BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**:**	**314 of 2020**
First date of hearing:		**07.02.2020**
Date of decision	**:**	**19.08.2021**

1.Mr. Balvir Singh
2. Mrs. Sunita Rani
R/o: - 7-B, DDA MIG Flats, Pocker-2, Sector 7, Dwarka, New Delhi- 110075 **Complainants**

Versus

Ansal Housing and Constructions limited
Regd. office: 15, UGF, Indra Prakash,
21, Barakhamba Road, New Delhi-110001 **Respondent**

CORAM:
Shri Samir Kumar **Member**
Shri Vijay Kumar Goyal **Member**

APPEARANCE:
Ms. Priyanka Aggarwal Advocate for the complainants
Ms. Meena Hooda Advocate for the respondent

ORDER

1. The present complaint dated 22.01.2020 has been filed by the complainants/allottees in Form CRA 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 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.	Name and location of the project	"Ansals Townwalk" Sector 104, Gurugram
2.	Nature of the project	Commercial project
3.	Project area	2.1 acres
4.	DTCP License	103 of 2012 dated 01.10.2012 valid up to 30.09.2016
5.	Name of the licensee	Jagrati Realtors Pvt. Ltd. and 3 others
6.	RERA registered/ not registered	**Not registered**
7.	Date of execution of plot buyer's agreement	**21.01.2014** (As per page 14 of the complaint)
8.	Unit no.	Shop no. 247
9.	Super Area	327 sq. ft
10.	Payment plan	Construction linked payment plan (As per page 30 of the complaint)
11.	Total consideration	Rs. 22,89,000/- (As per page 17 of the complaint)
12.	Total amount paid by the complainants	Rs. 20,71,389/- (As per customer ledger dated 22.06.2017 annexed at page 34 of the complaint)

13.	Due date of delivery of possession (*As per clause 30 of the agreement: The Developer shall offer of possession of the unit any time, within a period of 42 months from the date of execution of agreement or within 42 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 31.Further there shall be a grace period of 6 months allowed to the developer over and above the period of 42 months as above in offering the possession of the unit.*)	21.07.2017 calculated from the date of agreement **(Grace period is not allowed)**
14.	Offer of possession	Not offered
15.	Occupation Certificate	Not received
16.	Delay in delivery of possession till the date of decision i.e 19.08.2021	4 years 29 days

B. Facts of the complaint

3. That based-on promises and commitment made by the respondent, complainants booked a commercial shop admeasuring 327 sq. ft. the unit no. shop no. 247 in commercial project "Ansals Townwalk", sector 104, Gurugram, Haryana. The initial booking amount of Rs.3,56,081/-(including tax) was paid through cheques no-341314, 775575 and 341318 dated 08.08.2013 and 09.09.2013.

4. That the respondent to dupe the complainants in their nefarious net even executed buyer's agreement Signed Between M/s Ansal housing & construction ltd. and Mr Balvir Singh & Mrs Sunita Rani dated 21-04-2014 just to create a false belief that the project shall be completed in time bound manner and in the garb of this agreement persistently raised demands due to which they were able to extract huge amount of money from the complainants.

5. That the total cost of the said unit is Rs24,55,771/-out of this a sum of Rs.20,71,389/- paid by the by the complainants in time bound manner. It is pertinent to mention here that according to the statement the complainants paid a sum of Rs 20,71,389/-to the respondent till February 2017and before this builder was demanded more than 80% amount without doing appropriate work on the said project, which is illegal and arbitrary.

6. That complainants have paid all the instalments timely and deposited Rs.20,71,389/-that respondent in an endeavour to extract money from allottees devised a payment plan under which respondent linked more than 35% amount of total paid against as an advance rest 60% amount linked with the construction of super structure only of the total sale consideration to the time lines, which is not depended or co-related to the finishing of unit and internal development of facilities amenities and after taking the same respondent have not bothered to any development on the project till date as a whole project not more than 40 % and in term of particular tower just built a super structure only. Extracted the

huge amount and not spend the money in project is illegal and arbitrary and matter of investigation.

7. That complainants booked shop on dated 08.08.2013 (more than 6 year ago) and as per buyer agreement, builder is liable to offer possession on before 21.07.2017 so far.

8. That as the delivery of the shop was due on July 2017 which was prior to the coming into of force of the GST Act, 2016 i.e. 01.07.2017, it is submitted that the complainants are not liable to incur additional financial burden of GST due to the delay caused by the respondent. Therefore, the respondent should pay the GST on behalf of the complainants but just reversed builder collect the GST from complainants and enjoy the input credit as a bonus, this is also matter of investigation.

9. That the respondent has indulged in all kinds of tricks and blatant illegality in booking and drafting of shop/office buyer's agreement with a malicious and fraudulent intention and caused deliberate and intentional huge mental and physical harassment of the complainants.

10. That the complainants communicate with respondent and asked for delayed possession respondent show problem of financial crunch other side builder extracted huge amount from complaints and given loan to others, and project development abundant create suspicion on builder intention.

C. Relief sought by the complainants:

11. The complainants have sought following relief:

    (a) To direct the respondent to complete the project and get the occupancy certificate and handover the possession of the shop no. 247 having a super area of 327 sq. ft. in the project

    (b) To direct the respondent to pay delay interest on paid amount alongwith pendente lite and future interest from 21.07.2017 till actual physical possession.

    (c) To pass an order for forensic audit of builder because builder extract more than 80% but project still incomplete more than 70%.

    (d) To direct the respondent to quash the one-sided clauses from buyer's agreement.

12. On the date of hearing, the authority explained to the respondent/promoter 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:

13. The complainants through an application form dated 08.08.2013 applied to the respondent for provisional allotment of a unit in its project detailed above. The complainants, in pursuance of the aforesaid application form, was allotted an independent unit bearing no. shop 247, type of unit – shop, sales area 327 Sq. ft.,

(30.38 sq. mtrs.) in the project, namely, "Ansals Town walk" situated at sector-104, Gurugram.

14. That without prejudice to the aforesaid and the rights of the respondent, it is submitted that it would have handed over the possession to the complainants within time had there been no force majeure circumstances beyond the control of the respondent. There had been several circumstances which were absolutely beyond the control of the respondent such as orders dated 16.07.2012, 31.07.2012 and 21.08.2012 of the Hon'ble Punjab & Haryana high court passed in civil writ petition no.20032 of 2008 through which the shucking/extraction of water was banned being is the backbone of construction process; simultaneously, orders of 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 were being made only by liquid cash. The sudden restriction on withdrawals led the respondent's inability to cope with the labour pressure. However, the respondent is 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.

15. The homebuyers are guilty of deposit their installment in time causing thereby the respondent to slow the construction work, but now the project has been completed. As stated above the calculation and the amount so received would be subject to verification of record of answering respondent.

16. It is submitted that in view of clause–30, the respondent was required to handover the possession within a period of 42 months from the date of execution of agreement or within 42 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. Further, it is also clearly mentioned in clause–30 of the agreement that there shall be a grace period of 6 months allowed to the developer over and above the period of 42 months as above in offering the possession of unit.

17. As far as labour cess, firefighting works and Haryana VAT and GST are concerned, the central government levied such taxes, which are still beyond the control of the respondent. It is specifically mentioned in clause 7& 8 of agreement, the complainants were agreed to pay in addition to basic sale price of the said unit he is liable to pay EDC, IDC or any other statutory demand etc. The respondent completed the structure and very soon is likely to go issue of letter of offer of possession.

18. It is submitted that all the queries of the complainants were always attended by the respondent and its team. The respondent and its

team were always there to redress the grievance of the complainants, and always attended the communication not limited up-to personal visit or telephone of the complainants.

19. 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.

20. The authority on the basis of information and explanation and other submissions made and the documents filed by the complainants and the respondent is of considered view that there is no need of further hearing in the complaint.

E. Jurisdiction of the authority

21. The plea of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. 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

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

The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as per the provisions of section 11(4) (a) of the act of 2016 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 delay due to force majeure

22. The respondent promoter has sought further extension for a period of 6 months after the expiry of 42 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. It is observed that due date of possession as per the agreement was 21.07.2017. By this time, the 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 contention 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 5 years. Therefore, the respondent could not be allowed to take advantage of its own wrongs/faults/deficiencies.

F2. Objection regarding delayed payments

23. Though an objection has been taken in the written reply that the complainants have 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 made payment of more than 90% of the sale consideration. The payments made by the allottees 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.

F3. Objection regarding jurisdiction of authority w.r.t. buyer's agreement executed prior to coming into force of the Act

24. Another contention of the respondent is that authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the flat buyer's agreement executed between the parties and no agreement for sale as referred to under the provisions of the Act or the said rules has been executed inter se parties. The authority is of the view that the Act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has

provided for dealing with certain specific provisions/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."*

25. 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."*

26. 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, statutes, instructions, directions issued thereunder and are not unreasonable or exorbitant in nature.

G. Findings regarding relief sought by the complainants.

Relief sought by the complainants: The respondent immediately be directed to grant the possession of unit along with compensation for the delay caused herein to the complaint.

27. In the present complaint, the complainants intends to continue with the project and is seeking delay possession charges as

provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under:

> ***Section 18: - Return of amount and compensation***
>
> *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*

28. As per clause 30 of the apartment buyer's agreement dated 21.01.2014, the possession of the subject unit was to be handed over by of 21.07.2017. 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 the complainants not being in default under any provisions of this agreement 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 allottee that even 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. Clause 30 of the apartment buyer agreement (in short, agreement) provides for handover possession and is reproduced below:

Clause 30:

"The Developer shall offer of possession of the unit any time, within a period of 42 months from the date of execution of agreement or within 42months 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 31.Further there shall be a grace period of 6 months allowed to the developer over and above the period of 42months as above in offering the possession of the unit."

29. 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 residentials, 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.

30. 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.

31. **Admissibility of grace period:** The respondent promoter has proposed to hand over the possession of the apartment within 42

months from the date of execution of the agreement or fulfilment of the preconditions imposed thereunder. Further, the respondent has sought 6 months grace period for offering possession of the unit and the respondent has failed to offer of possession 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 promoter themselves and now it has become a very common practice to enter such a clause in the agreement executed between the promoter and the allotee. 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 it is 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.

32. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants is seeking delay possession charges however, 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.*

33. 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.

34. 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%.

35. 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;"*

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.

36. On consideration of the circumstances, the evidence and other record and submissions made by the complainants and the respondent and based on the findings of the authority regarding contravention as per provisions of Act, the authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of clause 30 of the buyer's agreement executed between the parties on 21.01.2014, possession of the booked unit was to be

delivered within a period of 42 months from the date of execution of the agreement, which comes out to be 21.07.2017. The six months of grace period is not allowed as the respondent has not offered the offer of possession till date.

Accordingly, the non-compliance of the mandate contained in section 11 (4)(a) of the Act on the part of the respondent is established. As such the complainants are entitled for delayed possession charges @9.30% p.a. w.e.f. from due date of possession i.e. 21.07.2017 till handing over of possession after the date of receipt of valid occupation certificate as per section 18(1) of the Act read with the rule 15 of the rules.

H. Directions of the authority

37. Hence, the authority hereby passes this order and issue the 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. The respondent shall pay interest at the prescribed rate i.e. 9.30% per annum for every month of delay on the amount paid by the complainants from due date of possession i.e. 21.07.2017 till handing over of possession after the date of receipt of valid occupation certificate as per section 18(1) of the Act read with the rule 15 of the rules.

ii. The respondent is directed to pay arrears of interest accrued within 90 days from the date of order and thereafter monthly payment of interest to be paid till offer

of possession shall be paid on or before the 10th of each succeeding month.

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 the part of 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 builder buyer's agreement as per law settled by hon'ble supreme court in civil appeal nos. 3864-3889/2020 on 14.12.2020

38. Complaint stands disposed of.

39. File be consigned to registry.

(Samir Kumar)
Member

(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated:19.08.2021

Judgement uploaded on 18.10.2021.