

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

Complaint no.:	2523 of 2021
First date of hearing:	04.08.2021
Date of decision:	22.09.2021

Swati Agarwal

R/o: - Apartment no.787, CA Apartments,
A-3 Block, Paschim Vihar, New Delhi-110063

Complainant

Versus

M/s Apex Buildwell Private Limited

Having Regd. office at: - 14A/36, WEA Karol Bagh, New
Delhi-110020

Respondent

CORAM:

Shri Vijay Kumar Goyal
Shri Samir Kumar

**Member
Member**

APPEARANCE:

Sh. Harshit Goyal (Advocate)
Sh. Sandeep Chaudhary (Advocate)

**Complainant
Respondent**

ORDER

1. The present complaint dated 23.06.2021 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 as provided 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*.

A. Unit and project related details

2. The particulars of unit details, 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:

Sno.	Heads	Information			
1.	Project name and location	"Our Homes", Sector 37-C, Gurugram.			
2.	Project area	10.144 acres			
3.	Nature of the project	Low cost /Affordable group housing colony			
4.	DTCP license no.	13 of 2012 dated 22.02.2012			
5.	License validity status	01.12.2019			
6.	Name of licensee	Prime IT Solution & Phonix Datatech Service			
7.	RERA registration details				
	S no.	Registration No.	Registration date	Valid up to	Area
	i.	40 of 2019	08.07.2019	01.12.2019	10.14 acres
8.	Unit no.	456, 4 th floor, Tower Orchid			
9.	Unit measuring	48 sq. mtrs.			
10.	Date of execution of flat buyer agreement	25.03.2013			



11.	Payment plan	Time linked Plan
12.	Total consideration	₹ 17,71,520/- (As per due installment sheet at pg. 54 of complaint)
13.	Total amount paid by the complainant	₹ 15,70,499/- (As per due installment sheet at pg. 54 of complaint)
14.	Due date of delivery of possession as per clause 3(a) of the flat buyer agreement 36 months or from the date of commencement of construction upon receipt of all approvals + 6 months' grace period. [Page 27 of complaint]	02.06.2017 (36 + 6 months from start date of construction i.e., date of consent to establish which is 02.12.2013) (Note: Grace period allowed)
15.	Delay in handing over possession till the offer of possession (01.03.2020) plus 2 months i.e., 01.05.2020	2 years 8 month 27 days
16.	Status of the project	ongoing
17.	Occupation certificate	i. 19.5.2017- Primary School ii. 29.11.2019 Type-1 (5 nos. towers), Type-1 (3 nos. towers), Type-2 (2 nos. towers) iii. 24.02.2020 Type-1 (16 nos. towers) & Commercial
18.	Offer of possession	01.03.2020



B. Facts of the complaint

3. The complainant pleaded the complaint on the following facts:

- a. That the complainant is an innocent allottee of the project "Our Homes" situated at sector 37-C, Gurugram being developed by the respondent company i.e., Apex Buildwell Pvt. Ltd.
- b. That the project in question is 'Our Homes' situated at Sector 37-C, Gurugram being developed by the respondent company is an affordable group housing colony comprised of 2 BHK apartments.
- c. In the year 2012, the representatives of the respondent company approached the complainant and presented a rosy picture of the project in question and assured timely delivery of the possession of the project in question.
- d. On the basis of the assurances as given by the said agents and representatives to be true and correct, the complainant approached the respondent and submitted application form dated 12.09.2012 for booking of an apartment in the project in question.
- e. The flat buyer's agreement was duly executed between the complainant and the respondent on 25.03.2013 in respect of the booked unit bearing no 456, 4th floor, tower orchid admeasuring 48 sq. mtrs super area at "Our Homes".
- f. According to clause 3(a) of the flat buyer agreement dated 25.03.2013, the respondent was liable to deliver the possession of the unit within a period of 36 months from the date of start of construction of the tower in which the flat is located (tower orchid) and a grace period of 6 months. The consent to establish was granted to the company on 02.12.2013. Accordingly, the due date of



possession comes out to be 02.06.2017 inclusive of grace period. However, the respondent has failed to fulfil its liability under clause 3(a) of the flat buyer agreement and section 11(4) (a) of the Real Estate (Regulation and Development) Act, 2016.

- g. The respondent company had offered possession of the booked unit vide possession letter dated 01.03.2020. The complainant obtained possession and keys of the booked unit from the respondent and signed the possession certificate dated 16.09.2020 and possession acknowledgement dated 16.09.2020. However, the respondent has also failed to execute and register sale deed of the booked unit till date.
- h. The Haryana RERA registration certificate bearing no. 40 of 2019 issued in respect of project in question i.e., "Our homes" has already expired on 01.12.2019.
- i. That the complainant had invested their hard-earned money in the booking of the unit in the project in question on the basis of false promises made by the respondent at the time of booking in order to allure the complainant. However, the respondent has failed to abide all the obligations of him stated orally and under the buyer's agreement duly executed between both the present parties.
- j. Therefore, the present complainant is forced to file present complaint before this hon'ble authority under section 31 of Real Estate Regulation and Development Act, 2016 read with Rule 28 of Haryana Real Estate (Regulation and Development) Rules, 2017 to seek redressal of the grievances against the respondent company.

C. Relief sought by the complainant:



4. The complainant has sought following reliefs:
- Direct the respondent to pay delay possession charges at the prescribed rate of interest to the complainant for the period of delay in delivery of possession of the booked unit from the due date of delivery of possession i.e., 02.06.2017 to date of offer of possession i.e., 01.03.2020.
 - To direct the respondent to execute and register the sale deed in the concerned sub registrar office in favour of complainant of the booked unit.
 - Any other relief which this hon'ble authority deems fit and proper.
5. 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

6. The respondent has contested the complaint on the following grounds:
- It is at the very outset it is submitted that the complainant has no cause of action against the answering respondent and the alleged cause of action is nothing but false and frivolous and the respondent has neither caused any violation of the provisions of the Act nor caused any breach of agreed obligations as per the agreement between the parties. Since the respondent has already completed the project promoted under the low cost/affordable housing policy, and therefore, the provisions of section 18 of the Act are not applicable as it cannot be said that the promoter has failed to complete or unable to give possession of the apartment.



- b. That the complaint under reply is neither tenable nor maintainable and has been filed with an oblique motive when the respondent has already offered possession of the flat and the complainant has already taken over the possession and the complaint is filed merely with an intent to gain wrongfully, and arm twist the respondent through the process of law once all obligations on behalf of the respondent are complete.
- c. It is stated that the respondent has been very well committed to the development of the real estate project and secured the occupation certificates for both of the phases of the project named "Our Homes" and offered possession to the complainant on 01.03.2020. And the delay occasioned in delivering the possession of the project is only because of explainable and extendable as per the agreed terms i.e. clause 3 of the apartment buyer's agreement and is due to causes beyond the control of the respondent. And in view of the same the complainant has without objection, protest or reserving any further rights to claim compensation for delay has already taken over the possession on 16.09.2020.
- d. That firstly, on grant of license bearing no. 13/2012 dated 22.02.2012 the respondent applied for all other relevant permissions and could secure the BR-III for sanction of building plans only on 7.05.2013 and the consent to establish by the office of Haryana state pollution control board, Panchkula was only granted on 2.12.2013. Since then the respondent is continuing the construction of the project, but to the misery the license so granted expired on 21.02.2016 i.e. prior to the permissible period of construction of 48 months and since 11.02.2016 the respondent had



been seeking the renewal of the license from the office of director general town & country planning, Haryana and finally the application dated 14.03.2016 of the respondent was allowed and the license was renewed on 26.04.2019 and the respondent in a duty bound manner had completed the entire construction and development of the project and obtained the first occupation certificate on 29.11.2019 and the second occupation certificate on 24.02.2020. And thereupon offered possession of the flat to the complainant in all its bona fides on 1.03.2020 and the same was taken over by the complainant on availing all benefits and without any objection or complaint whatsoever on 16.09.2020.

- e. That the provisions of Real Estate (Regulation and Development) Act, 2016 came into force on 28.07.2017 for which the respondent duly filed an application dated 28.08.2017 and due to lapse of license No. 13/2012 the same got dismissed vide orders dated 19.01.2018 and finally after regular follow ups and initial rejections the project has been registered vide registration no. 40 of 2019 dated 08.07.2019 and the said fact even lead to further operational obstacles & restrictions of funds in completion of the project and leading to delay in completion of the project which had been beyond the control of the respondents and was extendable as per the agreed terms.
- f. That the respondent company had been hard trying to avail all the approvals, permissions and sanctions from the relevant authorities and discharging the additional costs of renewal of license, plans and sanctions. And had the approvals & renewal of license be granted in



- time the respondent, would have duly completed the project within the permissible time period.
- g. More so the bans to construction activity imposed by the NGT from time to time and lastly in the months of October - November 2019 have further led to delay in completion of the project which are per se beyond the control of the respondent.
- h. That if the period of pendency of the license is condoned and extended than the respondent has delivered the project well within the agreed period of completion and therefore, there is no occasion or cause of action in favour of the complainant to file the present complaint.
- i. That thereby, the delay being occasioned is beyond the control of the respondent i.e. firstly due to the grant of consent to establish and thereafter due to the lapse of license and the same is excusable as contemplated and agreed by the parties vide para 3(b) (i) & (ii) of the apartment buyer's agreement executed between the parties and the agreed period of 36 months plus 6 months grace period is extendable and the complainant is estopped from filing the present complaint.
- j. Further it is stated that it is the respondent who had been suffering due to the delay that is being occasioned and has to face extra charges and costs and expenses in getting all the above permissions renewed and in particular the renewal of license and the costs of registration under RERA. Pertinent to note that the respondent has not received any exaggerated advance amounts from the complainant and construction as on date is much more advanced



than the amount received. Hence there is no cause or occasion to file the present complaint.

- k. That the complaint so preferred is hopelessly barred by limitation and the complainant is estopped from filling the present complaint due to his own acts, conduct and latches. The complainant is estopped to file the present complaint due to his own acts and conduct of accepting the possession upon securing best possible deal for himself and having never objected to the delay being so occasioned. Pertinent to note that the entire obligations of completion of the project is upon the respondent and the failure to pay the due amounts in a timely manner by so many of the allottees including the complainant have led to multiple problems and extra costs on the respondent leading to further delays.
- l. That the complainant does not have any cause of action under the jurisdiction of the hon'ble authority and hence the complaint is liable to be dismissed. That last and not the least the complainant in actual is only seeking a relief of compensation and interest, apart from direction for possession which has already been offered, which are beyond the scope of jurisdiction of the hon'ble authority under section 36 to 38 of the Act. Hence the complaint on the face of it is liable to be rejected.
7. Copies of all the documents have been filed and placed on record. The authenticity is not in dispute. Hence, the complaint can be decided on the basis of theses undisputed documents.

E. Jurisdiction of the authority

8. 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

9. 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

10. 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 complainant at a later stage.

F. Findings on the relief sought by the complainant

F.I. Direct the respondent to pay delay possession charges at the prescribed rate of interest to the complainant for the period of delay in delivery of possession of the booked unit.

11. In the present complaint, the complainant intends to continue with the project and is seeking delayed 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."

12. Clause 3(a) of the flat buyer agreement (in short, agreement) provides for handing over of possession and is reproduced below: -

"3. POSSESSION

(a) Offer of possession:

That subject to terms of this Clause 3, and subject to the APARTMENT ALLOTTEE(S) having complied with all the terms and conditions of this Agreement and not being in default under any of the provisions, formalities, registration of sale deed, documentation, payment of all amount due and payable to the DEVELOPER by the APARTMENT ALLOTTEE(S) under this agreement etc., as prescribed by the DEVELOPER, the DEVELOPER proposes to hand over the possession of the APARTMENT within a period of thirty (36) months with a grace period of 6 months, from the date of commencement of construction of the Complex upon the receipt of all project related approvals including sanction of building plan/revised plan and approval of all concerned authorities including the Fire Service Department, Civil Aviation Department, Traffic Department, Pollution Control Department etc. as may be required for commencing, carrying on and completing the said Complex subject to force majeure, restraints or restriction from any court/authorities. It is however understood between the parties that the possession of various Blocks/Towers comprised in the Complex as also the various common facilities planned therein shall be ready & completed in phases and will be handed over to the allottees of different Block/Towers as and when completed in a phased manner."

13. The authority has gone through the possession clause of the agreement and observed that 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



favour of the promoter and against the allottee that even a single situation may make the possession clause irrelevant for the purpose of allottee and the committed date for handing over possession loses its meaning. If the said possession clause is read in entirety, the time period of handing over possession is only a tentative period for completion of the construction of the flat in question and the promoter is aiming to extend this time period indefinitely on one eventuality or the other. Moreover, the said clause is an inclusive clause wherein the numerous approvals have been mentioned for commencement of construction and the said approvals are sole liability of the promoter for which allottee cannot be allowed to suffer. It is settled proposition of law that one cannot get the advantage of his own fault. 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.

Admissibility of grace period: The apartment buyer's agreement was executed on 25.03.2013 and as per clause 3(a) of the said agreement, the promoter has proposed to hand over the possession of the said unit within 36 months with an extended period of 6 months from the date of commencement of construction. The Consent to Establish by the office of Haryana State Pollution Board, Panchkula was granted on 02.12.2013. The due date of handing over possession has been calculated from the date of consent to establish. Since in the present case, the promoter is seeking 6 months' time as grace period and the



BBA incorporates unqualified reason for grace period/extended period of 6 months in the possession clause for obtaining occupation certificate. Accordingly, the authority literally interpreting the same allows this grace period of 6 months to the promoter at this stage.

14. **Admissibility of delay possession charges at prescribed rate of interest:** 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.”

15. 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.
16. 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., **22.09.2021** is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.
17. 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—

(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;"

18. 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.

F. II. Direct the respondent execute and register the sale deed in the concerned sub registrar office in favour of complainant of the booked unit.

19. In the present case, the complainant was offered possession by the respondent on 01.03.2020 in respect of unit no. 456, Tower Orchid after receipt of OC dated 29.11.2019 and 24.02.2020. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted villa to the complainant as per the terms and conditions of the buyer's agreement dated 25.03.2013 executed between the parties.
20. It is observed that proviso to clause 3(b)(iii) of the buyer's agreement dated 25.03.2013 provides for execution of conveyance deed in favor of



an allottee within reasonable time. The relevant clause of the buyer's agreement reads under:

"Provided all the details, documents as provided in the written notice as stated in this clause and/ or other documents required for the purpose of registration of the Conveyance Deed, the DEVELOPER shall make all reasonable efforts to get the Conveyance Deed registered within a reasonable time. The APARTMENT ALLOTTEE(S) agrees and undertakes to make himself/ herself available, if required, for the purpose of registration on the date(s) as informed by the DEVELOPER"

21. Since the developer do not mention any specific time period for executing the conveyance deed in the BBA nor has mentioned in the offer of possession therefore this reasonable time would mean same as mentioned in, proviso to Section 17(1) of the Act i.e., 3 months from the date of issue of occupancy certificate. The proviso to section 17(1) is produced as under:

*".....
Provided that, in the absence of any local law, conveyance deed in favour of the allottee or the association of the allottees or the competent authority, as the case may be, under this section shall be carried out by the promoter within three months from date of issue of occupancy certificate.*

....."

22. On consideration of the documents available on record and submissions made 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 3(a) of the agreement executed between the parties on 25.03.2013, the possession of the subject apartment was to be delivered within 36 months from the date of commencement of construction or date of execution of agreement whichever is later. The period of 36 months expired on 02.12.2016. As far as grace period is concerned, the same is allowed for the reasons quoted above. Therefore,



the due date of handing over possession is 02.06.2017. The respondent has offered the possession of the subject apartment on 01.03.2020. Accordingly, it is the failure of the respondent/promoter to fulfil its obligations and responsibilities as per the 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 shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 02.06.2017 till the offer of the possession plus two months i.e., 01.05.2020, at prescribed rate i.e., 9.30 % p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules.

G. Directions of the authority

23. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligations casted upon the promoters as per the functions entrusted to the authority under section 34(f):

- i. The respondent is directed to pay interest at the prescribed rate of 9.30% p.a. for every month of delay from the due date of possession i.e., 02.06.2017 till the offer of possession plus two months i.e., 01.05.2020.
- ii. The arrears of such interest accrued from 02.06.2017 till the offer of possession plus two months i.e., 01.05.2020 shall be paid by the promoters to the allottee within a period of 90 days from date of this order.



- iii. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
 - iv. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same rate of interest which the promoters shall be liable to pay the allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.
 - v. The respondents shall not charge anything from the complainant which is not the part of the agreement. However, holding charges shall not be charged by the promoters at any point of time even after being part of agreement as per law settled by Hon'ble Supreme Court in civil appeal no. 3864-3889/2020.
 - vi. The respondent shall execute the conveyance deed within 3 months of this order upon payment of requisite stamp duty as per the norms of the state government.
24. Complaint stands disposed of.
25. File be consigned to registry.


(Samir Kumar)

Member


(Vijay Kumar Goyal)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 22.09.2021