

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

Complaint no. : 4837 of 2020  
First date of hearing : 28.01.2021  
Date of decision : 03.08.2021

Mr. Jasmer Singh

**Address:** - R/o 246-R, Model Town, Panipat,  
Haryana - 132103

**Complainant**

**Versus**

ORRIS Infrastructure Pvt. Ltd.

**Office address:** - C-3/260, Janankpuri, New  
Delhi - 110058.

Also at: J-10/5, DLF Phase - II, Mehrauli-  
Gurgaon Road - 122002.

**Respondent**

**CORAM:**

Shri Samir Kumar  
Shri Vijay Kumar Goyal

**Member**  
**Member**

**APPEARANCE:**

Manoj Yadav  
Charu Rustagi

Advocate for the complainant  
Advocate for the respondent

**ORDER**

1. The present complaint dated 22.12.2020 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	Aster Court Premier, Sector 85, Gurugram.
2.	Project area	25.018 acres
3.	Nature of the project	Residential Housing Project
4.	DTCP license no. and validity status	39 of 2009 dated 24.07.2009 valid upto 23.07.2024 and 99 of 2011 dated 17.11.2011 valid upto 16.11.2024
5.	Name of licensee	BE Office Automation Products Pvt. Ltd. And 8 others <b>(For license no. 39 of 2009)</b> 1. M/s Radha Estate Pvt. Ltd. 2. M/s Elegant Land and Housing Pvt. Ltd.

		2. M/s Salmon Land and Housing Pvt. Ltd. <b>(For license no. 99 of 2011)</b>
6.	RERA Registered/ not registered	<b>Registered</b> vide Registration no. 19 of 2018 dated 13.10.2018 valid till 30.10.2020
7.	Unit no.	802, VIII Floor, Tower No. 3N
8.	Unit measuring	1970 sq. ft. <b>(Initial super area)</b> 2120 sq. ft. <b>(Revised super area)</b>
9.	Date of execution of Buyers Agreement	23.07.2012 (Page 35 of the complaint)
10.	Payment plan	Construction linked payment plan (Page 60 of the complaint)
11.	Total Sale consideration	Rs. 62,01,058/- (As per the final statement of account dated 16.04.2021)
12.	Total amount paid by the complainant	Rs. 49,35,234/- (As per the final statement of account dated 16.04.2021)
13.	Date of sanction of building plans	10.04.2012 (As per project details)
14.	Date of commencement of construction	Not provided
15.	Due date of delivery of possession  (As per clause 10.1 within a period of 36 months from the date of sanction of building plans, date of	23.07.2015 (No grace period is given)  (Due date of possession is calculated from the date of

	construction or date of execution of agreement, whichever is later)	execution of the agreement)
16.	Offer of possession	16.04.2021
17.	Delay in handing over possession till 16.04.2021 plus two months 16.06.2021	5 years 11 months and 24 days
18.	Occupation Certificate received on	12.04.2021

**B. Facts of the complainant**

3. The complainant has made following submissions in the complaint:
  - i. That the complainant had booked an apartment bearing No. 802 of 1970 sq. ft. in Tower 3N in the project "Aster Court Premier", (hereinafter, the project) sector 85, Gurugram of the respondent in 2012 for Rs. 48,72,017/- and paid an advance amount of Rs. 6,89,700/- on 01.03.2012.
  - ii. Thereafter, a pre-printed and one-sided apartment buyer's agreement (hereinafter, ABA) was offered to the complainant as late as on 23.07.2012. That along with the ABA, the respondent provided payment schedule in which number of installments to be paid by the complainant towards the discharge of the consideration of the respective apartment was provided. Based on the payment plan the complainant paid regular installments. The above amount included extra charges like service tax and interest on delayed payment @18% per annum.

- iii. That at the time of applying for the apartment/flat and payment of application money, the ABA is not shown to the allottee. There was a gap of substantial period between the date of application and signing of agreement. The agreement is shown and sent for signature to the allottee after paying the application money. ABA was a fixed set of papers, which was asked to be signed by the buyers' including the present complainant and no modification was entertained by the respondent. On request to change the one-sided clauses, it was told that the ABA has to be signed as it is and in case it is not acceptable than the allotment will stand cancelled and earnest money will be forfeited.
- iv. That as per clause 10.1 of the ABA, the respondent was bound to give possession of the flat to the complainant within 36 months from the date of execution of the ABA by the company or sanction of plans or commencement of construction, whichever is later. The demand for the start of construction was raised on 26.03.2012. That the ABA was executed on 23.07.2012 and therefore, the possession of the apartment was due on or before 23.07.2015. The construction of the complex is not yet completed. The complainant has paid almost the entire sum demanded by the respondent towards the apartment but the respondent has not fulfilled his promise

- to handover the possession of the flat within the promised time.
- v. That despite a delay of many years, the construction of the apartment was not completed within the promised time. It can hence be seen that the respondent is deficient in rendering services and after extracting most of the money from the buyer including the present complainant has deliberately not completed the construction of the apartment within the promised time.
- vi. The complainant has paid a substantial amount towards the consideration of the apartment which amounts to almost entire sum demand raised by the respondent till date. Despite on-time payments of almost the entire demand of the respondent and despite repeated requests and reminders over letters, email, phone calls and personal visits by the complainant, the respondent has failed to deliver the possession of the apartment to the complainant within the promised time.
- vii. That the complainant had also taken a loan from State Bank of India (SBI) for a sanctioned loan amount of Rs 30,00,000 @10.25% p.a. in the year 2012 and has been paying continuous installments all these years at the aforesaid higher rate of interest.

- viii. That as per the clause 11.5 of the terms of ABA, it was agreed by the respondent that in case of any delay, the respondent shall pay to the complainant, a compensation at the rate Rs. 5/- per sq. ft. per month of the super area till the date of notice of the possession. The respondents act of incorporating such one-sided patently unjust clauses in the ABA amounts to unfair trade practice.
- ix. That the buyers including the present complainant are suffering from tremendous financial losses without getting the benefit of the apartment due to the sole conduct of the respondent of not delivering the possession within the promised time.
- x. That the complainant has made an on-time payment of all the demands of the respondent but the possession has not been handed over despite the delay of many years. As per clause 8 of the ABA, the respondent charges interest @ 18% p.a. from the buyers/allottees/purchasers on any amount due. On the grounds of parity and equity, the respondent should also be subjected to pay the same rate of interest.
- xi. That since the unexpected, unreasonable and inordinate delay was caused on the part of the respondent due to deficiency of services by not completing the construction of the project and not making efforts towards fulfillment of their obligation to hand over the possession of the apartment in the

project to the complainant even after many years of purchasing the flat by the complainant, the complainant has suffered a lot of mental pressure, harassment and agony at the hands of the respondent which cannot be appropriately compensated by any amount. However, any reasonable amount of compensation may be awarded to the complainant from the respondent towards mental agony.

- xii. That the respondent vide its statement of account dated 07.12.2020 has without any justification increased the area of the apartment booked by the complainant from 1970 sq. ft. to 2120 sq. ft, thus, the price also increased by Rs 2,89,350/-. That the aforesaid increase in super area of the apartment without proportionate increase in the carpet area or usable area of the apartment amounts to an unfair trade practice. That the complainant is not obligated to pay this unjustified and illegal demand of Rs 2,89,350/- raised by the respondent on account of purported increase in super area of the apartment. That the respondent in the aforesaid statement has also charged a delayed payment interest of Rs 1,03,652/- without providing any details of the same. That the respondent miserably failed to hand over the actual physical possession of the apartment to the complainant.



**C. Relief sought by the complainant:**

4. The complainant has sought the following reliefs:
- i. To direct the respondent to handover the possession of the flat to the complainant with all the amenities, as assured in the brochure and as promised at the time of booking of the flat as soon as possible with proper occupation certificate.
  - 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.
  - iii. To direct the respondent not to charge the amount of Rs. 2,89,350/- from the complainant on account of increase in super area of the apartment.
  - iv. To restrain the respondent from charging the amount of Rs 1,03,652/- from the complainant on account of delayed payment interest.

**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 present complaint pertains to possession along with compensation for a grievance under section 18 of the Act and is required to be filed before the adjudicating officer under rule-29 of the rules and not before this authority under rule-28.

In the present case, the complainant is seeking possession of the apartment along with compensation and other reliefs. That the complainant has filed the present complaint under rule-28 of the said rules and is seeking the possession of the apartment, compensation and interest under section 18 of the said Act. It is submitted that the complaint, if any, is required to be filed before the adjudicating officer under rule-29 and not before this authority under rule-28 as the authority has no jurisdiction whatsoever to entertain such complaint and as such the complaint is liable to be rejected on this ground alone.

- ii. That in the present case as per clause 10.1 of the ABA dated 23.07.2012, the respondent was supposed to hand over the possession within a period of 36 months from the date of sanction of building plans, date of start of construction or the signing of agreement or within 36 months plus 6 months grace period i.e. altogether 42 months from the date of execution of ABA by the company or sanctions of plans or commencement of construction whichever is later.
- iii. That the respondent has further held that the time for giving possession comes out to be 42 months and can be further increased if the respondent-builder faces hardships or due to the conditions mentioned under clause 11.1, 11.2, 11.3 and 38 of the ABA. Clause 11.1 is reproduced below:

*"11.1 Delay due to reasons beyond the control of the Company If, however, the completion of the said Building / said Complex is delayed by reason of non - availability of steel and/or cement or other building materials or water supply or electric power or slow down, strike or due to dispute with the construction agency(ies) employed by the Company, lock-out or civil commotion, by reason of war or enemy action or terrorist action or earthquake or any act of God or if non - delivery for possession is as a result of any Act, Notice, Order, Rule and Notification of the Government and / or any other Public or Competent Authority or due to delay in sanction of building / zoning plans, grant of completion / occupation certificate by any Competent Authority or for any other reasons beyond the control of the Company then the Allottee agrees that the Company shall be entitled to the extension of time for delivery of possession of the said Apartment. The Company, as a result of such contingency arising, reserves the right to alter or vary the terms and conditions of this Apartment Buyer Agreement or if the circumstances beyond the control of the Company so warrant, the Company may suspend the Scheme for such period as it may consider expedient and the Allottee agrees not to claim compensation / loss / damages of any nature whatsoever (including the compensation stipulated in Clause (11.5) of this Apartment Buyer Agreement) during the period of suspension of the Scheme."*

- iv. That clause 11.2 is "failure to deliver possession due to non-approval of building plan". As per the project report of the said project, approval for the building plan has already been received dated 10.04.2012 and the approval no. being ZP-556-JD(BS)/2012/5150.
- v. That in the intervening period when the construction and development was under progress, there were various factors because of which the construction works had to be put on hold due to reasons beyond the control of the respondent. It is submitted that the parties have agreed that if the delay is on account of force majeure conditions, the respondent shall not be liable for performing its obligations. It is submitted that the project got delayed and proposed possession timelines could

not be completed on account of various reasons few of which are stated below.

- vi. That in the year, 2012 on the directions of the Supreme Court, the mining activities of minor minerals (including sand) were regulated. Supreme Court directed framing of Modern Mineral Concession Rules. The competent authorities took substantial time in framing the rules and in the process the availability of building materials including sand which was an important raw material for development of the said project became scarce in the ncr region. Further, it is pertinent to state that the National Green Tribunal in several cases related to Punjab and Haryana had stayed mining operations including in O.A No. 171/2013, wherein vide order dated 2.11.2015 mining activities were stayed on the yamuna river bed. These orders inter-alia continued till the year 2018. Similar orders staying the mining operations were also passed by the National Green Tribunal. The stopping of mining activity not only made procurement of material difficult but also raised the prices of sand/gravel exponentially.
- vii. That it is important to highlight that on account of non-payment of installments/dues (along with agreed amount of interest on such delayed payments) of this construction linked allotment by the complainant, it has been hard for the respondent to gather funds for the development of the project

which is also one of the major reasons for delay in delivery of the project. It appears that it has become a trend amongst the allottees' nowadays to first not to pay of the installments due or considerably delay the payment of the same and later on knock the doors of the various courts seeking refund of the amount along with compensation or delayed possession compensation, thus taking advantage of their own wrongs, whereas the developer comes under severe resource crunch leading to delays in construction or/and increase in the cost of construction thereof putting the entire project in jeopardy. The crux of the matter which emerges from the aforesaid submission is that had the complainant as well as other similarly situated persons paid of their installments in time, the respondent developer would have sufficient funds to complete the project which is not the case herein. By failing to deposit the installments on time the complainant has violated his contractual commitment and is estopped from raising any plea of delay in construction. Real Estate Regulatory Authority, Gurugram having been enacted by the legislature with the motive of balancing the rights and liabilities of the developer as well as the allottees, thus the complaint is liable to be dismissed on the this ground itself.

viii. That the completion of project requires availability of infrastructure like road, water supply, electricity supply,

sewerage, etc. and after charging EDC and IDC from the promoter, the Haryana Urban Development Authority, has failed to provide the same. The promoter has paid all dues towards the said IDC and EDC however, till date no infrastructure has not been developed. Thus, due to the non-availability of basic infrastructure which was supposed to be developed by competent authorities, it is very difficult for the real estate developers to meet the timeline.

- ix. That it is pertinent to mention here that the respondent had already applied for fire NOC and occupation certificate for the aforesaid towers falling in phase-I. The occupation certificate was applied on 10.11.2019. According to RERA registration, the date of completion of the project was 30.6.2020 which was duly extended due to COVID-19 by a period of 6 months i.e. up to 30.12.2020, vide Order dated 26.5.2020 passed by Haryana Real Estate Regulatory Authority, Gurugram. Thus, the respondent is already in receipt of the fire NOC, thus no delay accountability can be ascertained upon the respondent for the year 2020 due to the ongoing pandemic.
- x. That in addition to the grounds as mentioned above, the project was also delayed due to on-going litigation filed by one of the collaborator/ landowner of land in the project - BE Automation Products (P) Ltd. who was the owner of only 5.8 acres of land in the entire project. BE Automation Products (P)

Ltd. indulged in frivolous litigation and put restraints in execution of the project and sale of apartments. BE Automation Products (P) Ltd. filed cases against the company in each and every forum to create nuisance.

- xi. That a collaboration agreement dated 22.10.2007 was executed between the respondent and BE Automation Products (P) Ltd. setting out the terms and conditions of the collaboration. The said collaboration agreement also provided for the area entitlement of both the parties in the area to be developed on the 25.018 acres and the same was to be calculated on basis of saleable area attributable to 5.8 acres as contributed by BE Automation Products (P) Ltd..
- xii. That after the aforesaid agreement with BE Automation Products (P) Ltd. in 2007, the respondent had acquired 4.5 acres additional land by the virtue of which more flats could have been constructed. BE Automation Products (P) Ltd., by misrepresenting the collaboration agreement raised a claim that it was entitled to proportionate share in the construction on the additional land acquired by the respondent. That after the aforesaid event BE Automation Products (P) Ltd. moved court and filed an application under section 9 of the Arbitration and Conciliation Act, 1996 before the Additional District and Sessions Judge, Gurgaon (hereinafter, ADJ).

- xiii. That the ADJ granted a blanket stay in favour of BE Automation Products (P) Ltd. and against the respondent, whereby the respondent was restrained from creating third party interest in respect of any apartments, villas and commercial areas till the matter could be decided finally by the arbitrator. The respondent was also restrained from receiving any money in respect of sale of apartments, villas and commercial sites etc. or club membership charges or in any other form from any person.
- xiv. That after the above said stay order was passed, the respondent filed F.A.O. No. 9901 of 2014 (O&M) whereby Punjab and Haryana High Court vacated the stay. Then the respondent and BE Automation Products (P) Ltd. went for arbitration and J. Chandramauli Kumar Prasad (retd.), was appointed as sole arbitrator to adjudicate and decide the dispute between the two parties by the High Court vide order dated 30.01.2015. Final award was granted on 12.12.2016 whereby contentions of the respondent were upheld and the share of BE Automation Products (P) Ltd. was restricted to the original 82 flats selected by it. The dispute between the respondent and BE Automation Products (P) Ltd. was further raised on various platforms and the respondent claims that the BE Automation Products Pvt Limited is also responsible for the



delay in the construction of the project on account of various frivolous litigation initiated by the same.

**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:

**F1. Admissibility of grace period due to various orders by NGT and other judicial bodies**

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. However, the various orders as placed on record do not pertain to the ban of construction activity in the State of Haryana, particularly in Gurugram. 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 promoters has not assigned such compelling reasons as to why and how they shall be entitled for further extension of time six months in delivering the possession of the unit.

12. The authority is of the view that commercial hardships does not give the respondent an exception to not perform the contractual obligations. The promoter had proposed to hand over the possession of the apartment by 23.07.2015 and further provided in agreement that promoter shall be entitled to a grace periods of six month each unless there is a delay for reason mentioned in clauses 11.1, 11.2, 11.3 and 38. As a matter of fact, the promoter has not given the valid reason for delay to complete the project within the time limit prescribed

by the promoter in the apartment buyer's agreement. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace periods of six months each 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. 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. 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 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.
16. 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).*

17. The authority has observed that the total consideration of the apartment of Rs. 62,01,058/- and the complainant has paid Rs. 49,35,234/-. The allottee has failed to make payment despite several demand letters and reminders issued by the promoter. 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***

*Time is the essence with respect to the Allottee's obligations of the Buyer to pay the price of the said Apartment in accordance with the Schedule of Payments as given in Annexure-I along with other payments such as applicable stamp duty, registration fee, Taxes and other charges stipulated under this Apartment Buyer Agreement to be paid on or before due date or as and when demanded by the Company as the case may be and also perform or observe all other obligations of the Allottee under this Apartment Buyer Agreement. It*



*is clearly agreed and understood by the Allottee that it shall not be obligatory on the part of the Company to send Demand Notices/ reminder regarding the payment to be made by the Allottee as per Schedule of Payments (Annexure-I) or obligations to be performed by the Allottee. In the event the Allottee fails to make the payments on or before the due date, the Company may cancel the allotment made herein. However, in case of any default/ delay in payment by the Allottee, the Company may, at its sole option and discretion, without prejudice to its rights as set out in Clauses (4) and (12) of this Agreement, waive the breach by the Allottee in not making the payments as per the Schedule of Payments given in Annexure I but on condition that the Allottee shall pay to the Company interest which shall be charged after due date @ 15% per annum for the first ninety days from the date it was due and 18% per annum for all periods exceeding first ninety days. It is made clear and so agreed by the Allottee that the exercise of discretion by the Company in case of one Allottee shall not be construed to be precedent and/ or binding on the Company to exercise such discretion in case of other Allottees."*

18. The allottee has paid 78% of the total sale consideration as per the statement of account dated 16.04.2021. There is increase in the super area of the unit i.e., from 1970 sq. ft. to 2120 sq. ft., thus, resulting in increase of the total sale consideration. 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.
19. The authority is of the view that the complainant has taken a loan from SBI (as admitted by him in facts and corresponding documents have also been furnished along with the complaint) thus, the respondent cannot be given benefit of this objection.

**F3. Delay due to ongoing pandemic in getting required approvals from various competent authorities**

20. The respondent has raised an objection that the delay in getting occupation certificate and other necessary approvals has been caused due to the ongoing pandemic and lockdown imposed by the government in return. The application for issuance of occupancy certificate shall be moved in the prescribed form and accompanied by the documents mentioned in sub-code 4.10(1) of the Haryana Building Code, 2017 (hereinafter, the Code). The said section is reproduced below:

**Section 4.10: Occupation Certificate**

*"(1) Every person who intends to occupy such a building or part thereof shall apply for the occupation certificate in Form BR-IV(A) or BR-IV(B), which shall be accompanied by certificates in relevant Form BR-V (1) or BR-V(2) duly signed by the Architect and/ or the Engineer and along with following documents:*

*(i) Detail of sanctionable violations from the approved building plans, if any in the building, jointly signed by the owner, Architect and Engineer. (ii) Complete Completion drawings or as-built drawings along with completion certificate from Architect as per Form BR-VI. (iii) Photographs of front, side, rear setbacks, front and rear elevation of the building shall be submitted along with photographs of essential areas like cut outs and shafts from the roof top. An un-editable compact disc/ DVD/ any other electronic media containing all photographs shall also be submitted. (iv) Completion certificate from Bureau of Energy Efficiency (BEE) Certified Energy Auditor for installation of Rooftop Solar Photo Voltaic Power Plant in accordance to orders/ policies issued by the Renewable Energy Department from time to time. (v) Completion Certificate from HAREDA or Bureau of Energy Efficiency (BEE) Certified Energy Auditor for constructing building in accordance to the provision of ECBC, wherever applicable. (vi) No Objection Certificate (NOC) of fire safety of building from concerned Chief Fire Officer or an officer authorized for the purpose.*

*(2) No owner/ applicant shall occupy or allow any other person to occupy new building or part of a new building or any portion whatsoever, until such building or part thereof has been certified by the Competent Authority or by any officer authorized by him in this behalf*





*as having been completed in accordance with the permission granted and an 'Occupation Certificate' has been issued in Form BRVII. However, Competent Authority may also seek composition charges of compoundable violations which are compoundable before issuance of Form BRVII. Further, the water, sewer and electricity connection be released only after issuance of said occupation certificate by the Competent Authority.*

*(3) The 'Occupation Certificate' shall be issued on the basis of parameters mentioned below:-*

*(i) Minimum 25% of total permissible ground coverage, excluding ancillary zone, shall be essential for issue of occupation certificate (except for industrial buildings) for the first time or as specified by the Government:*

*Provided, in case of residential plotted, minimum 50% of the total permissible ground coverage shall be essential to be constructed to obtain occupation certificate, where one habitable room, a kitchen and a toilet forming a part of submitted building is completed.*

*(ii) The debris and rubbish consequent upon the construction has been cleared from the site and its surroundings.*

*(4) After receipt of application, the Competent Authority shall communicate in writing within 60 days, his decision for grant/ refusal of such permission for occupation of the building in Form BR-VII. The E-register shall be maintained as specified in Code-4.8 for maintaining record in respect of Occupation Certificate.*

*(5) If no communication is received from the Competent Authority within 60 days of submitting the application for "Occupation Certificate", the owner is permitted to occupy building, considering deemed issuance of "Occupation certificate" and the application Form BR-IV (A) or BR-IV(B) shall act as "Occupation Certificate". However, the competent authority may check the violations made by the owner and take suitable action."*

21. As per the provisions of above-mentioned section 4.10 of the Code, there are certain statutory formalities that are to be complied with before the submission of application for grant of occupation certificate. The utmost significance is given to the 'no-objection certificate' from the fire department (clause vi of section 4.10 of the Code). Though the application for the grant of occupation certificate/ completion certificate has been

made by the respondent in 2019 itself. However, the NOC from the fire department was obtained by the promoter on 17.02.2021. Thereafter, the occupation certificate was received on 12.04.2021. Thus, as the requisite document (NOC of the fire department) was not submitted along with application, the application for issuance of occupation certificate cannot be said to be complete. There is no applicability of deemed occupation certificate (clause 5 of section 4.10 of the Code) in case of deficient application, application not being in prescribed form, application not accompanied by prescribed documents or without meeting the prerequisite for applying for occupation certificate. Incomplete application is no application in eyes of law.

22. Thus, as the builder-respondent failed to apply for OC within the period of 36 months and the possession has been offered only after 16.04.2021, the respondent cannot claim benefit of the grace period of six months.

**F4. Delay due to on-going litigation filed by collaborator/ landowner**

23. The last objection raised by the respondent is that there was delay in development of the project as the respondent was involved in litigation at various forums and arbitration proceedings with the landowner/ collaborator. The authority

is of the view that the various proceedings between the respondent and the collaborator were ongoing till 15.03.2017 (fact admitted by the respondent), yet the possession has been offered as late as 16.04.2021. Thus, the respondent's claim for getting the delay condone is rejected as an innocent allottee should suffer because of the dispute between the promoters.

### **G. Findings on the relief sought by the complainant**

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

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

25. The possession clause 10.1 of the ABA is reproduced below:

***10.1 Schedule for possession of the said apartment***

*"The company based on its present plans and estimates and subject to all just exceptions: contemplates to complete construction of the said Building/ said Apartment within the period of 36 months plus grace period of 6 months from the date of execution of the Apartment Buyer Agreement by the Company or Sanction of Plans or Commencement of*

*Construction whichever is later, unless there shall be delay or there shall be failure due to reasons mentioned in Clauses (11.1).(11.2). (11.3) and Clause (38) or due to failure of Allottee(s) to pay in time the price of the said Apartment along with all other charges and dues in accordance with the schedule of payments given in Annexure 1 or as per the demands raised by the Company from time to time or any failure on the part of the Allottee(s) to abide by any terms or conditions of this Apartment Buyer Agreement."*

26. 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.

27. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within period of 36 months from the date of start of construction or execution of the agreement, whichever is later. In the present complaint, the date of start of construction has not been provided therefore, the due date of handing over possession comes out to be 23.07.2015 which is calculated from date of execution of agreement i.e., 23.07.2012. It is further provided in agreement that promoter shall be entitled to a grace period of 6 months 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 in 2019 and the occupation certificate was issued to the promoter on 12.04.2021. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 6 months cannot be allowed to the promoter at this stage.
28. **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. 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]**

*"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."*

29. 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.
30. 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., 3.08.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.
31. **Rate of interest to be paid by complainant for delay in making payments:** The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

*"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.*

*Explanation. —For the purpose of this clause—*

*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;"*

32. 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.
33. 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 10.1 of the buyer's agreement executed between the parties on 23.07.2012, possession of the said unit was to be delivered within a period of 36 months from the date of execution of agreement, sanction of building plans or start of construction. The date of sanction of building plans is 10.04.2012, the date of start of construction has not been provided. Thus, the due date of possession is calculated from the date of execution of agreement as it is later. The respondent-builder had claimed a grace period of 6 months because of circumstances out of the control of the company (clause 11.1), delay in getting approval of building

plans (clause 11.2), also because of the delay caused due to government orders (11.3) and clause 38 that the allottees to pay for the super area proportionate to their share. The grace period cannot be allowed to the respondent as the delay in getting a government document i.e., 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 12.04.2021. Thus, grace period is concerned, the same is disallowed for the reasons quoted above. Therefore the due date of possession comes out be 23.07.2015. In the present case, the complainant were offered possession by the respondent on 16.04.2021. 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 buyer's agreement dated 23.07.2012 executed between the parties.

34. 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 12.04.2021. However, the respondent offered the possession of the unit in question to the complainant only on 16.04.2021, 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 he has 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. 23.07.2015 till the expiry of 2 months from the date of offer of possession (16.04.2021) which comes out to be 16.06.2021.

35. 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. 23.07.2015 till 16.06.2021 as per provisions of section 18(1) of the Act read with rule 15 of the rules.

#### **H. Directions of the authority**

36. 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. 23.07.2015 till 16.06.2021 i.e. expiry of 2 months from the date of offer of possession (16.04.2021).
- ii. The arrears of such interest accrued from 23.07.2015 till 16.06.2021 shall be paid by the promoter to the allottee within a period of 90 days from the date of this order as per rule 16 of the rules.
- iii. The complainant are 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 apartment buyer agreement as per law settled by hon'ble Supreme Court in **civil appeal nos. 3864-3889/2020 decided on 14.12.2020.**

37. Complaint stands disposed of.

38. File be consigned to registry.

(Samir Kumar)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 03.08.2021

(Vijay Kumar Goyal)

Member

Judgement uploaded on 26.11.2021.