

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

Complaint no.:	2641 of 2021
First date of hearing:	04.08.2021
Date of decision:	22.09.2021

Ratnesh Lekhi  
R/o: - B-230, Ashiaana Bageecha,  
Saidpur Bhiwadi, Alwar-301019

**Complainant**

Versus

M/s Apex Buildwell Private Limited  
Having Regd. office at: - 14A/36, WEA Karol Bagh, New  
Delhi-110053

**Respondent**

**CORAM:**

Shri Vijay Kumar Goyal  
Shri Samir Kumar

**Member  
Member**

**APPEARANCE:**

Sh. Vaibhav(son of complainant in person)  
Sh. Sandeep Chaudhary (Advocate)

Complainant  
Respondent

**ORDER**

1. The present complaint dated 05.07.2021 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.	655, 6 <sup>th</sup> floor, Tower Orchid			
9.	Unit measuring	48 sq. mtrs.			
10.	Date of execution of flat buyer agreement	21.05.2013			
11.	Payment plan	Construction link			
12.	Total consideration	₹ 16,00,000/-			



		(As per BBA dated 21.05.2013 at pg. 25 of complaint)
13.	Total amount paid by the complainant	₹ 15,69,608/- (As per customer ledger at pg-65 of complaint)
14.	Due date of delivery of possession as per clause 3(a) of the flat buyer agreement 36 months from the date of commencement of construction upon receipt of all approvals + 6 months' grace period.  [Page 31 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)  <b>(Note: Grace period allowed)</b>
15.	Delay in handing over possession till the offer of possession (01.03.2020) plus 2 months i.e., 01.05.2020	2 years 10 month 29 days
16.	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
17.	Offer of possession	01.03.2020

**B. Facts of the complaint**

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



- a. That the respondent, launched a residential, affordable group housing, located in Sector 37 C, Gurgaon. The said project was launched with much fervour and was marketed with boastful claims. That the respondent -builder had published various web and news advertisements as well as visual advertisements so as to attract public at large to purchase apartment in the said project. The complainant on the basis of the said advertisements had approached the respondent builder and inquired about the above-referred project. The respondent builder had represented through its representatives at that time that the above referred project is one of the prestigious projects which is being launched in Sector 37 c, Gurgaon and had promised to provide an Apartment with total area of 48 sq. ft.
- b. That the complainant booked a residential apartment in apex build well Pvt. LTD. 'Our Homes' by paying an amount of Rs.1,64,944/- and receipt dated 05.09.2012 was issued by the Respondent. And subsequently an allotment letter dated 23rd October 2013 was issued in favor of the complainant for project situated at village Gadoli Khurd, Sector 37 C, Gurugram. The complainant opted for the time linked payment plan.
- c. That the respondent issued a receipt dated 05.09.2012 of Rs 1,64,944 which is more than 10%. Section 13 of the RERA act specifically states that a promoter shall not accept a sum more than 10% of the cost of the apartment, plot, or building as the case may be as a advance payment or an application fee, from a person without first entering into a written agreement for sale.

- d. That the respondent executed apartment buyer agreement on 21.05.2013. That the ABA includes stipulation of time being essence of the agreement and in Paragraph 3 a) Proposes to hand over the possession of the apartment within a period of 36 months, with a grace period of 6 months from the date of construction of the complex as by the documents which is submitted by the respondent in RERA is 12.12.2013 so the possession date of the apartment cannot be beyond 12.06.2017. Also, the respondent mention date of completion of the Project is 02.06.2017 and then again revise the date to 01.12.2019 which is way beyond the agreed period as by the ABA.
- e. That it is submitted that the buyer's agreement is an outright unilateral document, containing one side clauses. In fact, such one-sided terms and conditions of the said agreement were never shown to the complainant at the time of booking and were incorporated by the respondent without any consultation with the complainant. That even though the agreement contained unilateral and one-sided clauses. The said agreement smacks of high handedness, despotism, arrogance and arbitrariness. In order to amplify the foregoing, it is stated that the Respondent deliberately attempted to delay the execution of the buyer's agreement after receiving booking amount from the complainant, so as to put him in a disadvantageous position. This was done to intentionally place the complainant in a situation where they were required to pay substantial money. Therefore, the conduct of the respondent wrecks bad faith from the very beginning with the objective of thrusting their illegitimate demands upon the complainant.

- f. The buyer's agreement confirmed the allotment of the above-mentioned residential apartment subject to terms and conditions mentioned therein. As per the same the complainant was allotted the apartment for an area measuring 48 sq. mtrs. and the price payable for the same was Rs.16,00,000/-. Further, it was stipulated in Clause 3 a) of the agreement that the possession would be offered within a handed over within 36 months from the date of execution of the agreement and not from the date of booking/allotment as should have been the case since the agreement was deliberately delayed by the respondent. Even if reckoned from the date of the said agreement, the Respondent was obliged to handover possession of the said residential Apartment by 12.06.2017.
- g. That the complainant was under the bonafide belief that the construction was in full swing, and the opposite party will be able to hand over the possession in time, since the complainant had made an advance payment of Rs. 15,69,608/- and the phone calls from the builder had always painted a very rosy picture.
- h. That the respondent has intentionally delayed handing over possession and as such is guilty of deficiency in service. Further, the Respondent has failed to handover the possession of the residential apartment allotted to the complainant till date.
- i. That after the lapse of approximately 3 years, the respondent sent an offer of possession to the complainant vide letter dated 01.03.2020. That the Complainant has reason to believe that due to the inability of the respondent to handover the possession they may illegally terminate the agreement and refund the amount after forfeiting the earnest money. Hence, it is in the interest of justice,

fair play and equity that pending disposal of present complaint, status quo be maintained regards nature, title and interest in the impugned unit and interest of the complainant be protected.

- j. That without prejudice the complainant reserves the right to file a complaint with the leave of this authority before the adjudicating officer for compensation.
- k. That this hon'ble authority has jurisdiction to entertain the present complaint since the project is situated in Gurugram within the jurisdiction of this hon'ble authority.

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

4. The complainant has sought following reliefs:
  - a. Pass an order directing the respondent two immediately handover the physical possession of the residential apartment allotted to the complainant, complete in all respects as per the terms and conditions of the buyer's agreement.
  - b. Direct the respondent to pay the prescribed interest for the delay in handing over the possession.
  - c. Pass any such or other orders or directions or relief which this honorable tribunal finds fit and proper in the peculiar facts and circumstances of this case, in favor of the complainant.
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:



- a. 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 on 01.03.2020 and the complainant has defaulted in making the balance sale consideration and taking 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.



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 07.05.2013 and the consent to establish by the office of Haryana state pollution control board, Panchkula was only granted on 02.12.2013. 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 01.03.2020 which so far not been taken over nor the balance payments are made, hence such conduct itself disentitles the complainant in seeking the delay possession compensation as the one who seeks equity must first do equity. In fact, the complainant has never objected or complained about the delay in completion of the project and the complaint is only preferred wrongfully once the project despite all odds against the respondent has been completed by the respondent which neither legal nor justified.



- 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 respondent 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 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.
- l. 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.

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 complainant at a later stage.

**F. Findings on the relief sought by the complainant**

**F.I. Pass an order directing the respondent to immediately hand over the physical possession of residential apartment allotted to the complainant, complete in all respects as per the terms and conditions of the buyer's agreement.**

11. 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 hereby directs the complainant to take the physical possession of the residential apartment allotted within two months from this order.

**F. II. Direct the respondent to pay the prescribed interest for the delay in handing over the possession.**

12. 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."*

13. 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."*

14. 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 21.05.2013 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.

15. **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."*

16. 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.
17. 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%.
18. 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—*

*(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;"*





19. 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.
20. 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 21.05.2013, 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. 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 03.06.2020. However, the complainant offered the possession of the unit on 01.03.2020, so it can be said that the respondent 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. This 2 month of reasonable time is being given to the respondent/allottee keeping in mind that even after intimation of possession practically they have to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit, but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e., 02.06.2017 till the expiry of 2 months from the date of offer of possession (01.03.2020) which comes out to be 01.05.2020. Accordingly, it is the failure of the promoter/respondent to fulfil its obligations, responsibilities as per the buyer's agreement dated 21.05.2013 to give the possession within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 19(6), 19(7) and 19(10) of the Act on the part of the respondent is established.

**G. Directions of the authority**

21. 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 promoter 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 as per section 19(10) of the Act.
  - ii. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
  - iii. 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 promoter 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.
  - iv. The respondent shall not charge anything from the complainant which is not the part of the agreement. However, holding charges shall not be charged by the promoter 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.
22. Complaint stands disposed of.
23. File be consigned to registry.

(Samir Kumar)

Member

(Vijay Kumar Goyal)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 22.09.2021

Judgement uploaded on 21.12.2021.