

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

Complaint no. : 2902 of 2020  
First date of hearing: 11.11.2020  
Date of decision : 19.08.2021

1. Ajurab Singh
2. Himmat Kaur

**Address:** - House no. 6/90, First Floor, Subhash  
Nagar, New Delhi-110027

**Complainants**

**Versus**

1. Identity Buildtech Private Limited  
**Address:** - 110, Indraprakash 21, Barakhamba  
Road, New Delhi- 110001

**Respondent**

**CORAM:**

Shri Samir Kumar  
Shri V.K. Goyal

**Member  
Member**

**APPEARANCE:**

Sh. Harshit Batra  
Ms. Meena Hooda

Advocate for the Complainants  
Advocate for the Respondent

**ORDER**

1. The present complaint dated 06.10.2020 has been filed by the complainants/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 there under or to the allottee as per the agreement for sale executed inter-se them.

**A. Unit and project related details**

2. The particulars of the project, the details of 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	Ansal Highland Park, Sector-103, Gurugram
2.	Project area	11.70 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no. and validity status	32 of 2012 dated 12.04.2012 valid upto 11.04.2020
5.	Name of licensee	M/s Identity Buildtech Pvt. Ltd. and M/s Agro Gold Chemicals India LLP
6.	RERA Registered/ not registered	Registered vide registration no. 16 of 2019 date 01.04.2019
7.	Validity status	30.11.2021
8.	Date of building plan approval	16.04.2013 (Annexed with the reply)
9.	Date of booking	01.09.2012 (Page no. 17 of the complaint)
10.	Unit no.	EDNBG-1006 (Page no. 18 of the complaint)
11.	Unit measuring	1940 sq. ft. (Super area) (Page no. 18 of the complaint)





12.	Date of execution of flat buyer agreement	19.03.2013 (Page no. 15 of the complaint)
13.	Due date of delivery of Possession (As per clause 31, the developer shall offer possession of the unit within 48 months from the date of execution of agreement or within 48 months from the date of obtaining all the required sanctions + 6 months grace period)	16.04.2017 (Calculated from the date of approval of the building plan)  <b>Note: - Grace period is not allowed.</b>
14.	Payment plan	Construction linked payment plan (Page no. 32 of the complaint)
15.	Total sale consideration	Rs. 99,34,664.22/- (Page no. 37 of the complaint)
16.	Amount received from the complainants	Rs. 76,44,610.90/- (Page no. 35 of the complaint)
17.	Occupation Certificate	Not obtained
18.	Offer of possession	Not offered
19.	Delay in handing over possession till the date of decision i.e., 19.08.2021	4 years 4 months 3 days

**B. Facts of the complaint**

3. That the complainants are law abiding citizens of India and are presently residing at house no. 6/90, F.F, Subhash Nagar, New Delhi-110027. The complainants have booked a unit no. EDNBG-1006, 10th floor, super area 1940/- sq. ft. in the project under the name and style "Ansals Highland Park" (hereinafter referred to as "project").

4. That the respondent intended to develop a residential group housing project over the area of 11.7 acres under the name and title of Ansal Highland Park, situated at sector-103, Gurugram, Haryana.
5. That the development of the project came to the knowledge of the complainants by the shrewd marketing gimmick of the respondent and its marketing executives. The respondent assured and represented the complainants of a high-class aesthetic apartment and also assured of timely delivery of the project. The complainants being very simple people fell into the trap of the respondent and believed various representations made by the respondent which were subsequently proved to be false. The complainants booked an apartment in the project and entered into a flat buyer agreement (hereinafter referred to as "the agreement") with the respondent for a total sale consideration of Rs. 98,90,003.20/- (Rupees ninety-eight lakh ninety thousand three rupees and twenty paise only) excluding the additional cost of external electrification charges, firefighting, power backup charges, stamp duty charges, sale deed, registration charges, common maintenance charges, interest free security deposit and other taxes which stood to be an additional burden payable by the complainants over and above the sale consideration. The complainants agreed to pay all the demands and charges as provided in the agreement.
6. That according to clause 31 of the agreement, the respondent promised to complete the project within 48 months of the signing of the agreement plus an extended period of six





months as a grace period for delay accruing to *force majeure* conditions. Accordingly, the due date of handing over the possession of the unit allotted to the complainants fell due on 19.03.2017 and extendable upto 19.09.2017 as grace period on account of *force majeure* conditions. However, taking into consideration the then prevailing conditions i.e., from the date of booking of the unit and till date of handing over the possession as per the agreement, nothing constituted a force majeure condition during such period. Moreover, the respondent extended the 48 months of time period as stipulated in the agreement without giving any reasonable reasons with mala fide intent to deceive the complainants.

7. That the general practice of this hon'ble authority has been to excuse the grace period and not include it in ascertaining the interest. The delay in delivery of possession is also considered to be after the end of the grace period. However, in this peculiar case, the grace period utilized by the respondent should not be taken into account as the delay caused in delivering the possession is not due *force majeure* conditions as mentioned in clause 32 of the agreement. Furthermore, as per the oral communications by the respondent regarding the delay in handing over the unit allotted to the complainants, it is amply clear that the respondent intended to evade all the assurances and previous obligations by taking a plea in the light of the pandemic COVID-19. Since, the liability of the respondent to handover the possession of the unit was due for almost 3 years before the advent of Covid-19, and for the same reason the respondent cannot be given the benefit of the same

in the light of the above-mentioned judgement. Furthermore, under any circumstance, the respondent cannot be given the benefit of two grace periods - firstly, the 6 months grace period as stipulated in the agreement and the other occasioned due to the pandemic.

8. That further, clause 43 of the agreement provides that in the event of delay in payments of holding charges, the buyer shall also be liable to pay interest at 24% p.a. compounded quarterly, for any unpaid amount as may be deemed by the developer or its nominated agency and in clause 37 of the agreement, the respondent is promising to pay only Rs. 5/- per sq. ft. per month on super area for delay in offering possession of the unit, however this is against the objective of the Real Estate (Regulation and Development) Act, 2016, (hereinafter referred to as the "Act") and section 18 of the Act.
9. That the respondent has substantially failed to discharge its obligation imposed on him under the Act. No delivery of possession has been made till date. The possession has been delayed from 19.09.2017 and for this delay in delivering of possession; the respondent is liable to pay the interest for every month of delay as per section 18 of the Act.
10. That when the complainants inquired about the reason for delay in handing over the possession and penalty payable to them on account of such delay, the respondent with unlawful intention paid no heed to the requests of the complainants and never even bothered to intimate regarding the progress and construction status of the project. That even after the delay of almost 4 years, the complainants are still unaware as to the





date of handing over the possession of the unit. Moreover, as per the various telephonic conversation with the representatives, it was intimated that further an escalation cost in terms of the agreement shall also be demanded. It is pertinent to mention that such escalation cost is directly attributable to the delay on part of the respondent which for no reason and no fault shall accrue from the account of the complainants and demanded by the respondent.

11. That the complainants have always been diligent in making the payments as per the agreement and has till date paid a total amount of Rs. 76,44,610.90/- (Rupees seventy-six lakh forty-four thousand six hundred and ten rupees and ninety paise only) which constitutes 77.29% of the total sale consideration payable.
12. That it is pertinent to mention here that the respondent vide letter dated 27.06.2020 has demanded the complainants to "sign" a letter seeking extension of time for completion of the project and for the purpose of "third party funding to the project". The intention of the respondent through the letter seems extremely self-centred and vague in nature.
13. That, moreover, the ill-will and mala-fide intention on the part of the respondent is clear from the letter dated 27.06.2020, wherein the respondent unilaterally asked the complainants to fulfil two conditions falling in the favour of the respondent. The first condition being that the complainants have to agree to the new "total cost of unit" payable by the complainants to the respondent which in simply means demanding an additional amount over and above the amount of sale



consideration stipulated and originally agreed in the agreement and the second being unilateral condition seeking confirmation from the complainants for time extension for the purpose of completion of the project till 31st of October, 2022 "without any penalty/compensation". It is pertinent to mention that the respondent by issuing the letter has completely acted with mala-fide intention to seek self-comfort by asking confirmation of delay in completing the construction of project and on the other hand has attempted to safe guard itself from the compensation payable to the complainants on breach of terms of the agreement by seeking confirmation and approval to not demand any penalty or compensation for the extended period, which otherwise is a right of an allottee under the Act.

14. That the respondent has also violated the provisions of section 18 (a) of the act by changing the amount of price to be paid by the complainants against the unit purchased. The respondent has made an addition of Rs. 4,77,262.22/- (Rupees four lakh seventy-seven thousand two sixty-two and twenty-two paisa only) in the name of "escalation charges" which means additional cost which the complainants are not liable to pay.
15. That the ill-intention of the respondent is clear from the line/statement stipulated in the letter dated 27.06.2020 i.e., "escalation cost to be waived off by company in lieu of you agreeing to time extension upto 31st October 2022 without claiming penalty/compensation." The respondent is trying to hold the complainants from both the sides to take confirmation from either way or that way.



16. That according to section 3 of the Act, it is mandatory for the promoter to get their project registered within three months from the date of commencement of the act, but the respondent got the project registered in 2019 which is two years delay in following the mandatory obligation to register the ongoing project. This clearly shows the lax attitude and behaviour of the respondent towards law and order.
17. That the present case is a clear exploitation of innocence and beliefs of the complainants and an act of the respondent to retain the complainants hard-earned money of the complainants in an illegal manner.
18. That the respondent has utterly failed to fulfil his obligations to deliver the possession of the apartment in time and adhere to the contentions of the agreement which has caused mental agony, harassment and huge losses to the complainants, hence the present complaint.

**C. Relief sought by the complainants: -**

- 1) To direct the respondent to provide the complainants with prescribed rate of interest on delay in handing over of possession of the apartment on the amount paid by the complainants from the due date of possession as per the buyer's agreement till the actual date of possession of the apartment.
- 2) If need be, to appoint a local commissioner to check the development of the project and submit a report anticipating the actual delivery of possession as per the status of the project.

- 3) To direct the respondent to submit an affidavit stating the anticipated date for delivery of possession and hand over the possession of the apartment by such date; or to direct refund with interest on non-delivery of the apartment by the anticipated date.
19. On the date of hearing, the authority explained to the respondents/promoters about the contravention as alleged to have been committed in relation to section 11(4)(a) of the Act to plead guilty or not to plead guilty.

**D. Reply by the respondent**

20. The respondent has contested the complaint on the following grounds:
- I. That the present complaint is neither maintainable nor tenable by both law and facts. It was submitted that the present complaint is not maintainable before this authority. The complainants have filed the present complaint seeking refund and interest. It is respectfully submitted that complaints pertaining to refund, compensation and interest are to be decided by the adjudicating officer under Section 71 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter be referred to as "the Act" for short) read with Rule 29 of the Haryana Real Estate (Regulation and Development) rules, 2017, (hereinafter be referred to as "the Rules") and not by this authority. The present complaint is liable to be dismissed on this ground alone.
  - II. That even otherwise, the complainants have no locus-standi and cause of action to file the present complaint. The present





complaint is based on an erroneous interpretation of the provisions of the Act as well as an incorrect understanding of the terms and conditions of the flat buyer agreement dated 19.03.2013, as shall be evident from the submissions made in the following paragraphs of the present reply.

- III. That the above said project is related to Licence No.32 of 2012 dated 12.04.2012, received from the Director General, Town and Country Planning, Chandigarh, Haryana (DGTCP) over the land measuring an area of 93 kanal 12 marla i.e., 11.70 acres falling in the revenue estate of village Tikampura, District Gurugram and is the part of sector-103 of Gurugram-Manesar Urban Development Plan- 2021. The land under the said project named "Ansals Highland Park" is owned by developer's wholly owned subsidiary company M/s Identity Buildtech Pvt. Ltd., (Identity) and M/s Agro Gold Chemicals Pvt. Ltd. (AGCPL) having their registered offices at B-1/1345, Vasant Kunj, New Delhi-110070.
- IV. That the building plans of the project have duly been approved by the DGTCP Haryana vide Memo No. ZP-851/AD(RA)/2013/36610 dated 16.04.2013. Thereafter, the respondent herein was granted the approval of Fire Fighting Scheme from the fire safety point of view of the housing colony measuring 11.70 acres by the Director, Fire Service, Haryana, Chandigarh.
- V. That the complainants approached the respondent sometime in the year 2012 for the purchase of an independent unit in its upcoming residential project "Ansals Highland Park" (hereinafter "the project") situated in sector-

103, village Tikampur, Gurugram. It was submitted that the complainants prior to approaching the respondent, had conducted extensive and independent enquiries regarding the project and it was only after the complainants were fully satisfied with regard to all aspects of the project, including but not limited to the capacity of the respondents to undertake development of the same. The complainants took an independent and informed decision to purchase the unit, un-influenced in any manner by the respondent.

- VI. That thereafter the complainants vide application form dated 01.09.2012 had applied to the respondent for provisional allotment of the unit in the project. The complainants, in pursuance of the aforesaid application form, were allotted an independent unit bearing No. 6DNBG-1006, type of unit-3BHK-UT, sales area 1940 sq. ft. (180.23 sq. mtrs.) in the project namely, "Ansals Highland Park", situated at sector-103, Gurugram. The complainants consciously and wilfully opted for a construction linked plan for remittance of the sale consideration for the unit in question and further represented to the respondent that the complainants shall remit every instalment on time as per the payment schedule. The respondent had no reason to suspect the *bona-fide* of the complainants. The complainants further undertake to be bound by the terms and conditions of the application form as well as the flat buyer's agreement.
- VII. That it is further submitted that despite there being a number of defaulters in the project, the respondent itself infused funds into the project and has diligently developed the





project in question. It is also submitted that the construction work of the project is swing on full mode and the work will be completed within prescribed time period had there been no force majeure.

- VIII. That without prejudice to the aforesaid and the rights of the respondents, it was submitted that the respondents would have handed over the possession to the complainants within time had there been no force majeure circumstances beyond the control of the respondents, there had been several circumstances which were absolutely beyond and out of control of the respondents such as orders dated 16.07.2012, 31.07.2012 and 21.08.2012 of the Hon'ble Punjab & Haryana High Court duly passed in Civil Writ Petition No.20032 of 2008 through which the shucking/extraction of water was banned which is the backbone of construction process, simultaneously orders at different dates passed by the Hon'ble National Green Tribunal restraining thereby the excavation work causing Air Quality Index being worse, maybe harmful to the public at large without admitting any liability. Apart from these the demonetization is also one of the main factors to delay in giving possession to the home buyers as demonetization caused abrupt stoppage of work in many projects. The payments especially to workers to only by liquid cash. The sudden restriction on withdrawals led the respondent unable to cope with the labour pressure. However, the respondents are carrying its business in letter and spirit of the flat buyer's agreement as well as in compliance of other local bodies of Haryana Government as

well as Govt. of Haryana or the Central Govt., as the case may be.

- IX. That, it is submitted that the complaint is not maintainable or tenable under the eyes of law, as the complainants have not approached this authority with clean hands and has not disclosed the true and material facts relates to this case of complaint. The complainants, thus, has approached the authority with unclean hands and has suppressed and concealed the material facts and proceedings which has direct bearing on the very maintainability of purported complaint and if there had been disclosure of these material facts and proceedings.
- X. That without admitting or acknowledging the truth or legality of the allegations advanced by the complainants and without prejudice to the contentions of the respondents, it was respectfully submitted that the provisions of the Act are not retrospective in nature. The provisions of the Act cannot undo or modify the terms of an agreement duly executed prior to coming into effect of the Act. It was further submitted that merely because the Act applies to ongoing projects which registered with the authority, the Act cannot be said to be operating retrospectively. The provisions of the Act relied upon by the complainants seeking interest cannot be called in to aid in derogation and ignorance of the provisions of the flat buyer's agreement. It was further submitted that the interest for the alleged delay demanded by the complainants is beyond the scope of the buyer's agreement. The complainants cannot demand any interest or compensation



beyond the terms and conditions incorporated in the buyer's agreement. The complainants cannot demand any interest or compensation beyond the terms and conditions incorporated in the buyer's agreement.

- XI. That without prejudice to the contentions of the respondents, it was submitted that the present complaint is barred by limitation. The complainants have alleged that due date of possession in respect of the said unit was 19.09.2017, and therefore, no cause of action is arisen in favour of the complainants on 19.09.2017, and thus, the present complaint is barred by law of limitation and this authority lacks jurisdiction.
- XII. That, it is also a conceded and admitted fact that the project related to the present complaint has not yet been registered with RERA and more than 200 buyers have already been settled, meaning to say that demands of more than 200 persons/buyers have duly been satisfied by the respondent by giving them the respective units, and as such the authority lacks jurisdiction to entertain the present complaint.
- XIII. That, it is also worthwhile to mention here that the allegations having been levelled in this complaint are with regard to cheating and alluring which only can be decided by the Hon'ble Civil Court and in these scenarios this authority also lacks jurisdiction.
- XIV. That, it was submitted that several allottees, including the complainants, has defaulted in timely remittance of the payment of instalment which was an essential, crucial and an indispensable requirement for conceptualisation and

development of the project in question. Furthermore, when the proposed allottees defaulted in their payment as per schedule agreed upon, the failure has a cascading effecting on the operation and the cost for proper execution of the project increase exponentially whereas enormous business losses befall upon the respondents. The respondents, despite default of several allottees has diligently and earnest pursued the development of the project in question and has constructed the project in question as expeditiously as possible. It was further submitted that the respondents had applied for registration with the authority of the said project by giving afresh date for offering of possession. It is evident from the entire sequence of events, that no illegality can be attributed to the respondent. The allegations levelled by the complainants are totally baseless. Thus, it is most respectfully submitted that the present complaint deserves to be dismissed at the very threshold.

21. 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 has complete territorial and subject matter jurisdiction to adjudicate the present complaint for the reasons given below:

**E. I Territorial jurisdiction**



22. 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**

23. The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as per provisions of section 11(4)(a) of the Act leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

**F. Findings on the objections raised by the respondent.**

**F1. Objection regarding jurisdiction of the complaint w.r.t the apartment buyer's agreement executed prior to coming into force of the Act.**

24. The respondent submitted that the complaint is neither maintainable nor tenable and is liable to be outrightly dismissed as the apartment buyer's agreement was executed between the complainants and the respondent prior to the enactment of the Act and the provision of the said Act cannot be applied retrospectively.

25. The authority is of the view 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. 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/situation 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 *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."



26. Also, in appeal no. 173 of 2019 titled as ***Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya***, in order 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."*

27. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of any other Act, rules and regulations made thereunder and are not unreasonable or exorbitant in nature. Hence, in the light of above-mentioned

reasons, the contention of the respondent w.r.t. jurisdiction stands rejected.

**F2. Objection regarding delay due to force majeure**

28. The respondent promoters have sought further extension for a period of 6 months after the expiry of 48 months for unforeseen delays in respect of the said project. The respondent raised the contention that the construction of the project was delayed due to *force majeure* conditions including demonetization and the orders passed by the Hon'ble NGT including others. It was observed that due date of possession as per the agreement was 16.04.2017 wherein the event of demonetization occurred in November 2016. By this time, the major construction of the respondent's project must have been completed as per timeline mentioned in the agreement executed between the parties. Therefore, it is apparent that demonetization could not have hampered the construction activities of the respondent's project. Thus, the contentions raised by the respondent in this regard stand rejected. The other force majeure conditions mentioned by the respondent are of usual nature and the same could not have led to a delay of more than 4 years. Therefore, the respondent could be allowed to take advantage of its own wrongs/faults/deficiencies.

**F3. Objection regarding delayed payments**

29. Though an objection has been taken in the written reply that the complainants failed to make regular payments as and when demanded. So, it led to delay in completing the project. The respondent had to arrange funds from outside for





continuing the project. However, the plea advanced in this regard is devoid of merit. A perusal of statement of accounts shows otherwise wherein like other allottees, the complainants had paid more than 80% of the sale consideration. The payments made by the allottee does not match the stage and extent of construction of the project. So, this plea has been taken just to make out a ground for delay in completing the project and the same being one of the force majeure.

**G. Findings regarding relief sought by the complainants.**

**Delay possession charges:** To direct the respondent to give delayed possession interest to the complainants.

30. In the present complaint, the complainants intend to continue with the project and are seeking delay possession charges at prescribed rate of interest on amount already paid by them as provided under the proviso to section 18(1) of the Act which 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."***

31. Clause 31 of the flat buyer's agreement (in short, the agreement) dated 19.03.2013, provides for handing over of possession and is reproduced below:

**"31. Possession**

*"The developer shall offer possession of the unit any time, within a period of 48 months from date of execution of agreement or within 48 months from the date of obtaining all the required sanctions and approval necessary for commencement of construction, whichever is later subject to timely payment of all the dues by Buyer and subject to force-majeure circumstances as described in clause 32. Further, there shall be a grace period of 6 months allowed to the Developer over and above the period of 48 months as above in offering the possession of the Unit."*

32. The apartment buyer's agreement is a pivotal legal document which should ensure that the rights and liabilities of both builders/promoters and buyers/allottee are protected candidly. The apartment buyer's agreement lays down the terms that govern the sale of different kinds of properties like residential, commercials etc. between the buyer and builder. It is in the interest of both the parties to have a well-drafted apartment buyer's agreement which would thereby protect the rights of both the builder and buyer in the unfortunate event of a dispute that may arise. It should be drafted in the simple and unambiguous language which may be understood by a common man with an ordinary educational background. It should contain a provision with regard to stipulated time of delivery of possession of the apartment, plot or building, as the case may be and the right of the buyer/allottee in case of delay in possession of the unit. In pre-RERA period it was a general practice among the promoters/developers to invariably draft the terms of the apartment buyer's agreement in a manner that benefited only the promoters/developers. It had arbitrary, unilateral, and unclear clauses that either blatantly





favoured the promoters/developers or gave them the benefit of doubt because of the total absence of clarity over the matter.

33. The authority has gone through the possession clause of the agreement. At the outset, it is relevant to comment on the pre-set possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and the complainants not being in default under any provisions of this agreements and in 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 allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the apartment buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his 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 allottee is left with no option but to sign on the dotted lines.
34. The respondent promoter has proposed to handover the possession of the subject apartment within a period of 48 months from the execution of the agreement or the date of

approval of building plans and/or fulfilment of the preconditions imposed thereunder plus 6 months' grace period for unforeseen delays beyond the reasonable control of the company i.e., the respondent/promoter.

35. Further, the authority in the present case observed that, the respondent has not kept the reasonable balance between his own rights and the rights of the complainants/allottees. The respondent has acted in a pre-determined and preordained manner. The respondent has acted in a highly discriminatory and arbitrary manner. The unit in question was booked by the complainants on 01.09.2012 and the apartment buyer's agreement was executed between the respondent and the complainant on 19.03.2013. The date of approval of building plan was 16.04.2013. It will lead to a logical conclusion that that the respondent would have certainly started the construction of the project. On a bare reading of the clause 31 of the agreement reproduced above, it becomes clear that the possession in the present case is linked to the "fulfilment of the preconditions" which is so vague and ambiguous in itself. Nowhere in the agreement it has been defined that fulfilment of which conditions forms a part of the pre-conditions, to which the due date of possession is subjected to in the said possession clause. Moreover, the said clause is an inclusive clause wherein the "fulfilment of the preconditions" has been mentioned for the timely delivery of the subject apartment. It seems to be just a way to evade the liability towards the timely delivery of the subject apartment. According to the established



principles of law and the principles of natural justice when a certain glaring illegality or irregularity comes to the notice of the adjudicator, the adjudicator can take cognizance of the same and adjudicate upon it. The inclusion of such vague and ambiguous types of clauses in the agreement which are totally arbitrary, one sided and totally against the interests of the allottees must be ignored and discarded in their totality. In the light of the above-mentioned reasons, the authority is of the view that the date of approval of building plans ought to be taken as the date for determining the due date of possession of the unit in question to the complainants.

36. **Admissibility of grace period:** The respondent promoter has proposed to hand over the possession of the apartment within 48 months from the date of execution of the agreement or fulfilment of the preconditions imposed thereunder. The respondent promoter has sought further extension for a period of 6 months after the expiry of 48 months for unforeseen delays in respect of the said project. Further, the respondent has sought 6 months' grace period for offering possession of the unit and the respondent has failed to offer possession of the unit even after the lapse of grace period of 6 months and till date. The respondent raised the contention that the construction of the project was delayed due to *force majeure* which were beyond the control of the respondent promoter. Also, the allottees should not be allowed to suffer due to the fault of the respondent promoter. It may be stated that asking for extension of time in completing the



construction is not a statutory right nor has it been provided in the rules. This is a concept which has been evolved by the promoters themselves and now it has become a very common practice to enter such a clause in the agreement executed between the promoter and the allottee. It needs to be emphasized that for availing further period for completing the construction the promoter must make out or establish some compelling circumstances which were in fact beyond his control while carrying out the construction due to which the completion of the construction of the project or tower or a block could not be completed within the stipulated time. Now, turning to the facts of the present case the respondent promoter has not assigned such compelling reasons as to why and how they shall be entitled for further extension of time 6 months in delivering the possession of the unit. Accordingly, this grace period of 6 months cannot be allowed to the promoter at this stage.

37. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charge and 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.*

38. 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.

39. 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., 19.08.2021 is @7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., @9.30%.

40. 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;"*

41. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same as is being granted to the complainants in case of delayed possession charges.
42. On consideration of the documents available on record and submissions made by both the parties 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. By virtue of clause 31 of the apartment buyer's agreement executed between the parties on 19.03.2013, the possession of the subject apartment was to be delivered within stipulated time i.e., by 16.04.2017. As far as grace period is concerned, the same is not allowed as the delay was the result of the respondent's own mistakes and the respondent should be allowed to take advantage of his own wrong. Therefore, the due date of handing over possession was 16.04.2017 which is calculated from the date of execution of the agreement. The respondent has 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 apartment



buyer's agreement 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 is entitled for delayed possession charges @9.30% p.a. w.e.f. from due date of possession i.e., 16.04.2017 till handing over of possession after the date of receipt of valid occupation certificate as per section 18(1) of the Act read with rule 15 of the rules.

**H. Directions of the authority**

43. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoters as per the function entrusted to the authority under sec 34(f) of the Act:
- i. The respondent is directed to pay the interest at the prescribed rate i.e., 9.30 % per annum for every month of delay on the amount paid by the complainant from due date of possession i.e., 16.04.2017 till handing over of possession after receipt of occupation certificate as per section 18(1) read with rule 15 of the rules.
  - ii. The respondent is directed to pay arrears of interest 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 10<sup>th</sup> of the subsequent month as per rule 16(2) of the rules.



- iii. The complainants are also directed to make payment/arrears if any due to the respondent at the equitable rate of interest i.e., 9.30% per annum.
- iv. The respondent shall not charge anything from the complainants which is not part of the buyer's agreement. The respondent is not entitled to charge holding charges from the complainants/allottees at any point of time even after being part of the buyer's agreement as per the law settled by the hon'ble Supreme Court in civil appeal nos. 3864-3889/2020 decided on 14.12.2020.

44. Complaint stands disposed of.

45. File be consigned to the registry

  
(Samir Kumar)  
Member

  
(Vijay Kumar Goyal)  
Member

Dated:19.08.2021

Judgement uploaded on 18.10.2021.