

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

Complaint no.:	4041 of 2020
First date of hearing:	29.01.2021
Date of decision:	02.09.2021

1. Mr. Saurabh Sharma
2. Mrs. Anita Sharma
R/o C-66, 2nd Floor, Shivaji Park, Punjabi Bagh- New
Delhi.

Complainants

Versus

M/s. Anand Divine Developers Private Ltd.
Office address: 711/92, Deepali Nehru Place,
New Delhi-110019

Respondent

CORAM:

Shri Vijay Kumar Goyal
Shri Samir Kumar

**Member
Member**

APPEARANCE:

Utkarsh Thapar (Advocate)
M.K Dang (Advocate)

Complainants
Respondent

ORDER

1. The present complaint dated 03.12.2020 has been filed by the complainants/allottees 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 allottees 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 complainants, 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		"ATS TRIUMPH", Sector-104, Gurugram		
2.	Project area		14.093 acres		
3.	Nature of the project		Residential Group Housing Colony		
4.	DTCP license no. and validity status				
	Sno	Licence no. & date	Licensee	Validity	Area
	i.	63 of 2011 dated 16.07.2011	Great Value HPL Infratech Pvt. Ltd.	15.07.2019	10.462 acres
	ii.	10 of 2012 dated 03.02.2012	Great Value HPL Infratech Pvt. Ltd.	02.02.2020	10.462 acres
5.	RERA registration details		Not registered		
6.	Unit no.		8PH1 Tower -8		
7.	Unit measuring		4781 sq. ft. Super area		
8.	Date of execution of flat buyer agreement		21.02.2019 (Not signed)		
9.	Payment plan		Down payment plan		



10.	Total consideration	₹ 2,85,26,780/- (As per payment plan of buyer's agreement dated 21.02.2019 at pg. 40 of complaint)
11.	Total amount paid by the complainants	₹ 2,74,95,000/- 3,20,68,999/- (As per subsidiary ledger on pg-42 of complaint)
12.	Due date of delivery of possession as per clause 18 of the flat buyer's agreement is on or before 30.09.2019 + 3 months grace period. [Page 27 of complaint]	30.06.2020 (Note: 3 months grace period + 6 months extension due to covid-19)
13.	Delay in handing over possession till the date of this order i.e., 02.09.2021	1 year 8 months 25 days
14.	Status of the project	Completed
15.	Occupation certificate	29.05.2019
16.	Offer of possession	30.05.2019

B. Facts of the complaint

3. The complainants pleaded the complaint on the following facts:
- That in February 2019, while searching for a residential apartment, the complainants came across the project "ATS Triumph" (hereinafter referred to as "**project**"), being developed by the respondent company, situated at sector 104, Gurugram.



- b. The officials of the respondent company represented an extremely rosy picture of the project to the complainants and promised them that they would be provided with a lavish apartment in the project. It was further promised to the complainants by the respondent company that the possession of the apartment would be provided to them by or before September 2019. That lured in by the promises and assurances made by the officials of the respondent company, the complainants agreed to purchase an apartment (hereinafter referred to as "**unit**") bearing no. 8PH1, having a super area of 4781 square feet, situated at the 27th floor in the project; and on 05.02.2019 and 14.02.2019, the complainants paid INR 25,00,000/- (Rupees Twenty Five Lakh Only) and INR 7,00,000/- (Rupees Seven Lakh Only) respectively as the booking amount towards the purchase of the unit in the project.
- c. That it is pertinent to mention that before signing the builder buyer agreement ("BBA"), the respondent company assured the complainants that the construction of the project would at an extremely fast pace so that there is no delay in handing over the possession. That on 21.02.2019, the builder buyer agreement ("BBA") of the apartment was executed between the respondent company and the complainants. In terms of the agreement, the possession of the unit had to be offered to the complainants by or before 30.09.2019. Further, as per the terms of the agreement, the total consideration of the apartment was INR 2,85,26,780/- (Rupees Two Crore Eighty-Five Lakh Twenty-Six Thousand Seven Hundred Eighty Only).



- d. That as per the terms of the agreement, the complainants had to pay 93% of the total consideration of the unit before the possession of the unit was offered to them, and 7% of the total consideration of the unit i.e., approximately INR 19,00,000/- (Rupees Nineteen Lakh Only) after the possession was offered to them.
- e. That vide an email dated 01.06.2019, the respondent company informed the complainants that they had received the occupation certificate for the project. Further, vide the same email, they offered the possession of the unit to the complainants, and asked them to pay the remaining amount due towards the purchase of the unit. The complainants were shocked to receive the said email as the construction of the project was not remotely complete. In furtherance of the same, the complainants, vide a response to the aforementioned email, emailed the respondent company on 04.06.2019, expressing his disappointment towards the status of the construction of the project. The project was nowhere close to completion at the said time and there was no way the respondent company would have been able to provide the possession of the unit to the complainants within the stipulated time i.e., 30.09.2019. further, vide email dated 20.06.2019, again asked the complainants to make the payment of the dues towards the purchase of the unit to avoid delay penalty charges and interest. It was again assured to the complainants, that the possession of the unit would be provided to them within 90 days i.e., 30.09.2019 (possession date as per the agreement).
- f. Aggrieved and disappointed, however, with no other option left but to accept the unlawful demands of the respondent company since



- the complainants had already paid a huge amount towards the purchase of the unit. Further, to avoid the delay charges, the complainants, made the full payment towards the purchase of the unit by July 2019. The complainants paid INR 3,20,68,999/- (Rupees Three Crore Twenty Lakh Sixty-Eight Thousand Nine Hundred and Ninety-Nine Only) (including GST) towards the purchase of the unit.
- g. That since the complainants had taken a home loan for financing the purchase of the unit, they were also bearing interest on the said loan amount. Thus, with no other option left, the complainants again sent an email dated 22.06.2020 to the respondent company and requested them to provide the possession date of the unit at the earliest.
- h. That till date, the respondent company has not provided any concrete response to the complainants as to when the possession of the unit would be provided to them. That even after paying a huge sum of INR 3,20,68,999/-, the complainants are facing immense mental and financial agony due to the unprofessional, unethical and unlawful acts/conduct of the respondent company.
- i. That the misery of the complainants extends till date, as they are compelled to reside in a rented accommodation since September 2019, because they were promised that they would be provided with a home of their own by such time. The complainants are paying INR 35,000/- per month since September 2019. Thus, till date, the complainants have paid INR 4,90,000/- (Rupees Four Lakh Ninety Thousand Only) for the said rented accommodation.
- j. That the respondent company had to deliver the possession of the unit by or before 30.09.2019, or by 30.12.2019. However, even after

almost 1 year from the promised date of possession, the construction of the project has not been completed.

- k. It is further pertinent to mention that in August 2020, the respondent company organized a meeting with the complainants, wherein the officials of the respondent company themselves admitted that they were unable to provide the possession of the unit to the complainants within the stipulated time. Moreover, it was also promised to the complainants that they would be granted compensation for the delay in providing the possession, after the possession was provided to the complainants. Thus, it is deemed admission on part of the respondent company that they were at default with regards to the services provided to the complainants.
- l. That the respondent company has cheated the complainants by luring them into purchasing the unit and extracting their hard-earned money by promising them that the construction of the project would be completed on time, and they would be provided with the possession as promised. Further, the respondent company maliciously sent the email dated 01.06.2019 to the complainants, wherein the respondent company was offering the possession of the unit. Further, the complainants were asked to pay the remaining amount due towards the purchase of the unit, despite being well-aware that the construction of the project was not complete and was not going to be complete by the promised date of possession.

C. Relief sought by the complainants:

4. The complainants have sought following reliefs:

- a. Direct the respondent to provide the possession of the unit to the complainants as soon as possible after obtaining all necessary documents from the concerned department(s).
 - b. To direct respondent to pay the delayed charges to the complainants as per RERA rate of interest on the amount paid by the complainants i.e., INR 3,20,68,999/- (Rupees Three Crore Twenty Lakh Sixty-Eight Thousand Nine Hundred and Ninety-Nine Only) w.e.f. 30.09.2019 till the delivery of possession.
 - c. Direct the respondent to pay INR 4,90,000/- to the complainants as rent paid by the complainants from September 2019 till date; and
 - d. Any other relief which this Hon'ble authority deems fit and proper may also be granted in favour of the complainants.
5. On the date of hearing, the authority explained to the respondent/promoters 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:
- a. That the present complaint is neither maintainable nor tenable by both law and facts. It is submitted that the present complaint is not maintainable before this hon'ble authority. The complainants have filed the present complaint seeking interest and compensation. It is respectfully submitted that complaint pertaining to interest, compensation and refund are to be decided by the adjudicating officer under Section 71 of the Act, and not by this hon'ble authority. The present complaint is liable to be dismissed on this ground alone.



- b. That even otherwise, the complainants have no locus standi and cause of action to file the present complaint. The present complaint is based on erroneous interpretation of the provisions of the Act as well as an incorrect understanding of the terms and conditions of the allotment letter/buyer's agreement dated 21.02.2019, which is evidently from the submissions made in the following paragraphs of the present reply.
- c. That the complaint is not maintainable for the reason that the agreement contains an arbitration clause which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute i.e. clause 39 of the buyer's agreement, which is reproduced for the ready reference of this hon'ble authority-

"All or any dispute arising out of or touching upon or in relation to the terms of this Agreement or its termination, including the interpretation and validity thereof and the respective rights and obligations of the Parties shall be settled amicably by mutual discussion, failing which the same shall be settled through arbitration. The arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 as amended up to date. A sole arbitrator who shall be nominated by the Board of Directors of the company shall hold the arbitration proceedings at the office of the Company at Noida. The allottee hereby confirms that he shall have no objection to this appointment, more particularly on the ground that the Sole Arbitrator being appointed by the Board of Directors of the company likely to be biased in favour of the company. The Courts at Noida, Uttar Pradesh shall to the specific exclusion of all other courts alone have the exclusive jurisdiction in all matters arising out of/touching and/or concerning this Agreement regardless of the place of execution or subject matter of this Agreement. Both the parties in equal proportion shall pay the fees of the Arbitrator.

- d. That the complainants, after checking the veracity of the project namely, 'ATS Triumph', Sector 104, Gurugram had applied for allotment of a residential unit and agreed to be bound by the terms and conditions of the documents executed by the parties to the complaint. It is submitted that based on the application of the



complainants, the buyer's agreement was executed on 21.02.2019 for unit bearing no. 8HP1, 27th Floor, Tower 8 having super area of 444.16 sq. meter.

- e. That it was agreed that as per clause 4 of the buyer's agreement, the sale consideration of Rs. 2,85,26,780/- was exclusive of other costs, charges including but not limited to maintenance, stamp duty and registration charges, service tax, proportionate taxes and proportionate charges for provision of any other items/facilities. As per clause 7 of the buyer's agreement, timely payment by the complainants of the basic sale price and other charges as stipulated in the payment plan was to be the essence of the agreement.
- f. That the possession of the unit was supposed to be offered to the complainants in accordance with the agreed terms and conditions of the buyer's agreement. It is submitted that clause 18 of the buyer's agreement clearly states that *"Barring unforeseen circumstances and Force majeure events as stipulated hereunder, the possession of the said Apartment is proposed to be offered by the Company to the Allottee on or before 30 September, 2019 with a grace period of 3 (three) months from the date of the Agreement in which the registration for allotment is made, such date shall hereinafter referred to as 'Stipulated date', subject always to timely payment of all amounts including the Basic Sale Price, EDC/IDC, IFMS, Stamp Duty, Registration Fees and other charges as stipulated herein or as may be demanded by the company from time to time in this regard. The date of actual start of construction shall be the date on which the foundation of the particular building in which the said apartment is allotted shall be laid as per certification by the Company's Architect/*



Engineer-in-charge of the complex and the said certification shall be final and binding on the allottee."

- g. That furthermore, the payment of all dues was a condition precedent for handing over possession of the said apartment. The relevant clause 21(ii) is as under:

"The allottee, on receipt of such call notice shall pay to the company, within the stipulated period the amount demanded therein. Payment of all the dues as may be mentioned in such call notice shall be a condition precedent for handing over possession of the said Apartment and execution of Conveyance deed in favour of the allottee. All cost of stamp duty, registration fee and other miscellaneous/incidental expenses towards execution registration of the Conveyance deed shall be borne and paid by the Allottee. In the event of his failure to take over and/or occupy the Apartment allotted within thirty dates from the date of intimation in writing by Company, the same shall lie at his/her risk and cost and the allottee shall be liable to pay compensation @ Rs. 5/- per sq. ft of the super area per month as holding charges for the entire period of such delay including interest on delayed payment as provided in Clause 13 herein above".

- h. That the respondent after completing the construction of the unit in question, applied for the grant of the occupation certificate on 03.10.2016 and the same was granted by the concerned authorities on 28.05.2019. The respondent after the receipt of the occupation certificate offered the possession of the unit to the complainants vide email dated 01.06.2019 and intimated them to take the possession of the apartment after completing the possession formalities along with payment of all the outstanding dues.
- i. That the respondent vide its letter dated 18.02.2020, requested the complainants to register the conveyance deed and deed of apartment and to clear the outstanding dues along with penal interest and/or holding charges. However, despite being aware that the stamp duty charges, registration charges and other miscellaneous charges are payable by the complainants, they have not done so.

j. However, on account of the ban on construction activities by the Hon'ble Supreme Court and several authorities, the respondent has not been able to complete the apartment. Moreover, the outbreak of the deadly Covid-19 virus has resulted in significant delay in completion of the construction of the projects in India and the real estate industry in NCR region has suffered tremendously. The outbreak resulted in not only disruption of the supply chain of the necessary materials but also in shortage of the labor at the construction sites as several laborer's have migrated to their respective hometowns. The Covid-19 outbreak which has been classified as 'pandemic' is an Act of God and the same is thus beyond the reasonable apprehension of the respondent. It is submitted that the same falls under the ambit of the definition of 'force majeure' as defined in clause 23 of the buyer's agreement and the respondent cannot be held accountable for the same it was agreed vide the said clause. Clause 23 of the buyer's agreement is reproduced hereunder:

"The company shall not be held liable or responsible for performing any of its obligations or undertakings provided in this Agreement is such performance is prevented, delayed or hindered by Force majeure events such as non-availability of necessary infrastructure facilities being provided by the government for carrying development activities, non-availability or inadequate supply of steel and/or cement or other building materials or water or electric power or labor, slow down, strike or due to dispute with the construction agency employed by the company, lock-out or civil commotion, war or enemy action or by change of law, act, notification, prohibitory order, rule of Government..... and in such event, the company shall not be liable for any compensation or damages in any manner whatsoever."

The time period covered by the above-mentioned force majeure events is required to be added to the time frame mentioned above. The respondent cannot be held responsible for the circumstances which were beyond its control.

- k. That despite the above-mentioned scenario and the non-payment of the installment demands by the complainants, the respondent is on the last stages of the finishing work of the unit in question. However, the unit would be handed over to the complainants only after the payment of the remaining sale consideration and after completion of documentation formalities.
- l. The complainants are real estate investors who have invested their money in the project of the respondent with an intention to make profit in a short span of time. However, their calculations have gone wrong on account of slump in the real estate market and they are now deliberately trying to unnecessarily harass, pressurize and blackmail the respondent to submit to their unreasonable demands instead of abiding by contractual obligations of making timely payment towards the due amount.
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 these 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 complainants at a later stage.

F. Findings on the objections raised by the respondent

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

11. The respondent/promoter raised the contention that the construction of the project was delayed due to several unforeseeable events which were beyond the reasonable control of the respondent which have materially and adversely affected the timely completion of the project and are covered under force majeure conditions such as the ban on construction activities by the Hon'ble Supreme Court and several authorities. Moreover, the outbreak of the deadly Covid-19 virus has resulted in significant delay in completion of the construction of the projects in India and the real estate industry in NCR region has suffered tremendously. The outbreak resulted in not only disruption of the supply chain of the necessary materials but also in shortage of the labor at the construction sites as several laborer's have migrated to their respective hometowns. The Covid-19 outbreak which has been classified as "pandemic' is an Act of God and the same is thus beyond the reasonable apprehension of the respondent. It is relevant to mention



that the same falls under the ambit of the definition of "force majeure" as defined in clause 23 of the buyer's agreement and the respondent cannot be held accountable for the same it was agreed vide the said clause.

12. The due date of possession was in December 2019, and any situation or circumstances which could have a reason for not carrying out the construction activities in this project are allowing to be taken into consideration. While considering whether the said situation or circumstances were in fact beyond the control of the respondent and hence the respondent is entitled to force majeure clause 23, the authority takes into consideration all the pleas taken by the respondent to plead the force majeure condition happened. Accordingly, authority holds that the respondent is entitled to invoke clause 23 for delay with force majeure condition and grants 6 months extension after the due date of possession i.e., 30.09.2019.

G. Findings on the relief sought by the complainants

G.I. Direct the respondent to provide the possession of the unit to the complainants as soon as possible after obtaining all necessary documents from the concerned department(s)

13. In the present case, the complainants were offered possession by the respondent on 30.05.2019 in respect of unit no. 8PH1 after receipt of OC dated 29.05.2019.

Validity of offer of possession

14. At this stage, the authority would express its views regarding the concept of 'valid offer of possession'. It is necessary to clarify this concept because after valid and lawful offer of possession liability of



promoter for delayed offer of possession comes to an end. On the other hand, if the possession is not valid and lawful, liability of promoter continues till a valid offer is made and allottees remain entitled to receive interest for the delay caused in handing over valid possession. The authority after detailed consideration of the matter has arrived at the conclusion that a valid offer of possession must have following components:

- i. **Possession must be offered after obtaining occupation certificate-** The subject unit after its completion should have received occupation certificate from the department concerned certifying that all basic infrastructural facilities have been laid and are operational. Such infrastructural facilities include water supply, sewerage system, storm water drainage, electricity supply, roads and street lighting.
- ii. **The subject unit should be in habitable condition-** The test of habitability is that the allottees should be able to live in the subject unit within 30 days of the offer of possession after carrying out basic cleaning works and getting electricity, water and sewer connections etc from the relevant authorities. In a habitable unit all the common facilities like lifts, stairs, lobbies, etc should be functional or capable of being made functional within 30 days after completing prescribed formalities. The authority is further of the view that minor defects like little gaps in the windows or minor cracks in some of the tiles, or chipping plaster or chipping paint at some places or improper functioning of drawers of kitchen or cupboards etc. are minor defects which do not render unit uninhabitable. Such minor defects can be rectified later at the cost of the developers. The allottees should

accept possession of the subject unit with such minor defects under protest. This authority will award suitable relief for rectification of minor defects after taking over of possession under protest.

However, if the subject unit is not habitable at all because the plastering work is yet to be done, flooring works is yet to be done, common services like lift etc. are non-operational, infrastructural facilities are non-operational then the subject unit shall be deemed as uninhabitable and offer of possession of an uninhabitable unit will not be considered a legally valid offer of possession.

- iii. **Possession should not be accompanied by unreasonable additional demands-** In several cases additional demands are made and sent along with the offer of possession. Such additional demands could be unreasonable which puts heavy burden upon the allottees. An offer accompanied with unreasonable demands beyond the scope of provisions of agreement should be termed an invalid offer of possession. Unreasonable demands itself would make an offer unsustainable in the eyes of law. The authority is of the view that if respondent has raised additional demands, the allottees should accept possession under protest.

15. The complainants stated that till date they have not taken the possession of the unit since the unit is not in a habitable condition. The authority appointed a local commission to visit the project site and submit its report w.r.t the status of the villa as well as the project. The local commission submitted its report on 03.03.2021 with the findings as under:

"The site of the project "ATS Triumph" being developed by M/s Divine Developers Pvt. Ltd. has been inspected on 03.03.2021 and the report is

submitted based on actual site status along with issues raised by the complainant and it is concluded that:

The complete project is registerable as the occupation certificates for Block A, Block B, Block C, Block D, EWS Block, Community building & Convenient shopping have been obtained after the publication of the Haryana Real Estate (Regulation and Development) Rules, 2017 and no occupation certificate has been granted for the 19 villas in the project till date.

The site of project has been inspected on the basis of approved site plan provided by the promoter and it was found that the promoter has constructed the community building, convenient shopping in pocket 2 of the project against the approved site plan. Further the revenue rasta falling in pocket 2 is also covered by the promoter by developing landscaped area, internal road etc. on the same.

The DTCP, Haryana has granted the occupation certificate on 29.05.2019 for the project except villas whereas as on date finishing works for approximately 70 percent units are pending such as electrical wiring, switches/switch boards, wooden flooring in bedrooms, modular works for kitchen, sanitary wares in bathroom & kitchen and internal doors, final internal paint, false ceiling. In some unit's main entrance doors are also not installed. Further the promoter has not developed the 24m road falling in the project area as per the specification laid down by government.

The complainant unit was checked specifically, and it was observed that the internal finishing works such as wooden flooring in the bedrooms, sanitary wares in the bathrooms & kitchen, false ceiling, electrical switches & switch boards, railing & glass work in the internal stairs of unit, plaster on one wall of the bedroom and installation of air conditioner are pending. Further there is stack of bricks in the unit and the terrace works like swimming pool are also pending. Therefore, the unit is not fit for possession as approximately 50% of the finishing works are pending after expiry of approximately 2 year of offering possession/granting occupation certificate.

As occupation certificate means the project is habitable to live but after approximately 2 years of granting occupation certificate the promoter has failed to complete the finishing work in the units. Hence, the promoter was failed to make the project habitable as the units of the project are not fit for possession".

So, it can be concluded that the unit was not habitable at the time of offer of possession and offer of possession of an uninhabitable unit will not be considered a legally valid offer of possession. Therefore, in light of the said report and applying above principle on facts of this case, the respondent is directed to complete the villa in all respects within 2

months from the date of this order and make it ready for habitation. The respondent now has to make a fresh offer of possession accompanied with fresh statement of accounts deleting all demands which are not as per buyer's agreement and including therein interest payable to the complainants for delay caused in offering possession as the offer of possession dated 30.05.2019 is quashed hereby and at the same time the complainants are directed to take possession of the said unit after a valid offer of possession.

G.II Direct the respondent to pay the delayed charges to the complainants as per RERA rate of interest on the amount paid by the complainants i.e., INR 3,20,68,999/- (Rupees Three Crore Twenty Lakh Sixty-Eight Thousand Nine Hundred and Ninety-Nine Only) w.e.f. 30.09.2019 till the delivery of possession.

16. In the present complaint, the complainants intend to continue with the project and is seeking delayed possession charges @ RERA rate of interest on the amount paid. Clause 18 of the flat buyer agreement (in short, agreement) provides for handing over of possession and is reproduced below: -

"Time of Handing Over Possession:

Barring unforeseen circumstances and Force Majeure events as stipulated hereunder, the possession of the said Apartment is proposed to be, offered by the Company to the Allottee on or before 30 September 2019, plus Three months of grace period from the date of this agreement, subject always-to-timely payment of all charges including the Basic Sale Price Stamp Duty, Registration Fees and Other Charges as stipulated herein or as may be demanded by the Company from time to time in this regard."

17. At the outset, it is relevant to comment on the pre-set possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and application, and the



complainants not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoters. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoters and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoters 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 flat buyer agreement by the promoters are 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 promoter has proposed to hand over the possession of the apartment by or before 30.09.2019 plus 3 months. Since in the present matter the BBA incorporates unqualified reason for grace period/extended period of 3 months in the possession clause. Accordingly, the authority literally interpreting the same allows this grace period of 3 months to the promoter at this stage. Moreover, authority while considering the force majeure reasons provided by the promoter and letter no. F18/4/2020-PPD by GOI dated 13.05.2020 allows a further period of 6 months to the promoter at this stage. Accordingly, the due date of possession comes out to be 30.06.2020.



18. **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."

19. 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.
20. 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., **02.09.2021** is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.
21. 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:

"(z) "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;"*

22. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., **9.30%** by the respondent/promoter which is the same as is being granted to the complainants in case of delayed possession charges.

G.II. Direct the respondent to pay INR 4,90,000/- to the complainants as rent paid by the complainants from September 2019 till date.

23. The complainants are claiming compensation in the above-mentioned reliefs. The authority is of the view that it is important to understand that the Act has clearly provided interest and compensation as separate entitlement/rights which the allottees can claim. For claiming compensation under sections 12, 14, 18 and section 19 of the Act, the complainants may file a separate complaint before Adjudicating Officer under section 31 read with section 71 of the Act and rule 29 of the rules.
24. 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 18 of the agreement executed on 21.02.2019 but not signed, the possession of the subject apartment was to be delivered by or before 30.09.2019. 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 30.06.2020. The respondent



has offered the possession of the subject apartment on 30.05.2019 however, this offer is not a valid offer of possession for the reasons quoted above. 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 allottees shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 30.06.2020 till ~~the offer of the possession plus two months~~ 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.

H. Directions of the authority

25. 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., 30.06.2020 till ~~the date of order i.e., 02.09.2021~~ *the actual handing over of possession* ~~31.08.2012~~ *30.05.2020*
- ii. The arrears of such interest accrued from ~~31.08.2012~~ till the date of order by the authority shall be paid by the promoter to the allottee within a period of 90 days from date of this order and interest for every month of delay shall be paid by the promoter to the allottee before 10th of the subsequent month as per rule 16(2) of the rules.

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- iii. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
 - iv. The rate of interest chargeable from the allottees 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 allottees, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.
 - v. The respondent shall not charge anything from the complainants 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 is directed to handover the possession of the unit complete in all respect after removing the deficiencies and make a fresh valid offer of possession within 3 months from the date of this order.
26. Complaint stands disposed of.
27. File be consigned to registry.

(Samir Kumar)

Member

V.1-3
(Vijay Kumar Goyal)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 02.09.2021