

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

Complaint no. : 2471 of 2021
First date of hearing : 08.09.2021
Date of decision : 08.09.2021

Ms. Aditi Sawhney

Address: - B-78, Greater Kailash-I, New Delhi-
110048.

Complainant

Versus

Puri Constructions Private Limited

Office address: - 4-7 b, Ground Floor,
Tolstoy House, 15 and 17 Tolstoy Marg,
New Delhi - 110001.

Respondent

CORAM:

Shri Samir Kumar
Shri Vijay Kumar Goyal

Member
Member

APPEARANCE:

Ms. Charu Rustagi
Shri Himanshu Juneja

Advocate for the complainant
Advocate for the respondent

ORDER

1. The present complaint dated 28.06.2021 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	Emerald Bay, Sector-104, Gurugram.
2.	Project area	17.1745 acres
3.	Nature of the project	Residential Group Housing Colony
4.	DTCP license no. and validity status	68 of 2012 dated 21.06.2012 valid upto 20.06.2018 and 32 of 2013 dated 17/05/2013 valid upto 20/06/2020
5.	Name of licensee	Florentine Estate of India and 1 other
6.	RERA Registered/ not registered	Registered vide Registration no. 136 of 2017 dated 28.08.2017 valid till 28.02.2021
7.	Unit no.	1502, 15 th Floor, Block B2
8.	Unit measuring	1550 sq. ft.

9.	Date of execution of Buyers Agreement	29.10.2013 (Page 20 of the complaint)
10.	Payment plan	Construction linked payment plan (Page 55 of the complaint)
11.	Total Sale consideration	Rs. 1,26,82,348/- (As per sales customer ledger dated 10.08.2021 on page 46, annexure R3 of the reply)
12.	Total amount paid by the complainant	Rs. 1,26,19,843/- (As per sales customer ledger dated 10.08.2021 on page 46, annexure R3 of the reply)
13.	Due date of delivery of possession (As per clause 11(a) read with 11(b), (c) and 45: within 48 months from the date of execution of the agreement and an additional period of 180 days for applying and obtaining the occupation certificate)	29.10.2017 (No grace period is given)
14.	Offer of possession	07.02.2019 (Page 88, annexure A-III of the complaint)
15.	Delay in handing over possession till 07.02.2019 plus two months i.e., 07.04.2019	1 year 5 months 9 days
16.	Occupation Certificate received on	21.11.2018 (Page 47, annexure R4 of the reply)

B. Facts of the complainant

3. The complainant has made the following submissions:

- i. That the respondents obtained licence no. 68 of 2012 and floated a group housing complex scheme 'Emerald Bay' (hereinafter, the Project) located at sector-104.
- ii. That the respondent and the complainant entered into a apartment buyer agreement (hereinafter, ABA) on 29.10.2013 wherein the complainant was allotted unit no. B2-1502, tower-B2, admeasuring 1550 sq. ft. for a total consideration of Rs. 1,26,79,991/- as per the statement of account dated 09.03.2021. That as per clause 11 (a) of the agreement, the possession of the unit in question was to be handed over within 48 months along with grace period of 6 (six) months. That the vacant and peaceful possession of the unit was to be handed over lastly by 29.10.2017.
- iii. That it is pertinent to note that the respondent had offered possession of the unit in question to complainant on 07.02.2019 but the actual handover of the possession has not been done even today despite delay of 3 years 5 months and 10 days also that the respondents did not adjust the delay possession charges.

- iv. That as per the statement of account which was received by the complainant dated 09.03.2021, the complainant has paid a total amount of Rs. 1,26,19,843/- .
- v. That the complainant aggrieved of having not received possession along with delay possession charges on time is filing the present complaint before this authority.

C. Relief sought by the complainant:

4. The complainant has sought the following reliefs:
- i. To direct the respondent to handover the peaceful and vacant possession of the flat to the complainant.
- ii. To direct the respondent to pay interest at the prescribed rate for every month of delay from the due date of possession till the date of actual possession.

D. Reply by the respondent:-

5. The respondent has raised certain preliminary objections and has contested the present complaint on the following grounds:
- i. That the complaint filed by the complainant is not maintainable under the provisions of Act of 2016 and applicable rules, as the complaint can only be filed for violation and/or breach of the provisions of the Act and Rules. In the present complaint no

violation or breach of the provisions of the Act and Rules has been alleged or averred.

- ii. The agreed price between the parties as recorded in the allotment letter and payment plan was Rs. 7068.75/- per sq. ft. Further the respondent as a goodwill gesture vide letter dated 4.9.2015, gave a discount of Rs. 1476.75/- per sq.ft. and free club membership against the unit and accordingly reduced the basic sale price from Rs.7068.75/- per sq.ft. to Rs.5592/- per sq.ft. and the said discount was as a goodwill gesture and if the complainant is raising issue then the bonhomie between the parties is no more and the said discount stands withdrawn.
1. That the complainant has been guilty of concealing true and material facts, as initially the said apartment was booked in the names of Ms. Aditi Sawhney and Mr. Anil Sawhney but later on the father of the complainant [Mr. Anil Sawhney] requested for change in the name of the allottees in the month of may, 2019 and company acceding to the said request and carried out the changes accordingly in the name of the allottees. The respondent has offered possession of the apartments in the project to all the allottees in the month of january-february 2019 and since then more than 250 families are residing therein, hence all the

allegations regarding delivery of possession are wrong. The complainant wants to evade and avoid the payment of balance amounts as well as the maintenance charges since the date of offer of possession i.e. 7.2.2019. Hence the complaint being false and frivolous, be dismissed.

- iii. That the present complaint does not fall within the ambit of Haryana Real Estate Regulatory Authority and the authority has got no jurisdiction to try and entertain the same as neither there is any breach of any of the obligations by the respondent nor there is any delay in offer of possession, as the respondent had already obtained the occupation certificate on 21.11.2018 and offered the possession of the apartment to the complainant.
- iv. That the complainant has got no cause of action to file the present complaint. The whole complaint is based upon the ground of expiry of 54 months from the date of agreement, subject to force majeure conditions and apart from other conditions like torrential rains, extreme weather conditions in summers etc. the following major force majeure conditions have affected the construction and its progress in last 5 years and after taking into account the time spent to overcome the effects of these conditions, the timeline to complete construction is within prescribed timelines.

Further, adequate mechanism for compensation in case of delay is provided in the agreed terms of ABA.

- v. That due to the Central Government's notification with regard to demonetization, the contractor (Simplex Infrastructures Limited) had requested for an extension of time for 6 months, expressing his inability to undertake the construction from 9.11.2016 till april 2017.
- vi. That the Reserve Bank of India (hereinafter, the RBI) has published reports on impact of demonetization observing that the construction industry was in negative during Q3 and Q4 of 2016-17 and started showing improvement only in april 2017.
- vii. That demonetization was beyond the control of the respondent company hence the time period for offer of possession should deemed to be extended for 6 months on account of above.
- viii. That the National Green Tribunal has passed several orders for stopping all construction activity in the whole NCR region when pollution levels were alarmingly high in april 2015, november 2016 and further the construction activities were stopped for certain time period i.e. from 9.11.2017 till

december 2017 and then re-mobilization of resources took time. The contractor could not undertake construction for 3-4 months in compliance of the orders due to shortage of labour in april- may 2015, november-december 2016, november-december 2017. In view of the above the delay of completion of construction of 6-12 months is duly covered by the above stated major events and conditions which were beyond the control of the respondent and also being minuscule delay in a project of huge magnitude cannot tantamount to default. Rather the non-payment of timely installments by the petitioner amounts to default on the part of petitioner.

- ix. That the respondent had applied for revision in building plans with the Department of Town and Country Planning Haryana, and a considerable time was spent for obtaining the approval for revised building plans.
- x. That due to heavy rainfall in Gurugram in the year 2016 and unfavorable weather conditions, all the construction activities were stopped as the whole town was waterlogged and gridlocked as a result of which the construction came to standstill for many weeks.

- xi. That the State of Haryana has miserably failed to provide the basic civic infrastructure to all the new sectors falling on the Dwarka Expressway despite payment of hundreds of crores of rupees towards EDC and IDC by the respondent and other developers. The state agencies responsible for providing water supply and electricity in new sectors have also failed to provide the same on time. All these factors have impacted the pace of construction. It is pertinent to mention here that the total sale consideration of the present unit of the complainant includes more than Rs. 8Lacs, towards taxes and EDC and IDC, which stand paid to the Government agencies.
- xii. That despite all circumstances mentioned hereinabove, the respondent has completed the construction and has obtained the occupation certificate on 21.11.2018 for the said project. The project has been completed much prior to the prescribed timelines by taking into account the time spent in overcoming the effects of the above stated force majeure conditions. As per agreed terms of ABA provided in Clause 11, the time period of 54 months for completion of construction and obtaining occupation certificate expired on 21.04.2018, which was subject to force majeure conditions. The respondent has

obtained OC on 21.11.2018 hence after taking into account the time period spent in overcoming the effects of above stated force majeure conditions, which is more 12 months, the respondent has completed the construction much prior to the prescribed timelines. Hence present petition be rejected.

E. Jurisdiction of the authority

6. The preliminary objections raised by the respondent regarding jurisdiction of the authority to entertain the present complaint stands rejected. The authority observed that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I Territorial jurisdiction

7. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram District, therefore this authority has complete territorial jurisdiction to deal with the present complaint.

E.II Subject-matter jurisdiction

8. 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) leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

F. Findings of the authority on the objections raised by the respondent:

9. With regards to the above contentions raised by the promoter/developer, it is worthwhile to examine following issues:

F.I. Objection raised by the respondent regarding force majeure condition

10. The respondent has raised an objection that the time of giving possession comes out to be 42 months and got delayed further due to numerous orders passed by NGT and other judicial bodies. This led to respondent facing commercial hardships to collect raw materials, labour for the completion of the said project in timely manner.

11. The respondent has relied upon various NGT orders for justifying the delay caused in completion of the project and to

seek extension in the time-period. The order dated 07.04.2015 relied upon by the respondent states that:-

“In these circumstances we hereby direct state of U.P., Noida and Greater NOIDA Authority, HUDA, State of Haryana and NCT, Delhi to immediately direct stoppage of construction activities of all the buildings shown in the report as well as at other sites wherever, construction is being carried on in violation to the direction of NGT as well as the MoEF guideline of 2010.”

12. A bare perusal of the above makes it apparent that the above-said order was for the construction activities which were in violation of the NGT direction and MoEF guideline of 2010, thereby, making it evident that if the construction of the respondent's project was stopped then it was due to the fault of the respondent themselves and they cannot be allowed to take advantage of their own wrongs/faults/deficiencies. Also, the allottee shall 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 stated that the period of 180 days shall be given for applying and obtaining the occupation certificate of the said project. However, the promoter applied the occupation certificate as late as 23.08.2018 i.e., after the delay of ten months. Accordingly, this grace period of 180 days cannot be allowed to the promoter at this stage.

F2. Non-payment of installments by the complainant and other allottees

13. The respondent has raised another objection that due to non-payment of installments by the complainant and other allottees, he faced a financial crunch and wasn't able to finish the project on time. The objection raised by the respondent regarding delay in making timely payments by the

complainant who has committed breach of terms and conditions of the contract by making default in timely payment of the installments which has led to delay in completion of construction at the end of respondent.

14. That the ABA was entered into between the parties and, as such, the parties are bound by the terms and conditions mentioned in the said agreement. The said agreement was duly signed by the complainant after properly understanding each and every clause contained in the agreement. The complainant was neither forced nor influenced by respondent to sign the said agreement. It was the complainant who after understanding the clauses signed the said Agreement in their complete senses.

15. In the present complaint, it is an obligation on the part of the complainant/ allottee to make timely payments under section 19(6) and 19(7) of the Act. Section 19(6), (7) proviso read as under.

"Section 19: - Right and duties of allottees.-

.....
Section 19(6) states that every allottee, who has entered into an agreement for sale to take an apartment, plot or

*building as the case may be, under section 13[1], shall be responsible to make necessary payments in the manner and within the time as specified in the said agreement for sale and shall pay at the proper time and place, the share of the registration charges, municipal taxes, water and electricity charges, **maintenance charges**, ground rent, and other charges, if any.*

Section 19(7) states that the allottee shall be liable to pay interest, at such rate as may be prescribed, for any delay in payment towards any amount or charges to be paid under sub-section (6).

16. The authority has observed that the total consideration of the apartment of Rs. 1,26,79,991/- and the complaint has paid Rs. 1,26,19,843/-. As per clause 8 of apartment buyer agreement, it is the obligation of the allottee to make timely payments and the relevant clause of apartment buyer agreement is reproduced as under:

8. Time is the Essence: Buyer's Obligation

"The Allottee(s) agrees that time is essence with respect to payment of Total Price and other charges, deposits and amounts payable by the Allottee(s) as per this agreement and/or as demanded by the Company from time to time and also to perform/ observe all other obligations of the Allottee(s) under this Agreement. The Company is not under any obligation to send any reminders for the payments to be made by the Allottee(s) as per the schedule of payments and

*for the payments to be made as per demand by the Company
or other obligations to be performed by the Allottees.”*

17. The authority is of the view that the complainant has paid substantial amount of the total sale consideration as per the statement of account dated 09.03.2021. Thus, the allottee cannot be said to be in violation of his duties and obligations arising out of sections 19 (6) and (7) nor clause 8 of the ABA.

G. Findings on the relief sought by the complainant

G.1. Admissibility of delay possession charges at prescribed rate of interest

18. In the present complaint, the complainant intend to continue with the project and are seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under.

“Section 18: - Return of amount and compensation

18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building, —

.....

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.”

19. The possession clause 11(a) of the ABA is reproduced below:

***11(a) Schedule for possession of the said apartment/
villa***

"The company based on its present plans and estimates and subject to all just exceptions endeavors to complete construction of the said Building/ said Apartment/ Villa within the period of forty eight (48) months from the date of execution of this Agreement unless there shall be delay or failure due to Force Majure conditios including but not limited to reasons mentioned in clause 11(b) and 11(c) or due to failure of the Allottee(s) to pay in time the Total Price and other charges and dues/ payments mentioned in this Agreement or any failure on the part of the Allottee(s) to abide by all or any of the terms and conditions of this Agreement. The Apartment/ Villa Allottee agrees and understand that beyond 48 months that the Company shall be entitled to period of an additional one hundred and eighty (180) days, for applying and obtaining the occupation certificate in respect of the Group Housing Complex."

20. 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 complainant not being in default under any provisions of these agreements and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of

such conditions are not only vague and uncertain but so heavily loaded in favor 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 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.

21. Admissibility of grace period: The promoter has proposed to hand over the possession of the said unit within period of forty-eight (48) months from the date of execution of ABA. In the present complaint, the due date of handing over possession comes out to be 29.10.2017 which is calculated from date of execution of agreement i.e., 29.10.2013. It is further provided in agreement that promoter shall be entitled

to a grace period of 180 days for pursuing the occupancy certificate etc. from DTCP under the Act in respect of the project. As a matter of fact, the respondent has himself admitted that he had applied for the occupation certificate in respect of the said tower only on 23.08.2018 and the occupation certificate was issued to the promoter on 21.11.2018. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 180 days cannot be allowed to the promoter at this stage.

22. Admissibility of delay possession charges at prescribed rate of interest: The complainant is seeking delay possession charges at simple interest. 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. The same 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]

"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."

23. The legislature in its wisdom in the subordinate legislation under 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.

24. 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., 08.09.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

25. Rate of interest to be paid by complainant for delay in making payments: The definition of term 'interest' as defined under section 2(z) 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—

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 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;”

26. 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 same as is being granted to the complainant in case of delayed possession charges.

27. On consideration of the documents available on record and submissions made by the parties regarding contravention as per 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 11(a) of the ABA that was executed between the parties on 29.10.2013, possession of the said unit was to be delivered within a period of 48 months from the date of execution of the agreement. Thus, the due date of possession is calculated from the date of execution of ABA. The respondent-builder had claimed a grace period of 180 days for obtaining the occupation certificate from the competent authority. The grace period cannot be allowed to the respondent as the delay in obtaining occupation certificate from the competent authority was due to the failure of the builder/ promoter to complete the project on time and the occupation certificate was received as late as 21.11.2018. Thus, as far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore the due date of possession comes out to be 29.10.2017. In the present case, the complainant was offered possession by the respondent on 07.02.2019. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the complainant as per the terms and conditions of the ABA dated 29.10.2013 executed between the parties.

28. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 21.11.2018. However, the respondent offered the possession of the unit in question to the complainant only on 07.02.2019, so it can be said that the complainant came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, he should be given 2 months' time from the date of offer of possession. These 2 months' of reasonable time is being given to the complainant keeping in mind that even after intimation of possession practically they have to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e. 29.10.2017 till the expiry of 2 months from the date of offer of possession (07.02.2019) which comes out to be 07.04.2019.

29. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainant is entitled to delay possession charges at prescribed rate of the interest @ 9.30 % p.a. w.e.f. 29.10.2017 till 07.04.2019 as per provisions of section 18(1) of the Act read with rule 15 of the rules.

H. Directions of the authority

30. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

- i. The 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. 29.10.2017 till 07.04.2019 i.e. expiry of 2 months from the date of offer of possession (07.02.2019) as per the provisions of section 19(10) of the Act.
- ii. The arrears of such interest accrued from 29.10.2017 till 07.04.2019 shall be paid by the promoter to the allottee within

a period of 90 days from date of this order as per rule 16 (2) of the rules.

iii. The complainant is directed to make the outstanding payments, if any, to the respondent alongwith prescribed rate of interest i.e., equitable interest which has to be paid by both the parties in case of failure on their respective parts.

iv. The respondent shall not charge anything from the complainant which is not the part of the buyer's agreement. The respondent shall not claim holding charges from the complainant/allottee 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 decided on 14.12.2020.**

31. Complaint stands disposed of.

32. File be consigned to registry.

(Sanjay Kumar)

Member

(Vijay Kumar Goyal)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 08.09.2021.