

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

Complaint no.:	696 of 2021
First date of hearing:	19.03.2021
Date of decision:	24.09.2021

Ram Gopal Yadav
R/o 4A, Vine Street, Malibu Towne, Sector 47, Distt
Gurugram 122004.

Complainant

Versus

Indentity Buildtech Pvt. Ltd.
Office address: 110, Indraprakash, 21, Barkhamba
Road, New Delhi- 110001.

Respondent

CORAM:

Shri Vijay Kumar Goyal
Shri Samir Kumar

**Member
Member**

APPEARANCE:

Arsh Mehta (Advocate)
Meena Hooda (Advocate)

**Complainant
Respondent**

ORDER

1. The present complaint dated 03.02.2021 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	"Ansal Highland Park", Sector-103, Gurugram
2.	Project area	11.7 acres
3.	Nature of the project	Residential
4.	DTCP license no. and validity status	32 of 2012 dated 12.04.2012 valid upto 11.04.2020
5.	Name of licensee	M/s Identity Buildtech Pvt Ltd. M/s Agro Gold Chemicals India LLP
6.	RERA registration details	Not registered
7.	Unit no.	EDNBG-0904
8.	Unit measuring	1940.00 sq. ft.
9.	Date of execution of flat buyer agreement	05.04.2013
10.	Payment plan	Construction link
11.	Total consideration	₹ 1,01,66,857/- (As per the customer ledger dated 16.10.2020 on pg-118 of complaint)
12.	Total amount paid by the complainant	₹ 81,71,227/- (As per the customer ledger dated 16.10.2020 on pg-117 of complaint)



13.	Due date of delivery of possession as per clause 31 of the flat buyer's agreement 48 months from the date of execution of agreement or within 48 months from date of obtaining all the required sanctions and approvals necessary for commencement of construction, whichever is later + 6 months grace period. [Page 79 of complaint]	05.04.2017 (48 months from date of execution of builder buyer agreement i.e., 05.04.2013) (Note: Grace period not allowed)
14.	Delay in handing over possession till the date of this order i.e., 24.09.2021	4 years 5 months 19 days
15.	Status of the project	Ongoing
16.	Occupation certificate	Not Obtained

B. Facts of the complaint

3. The complainant has pleaded the complaint on the following facts:
- That the complainant Ram Gopal Yadav, residing at VPO kherki daula, house no. - 18, Dist. Gurugram 122004 is a respectable citizen of India.
 - In 2012, the Respondent announced the launch of ansals highland park project consisting of 2BHK, 3BHK and 4BHK apartments along with certain committed amenities. This is with reference to the residential group housing colony project "Ansals Highland Park" being developed and marketed by Ansal Housing Limited (formerly known as Ansal Housing & Construction Ltd.) on the land falling in the Sector 103, Gurugram which is owned by Ansal Housing Limited's wholly owned subsidiary Identity Buildtech Private Limited (hereinafter referred to as "IBPL") and under the license

- issued by the Government of Haryana, vide letter no vide letter no. 32 dated 12.04.2012, issued by Director General, Town & Country Planning, Chandigarh, Government of Haryana in the name of IBPL.
- c. The complainant while searching for a flat/accommodation were lured by such advertisements and calls from the agents of the respondent for buying a house in their project namely Ansals Highland Park. The agents and officers of the respondent company told the members of the AHPRWA about the moonshine reputation of the company and the agents of the respondent company made huge presentations about the project mentioned above and also assured that they have delivered several such projects in the national capital region. The respondent handed over one brochure to the complainant which showed the project like heaven and in every possible way tried to hold the complainant and incited the complainant for payments. The hands of the respondent trapped the complainant.
- d. That the complainant who was caught in the web of false promises of the respondent company and its agents, paid the initial amount towards the booking, accordingly, filed the application form for allotment of a unit. Complainant after having purchased the apartment in the said project were sent one detailed agreement and were requested to sign the agreement and return to the respondent Company. The same was signed on 05.04.2013.
- e. The intentions of the License holder Identity Buildtech Private Limited (IBPL), a wholly owned subsidiary of the Developer of the project, Ansal Housing Limited (formerly known as Ansal Housing and Construction Limited) appeared to be dishonest from day one



which becomes abundantly clear from Page No. 3 of the agreement, bearing clause titled "developers' representation" which states that:

"the project namely 'ansals highland park' is being developed by the developer under license no. 32 of 2012 received from director general town & country planning, chandigarh, haryana (dgtcp) on lands area of 11.7 acres. the land under the project is owned by developer's wholly owned subsidiary m/s identity buildtech pvt ltd (hereinafter referred to as "ibpl") and m/s agro gold chemicals pvt. ltd. (agcpl) having its registered office at b-1/345, vasant kunj, new delhi - 110070."

- f. It is hereby pertinent to mention herein that the above-mentioned clause of the agreement categorically means that the license has been held by the developer and the developer has been mentioned as Ansal Housing & Construction Ltd. at page no. 3 of the agreement. This was a fraudulent representation to the complainant it gave them an impression that the licensee of the project was held in the name of Ansal Housing & Construction Ltd. since Ansal group which enjoyed certain reputation in the construction industry whereas "IBPL" was not known to anyone resulting in the members of the complainant association being induced to make investment presuming the license is in the name of Ansal Housing Limited (formerly known as Ansal Housing And Construction Limited). Further, it is necessary and absolutely imperative to state herein that all the payments at all times have been received in the name of Ansal Housing & Construction Ltd. and all the receipts are also being issued by Ansal Housing & Construction Ltd. which is against the spirit of legal parameters.
- g. Further, complainant having dreams of his own residential flat in NCR signed the agreement in the hope that the flat will be delivered

within 48 months i.e., from the year 2012-2013 as per clause 31 of the agreement. The complainant was also handed over one detailed payment plan which was construction linked plan. It is unfortunate that the dream of owning a flat of the members of the complainant association was shattered due to dishonest, unethical attitude of the respondent.

- h. The complainant, despite having paid a considerable payment against the total Consideration under the agreement, has not been delivered the possession of the apartment as per the delivery schedule provided in the agreement. The respondent not only failed to adhere to the terms and conditions of the agreement entered into with the complainant but also illegally extracted money from the complainant by making false promises and statements in connection with the status of the construction from time to time. The respondent always kept the complainant in dark about the construction and the respondent did not leave any stone unturned to illegally extract money. Hence, by falsely ensuring false construction and possession timelines pertaining to the apartments, the complainant has been subjected to unethical/unfair trade practice as well as subjected to harassment in the guise of a biased agreement. The above said acts of the respondent clearly state that the respondent with prejudice have been indulging in unfair trade practices and have also been providing gross deficient services. All such acts and omissions on the part of the respondent have caused an immeasurable mental stress and agony to the complainant.



- i. The total demands made by the respondent company was Rs. 32,87,959.00 before signing the agreement, to which the complainant paid the entire sum to the respondent company which was acknowledged by the respondent company in receipts.
- j. That an agreement was signed between the complainant and the promoter of the project M/s. Ansal Housing & Construction Limited., New Delhi on 05.04.2013 wherein at column No. 31 it was assured that the delivery of the property would be given within 48 months plus six months i.e., by 04.10.2017.
- k. The complainant and the respondent company signed the above said agreement wherein the total consideration of the apartment was Rs 1,00,86,913.20 which was inclusive of the basic sale price, external development charges, internal development charges, infrastructural development charges, club membership charges, car parking, as in accordance with the clause 1 of the said agreement.
- l. It is hereby pertinent to mention that the above-mentioned clause of the agreement categorically means that the license has been held by the developer and the developer has been mentioned as Ansal Housing & Construction Ltd. at page no. 3 of the agreement. This was a fraudulent representation to the complainant as it gave him the impression that the licensee of the project was held in the name of Ansal Housing & Construction Ltd. since Ansal group which enjoyed certain reputation in the construction industry whereas "IBPL" was not known to anyone resulting in the complainant being induced to make investment presuming the license is in the name of Ansal Housing Limited (formerly known as Ansal Housing and

- Construction Limited). Further, it is necessary and absolutely imperative to state herein that all the payments at all times have been received in the name of Ansal Housing & Construction Ltd. and all the receipts are also being issued by Ansal Housing & Construction Ltd. which is against the spirit of legal parameters.
- m. Further, the complainant having dream of its own residential flat in NCR signed the agreement in the hope that the flat will be delivered within 48 months plus six months i.e., from the year 2012-2013 as per clause 31 of the agreement. the complainant was also handed over one detailed payment plan which was construction linked plan. it is unfortunate that the dream of owning a flat of the complainant was shattered due to dishonest, unethical attitude of the respondent.
- n. That in terms of clause 31 of the said agreement dated 05.04.2013 (as already referred above), the respondent was under dutiful obligation to complete the construction and to offer the possession within 48 months with a grace period of 6 months. that when the complainant approached the respondent in person to know the fate of the construction and offer of possession in terms of the said agreement, the respondent misrepresented to the complainant that the construction has been completed and under such state of confusion created by you by fraud and misrepresentation, you mislead the complainant.
- o. However, when the complainant went to visit the said site personally, he was shocked to find that the construction is far from completion and as you are yourself guilty of violation of the terms of agreement and have failed to complete the construction in the



- given time schedule even after the lapse of the grace period of 6 months (expiring on 30th September 2017).
- p. The respondent has completely failed to honour their promises and have not provided the services as promised and agreed through the brochure, agreement and the different advertisements released from time to time. Further, such acts of the respondent are also illegal and against the spirit of RERA Act, 2016 and HRERA Rules, 2017.
- q. It is pertinent to mention herein that while making regular and diligent payments for their apartment, the complainant also paid for additional services/facilities which completed the allotted apartment as a whole and any possession offered without/incomplete amenities within the apartment complex cannot be considered to be complete. Hence, in view of the present state of affairs, it is abundantly clear that the respondent has given false or misleading promises for delivery of the respective apartments and for supply of other services/facilities in the complex of the project.
- r. In early 2017, i.e., when the construction of the said project should have been completed, the respondent discontinued all construction activity at the project site. Pertinently, by early 2017, the complainant had already paid a considerable amount of approx... 78% of the total consideration and hence this sudden discontinuation of construction activity at the project site is beyond understanding to the complainant.
- s. The complainant has suffered a loss and damage in as much as they had deposited the money in the hope of getting the said unit for

residential purposes. He has not only been deprived of the timely possession of the said unit but also the benefit of escalation of price of the said unit and the prospective return he could have got had he not invested in the project of the respondent. Therefore, the compensation in such cases would necessarily have to be higher than what is agreed in the agreement.

C. Relief sought by the complainant:

4. The complainant has sought following reliefs:

- a. It is most respectfully prayed that this hon'ble authority be pleased to order the respondent to handover the possession to the complainant as soon as possible.
- b. It is most respectfully prayed that this hon'ble authority be pleased to direct the respondent, not to cancel the allotment of the unit.
- c. It is most respectfully prayed that this hon'ble authority be pleased to restrain the respondent from raising any fresh demand with respect to the project.
- d. It is most respectfully prayed that this hon'ble authority be pleased to order the respondent to adjust the entire amount of interest due to the complainant from the date of the delivery period as per the buyer's agreement to the actual delivery of possession against the demands from the complainant, if any, as per the guidelines laid in the RERA, 2016.
- e. It is most respectfully prayed that this hon'ble authority be pleased to order the respondent to pay the balance amount due to the complainant from the respondent account of the interest, as per the guidelines laid in the RERA, 2016, before signing the sale deed together with the unambiguous intimation/ offer of possession.

- f. It is most respectfully prayed that this hon'ble authority be pleased to order the respondent not to demand anything irrelevant, unjustified and illegal which has not been agreed to between the parties as agreement, per the apartment buyer's agreement.
 - g. It is most respectfully prayed that this hon'ble authority be pleased to order the respondent not to ask for the monthly maintenance charges for a period of 12 months or more in advance.
 - h. It is most respectfully prayed that this hon'ble authority be pleased to order the respondent not to force the complainant to sign any indemnity cum undertaking indemnifying the builder from anything legal as precondition for signing the conveyance deed.
 - i. It is most respectfully prayed that this hon'ble authority be pleased to order the respondent to kindly handover the entire possession of the unit of the complainant, once it is ready, in all respects and not to force an incomplete unit without proper road, electrification of the roads, functioning of the club etc. and other things which were assured in the brochure, as the complainant had booked a unit in a complex based on the brochure and not a stand-alone flat.
 - j. It is most respectfully prayed that this hon'ble authority be pleased to pass any other interim relief(s) which this hon'ble authority thinks fit in the interest of justice and in favour of the complainant.
5. On the date of hearing, the authority explained to the respondents/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. That the present complaint is not maintainable qua the answering respondent as the complaint is totally false, frivolous and devoid of any merits against the answering respondent. the complaint under reply is based on pure conjecture. Thus, the present complaint is liable to be dismissed on this ground alone.
- b. That the present complaint is not maintainable as the complaint under reply failed to disclose any cause of action against the respondent. Thus, the present complaint is liable to be dismissed on this ground alone.
- c. That the present complaint is not maintainable as this hon'ble authority has no jurisdiction to hear the cases that pray for- not seeking any further demands from the petitioner/complainant even if they are legitimately due as per the builder buyer agreement. Further, that the complaint prays that there be no cancellation of the flat even if the complainant is in willful default of the contract. it is respectfully submitted that the hon'ble HRERA Gurugram be pleased to dismiss the present complaint.
- d. The answering respondent is a developer and has built multiple residential and commercial buildings within Delhi/NCR with a well-established reputation earned over years of consistent customer satisfaction.
- e. That the complainant had approached the answering respondent for booking an 3BHK flat in an upcoming project Ansals Highlands Park, sector 103, Gurugram. Upon the satisfaction of the complainant regarding inspection of the site, title, location plans, etc. an agreement to sell dated 05.04.2013 was signed between the parties.

- f. That the current dispute cannot be governed by the RERA Act, 2016 because of the fact that the agreement signed between the complainant and the answering respondent was in the year 2013. It is submitted that the regulations at the concerned time period would regulate the project and not a subsequent legislation i.e., RERA Act, 2016. It is further submitted that parliament would not make the operation of a statute retrospective in effect.
- g. That the complaint specifically admits to not paying the full payment as agreed upon under the builder buyer agreement. It is submitted that the complainant cannot be allowed to take advantage of his own wrong.
- h. That the questions of compensation and interest are questions that can or cannot be decided by the Hon'ble Tribunal is pending consideration before the Hon'ble Supreme Court of India. It is further submitted that until the said question is given a quietus by the Apex Court the said matter be kept pending to avoid any possibility of a contrary/conflicting decision.
- i. That even if the complaint is admitted to be true and correct, the agreement which was signed in the year 2013 without coercion or any duress cannot be called in question today. It is submitted that the builder buyer agreement provides for a penalty in the event of a delay in giving possession. It is submitted that clause 37 of the said agreement provides for Rs. 5/ sq foot per month on super area for any delay in offering possession of the unit as mentioned in Clause 31 of the agreement. Therefore, the complainant will be entitled to invoke the said clause and is barred from approaching the Hon'ble Commission in order to alter the penalty clause by



virtue of this complaint more than 6 years after it was agreed upon by both parties.

- j. That the Respondent had in due course of time obtained all necessary approvals from the concerned authorities. It is submitted that the wholly owned subsidiary of Ansal Housing i.e., IBPL was allotted the license no. 32 of 2012 for carrying out the construction on 11.7 acres of land by the DGTCP Haryana. Further, the developer also got registered the ongoing project with RERA vide GSM/322/54/2019/16 dated 01.04.2019. Thus, the Respondents have in a timely and prompt manner ensured that the requisite compliances be obtained and cannot be faulted on giving delayed possession to the complainant. That the answering respondent has adequately explained the delay and the same has been acknowledged by the complainant.
- k. It is submitted that the delay has been occasioned on account of things beyond the control of the answering respondent. It is further submitted that the builder buyer agreement provides for such eventualities and the cause for delay is completely covered in the said clause. The respondent ought to have complied with the orders of the Hon'ble High Court of Punjab and Haryana at Chandigarh in CWP No. 20032 of 2008, dated 16.07.2012, 31.07.2012, 21.08.2012. The said orders banned the extraction of water which is the backbone of the construction process. Similarly, the complaint itself reveals that the correspondence from the answering respondent specifies force majeure, demonetization and the orders of the Hon'ble NGT prohibiting construction in and around Delhi as the causes which contributed to the stalling of the project at crucial

junctures for considerable spells. Further, the spread of the pandemic impacted financial institutions, work force, raw materials, logistics and resultantly, timelines have been revised.

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. It is most respectfully prayed that this hon'ble authority be pleased to order the respondent to adjust the entire amount of**

interest due to the complainant from the date of the delivery period as per the buyer's agreement to the actual delivery of possession against the demands from the complainant, if any, as per the guidelines laid in the RERA, 2016.

11. In the present complaint, the complainant intends to continue with the project and is seeking delayed possession charges interest on the amount paid. Clause 31 of the flat buyer agreement (in short, agreement) provides for handing over of possession and is reproduced below: -

"31

The developer shall offer possession of the unit any time, within a period of 48 months from the date of execution of the agreement or within 48 months from the date of obtaining all the required sanctions and approval necessary for commencement of construction, whichever is later subject to timely payment of all dues by buyer and subject to force majeure circumstances as described in clause 32. Further, there shall be a grace period of 6 months allowed to the developer over and above the period of 48 months as above in offering the possession of the unit."

12. 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 complainant not being in default under any provisions of this agreement 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 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 flat buyer agreement by the

promoter 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 within a period of 48 months plus 6 months from date of agreement or from the date of approvals required for the commencement of construction which whichever is later. The due date of possession is calculated from the date of agreement i.e., 05.04.2013. The period of 48 months expired on 05.04.2017. Since in the present matter the BBA incorporates qualified reason for grace period/extended period of 6 months in the possession clause for offering possession of the unit subject to force majeure. The force majeure reasons provided by the promoter are not taken into consideration by the authority as the promoter has still not applied for occupation certificate, this quiescent act of promoter cannot be ignored and accordingly, this grace period of 6 months shall not be allowed to the promoter at this stage.

13. **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."

14. 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.
15. 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., 24.09.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.
16. 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;"

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

F.II. It is most respectfully prayed that this hon'ble authority be pleased to order the respondent not to ask for the monthly maintenance charges for a period of 12 months or more in advance.

18. The Act mandates under section 11(4)(d), that the developer will be responsible for providing and maintaining the essential services, on reasonable charges, till the taking over of the maintenance of the project by the association of the allottees. Section 19(6) of the Act also 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, shall be responsible to make necessary payments in the manner and within the time as specified in the said agreement for sale/the builder buyer's agreement and shall pay within stipulated time and appointed place, the share of the registration charges, municipal taxes, water and electricity charges, maintenance charges, ground rent and other charges, if any.
19. Maintenance charges essentially encompass all the basic infrastructure and amenities like parks, elevators, emergency exits, fire and safety, parking facilities, common areas, and centrally controlled services like electricity and water among others. Initially, the upkeep of these facilities is the responsibility of the builder who collects the maintenance fee from the residents. Once a resident's association takes shape, this duty falls upon them, and they are allowed to change or

introduce new rules for consistently improving maintenance. In the absence of an association or a society, the builder continues to be in charge of maintenance. Usually, maintenance fees are charged on per flat or per square foot basis. Advance maintenance charges on the other hand accounts for the maintenance charges that builder incurs while maintaining the project before the liability gets shifted to association of owners. Builders generally demand advance maintenance charges for 6 months to 2 years in one go on the pretext that regular follow up with owners is not feasible and practical in case of ongoing projects wherein OC has been granted but CC is still pending.

20. The maintenance of the project is essential to enjoy the basic facilities provided in the project by the promoter. Therefore, while providing these essential services, the promoter would be required to maintain sufficient funds with him. In order to meet these expenses, the demand of the promoter raised on the allottee to pay advance maintenance charges for a certain period cannot by any stretch of imagination be said to be unreasonable or unjustified. Thus, the authority is of the view that the respondent is entitled to collect advance maintenance charges as per the builder buyer's agreement executed between the parties. However, the period for which advance maintenance charges (AMC) is levied should not be arbitrary and unjustified. Generally, AMC is charged by the builders/developer for a period of 6 months to 2 years. The authority is of the view that the said period is required by the developer for making relevant logistics and facilities for the upkeep and maintenance of the project. Since, the developer has already received the OC/part OC and it is only a matter of time that the completion of the project shall be achieved; its ample time for a RWA to be formed for

taking up the maintenance of the project and accordingly the AMC is handed over to the RWA.

21. Keeping in view the facts above, the authority deems fit that the respondent is right in demanding advance maintenance charges at the rate prescribed therein at the time of offer of possession in view of the judgements (supra). However, the respondent shall not demand the advance maintenance charges for more than one (1) year from the allottee even in those cases wherein no specific clause has been prescribed in the agreement or where the AMC has been demanded for more than a year.

F.III. It is most respectfully prayed that this hon'ble authority be pleased to order the respondent not to force the complainant to sign any indemnity cum undertaking indemnifying the builder from anything legal as precondition for signing the conveyance deed.

22. At times, the allottee is asked to give the affidavit or indemnity-cum-undertaking in question before taking possession. The allottee has waited for long for his cherished dream home and now when it is ready for taking possession, he has either to sign the indemnity-cum-undertaking and take possession or to keep struggling with the promoter if indemnity-cum-undertaking is not signed by him. Such an undertaking/ indemnity bond given by a person thereby giving up their valuable rights must be shown to have been executed in a free atmosphere and should not give rise to any suspicion. If a slightest of doubt arises in the mind of the adjudicator that such an agreement was not executed in an atmosphere free of doubts and suspicions, the same would be deemed to be against public policy and would also amount to

unfair trade practices. No reliance can be placed on any such indemnity-cum-undertaking and the same is liable to be discarded and ignored in its totality. Therefore, this authority does not place reliance on such indemnity cum undertaking. To fortify this view, the authority place reliance on the NCDRC order dated 03.01.2020 in case titled as Capital Greens Flat Buyer Association and Ors. Vs. DLF Universal Ltd., Consumer case no. 351 of 2015, wherein it was held that the execution of indemnity-cum-undertaking would defeat the provisions of sections 23 and 28 of the Indian Contract Act, 1872 and therefore, would be against public policy, besides being an unfair trade practice. The relevant portion of the said judgment is reproduced herein below:

"Indemnity-cum-undertaking

30. The developer, while offering possession of the allotted flats insisted upon execution of the indemnity-cum-undertaking before it would give possession of the allotted flats to the concerned allottee. Clause 13 of the said indemnity-cum-undertaking required the allottee to confirm and acknowledge that by accepting the offer of possession, he would have no further demands/claims against the company of any nature, whatsoever. It is an admitted position that the execution of the undertaking in the format prescribed by the developer was a pre-requisite condition, for the delivery of the possession. The opposite party, in my opinion, could not have insisted upon clause 13 of the Indemnity-cum-undertaking. The obvious purpose behind such an undertaking was to deter the allottee from making any claim against the developer, including the claim on account of the delay in delivery of possession and the claim on account of any latent defect which the allottee may find in the apartment. The execution of such an undertaking would defeat the provisions of Section 23 and 28 of the Indian Contract Act, 1872 and therefore would be against public policy, besides being an unfair trade practice. Any delay solely on account of the allottee not executing such an undertaking would be attributable to the developer and would entitle the allottee to compensation for the period the possession is delayed solely on account of his having not executed the said undertaking-cum-indemnity.

23. The said judgment of NCDRC was also upheld by the Hon'ble Supreme Court vide its judgement dated 14.12.2020 passed in civil appeal nos. 3864-3889 of 2020 against the order of NCDRC.
24. Therefore, in light of the aforesaid discussion and judgements, the authority is of the view that execution of indemnity-cum-undertaking does not preclude the complainant-allottee from exercising his right to claim delay possession charges as per the provisions of the Act.
25. 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 31 of the agreement executed between the parties on 05.04.2013, the possession of the subject apartment was to be delivered within 48 months from the date of commencement of construction. The period of 48 months expired on 05.04.2017. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over possession is 05.04.2017. 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., 05.04.2017 till the actual handing over of the possession, at prescribed rate i.e., 9.30 % p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules.

G. Directions of the authority

26. 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., 05.04.2017 till the actual handing over of the possession.
- ii. The arrears of such interest accrued from 05.04.2017 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.
- iii. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
- iv. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same rate of interest which the 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.
- v. The respondent shall not charge anything from the complainant which is not the part of the agreement.
- vi. The respondent is right in demanding advance maintenance charges at the rates' prescribed in the builder buyer's agreement at the time of offer of possession. However, the respondent shall not demand the advance maintenance charges for more than one year from the allottee even in those cases wherein no specific clause has been

prescribed in the agreement or where the AMC has been demanded for more than a year

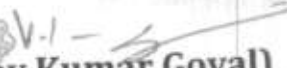
vii. The respondent shall not execute indemnity-cum-undertaking which preclude the complainant-allottee from exercising his right to claim delay possession charges as per the provisions of the Act.

27. Complaint stands disposed of.

28. File be consigned to registry.


(Samir Kumar)

Member

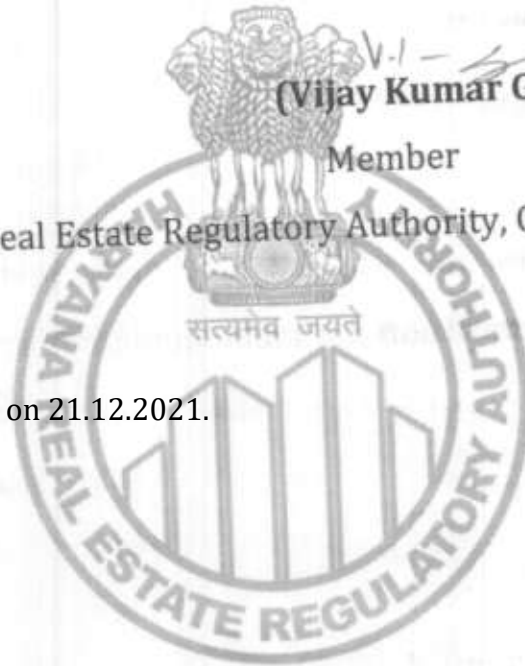

(Vijay Kumar Goyal)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 24.09.2021

Judgement uploaded on 21.12.2021.



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