HARYANA REAL ESTATE REGULATORY AUTHORITY PANCHKULA

Website: www.haryanarera.gov.in

Complaint no.:	**869 of 2022**
Date of filing.:	**26.05.2022**
Date of first hearing.:	**02.08.2022**
Date of decision.:	**03.09.2026**

Prem Pal S/o Sh. Kundan Lal & Deepali W/o Sh. Prem Pal
Both R/o BE-323, Galino-4, Hari Nagar,
New Delhi110064.

....COMPLAINANTS

VERSUS

M/s Countrywide Promoters Pvt. Ltd.
OT-14, 3rd floor, Next Door Parklands
Sector-76, Faridabad

....RESPONDENT

CORAM: **Parneet Singh Sachdev** **Chairman**

Nadim Akhtar **Member**

Dr. Geeta Rathee Singh **Member**

Chander Shekhar **Member**

Present: - Mr. Rajan Kumar Hans, Counsel for complainants through VC

Mr. Hemant Saini, Counsel for the respondent through VC.

<u>ORDER</u> (PARNEET S. SACHDEV-CHAIRMAN)

1. Present complaint has been filed by complainant under Section 31 of the Real Estate (Regulation & Development) Act, 2016 (for short Act of 2016) read with Rule 28 of The Haryana Real Estate (Regulation & Development) Rules, 2017 for violation or contravention of the provisions of the Act of 2016 or the Rules and Regulations made thereunder, wherein it is inter-alia prescribed that the promoter shall be responsible to fulfil all the obligations, responsibilities and functions towards the allottee as per the terms agreed between them.

A. UNIT AND PROJECT RELATED DETAILS

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

S.No.	Particulars	Details
1.	Name of the project.	Park-81, Faridabad.
2.	Nature of the project.	Residential
3.	RERA Registered/not registered	Not Registered
4.	Details of unit.	81, AVE-41-FF, 2067sq. ft.
5.	Date of Allotment	16.03.2010

6.	Date of builder buyer agreement	26.06.2012
9.	Due date of possession (36 months)	26.06.2015
10.	Possession clause in BBA (Clause 5.1)	*Subject to Clause 14 herein or any other circumstances not anticipated and beyond the control of the Seller/Confirming Party and any restraints/ restrictions from any courts/authorities and subject to the Purchaser(s) having complied with all the terms and conditions of this Agreement and not being in default under any of the provisions of this Agreement including but not limited to 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 Seller/Confirming Party, whether under this Agreement or otherwise, from time to time, the Seller/Confirming Party proposes to hand over the possession of the Floor to the Purchaser(s) within a period of 36 months from the date of execution of the floor buyers agreement or sanction of building plan whichever is later. The Purchaser(s) agrees and understands that subject to clause 14 of this agreement the Seller/Confirming Party shall be entitled to a grace period of 180 (One Hundred and Eighty) days, after the expiry of 36 months, for*

		applying and obtaining the occupation certificate from the concerned authority.
11.	Basic sale consideration	₹ 49,44,016/-
12.	Amount paid by complainant	₹57,80,963/-
13.	Offer of possession	18.02.2022 with demand of ₹ 27,01,898/- (inclusive of stamp duty charges of ₹ 5,05,000/-)
14.	Occupation Certificate	12.10.2021

B. FACTS OF THE COMPLAINT AS STATED IN THE COMPLAINT

3. Facts of the present complaint that the complainant had booked a unit in the respondent's project-Park-81 by depositing an amount of ₹5,00,000/- on 03.09.2009. Allotment letter for unit no 81, AVE-41-FF having area of 2067sq. ft. was issued in favor of complainant on 16.03.2010. Copy of allotment letter is annexed as Annexure P-1.
4. That on 26.06.2012, a pre-printed one-sided, arbitrary and unilateral flat buyer agreement for the said unit was executed between the parties. As per clause 5.1 of agreement, possession of the unit should be provided within 36 months from the date of execution of BBA, so the effective date of possession becomes 26.06.2015.

5. That as per the various demands raised by the respondent, the complainants have paid Rs 57,80,963/- on time. Copies of the payment receipts of various dates and ledger statement dated 12.07.2021 are annexed as Annexure P-3.
6. That on 12.10.2021, the respondent received an occupation certificate from the District Town Planner for the said unit. As per the O.C, the DTP gave the occupation of area 187.216 sq. mtr. Or 2015 sq. ft. Copy of Occupation Certificate dated 12.10.2021 is annexed as Annexure P-5.
7. That on 18.02.2022, the builder issued a letter for the offer of possession and according to Annexure-A of possession letter, the builder has increased the super build area from 2067 sq. ft. to 2424 sq. ft which is an increase of 357 sq. ft. of area. Copy of possession letter dated 18.02.2022 is annexed as Annexure P-6. As per annexure A of the possession letter the builder has increased various costs due to an increase in size area. As such, respondent is demanding a hefty sum of Rs 13,74,501/- against the increased area of 357 sq. ft which is way over and above of the amount what got settled in builder buyer agreement.
8. That the respondent was supposed to give the possession of the floor on 26.06.2015 but it has delivered the possession by delay of over 6 years on 18.02.2022 but is not providing the compensation for the delayed possession to the complainant.

9. That no compensation is sought by the complainant in the complaint to the honourable authority and the complainant reserves the right to approach the adjudicating officer to claim the right of compensation. Thus, the present complaint.

C. RELIEF SOUGHT

10. That the complainants seeks following relief and directions to the respondent:-

    i. Pass an appropriate award directing the Respondent, Not to charge any additional amount as demanded over and above the agreed amount as per BBA. (Justification: - Section 11 (4), Section 19(1), Section 19(3) of the Act.).

    ii. Pass an appropriate award directing the Respondent Not to charge the amount of Rs.13,74,501/-/- against the increased area of 357 Sq. Feet. despite the fact that he has received the OC for 2015 Sq Ft only.

    iii. Pass an appropriate award directing the Respondent to pay delayed possession charges of delay in 6 years in offering the possession on the Prescribed rate of interest (as per calculation done in Regulation DDD) (Justification:- Section 18 of the Act, Rule 15.)

iv. Pass an appropriate award directing the Respondent Not to charge any Holding charge or any interest on the due amount or any other amount Pending.

v. Pass Any other relief/direction which the Hon'ble Authority deems fit and proper in the facts & circumstances of the present complaint.

D. REPLY SUBMITTED ON BEHALF OF RESPONDENT

Learned counsel for the respondents filed detailed reply on 09.03.2023 and 13.03.2023 pleading therein:

11. That post completion of work, the respondent had received occupation certificate from DTP, Haryana vide dated 12.10.2021 which is annexed as Annexure-16.

12. That the respondent in line of offer of possession dated 18.02.2022 raised the demand from the complainants. However, the complainants had defaulted the payment and the respondents had issued numerous reminders, letters dated 20.10.2020 and 19.05.2022 for scrutiny of the complainants account, however all went in vein. Complainants instead of clearing the dues and taking the possession of unit in question, the complainants deliberately with malafide intentions indulged themselves in filing the instant complaint.

13. That in terms of clause 5 of the duly executed FBA, the Respondents were to offer possession within 36 months from the date of the sanction of the building plan or execution of FBA, whichever is later, in additional to further grace period of 180 days subject to force majeure. The proposed timeline was subject to force majeure circumstances as stated in Clause 14 of the FBA. Further, the Environment Pollution (Prevention and Control) Authority, EPCA, expressing alarm on severe air pollution level in Delhi-NCR issued press note vide which the construction activities were banned within the Delhi-NCR region. The ban was commenced from 31/10/2018 and was initially subsisted till 10/11/2018 and the same was further extended till 12/11/2018.

14. That the complainants and the respondents have duly executed Floor buyer agreement on 26.06.2012. It is submitted that while the charges namely- Basic Sales Price (BSP), Development Charges (DC), Preferential Location Charges (PLC), Club Membership Charges (CMC), External Development Chargers (EDC), Electrification Chargers (EC), Utility Connection Chargers (UCC), Installation of Sewerage Treatment Plant, Effluent Treatment Plant, Pollution Control Devices, fresh incidence of tax as may be levied by the Government, Electricity Connection Chargers. It is submitted that these charges were quantified chargers as per the FBA, however, for various other charges, were purposed at the stage of offering possession but they were duly

mentioned in the FBA. Thus, the said charges were already agreed upon by the Complainants at the stage of entering into the transaction. Reference may be had to clause 2.5 of the FBA.

15. That agreements that were executed prior to the implementation of RERA Act and Rules shall be binding on the parties and cannot be re-opened. Thus, both the parties being signatory to a duly documented Application Form and Floor Buyer's Agreement are bound by the terms and conditions so agreed between them.

16. It is clarified in the Rules published by the state of Haryana, the explanation given at the end of the prescribed agreement for sale in Annexure A of the Rules, it has been clarified that the developer shall disclose the existing agreement for sale in respect of ongoing project and further that such disclosure shall not affect the validity of such existing agreement executed with its customers. The explanation is extracted herein below for ready reference:

"Explanation: (a) The promoter shall disclose the existing Agreement for Sale entered between Promoter and the Allottee in respect of ongoing project along with the application for registration of such ongoing project. However, such disclosure shall not affect the validity of such existing agreement (s) for sale between Promoter and Allottee in respect of apartment, building or plot, as the case may be, executed prior to the stipulated date of due registration under Section 3(1) of the Act.".

In view of the above, it is evident that the parties are bound by the terms of the duly executed FBA.

17. That the unit allotted to the complainants was admeasuring to 2,424 sq ft. vide offer of possession dated 18.02.2022.Therof, the calculation of the net cost for the tentative size of the unit provided by complainant is denied.

18. In addition, respondent had placed on record an affidavit in compliance with the direction of this Hon'ble Authority on 12.10.2023, pertaining to information of regarding the actual area of the unit no. 81, AVE 4-FF, situated as Park-81, Parklands, as per the agreement, the final area of the allotted flat, the area from which occupation has been granted vide OC dated 12.10.2021,component wise details of the actual area of the flat and component wise break up of demand of Rs 13,74,501/-.

F.ARGUMENTS OF COUNSEL FOR COMPLAINANTS AND RESPONDENT

19. Ld. counsel for complainants and respondents reiterated the submissions as made in their pleadings.

G. ISSUES FOR ADJUDICATION

20. Whether the complainants are entitled to possession of the booked unit along with delay interest and other charges in terms of Section 18 of Act of 2016? If Yes, the quantum thereof.

H.OBSERVATIONS OF THE AUTHORITY

21. As per record, complainants were allotted unit bearing no. 81,AVE-41-FF, measuring 2067 sq. ft. in the project being developed by the respondent namely 'Park-81' situated at Faridabad vide allotment letter dated 16.03.2010. Builder buyer agreement was also executed between the parties for the said unit on 26.06.2012. Against basic sale consideration of ₹ 49,44,016/- complainants have already paid a total amount of ₹ 57,80,963/-. Respondent after receipt of Occupation Certificate dated 12.10.2021 had issued offer of possession on 18.02.2022 to the complainants. It is the contention of the complainants that the respondent have failed to complete the project and thus delayed delivery of possession of the booked unit beyond the time period stipulated in the agreement. Area offered at time of possession is not in consonance with the occupation certificate. Hence, the present complaint is filed seeking possession of the booked unit along with delay interest and area as per occupation certificate.

22. As per clause 5.1 of the builder buyer agreement, possession of the unit was to be delivered within 36 months from date of sanction of building plan or execution of the floor buyer's agreement. As such, date of sanction of building plan has not been provided by the parties. Hence, deemed date of possession is calculated taking 36 months from date of agreement which works out to 26.06.2015.

23. The agreement further entitles the respondent to a grace period of 180 days after expiry of 36 months for applying and obtaining the grant of occupation certificate. In this regard, it is observed that respondent has not placed on record any document to show that an application had been filed with the competent authority for grant of occupation certificate from 26.06.2015 till 26.12.2015 i.e the grace period. The delay is entirely on the part of the respondent. As per the settled principle no one can be allowed to take advantage of its own wrong. Accordingly, this grace period of 180 days cannot be allowed to the promoter. Thus the deemed date of possession works out to 26.06.2015.

24. Admittedly, the delivery of possession of the unit in question has been delayed beyond the stipulated period of time. The due date of possession in the present case is 26.06.2015. The claim of the respondent regarding exclusion of delay due to *force majeure* is now being examined. The respondent has claimed that bans by Environment Pollution (Prevention and Control) Authority which commenced from 31.10.2018 and was initially subsisted till 10.11.2018 and the same was further extended till 12.11.2018.

25. The onus squarely lies with the respondent to explain how this ban of around 13 days lies within the definition of *force majeure*. Further onus also lies upon the respondent to explain how this ban directly affected its construction activities.

26. Force majeure is a French expression which translates, literally, to "superior force". To appreciate its nuances, jurisprudence of the concept under

the Indian Contract Act, 1872 need to be elucidated. In the context of law and business, the Merriam Webster dictionary states that force majeure usually refers to "those uncontrollable events (such as war, labor stoppages, or extreme weather) that are not the fault of any party and that make it difficult or impossible to carry out normal business. A company may insert a force majeure clause into a contract to absolve itself from liability in the event it cannot fulfill the terms of a contract (or if attempting to do so will result in loss or damage of goods) for reasons beyond its control". Black's Law Dictionary defines Force Majeure as follows, "In the law of insurance, superior or irresistible force. Such clause is common in construction contracts to protect the parties in the event a part of the contract cannot be performed due to causes which are outside the control of the parties and could not be avoided by exercise of due care. Typically, such clauses specifically indicate problems beyond the reasonable control of the lessee that will excuse performance."

27. In India, it is often referred to as an "act of God". Various courts have, over time, held that the term force majeure covers not merely acts of God, but may include acts of humans as well. The term "Force Majeure" is based on the concept of the Doctrine of Frustration under the Indian Contract Act, 1872; particularly Sections 32 and 56. The law uses the term "impossible" while discussing the frustration of a contract, i.e., a contract which becomes impossible has been frustrated. In this context, "impossibility" refers to an unexpected subsequent event or change of circumstance which fundamentally

strikes at the root of the contract. In the case of Alopi Parshad and Sons Ltd vs Union of India, AIR 1960 SC 588 and the landmark Energy Watchdog and Ors. Vs. Central Electricity Regulatory Commission and Ors (2017) - 2017 3 AWC 2692 SC, the Supreme Court of India has categorically *stated that mere commercial onerousness, hardship, material loss, or inconvenience cannot constitute frustration of a contract. Furthermore, if it remains possible to fulfill the contract through alternate means, then a mere intervening difficulty will not constitute frustration. It is only in the absence of such alternate means that the contract may be considered frustrated.*

28. Section 56 of the Indian Contracts Act (Agreement to do impossible act) states that "a contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful." It is the performance of contractual obligations that must become unlawful/impossible, not the ability to enjoy benefits under the contract. *The Supreme Court in Energy Watchdog and Ors. Vs. Central Electricity Regulatory Commission and Ors (2017) - 2017 3 AWC 2692 SC lent further insight into interpreting a Force Majeure situation i.e*

- Events beyond the reasonable control of one party should not render that party liable under a contract for performance, if that event prevents the party's performance;

- The language of the agreement relating to duty to mitigate, best efforts, prudent man obligations to nevertheless perform etc., will all be taken into consideration in understanding the parties' intent;
- Force majeure events must be unforeseeable by both parties;
- The requirement to put the other party on notice must be met with if the contract provides for notice requirements; and
- ***Burden of proof rests with the party relying on the defense of force majeure for its inability to perform the obligation.***

29. In the present case, no supporting evidence has been placed on record which proves that ban of 13 days had prevented the respondent from discharging his obligations. Mere pleading of force majeure conditions without fulfilling its obligations, cannot be allowed. Hence, plea of respondent does not hold any strength and is rejected.

30. As per observations recorded in the preceding paragraph possession of the unit should have been delivered to the complainants by 26.06.2015. However, respondent failed to complete construction of the project and deliver possession within stipulated time. An offer of possession was issued to the complainants on 18.02.2022 along with demand of ₹27,01,818/- (inclusive of stamp duty charges of ₹ 5,05,000/-). Said offer of possession was issued after receipt of occupation certificate on 12.10.2021. It is the submission of the respondent that the offer of possession was issued after completion of all development works and receipt of occupation certificate, thus the complainants

should have accepted the said offer of possession. However, the complainants failed to do the same.

31. With regard to the contention of the complainants in respect of issue of increase in area/area not in consonance with Occupation Certificate, the Authority has carefully examined the statement of account issued along with offer of possession dated 18.02.2022 and observes as follows:

With regard to the final area of the unit which is chargeable from the complainants, it is noted that as per the builder buyer agreement executed between the parties, the area of the floor was 2067 sq. ft. however, ultimately as per the occupation certificate dated 12.10.2021, the area of the floor comes to 2058.24 sq. ft.. Authority observes that respondent is entitled to charge only for the area of the unit which is actually to be provided to the allottee at the time of handing over of possession. Any area over and above the approved area mentioned in occupation certificate cannot be burdened upon the allottee. Further, it is pertinent to refer to definition of Floor Area Ratio (FAR)- clause 1.2 (xli) of Haryana Building Code,2017 which clearly establishes that lift, mumty, balcony, parking , services and storages shall not be counted towards FAR. Any area beyond FAR is not a saleable area of the project. However, cost of construction of all such structures which is not included in FAR can be burdened upon total cost of the unit by the respondent but; cannot be charged independently making it a chargeable component of the unit. Hence, the respondent is directed to re-calculate the price of the floor according to the final area of the unit i.e 2058.24 sq.ft

32. The facts set out in the preceding paragraphs demonstrate that, admittedly, the delivery of possession of the booked unit has been delayed beyond the stipulated period of time. As per para 23 of this order, respondent should have delivered possession of the floor by 26.06.2015. However, the respondent failed to construct the project and deliver possession of the booked floor. An offer of possession was issued to the complainants on 18.02.2022. Along with said offer of possession respondent had issued a detailed statement of account of payable and receivable amounts which has been challenged by the complainants on account of area of unit that have been already adjudicated in para 31 of this order. Said offer of possession was a valid offer of possession duly issued after receipt of occupation certificate on 12.10.2021. There was no impediment in the complainants having accepted the same. Admittedly there has been an inordinate delay in delivery of possession but the complainants wishes to continue with the project and take possession. In these circumstances, provisions of Section 18 of the Act clearly come into play by virtue of which while exercising the option of taking possession of the booked floor, the complainants are also entitled to receive interest from the respondent on account of delay caused in delivery of possession for the entire period of delay till a valid offer of possession is issued to the complainants. Therefore, the Authority hereby concludes that the complainants are entitled to receive delay interest for

the delay caused in delivery of possession from the deemed date of possession i.e 26.06.2015 till the date of valid offer of possession i.e 18.02.2022.

33. As per Section 18 of the RE(R&D) Act,2016 interest shall be awarded at such rate as may be prescribed. The definition of term 'interest' is defined under Section 2(za) of the Act which is as under:

> *(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;*

Rule 15 of HRERA Rules, 2017 provides for prescribed rate of interest which is as under:

> ***"Rule 15:*** *"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"

34. Hence, Authority directs respondents to pay delay interest to the complainant for delay caused in delivery of possession at the rate prescribed in Rule 15 of Haryana Real Estate (Regulation and Development) Rules, 2017 i.e at the rate of SBI highest marginal cost of lending rate (MCLR)+ 2% which as on date works out to 10.80% (8.80% + 2.00%) from the due date of possession till the date of a valid offer of possession.

35. Authority has got calculated the interest on total paid amount from due date of possession and thereafter from date of payments whichever is later till the date of offer of possession as mentioned in the table below:

Sr. No.	**Principal Amount (in ₹)**	**Deemed date of possession or date of payment whichever is later**	**Interest Accrued till date of offer i.e. 18.02.2022 (in ₹)**
1.	38,99,414.26	26.06.2015	2803732
2.	6,88,625.28	18.08.2015	484332

3.	5,27,230.28	30.10.2015	359429
4.	33,618	13.12.2016	18840
5.	5,71,429.59	09.11.2018	202558
Total:	57,20,317/-		38,68,891/-

36. Complainants claimed to have paid an amount of ₹ 57,80,963/-. However, receipts of only ₹ 57,20,317/- is available on record. Calculation of interest is made taking ₹ 57,20,317/- as total paid amount.

37. In respect of relief clause (i) and (iv), it is observed that said reliefs are neither argued nor pressed upon at time of hearing.

I. DIRECTIONS OF THE AUTHORITY

38. The Authority hereby passes this order and issues following directions under Section 37 of the Act to ensure compliance of obligation cast upon the promoter as per the function entrusted to the Authority under Section 34(f) of the Act of 2016:

i. Respondent is directed to pay upfront delay interest of ₹ 38,68,891/- to the complainants towards delay already caused in handing over the possession within 90 days from the date of this order.

ii. The respondent shall issue a fresh statement of account to the complainants incorporating therein the principles laid down in this order within 30 days of uploading of this order.

iii. Complainants shall accept the offer of possession within next 30 days of the receipt of fresh statement of accounts. Complainants will remain liable to pay balance consideration amount, if any, to the respondent at the time of actual/physical offer of possession.

iv. The respondent shall not charge anything from the complainant which is not part of the agreement to sell

39. **Disposed of**. File be consigned to record room after uploading on the website of the Authority.

....
CHANDER SHEKHAR
[MEMBER]

....
DR. GEETA RATHEE SINGH
[MEMBER]

....
NADIM AKHTAR
[MEMBER]

....
PARNEET S. SACHDEV
[CHAIRMAN]