

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

Complaint no. : 1176 of 2023
Date of complaint : 13.03.2023
Date of order : 19.03.2025

Hardeep Kumar and Safia Gupta
Both R/o: - 307, Sector 4, Mansa Devi Complex,
Panchkula-134114, Haryana.

Complainants

Versus

1. KNS Infracon Pvt. Ltd.
2. M/s Tashee Land Developers Pvt. Ltd.
Both Having Registered Office at: -
517 A, Narain Manzil, 23 Barakhamba Road,
Cannaught Place, New Delhi- 110001.

Respondents

CORAM:
Ashok Sangwan

Member

APPEARANCE:
Soumya Kumar (Advocate)
Rishabh Jain (Advocate)

Complainants
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	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 B (pg. 30 of complaint)
8.	Date of execution of buyers' agreement	25.06.2013 (pg. 28 of complaint)
9.	Payment plan	Construction linked
10.	Basic sale consideration	Rs.53,73,000/- (pg. 32 of complaint)
11.	Total amount paid by the complainant	Rs.62,79,109/- (as per page 11 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, after expiry of 36 months, for applying and obtaining occupation certificate in

		<i>respect of the Colony from the concerned authority....."</i> (Emphasis supplied) (page 36 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	24.10.2024 (as per DTCP Website)

B. Facts of the complaint

3. The complainants have made the following submissions: -

- I. That on 10.05.2011, the complainants had applied for booking a flat in the respondent's project named "Capital Gateway", situated in Sector 111, Gurgaon. At the time of application, it was represented to the complainants that delivery of possession would be facilitated no later than 3 years from the said application, with a further grace period of 6 months, i.e., by 10.11.2014, in terms of Clause 13 of the terms & conditions.
- II. That on 17.06.2013, the respondents issued allotment letter to the complainants for unit no. B-202, admeasuring 1990 sq. ft. at a rate of Rs.2700/- per sq. ft.

- III. That on 25.06.2013, builder-buyer agreement was executed between the parties, whereby it was stipulated that basic sale price for the flat was Rs.53,73,000/- and promised date of delivery of possession was within a period of 36 months from the date of sanction of building plans, with a further grace period of 180 days. Pertinently, the respondents had received sanction for the building plans on 07.06.2012. Consequently, possession was required to be delivered to the complainants by 7.12.2015.
- IV. That the complainants made several payments to the respondents in good faith, with the expectation of timely delivery of possession of the flat in question. The complainants also deposited the appropriate TDS for the said payments. Cumulatively, the complainants have paid an amount of Rs.62,79,109/- against the basic sales price of Rs.53,73,000/-. However, the respondents have utterly and miserably failed to fulfil their end of the transaction, insomuch as the complainants are yet to even receive an offer of possession of the concerned flat, despite passage of a period of over 9 years since the execution of the flat buyer's agreement.
- V. That the complainants thus seek the indulgence of this forum to aid them to receive possession of the said flat, along with payment of interest by the respondents for the delay in possession, along with any other appropriate relief in terms of the Act.
- C. Relief sought by the complainants:**
4. The complainants have sought following relief(s):
- I. Direct the respondents to handover possession of the flat and to pay delay possession 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 25.06.2013, the flat buyer's agreement was executed between the parties, wherein flat bearing no.202, 2nd Floor, B Tower was allotted to the complainants.
- v. That the structure of the said project in question is complete and few installments 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 respondent is 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.
- viii. That the development activities in the said project have been vastly affected due to people like complainants who have failed to pay their dues in timely manner.
- ix. That the provisions of the Act, 2016 have been propagated for the benefit of innocent customers and not the investors like the complainants in the present complaint.
- x. 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 complainant being investor.

10. The respondents have taken a stand that the complainants are investors and not a consumer. Therefore, they are 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 25.06.2013, it is revealed that the complainants are buyers, and they have paid a considerable amount 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 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. 000600000010557 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 07.12.2015. 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 respondents. 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 handover possession of the flat and to pay delay possession charges.

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 flat buyer's agreement dated 25.06.2013 (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)

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 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."

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 07.12.2015.

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., 19.03.2025 is **9.10%**. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **11.10%**.
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 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;"*

21. Therefore, interest on the delay payments from the complainants 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 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 respondents are 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 as per the DTCP website the occupation certificate for the tower in question has been granted to the respondents/promoter on 24.10.2024. However, possession of the apartment has not been offered to the complainants till date.
23. Accordingly, it is the failure of the promoter to fulfil its obligations and responsibilities as per the agreement dated 25.06.2013 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 respondents is established. As such, the allottees shall be paid, by the promoter,

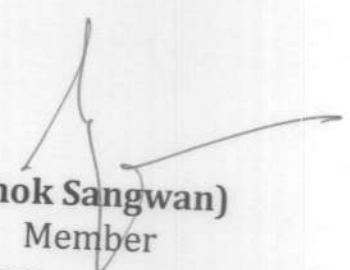
interest for every month of delay from due date of possession i.e., 07.12.2015 till offer of possession plus 2 months or actual handing over of possession whichever is earlier, as per section 18(1) of the Act of 2016 read with rule 15 of the rules.

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 is directed to pay interest to the complainants against the paid-up amount 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 offer of possession plus 2 months 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 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.
- iii. The respondents/promoter is directed to supply a copy of the updated statement of account after adjusting delay possession charges within a period of 30 days to the complainants.
- iv. The complainants are directed to pay outstanding dues, if any, after adjustment of delay possession charges within a period of 60 days from the date of receipt of updated statement of account.

- v. The respondents/promoter shall not charge anything from the complainants which is not the part of the flat buyer's agreement dated 25.06.2013.
- vi. The respondents/promoter is directed to handover possession of the flat/unit to the complainants in terms of Section 17(1) of the Act of 2016.
- vii. The rate of interest chargeable from the allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 11.10% 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 delay possession charges as per section 2(za) of the Act.
- viii. The respondents/promoter is further directed to pay a cost of Rs.20,000/- already imposed on it vide order dated 27.03.2024 to the complainants.
- ix. A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.
25. Complaint stands disposed of.
26. File be consigned to registry.


(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 19.03.2025