

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

Complaint no.: 5340 of 2023
Date of decision:- 11.09.2024

Jasleen Kaur
R/o:- A-204, Ramkishan Apartments, Plot No.12,
Sector-23, Dwarka, New Delhi-110077.

Complainant

Versus

M/s. ATS Real Estate Builders Private Limited.
Regd. office: 711/90, Deepali, Nehru Place,
New Delhi.

Respondent

CORAM:

Shri Ashok Sangwan

Member

APPEARANCE:

Sh. Sushil Yadav (Advocate)

Complainant

Sh. M.K. Dang (Advocate)

Respondent

ORDER

1. The present complaint dated 15.11.2023 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 as provided under the provision of the Act or the Rules and regulations made there under or to the allottees as per the agreement for sale executed *inter se*.

A. Unit and project related details

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

S. N.	Particulars	Details
1.	Name of the project	"ATS Marigold".
2.	Project location	Sector-89A, Gurugram
3.	Project type	Group housing
	Project area	11.125 acres
4.	HRERA registered/ not registered	Registered No. 55 of 2017 dated 17.08.2017
	Dtcp License	License no. 87 of 2013 Dated 11.10.2013
5.	Allotment letter	16.08.2014 (As on page no. 21 of reply)
6.	Apartment Agreement	Buyer's 20.10.2014 (As on page no. 11 of complaint)

7.	Unit no.	Unit no.-5064, Floor-6, Tower no.-5 alongwith 2 car parkings (As on page no. 12 of complaint)
8.	Unit area admeasuring	1750sq.ft. [Super-Area] 1480sq.ft. [Built up Area] (As on page no. 12 of complaint)
9.	Possession clause	<p>Clause 6. COMPLETION OF CONSTRUCTION</p> <p><i>6.2. The Developer shall endeavor to complete the construction of the Apartment within 42(forty two) months from the date of this Agreement, with the grace period of 6 (six) months i.e. ("Completion Date"), subject always to timely payment of all charges including the basic sale price, stamp duty, registration fees and other charges as stipulated herein. The Company will send possession Notice and offer possession of the Apartment to the Applicant(s) as and when the Company receives the occupation certificate from the competent authority(ies)</i></p> <p>[Emphasis supplied] (As on page no. 22 of complaint)</p>
11.	Due date of possession	20.10.2018 [Calculated 42 months from the date of execution of BBA plus 6 months]
12.	Total sale consideration	Rs.1,17,31,250/- (As on page no. 42 of complaint)
13.	Amount paid by the complainant	Rs.1,09,15,812/- (As per applicant ledger on page no. 51)

		of complaint)
14.	Occupation certificate	16.06.2023 (As on page no. 67 of reply)
15.	Offer of possession	20.06.2023 (As on page no. 44 of complaint)

B. Facts of the complaint:

1. The complainant made the following submissions in the complaint:
 - I. That the respondent gave advertisement about the project named "ATS Marigold", situated at sector 89A, Gurgaon promising various facilities like world class amenities and timely completion/execution of the project etc. Relying on the promise and undertakings given by the respondent, the complainant booked an apartment/flat in the project for a total sale consideration is Rs.1,17,31,250/-.
 - II. That the complainant made payment of Rs. 1,17,45,960/- to the respondent from time to time as per the demands raised by the respondent. The Flat Buyers Agreement was executed on 20.10.2014 and unit bearing no.5064, Tower No. 5 , on 6th Floor, having super area of 1750 sq. ft. was allotted to the complainant. That as per clause -6.2 of the Agreement, the respondent undertook to deliver the possession of the flat within 42 months from the date of the agreement with a grace period of six months i.e 20.04.2018.
 - III. That the complainant inquired from time to time to the respondent about the progress of the project but the respondent always gave

false impression that the work is going on in full swing and accordingly asked for the payments which the complainant gave on time. The complainant was shocked & surprised on visiting the site to see that no construction work was going on and no one was present at the site. The respondent malafidely cheated and defrauded the complainant.

- IV. That despite receiving more than 95% payment for all the demands raised by the respondent and repeated requests and reminders over phone calls and personal visits by the complainant, the respondent failed to deliver the possession of the unit within the stipulated period.
- V. That the construction of the block in which the unit was booked has not been completed within the promised time-period for reasons best known to the respondent. The respondent sent an offer of possession to the complainant on 20.06.2023, but when the complainant visited the unit, it was not in a habitable condition. This clearly shows the ulterior motive of the respondents was to extract money from the innocent people fraudulently.
- VI. That the complainant has requested the respondent several times to deliver possession of the unit in question alongwith prescribed interest on the amount deposited by the complainant but the respondent refused to do so.

C. Relief sought by the complainant:

4. The complainant has sought following relief(s):

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- i. Direct the respondent to pay interest on the total amount paid by the complainant on account of delay in handing over possession of the unit.

D. Reply by respondent:

5. The respondent has made following submissions by way of written submissions:

- I. That the complaint is neither maintainable nor tenable and is liable to be out-rightly dismissed. The Apartment Buyer's Agreement was executed between the complainant and the respondent prior to the enactment of the Act, 2016 and the provisions laid down in the said Act cannot be applied retrospectively.
- II. That the complaint is not maintainable for the reason that the agreement contains an arbitration clause which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute. Clause 21.1 of the Buyer's Agreement is reproduced below:

"All or any disputes that may arise with respect to the terms and conditions of this Agreement, including the interpretation and validity of the provisions hereof and the respective rights and obligations of the parties shall be first settled through mutual discussion and amicable settlement, failing which the same shall be settled through arbitration. The arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 and any statutory amendments/modifications thereto by a sole arbitrator who shall be mutually appointed by the parties or if unable to be mutually appointed then to be appointed by the Court. The decision of the Arbitrator shall be final and binding on the parties."

- III. That the respondent is a real estate company having immense goodwill, comprised of law abiding and peace loving persons and has always believed in satisfaction of its customers. The



complainant after checking the veracity of the project namely, 'ATS Marigold', Sector 89A, Gurugram had applied for allotment of an apartment and had agreed to be bound by the terms and conditions of the Application Form.

- IV. That the respondent allotted unit bearing no. 5064 to the complainant vide Allotment Letter dated 16.08.2014. That the Apartment Buyer's Agreement was executed between the parties on 20.10.2014 and the complainant agreed to be bound by the terms and conditions contained therein. The apartment booked by the complainant was located in tower no. 5 having super built up area of 1750 sq. ft. for a sale consideration of Rs.1,17,31,250/-.
- V. That after completing the construction, the respondent vide its letter dated 11.10.2022, intimated the complainant that her unit is ready for carrying fit-out works and requested to complete the interior/fit-out work within 3 months.
- VI. That the possession of the unit was supposed to be offered to the complainant in accordance with the agreed terms and conditions of the Buyer's That the construction was to be completed within a period of 42 months from the date of the agreement and the same was subject to the occurrence of force majeure conditions. The possession of the unit was to be handed over to the complainant only after the receipt of the Occupation Certificate from the concerned authorities. That after the completion of the construction, the respondent had applied for the grant of the Occupation Certificate vide application dated 26.08.2022. After scrutiny, the concerned authorities granted the occupation certificate for the tower in question on 16.06.2023 and the

respondent offered the possession to the complainant on 20.06.2023. As on date, the complainant is still liable to pay a sum of Rs.5,76,751.5 including interest for delayed period.

VII. That the implementation of the project was hampered and most of the work was stalled due to non-payment of instalments by allottees on time and also due to the events and conditions which were beyond the control of the respondent and which have affected the materially affected the construction and progress of the project. Some of the Force Majeure events/conditions which were beyond the control of the respondent and affected the implementation of the project and are as under :

- a. Inability to undertake the construction for approx. 7-8 months due to Central Government's notification with regard to demonetization.
- b. Orders Passed by National Green Tribunal.
- c. Non-Payment of Instalments by Allottees.
- d. Inclement Weather Conditions.
- e. Outbreak of Covid-19 pandemic.

VIII. That the complainant has been called upon to take the possession of her unit after payment of the amount due to the respondent and fulfillment of the requisite formalities yet the complainant is intentionally not coming forward to do so even after reminder was sent by the respondent to the complainant on 27.07.2023. The complainant has stated that she would not take over the physical possession of the unit in question till the time the respondent pays delay possession charges to the complainant.

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- IX. That the demands of the complainant are highly untenable, misconceived and aimed at blackmailing the respondent. Instead of completing the requisite formalities, the complainant has filed the present highly false, frivolous and baseless complaint with totally mala fide and dishonest intentions of arm twisting, blackmailing, pressurizing and harassing the respondent.
- X. That in the facts and circumstances of the present case, a direction is required to be given by this Hon'ble Authority to the complainant that upon paying her outstanding dues to the respondent along with interest for the delayed period, complying with the requisite formalities, she is required to take over the possession of the said unit. Moreover, as already stated, there has been no delay on the part of the respondent and the complaint is liable to be dismissed.
6. Copies of all the relevant documents have been filed and placed on 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:

7. 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

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;

10. 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 leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

F. Findings on objections raised by the respondent

F.I Objection regarding delay due to force majeure circumstances

11. The respondent-promoter has raised a contention that the construction of the project was delayed due to force majeure conditions such as various orders passed by the National Green Tribunal, Environment Pollution (Prevention & Control) Authority,



shortage of labour and stoppage of work due to lock down due to outbreak of Covid-19 pandemic. Since there were circumstances beyond the control of respondent, so taking into consideration the above-mentioned facts, the respondent be allowed the period during which his construction activities came to stand still, and the said period be excluded while calculating the due date. In the present case, the allotment letter was issued by the respondent to the complainant on 16.08.2014. The apartment buyer's agreement was executed between the parties on 20.10.2014. Thus, the due date for completion of project was 20.10.2018. The respondent is seeking the benefit of covid-19, which came into picture after the due date of possession. Though there have been various orders issued to curb the environment pollution, but these were for a short period of time. So, the circumstances/conditions after that period can't be taken into consideration for delay in completion of the project. Thus, the Authority is of the view that no relief w.r.t this can be granted to the respondent.

F.II. Objection regarding jurisdiction of authority w.r.t. buyer's agreement executed prior to coming into force of the Act.

12. One of the contentions of the respondent is that the Authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the buyer's agreement executed between the parties. The respondent further submitted



that the provisions of the Act are not retrospective in nature and the provisions of the Act cannot undo or modify the terms of buyer's agreement duly executed prior to coming into effect of the Act.

13. The Authority is of the view that the Act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situations in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of hon'ble Bombay High Court in **Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)** which provides as under:

"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter....."

122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate

law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."

14. Also, in appeal no. 173 of 2019 titled as ***Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya*** dated 17.12.2019, the Haryana Real Estate Appellate Tribunal has observed-

"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."

F.III. Objection regarding the complainant is in breach of agreement for non-invocation of arbitration.

15. The respondent submitted that the complaint is not maintainable for the reason that the agreement contains an arbitration clause which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute.
16. The Authority is of the opinion that the jurisdiction of the authority cannot be fettered by the existence of an arbitration clause in the buyer's agreement as it may be noted that section 79 of the Act bars the jurisdiction of civil courts about any matter which falls within the purview of this authority, or the Real Estate Appellate Tribunal. Thus, the intention to render such disputes as non-arbitrable seems

to be clear. Also, section 88 of the Act says that the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. Further, the authority puts reliance on the catena of judgments of the Hon'ble Supreme Court, particularly in *National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506*, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, consequently the authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause.

G. Findings on the relief sought by the complainant.

G.I Direct the respondent to pay interest on the total amount paid by the complainant on account of delay in handing over possession of the unit.

17. In the present complaint, the complainant intend to continue with the project and are seeking possession and delay possession charges along with interest on the amount paid. 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.

"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.

18. **Admissibility of grace period:** The promoter was obligated to hand over the possession of the unit by 02.10.2019 as the same has been undertaken by the respondent in clause 9 (i) of the agreement to sell dated 02.04.2016.

19. **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."

20. 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.



21. 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., 04.09.2024 is 9.10%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 11.10%.
22. 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;"*
23. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 11.10% by the respondent/promoter which is the same as is being granted to the complainants in case of delayed possession charges.
24. 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. Due date of possession as mentioned specifically in clause 6.2 of the Apartment Buyer's Agreement dated 20.10.2014. As per clause 6.2 of the apartment

buyer's agreement dated 20.10.2014, the possession was to be handed over to the complainant within 42 months from the date of execution of the agreement alongwith a grace period of 6 months. Therefore, the due date of handing over possession is 20.10.2018. The respondent has offered the possession of the subject apartment on 20.06.2023 after obtaining the occupation certificate on 16.06.2023.

25. 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., 20.10.2018 till offer of possession plus two 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

26. 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 promoters as per the functions entrusted to the authority under section 34(f):

- i. The respondent is directed to pay the interest at the prescribed rate i.e., 11.10% per annum for every month of delay on the amount paid by the complainants from due date of possession i.e., 20.10.2018 till actual handing over of possession or offer of possession plus two months after obtaining occupation certificate from the competent authority, whichever is earlier,

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- as per section 18(1) of the Act of 2016 read with rule 15 of the rules.
- ii. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
 - iii. The rate of interest chargeable from the allottees/complainants by the promoter, in case of default shall be charged at the prescribed rate i.e., 11.10% by the respondent/promoter which is the same rate of interest which the promoters 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.
 - iv. The respondent shall not charge anything from the complainant which is not the part of the agreement.
27. Complaint stands disposed of.
28. File be consigned to registry.

Ashok Sangwan
(Member)

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 11.09.2024

HARERA
GURUGRAM