

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

Complaint no. : 1162 of 2020
First date of hearing: 26.03.2020
Date of decision : 19.08.2021

Shaila Kohli

Address: - C-375, First Floor, Saraswati Vihar,
New Delhi-110034

Complainant

Versus

Ansal Housing Limited

Address: - 606, 6th Floor, Indra Prakash Building,
21, Barakhamba Road, New Delhi- 110001

Respondent

CORAM:

Shri Samir Kumar
Shri V.K. Goyal

Member
Member

APPEARANCE:

None
Ms. Meena Hooda

Advocate for the Complainant
Advocate for the Respondent

ORDER

1. The present complaint dated 03.03.2020 has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions 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 complainant, 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	Estella, Sector-103, Gurugram
2.	Project area	15.743 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no. and validity status	17 of 2011 dated 08.03.2011 valid upto 07.03.2015
5.	Name of licensee	M/s Ish Kripa Properties Pvt. Ltd.
6.	RERA Registered/ not registered	Not registered
7.	Date of building plan approval	28.11.2011 (Annexed with the reply)
8.	Date of allotment	23.03.2011 (Page no. 16 of the complaint)
9.	Unit no.	N-1102 (Page no. 23 of the complaint)
10.	Unit measuring	1725 sq. ft. (Page no. 23 of the complaint)
11.	Date of execution of flat buyer agreement	15.04.2013 (Page no. 19 of the complaint)

12.	Due date of delivery of Possession (As per clause 30, the developer shall offer possession of the unit within 36 months from the date of execution of agreement or within 36 months from the date of obtaining all the required sanctions + 6 months grace period)	15.04.2016 (Calculated from the date of agreement since it was executed at a later date than approval of the building plan) Note: - Grace period is not allowed.
13.	Payment plan	Construction linked payment plan (Page no. 40 of the complaint)
14.	Total sale consideration	Rs. 59,31,250/- (Page no. 40 of the complaint)
15.	Amount received from the complainant	Rs. 58,91,295.25/- (Page no. 47 of the complaint)
16.	Occupation Certificate	Not obtained
17.	Offer of possession	Not offered
18.	Delay in handing over possession till the date of decision i.e., 19.08.2021	5 years 4 months 4 days

B. Facts of the complaint

3. That the complainant is filing this complaint against the respondent as the respondent had failed to complete the construction and deliver the possession of the unit booked by the complainant and one Mr. Sanjeev Kohli by its promised time i.e., 15.04.2016. The complainant had made the booking for a residential unit in the project of the respondent namely, "Ansal Estella", located at Sector 103, Gurgaon, Haryana in the year 2010 and had made payment of Rs. 4,50,000/- as per the

demand of the respondent. The complainant being aggrieved with the conduct of the respondent company of not complying with the timely handing over the possession of the unit, the complainant herein is filing this case before this authority seeking redressal of her grievances and direction upon the respondent to deliver the immediate possession of the unit along with delay penalty from the period when the possession became due till the actual delivery of the possession.

4. That the respondent through various representations lured the complainant and Mr. Sanjeev Kohli to jointly book a unit in its project "Ansal Estella" located at sector 103, Gurugram, Haryana. The respondent had left no stone unturned in depicting the grandeur of the project. Further, the respondent through their online site as well as their representatives, painted a rosy picture in the mind of the complainant which inevitably led the complainant to make a booking in the project.
5. That lured by such representations, the complainant along with Mr. Sanjeev Kohli booked the unit bearing no. N - 1102 jointly by paying an amount of Rs.8,45,250/- in the project "Ansal Estella". Thereafter, the respondent sent a letter of offer of allotment and also sent a detailed statement of account with the said letter wherein allotment call was made which was to be paid before 05.04.2011.
6. That thereafter a flat buyer agreement was executed between the parties on 15.04.2013. As per the flat buyer agreement executed between the parties the respondent company was to

handover the possession of the unit within 36 months from the date of execution of the flat buyer agreement.

7. That the details of the unit allotted to the complainant by the respondent company are as follows: unit no.: N-1102, floor: eleventh type: 3 BHK, residential area: 1725 sq. ft. rate: Rs.2800/- per sq. ft. basic sale price: Rs.48,30,000/- and total sale price: Rs.59,95,467/
8. That it is to be noted that the parties entered into the agreement on 15.04.2012, thus, if we calculate the due date of possession then the same comes out to be 15.04.2016. The respondent company was under the obligation to complete the project and deliver the possession of the unit latest by 15.04.2016. The respondent company has miserably failed to deliver the possession of the unit by its scheduled time thereby defeating the possession clause of the agreement executed between the parties. Thus, constraining the complainant to file the present complaint before the authority for grant of immediate possession of the unit booked along with delay penalty for the period of delay from the due date of possession until the actual date of possession on the amount paid by the complainant in lieu of the said booking.
9. That an application dated 22.04.2014 for change in right to purchase a property was made on behalf of the existing owners namely, the complainant and Mr. Sanjeev Kohli and as per the application the unit bearing no. N-1102 was transferred solely in the name of the complainant.
10. That on the bare perusal of various clauses of the agreement executed between the parties it is apparent that the present

agreement is unilateral and arbitrary where the respondent has an upper hand in the entire transaction. As per the agreement, the respondent had the authority to impose an exorbitant rate of compoundable interest on the complainant to the tune of 24% per annum on delayed payments whereas, the respondent was only liable to pay a meagre amount in case of delayed possession to the tune of Rs.5/- per sq. ft. per month of the area of the unit.

11. That the said clauses are unilateral as the respondent has only tried to save itself from compensating the complainant in case of delay in completion of the project and in giving the possession of the unit to the complainant. The respondent has only tried to considerably limit their own liability and impose unfair and arbitrary interest on the complainant in order to grab the hard-earned money. Such clauses also create a fear in the minds of the customers to make the payments as per the whims and arbitrary demands of the companies as they are under a constant fear of paying considerably more than what they would have been normally charged. These clauses give arbitrary power to the companies to exploit its customers and should be dealt with a heavy hand by this authority.
12. That the said clause is also in clear contravention of the provisions of the Real Estate (Regulation and Development) Act, 2016 which has clarified the position that the interest payable by the promoter in case of default shall be the same as the interest payable by the allottees in case of any default made by them. The term was introduced and explained by the legislators, in order to avoid the exploitation of the consumer

by the real estate companies, by providing a level playing field where similar interests have to be paid by the parties for any default on their part. The relevant section has been miserably defeated and contravened by the unilateral clauses of the respondent's agreement. Thus, this authority is requested to take a note of the same and grant appropriate relief to the complainant herein as he has been subjected to financial and emotional distress because of the said unilateral and illegal clauses.

13. That a construction linked payment plan had been adopted by the complainant under the said allotment. According to the said payment plan, the payment was to be made in accordance with the milestone reached by the respondent company in constructing the project. However, the respondent company has been arbitrarily charging the complainant without reaching the milestone constraining the complainant to file the present complaint for immediate grant of possession along with delay penalty at a prescribed rate of interest.
14. That the complainant till date have deposited a total amount of Rs.58,91,295/- (Rupees fifty-eight lac ninety-one thousand two hundred and ninety-five only) in lieu of the booking done in the project of the respondent company but despite paying the entire amount as per the demands of the respondent company. The respondent company had miserably failed in not completing and delivering the possession of the unit.
15. That the complainant is approaching this authority for the redressal of her grievances as the respondent company is trying to dupe the honest buyers.

16. That it is only just and fair that this authority may be pleased to hold that the respondent was liable to deliver the possession of the unit by 15.04.2016 and the buyer cannot be expected to wait endlessly for the possession.
17. That it is only just and fair that this authority may be pleased to direct the respondent to grant immediate possession of the unit to the complainant herein along with delay penalty at the prescribed rate of interest fixed by the authority.

C. Relief sought by the complainant: -

- 1) Direct the respondent to deliver immediate possession of the unit no. N -1102, in the project 'Ansal Estella' located at sector - 103, Gurugram, Haryana along with all promised amenities and facilities.
 - 2) Direct the respondent to make payment of delay penalty on the amount already paid by the complainant to the respondent, from the promised date of delivery of the unit till the actual delivery of the unit to the complainant at the prescribed rate of interest.
18. 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

19. The respondent has contested the complaint on the following grounds:
 1. 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 complainant has 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 complainant has 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 15.04.2013, as shall be evident from the submissions made in the following paragraphs of the present reply.
- III. That the respondent is a public limited company registered under the Companies Act, 1956, having its registered office at 606, Indraprakash, 21 Barakhamba Road, New Delhi - 110001. The present reply is being filed by the respondent through its duly authorized representative, namely, Mr. Vaibhav Chaudhary whose authority letter is attached herewith. The above said project is related to Licence No.17 of 2011 dated 08.03.2011, received from the Director General, Town and Country Planning, Chandigarh, Haryana (DGTCP) over the land measuring 15.743 acres falling in the

revenue estates of Village Dhanwapur and Tikampura, Tehsil & District Gurugram presently the part of residential sector-103 of the Gurugram-Manesar Urban Plan- 2021. The building plans of the project have duly been approved by the DGTCP Haryana vide Memo No. ZP-7333/JD(BS)2011/17636 dated 28.11.2011. Thereafter, the respondent herein was granted the approval of Fire Fighting Scheme from the fire safety point of view of the housing colony measuring 15.743 acres by the Director, Fire Service, Haryana, Chandigarh.

- IV. That the relief sought in the complaint by the complainant is based on false and frivolous grounds; thus, are not entitled to any discretionary relief from this authority, as the person not coming with clean hands may be thrown out without going into the merits of the case. However, the true facts of the case are that the landowners under the project had entered into agreements with erstwhile owners of the project land to obtain licence from Government of Haryana for setting up of a group housing project on the project land to develop and market the same. After receipt of the licence, the landowners have purchased the entire project land from the erstwhile owners of land through various sale deeds after taking necessary permission from the Director General, Town and Country Planning, Haryana, Chandigarh for such purchase. The landowners had entered into an agreement with the developer, whereby the landowners have assigned the complete right to develop, build and market sanctioned FSI area of 5,00,000 sq. ft. and the developers in exercise of

the rights so acquired are developing and marketing a part of the project and more specifically the built-up area comprised in towers K, L, M, N, O and P. The remaining area of the project is being developed, built and marketed by the landowners themselves. In view of the recitals as above, the developer is sufficiently entitled to market and sell the apartments comprised in tower K, L, M, N, O and P and has offered the apartment for sale to general public.

- V. That the predecessor vendor of the complainant approached the respondent for the purchase of an independent unit in its upcoming residential project "Estella" situated in sector-103, village Dhanwapur and Tikampur, Gurugram. It was submitted that the complainant prior to approaching the respondent, had conducted extensive and independent enquiries regarding the project and it was only after the complainant was fully satisfied with regard to all aspects of the project, including but not limited to the capacity of the respondent to undertake development of the same. The complainant took an independent and informed decision to purchase the unit, un-influenced in any manner by the respondent.
- VI. That thereafter, the complainant through an application form applied to the respondent for provisional allotment of a unit in the project. The complainant, in pursuance of the aforesaid application form, was allotted an independent unit bearing no. N-1102, type of unit - 3 BHK, sales area 1725 sq. ft., (160.26 sq. mtrs.) in the project, namely, Estella, situated at sector-103, Gurugram. The complainant 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 complainant shall remit every instalment on time as per the payment schedule. The respondent had no reason to suspect the bonafide of the complainant. The complainant further undertook to be bound by the terms and conditions of the application form and the flat buyer's agreement as well.

- VII. That, it was 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 respondent, it was submitted that the respondent would have handed over the possession to the complainant within time had there been no force majeure circumstances beyond the control of the respondent, there had been several circumstances which were absolutely beyond and out of 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 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 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 as well as Government of Haryana or the Centre Government, 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 complainant has not approached this authority with clean hands and has not disclosed the true and material facts relates to this case of complaint. The complainant, 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 complainant and without prejudice to the contentions of the respondent, 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 complainant 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 complainant is beyond the scope of the buyer's agreement. The complainant cannot demand any interest or compensation beyond the terms and conditions incorporated in the buyer's agreement. The complainant 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 respondent, it was submitted that the present complaint is barred by limitation. The complainant has alleged that due date of possession in respect of the said unit was 15.04.2016, and therefore, no cause of action is arisen in favour of the complainant on 15.04.2016, 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 as such the authority lacks jurisdiction to entertain the present complaint.

- XIII. That the respondent reserves its right to file additional reply and documents, if required, assisting the authority in deciding the present complaint at the later stage.
- XIV. 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.
- XV. That, it was submitted that several allottees, including the complainant, 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 respondent. The respondent, despite default of several allottees has diligently and earnestly 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 respondent 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 complainant are totally baseless. Thus, it is most respectfully

submitted that the present complaint deserves to be dismissed at the very threshold.

20. 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

21. 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

22. 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.

23. 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 complainant and the respondent prior to the enactment of the Act and the provision of the said Act cannot be applied retrospectively.
24. 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."*

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 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

27. The respondent promoters have sought further extension for a period of 6 months after the expiry of 36 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 15.04.2016 wherein the event of demonetization occurred in November 2016. 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 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 5 years. Therefore, the respondent could be allowed to take advantage of its own wrongs/faults/deficiencies.

F3. Objection regarding delayed payments

28. Though an objection has been taken in the written reply that the complainant 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 complainant had paid more than 90% 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 complainant.

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

29. In the present complaint, the complainant intends 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."*

30. Clause 30 of the flat buyer's agreement (in short, the agreement) dated 15.04.2013, provides for handing over of possession and is reproduced below:

"30. Possession

"The developer shall offer possession of the unit any time, within a period of 36 months from date of execution of agreement or within 36 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 36 months as above in offering the possession of the Unit."

31. 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.

32. 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 complainant 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.

33. The respondent promoter has proposed to handover the possession of the subject apartment within a period of 36 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.
34. 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 complainant/allottee. 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 complainant on 23.03.2011 and the apartment buyer's

agreement was executed between the respondent and the complainant on 15.04.2013. The date of approval of building plan was 28.11.2011. 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 30 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 execution of agreement ought to be taken as the date for determining the due date of possession of the unit in question to the complainant.

35. **Admissibility of grace period:** The respondent promoter has proposed to hand over the possession of the apartment within 36 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 36 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.

36. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is 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.

37. 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.
38. 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%.
39. The definition of term 'interest' as defined under section 2(z a) 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;*"

40. Therefore, interest on the delay payments from the complainant 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 complainant in case of delayed possession charges.
41. 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 30 of the flat buyer's agreement executed between the parties on 15.04.2013, the possession of the subject apartment was to be delivered within stipulated time i.e., by 15.04.2016. 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 15.04.2016 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 flat 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., 15.04.2016 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 and section 19(10) of the Act of 2016.


H. Directions of the authority

42. 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., 15.04.2016 till handing over of possession after receipt of occupation certificate as per section 18(1) read with rule 15 of the rules and section 19(10) of the Act of 2016.

- 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 10th of the subsequent month as per rule 16(2) of the rules.
 - iii. The complainant is 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 complainant which is not part of the buyer's agreement. The respondent is not entitled to charge holding charges from the complainant/allottee 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.
43. Complaint stands disposed of.
44. File be consigned to the registry


(Sanir Kumar)
Member


(Vijay Kumar Goyal)
Member

Dated:19.08.2021

Judgement uploaded on 13.10.2021.