allottee being investor is not entitled to protection of this Act stands rejected.

G. Findings on the relief sought by the complainant.

G. I Direct the respondent to pay delay possession charges.

11. 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
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)

12. Clause 2.1 of the flat buyer's agreement dated 30.08.2013 (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 36 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 36 months for applying and obtaining OC in respect of the colony from the concerned authority..."

(Emphasis supplied)



13. 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.

14. **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 36 months from the date of sanction of building plans. The building plans were approved on 07.06.2012. Therefore, the due date of handing over possession comes out to be 07.06.2015. 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."

15. 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 07.12.2015.



16. **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.

17. 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.
18. 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., 23.10.2024 is **9.10%**. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **11.10%**.
19. The definition of term 'interest' as defined under section 2(z) 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:

"(z) "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;"*

20. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 11.10% by the respondents/promoter which is the same as is being granted to the complainant in case of delayed possession charges.

21. 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. By virtue of clause 2.1 of the buyer's agreement executed between the parties, the possession of the subject apartment was to be delivered within a period of 36 months from date of sanction of building plans which comes out to be 07.06.2015. As far as grace period is concerned, the same is allowed for the reasons quoted above. Therefore, the due date of handing over possession was 07.12.2015. 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.

22. Accordingly, it is the failure of the promoter to fulfil its obligations and responsibilities as per the agreement dated 30.08.2013 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., 07.12.2015 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.

G. II Direct the respondent to pay Rs.50,000/- towards expenses incurred for getting loan sanctioned from bank.

23. The complainant is seeking an additional relief w.r.t payment of expenses amounting to Rs.50,000/- incurred for getting the loan sanctioned from financial institution. However, the complainant has neither pleaded these charges in her complaint nor has pressed the said relief during pendency of complaint. Moreover, there is not even a single document available on record which can substantiate the claim of the complainant. In view of the above, the said relief is declined.

G. III Direct the respondent to pay an amount of Rs.5,00,000/- towards harassment, agony suffered by the complainant and Rs.50,000/- towards litigation charges.

24. The complainant is seeking relief w.r.t. compensation in the above-mentioned relief. Hon'ble Supreme Court of India in *civil appeal nos. 6745-6749 of 2021 titled as M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of Up & Ors.*, has 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. Therefore, for claiming compensation under sections 12, 14, 18 and section 19 of the Act, the complainant may file a separate complaint before Adjudicating Officer under Section 31 read with section 71 of the Act and rule 29 of the rules.

H. Directions of the authority

25. 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 complainant against the paid-up amount of Rs.76,17,200/- at the prescribed rate i.e., 11.10% p.a. for every month of delay from the due date of possession i.e., 07.12.2015 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 arrears of such interest accrued from 07.12.2015 till the date of order by the authority shall be paid by the promoter to the allottee within a period of 90 days from date of this order and interest for every month of delay shall be paid by the promoter to



- the allottee before 10th of the subsequent month as per rule 16(2) of the rules.
- iii. The respondents/promoter shall issue a statement of account after adjusting the delay possession charges to the complainant within a period of 60 days.
 - iv. The respondents/promoter shall handover possession of the flat/unit to the complainant in terms of Section 17(1) of the Act of 2016.
 - v. The respondents/promoter shall not charge anything from the complainant which is not the part of the flat buyer's agreement dated 30.08.2013.
 - vi. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 11.10% by the respondents/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.
26. Complaint stands disposed of.
27. File be consigned to registry.

HARERA
GURUGRAM

(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 23.10.2024