

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

Complaint no.:	2857 of 2021
First date of hearing:	02.09.2021
Date of decision:	02.09.2021

1. Mrs. Priyanka Bhatkoti, 2. Mr. Rahul Bhatkoti R/o 1 st Floor Plot No. 180 Block D, Sector 8, Dwarka, New Delhi-110077	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	Member
Shri Samir Kumar	Member

APPEARANCE:	
Shashikant Sharma (Advocate)	Complainants
M.K Dang (Advocate)	Respondent

ORDER

1. The present complaint dated 26.07.2021 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 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 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.		2031 Tower -2		
7.	Unit measuring		2290 sq. ft. Super area		
8.	Date of execution of flat buyer agreement		17.06.2016		
9.	Payment plan		Down payment plan		

10.	Total consideration	₹ 1,59,85,750/- (As per payment plan of buyer's agreement dated 17.06.2016 at pg. 51 of complaint)
11.	Total amount paid by the complainants	₹ 1,71,19,500/- (As per statement of unit on pg-76 of complaint)
12.	Due date of delivery of possession as per clause 18 of the flat buyer's agreement 36 months with a grace period of 6 months from the date of execution of agreement [Page 37 of complaint]	17.06.2020 (Note: 6 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 2 months 16 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:
 - a. The complainants are the respectable as well as law abiding citizens of India. That the respondent is a reputed developer and in the business of construction of residential & commercial units and after

- commencement of the project the respondent intended to sell the same to prospective buyers. Whereas the respondent has commenced a project namely "Triumph" at sector 104, Gurugram.
- b. That the respondent had advertised and represented that respondent are having well known project namely "Triumph" at sector 104, Gurugram where respondent is going to develop Flats under the categories of 3BHK/4BHK. That trusting upon pamphlets, inducement and advertisement of the respondent, complainants have shown their willingness to purchase a flat in the said project of the respondent.
- c. That complainants after going through the inducement of respondent's project wherein the respondent has given huge advertisement and offers on the project shown their willingness to book/purchase a unit no. 2031 measuring super area of 2290 sq. ft. (i.e., 212.75 sq. mtrs) on floor 3rd, Tower 2, at sale consideration of Rs.1,50,27,000/-. The said flat was booked on 15.06.2016 vide application no. 371 and the buyer's agreement was also executed between complainants and respondent on 17.06.2016 and the respondent issued allotment letter on 17.06.2016.
- d. That as per terms and conditions of the buyer's agreement, respondent was supposed to handover the flat within a period of 36 months plus six months grace period date of execution of the buyer's agreement. In this connection the relevant para no. 18 of the buyer's agreement is reproduced as under:

"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 within a period of 36 (Thirty six) months with a grace period of 6 (six) months from the date of 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 a s 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"

- It is respectfully submitted that as per the buyer's agreement the respondent/promoter must deliver the flat till 17th December 2019.
- e. That at the time of booking of the flat respondent had offered one "Subvention Scheme". That against the said scheme complainants had to apply for loan from ICICI Bank and complainants paid Rs 23,50,000 (Twenty-three lakhs and fifty thousand only) at the time of booking through own contribution. After the said scheme a tripartite agreement was also executed between ICICI bank, complainants, and respondent on the same day i.e., 17.06.2016 and complainants had taken a loan of Rs. 72,00,000/- from ICICI Bank. It is respectfully submitted that the complainants have made a total sum of Rs. 1,71,19,500/- till date. It is relevant to mention here that according to the tripartite agreement the respondent/developer is liable to pay the pre-EMI interest to the bank for the period of 36 months or till possession whichever is earlier.
- f. That the complainants paid the amount from time to time as and when such demands were raised by respondent. That on 30.05.2019 the respondent very kindly issued a letter of offer of possession wherein the respondent demanded a sum of Rs. 42,18,962/- and instructed to clear the outstanding within a period of 22 days i.e., 21.06.2019. In the said offer of possession the respondent stated

- that on receipt of the entire payment the respondent will provide possession of the flat within a period of 90 days.
- g. That in January 2020 the complainants sent various reminders/emails regarding to complete the furnishing work and handing over the flat. In this regard, the complainants also personally visited 2-3 times in the offices of respondent but on each visit the respondent continuously gave the answer that the finishing work is going on and the possession of the flat would be delivered very shortly. That during September 2020 when the complainants visited the flat personally and astonished to note that no work has been done by the respondent and the flat was in the same condition as before.
- h. That complainants visited respondent personally as well as made various telephonic talks and through emails also requested to complete the work of the flat and handover the physical possession of the flat, but respondent is adamant and have not completed the furnishing work and have not handed over the possession of the flat till date. From the above it revealed that respondent have cheated and defrauded the complainants from the very beginning to till date and wants to misuse the hard-earned money of complainants.
- i. That due to delay in handing over the possession and cheating and fraud committed by respondent, complainants are no more interested to show their willingness to proceed further.
- j. That at the time of booking of the flat the sale cost indicated was Rs.1,50,27,000/- and complainants total paid a sum of Rs.1,71,19,500/- to the respondent and after completion of all the payments the respondent failed to handover the peaceful possession

of the flat to the complainants till date. The complainants lastly visited on 20.06.2021 and astonished to note that the flat is still lying in highly incomplete state.

- k. That in view of the above facts and circumstances of the case, it is evident that from the date of booking till today respondent is playing a game of cheating and fraud with applicants/complainants in order to grab the hard -earned money from the applicants/complainants.

C. Relief sought by the complainants:

4. The complainants have sought following reliefs:
- Direct the respondent(s) to pay interest @ 10.75% per annum on the amount already paid by the complainants i.e., Rs. 1,71,19,500/- from January 2020 from due date of handover of the physical possession to till date.
 - To direct the respondent to pay the pending bank loan EMI and interest thereon from June 2019 till handing over the physical possession of the unit.
 - To direct the respondent that after payment of the above amount of delayed interest and pending Bank Loan EMI, the possession should be handed over to the complainants within the stipulated time period as per the direction of the Hon'ble authority
 - 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 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.

- b. 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 17.06.2016 for unit bearing no. 2031, 3rd Floor, Tower 2 having super area of 212.75 sq. meter.
- c. That it was agreed that as per clause 4 of the buyer's agreement, the sale consideration of Rs. 1,50,27,000/- 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 12 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.
- d. 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."*
- e. That it is pertinent to mention herein that the implementation of the said project was hampered due to non-payment of instalments by allottees on time and also due to the events and conditions which were beyond the control of the respondent and which have affected

the materially affected the construction and progress of the project. Some of the Force Majeure events/conditions which were beyond the control of the respondent and affected the implementation of the project and are as under:

I) Inability to undertake the construction for approx. 7-8 months due to Central Government's Notification with regard to demonetization: [Only happened second time in 71 years of independence hence beyond control and could not be foreseen]. The respondent had awarded the construction of the project to one of the leading construction companies of India. The said contractor/company could not implement the entire project for approx. 7-8 months w.e.f from 9-10 November 2016 the day when the Central Government issued notification with regard to demonetization. During this period, the contractor could not make payment to the labour in cash and as majority of casual labour force engaged in construction activities in India do not have bank accounts and are paid in cash on a daily basis. During Demonetization the cash withdrawal limit for companies was capped at Rs. 24,000 per week initially whereas cash payments to labour on a site of the magnitude of the project in question are Rs. 3-4 lakhs per day and the work at site got almost halted for 7-8 months as bulk of the labour being unpaid went to their hometowns, which resulted into shortage of labour. Hence the implementation of the project in question got delayed due on account of issues faced by contractor due to the said notification of Central Government.

Further there are studies of Reserve Bank of India and independent studies undertaken by scholars of different institutes/universities

and also newspaper reports of Reuters of the relevant period of 2016-17 on the said issue of impact of demonetization on real estate industry and construction labour.

The Reserve Bank of India has published reports on impact of demonetization. In the report- Macroeconomic Impact of demonetization, it has been observed and mentioned by Reserve Bank of India at page no. 10 and 42 of the said report that the construction industry was in negative during Q3 and Q4 of 2016-17 and started showing improvement only in April 2017.

Furthermore, there have been several studies on the said subject matter and all the studies record the conclusion that during the period of demonetization the migrant labour went to their native places due to shortage of cash payments and construction and real estate industry suffered a lot and the pace of construction came to halt/ or became very slow due to non-availability of labour. Some newspaper/print media reports by Reuters etc. also reported the negative impact of demonetization on real estate and construction sector.

That in view of the above studies and reports, the said event of demonetization was beyond the control of the respondent, hence the time period for offer of possession should be deemed to be extended for 6 months on account of the above.

(II) Non-Payment of Instalments by allottees: Several other allottees were in default of the agreed payment plan, and the payment of construction linked instalments was delayed or not made resulting in badly impacting and delaying the implementation of the entire project.

(III) Inclement Weather Conditions viz. Gurugram: Due to heavy rainfall in Gurugram in the year 2016 and unfavorable weather conditions, all the construction activities were badly affected as the whole town was waterlogged and gridlocked as a result of which the implementation of the project in question was delayed for many weeks. Even various institutions were ordered to be shut down/closed for many days during that year due to adverse/severe weather conditions.

- f. That the complainants have been constant defaulters and they have concealed the material facts from this hon'ble authority. It is pertinent to mention herein that despite being aware that timely payment of the installment amount was the essence of the allotment, the complainants failed to adhere to the same and the respondent was constrained to issue reminders dated 30.05.2018 and 07.07.2018.
- g. It is pertinent to mention herein that the respondent has even offered the possession of the unit to the complainants vide letter dated 30.05.2019 after obtaining the occupation certificate on 28.05.2019. It is submitted that the complainants have despite reminders dated 30.50.2019, 03.07.2019, 02.08.2019 and 12.09.2019 only remitted part-payment out of the total sale consideration and are bound to make payment towards the remaining due amount.
- h. 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 labour at the construction sites as several labourers 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 22 of the buyer's agreement and the respondent cannot be held accountable for the same. This time period is 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. It is pertinent to mention herein that even this hon'ble authority had vide its order no. 9/3-2020 HARERA/GGM(Admin) dated 26.05.2020 had extended the registration and completion date automatically by 6 months due to the outbreak of Covid-19. Even this hon'ble authority had agreed vide the said order that due to the force majeure condition, the regular development work of the real estate projects have been getting affected. That the complainants have made part-payment towards the total sale consideration and are bound to make payment towards the remaining due amount along with registration charges, stamp duty, service tax as holding charges are being accrued as per the terms of the Buyer's Agreement. The complainants have never been ready and willing to abide by the

contractual obligations and have instead filed the present baseless, false and frivolous complaint.

- i. 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.
 - j. 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 non-payment of instalment by different allottee of the project, demonetisation, inclement weather conditions viz. Gurugram. 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. The reasons given by the respondent are supported by the documentary proof of the same. Moreover, the due date of possession was in the year 2019 and any situation or circumstances which could have a reason for not carrying out the construction activities in the project prior to this date due are allowing to be taken into consideration. While considering whether the said situations or circumstances were in fact beyond the control of the respondent and hence the respondent is entitled to force majeure clause 22, the authority takes into consideration all the pleas taken by the respondent to plead the force majeure condition. However as far as the delay in payment of instalments by many allottees or regarding the dispute with contractor is concerned the respondent has not given any specific details about the same. With regard to NGT order, demonetization of Rs. 500/- and Rs. 1000/- currency notes and heavy rainfall in Gurugram are concerned these events are stated to have taken place in the year 2015 and 2016 i.e., the prior to due delivery of possession of the apartment to the complainants. Accordingly, authority holds that the respondent is entitled to invoke clause 22 for delay with force majeure condition.

G. Findings on the relief sought by the complainants

G.I. Direct the respondent(s) to pay interest @ 10.75% per annum on the amount already paid by the complainants i.e., Rs. 1,71,19,500/- from January 2020 from due date of handover of the physical possession to till date

12. In the present complaint, the complainants intend to continue with the project and is seeking delayed possession charges @ 10.75% 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: -

"18 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."

13. 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 within 36 months from the date of agreement i.e., 17.06.2019 with a grace period of 6 months. Since in the present matter the BBA incorporates unqualified reason for grace period/extended period of 6 months in the possession clause. Accordingly, the authority literally interpreting the same allows this grace period of 6 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 17.06.2020.

14. **Admissibility of delay possession charges at prescribed rate of interest:** Proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

"Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]

(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.

Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public."

15. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of

interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.

16. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., **02.09.2021** is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.
17. The definition of term 'interest' as defined under section 2(z a) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

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

Explanation. —For the purpose of this clause—

(i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default.

(ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"

18. Therefore, interest on the delay payments from the 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. To direct the respondent to pay the pending bank loan EMI and interest thereon from June 2019 till handing over the physical possession of the unit.

19. **Subvention Scheme:** - A subvention scheme is a financial plan wherein the buyer pays some value of the total property at the time of booking

the property. This amount includes registration fee, stamp duty, GST etc. After the initial payment or a couple of payments, the bank or the financial institute pay the remaining amount of the property as demanded, at various stages of construction. Once a certain amount of payment is done, the buyer pays the remaining amount along with the bank equally at the time of possession. The amount of interest is borne by the builder for a limited period and the buyer can repay the amount to the bank in the form of EMI later. In these types of cases, despite an agreement for sale is executed inter-se the builder and the buyer, sometimes there is execution of one or more documents in the shape of memorandum of understanding (MoU) and tripartite agreement (TPA). In the buyer's agreement, there are usual terms and conditions of sale of allotted unit, payment of its price, delivery of possession by certain dates and the payment schedule etc. In the second document i.e. MoU, there are certain conditions with regard to payment of the price of the allotted unit by the buyer to the builder and payment of interest of that amount by the builder to the financial institution for a limited period i.e. either upto the date of offer of possession or thereafter. In the third case there is a tripartite agreement between the buyer, builder, and the financial institution to pay the remaining amount of the allotted unit to the builder on behalf of the buyer by the financial institution and payment of interest on that amount by the builder to the financial institution for a certain period i.e. either upto date offer of possession or till the time of delivery of possession. The MoU and tripartite agreements fall within the definition of agreement of sale and can be enforced by the regulatory authority in view of the provisions of The Real Estate Regulation and Development Act, 2016 and held by the

National Consumer Dispute Redressal Commission in case of IDBI Bank Limited Vs Parkash Chand Sharma and Anr, 2018(iii) National Consumer Protection Judgement, 45 and formed by the hon'ble Apex court of land in Bikram Chatterji Vs Union of India and Ors. In writ petition no. 940 of 2017 decided on 23.07.2019 and wherein it was held that when the builder fails with the obligations under the subvention scheme thereby causing a double loss to the allottee then, the court can intervene, and the builder has to comply with the same in case it is proved that there was a diversion of funds.

20. Under the subvention scheme, there is a tri-partite agreement dated 17.06.2016 between the allottee, financial institution and developer wherein the financial institution is required to release the loan amount sanctioned in favour of the allottee to the builder as per the schedule of construction. It is an obligation on the part of the builder to pay the pre-EMI interest till the date of offer of possession to the financial institution on behalf of the allottee. The clause 27 of the tri-partite agreement is reproduce below:

"The obligation of developer is to pay the pre-EMI interest amount during subvention period (i.e., for a period of 36 months or till possession whichever is earlier) on behalf of the Borrower which was otherwise payable by the Borrower. The obligation to pay the pre-EMI interest amount shall commence from the date of first disbursement of the loan amount paid by ICICI Bank Ltd. The interest amount shall be payable as per the Interest set out in the loan agreement executed between the Borrower and ICICI Bank Ltd The developer shall not be liable to and or be under any obligation of performance of any of the terms and conditions, covenants contained in the loan agreement or any other agreement or understanding between ICICI Bank Ltd and the borrower except the terms and conditions agreed herein and the Subvention Scheme"

21. A perusal of tri-partite agreement dated 17.06.2016 entered into between the buyer and developer shows that the subvention scheme was to be governed as per clause 27 of that document which have

already been detailed in above para of the order. The tenure of that scheme is 36 months or till possession whichever is earlier. The total sale consideration of the allotted unit as per buyer's agreement dated 17.06.2016 is Rs.1,59,85,750/-. Though the tenure of subvention scheme is 36 months or offer of possession whichever is earlier but after passage of more than 5.3 years even after receiving occupation certificate dated 29.05.2021 neither the unit is completed nor a valid offer of possession of the allotted unit has been made to the allottee by the builder. Even, there is nothing on the record to show as agreed between the parties as per tri-partite agreement dated 17.06.2016 that the builder is paying any pre-Emi during the tenure of subvention scheme. So, on its failure to pay that amount to the financial institution being paid by the allottee, the builder is liable to pay that amount as per subvention scheme. So, as per the tri-partite agreement dated 17.06.2016, the respondent/developer is only liable to pay the arrears of Pre-Emi from 17.06.2016 to 17.06.2019 i.e., for 36 months as per clause 27.

G.III. To direct the respondent that after payment of the above amount of delayed interest and pending Bank Loan EMI, the possession should be handed over to the complainants within the stipulated time period as per the direction of the Hon'ble authority

22. In the present case, the complainants were offered possession by the respondent on 30.05.2019 in respect of unit no. 2031 after receipt of OC dated 29.05.2019.

Validity of offer of possession

23. 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 allottee remains 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 allottee 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

24. The complainant stated that till date they have not taken the possession of the unit since the unit is not in a habitable condition and the photographs are also attached in the complaint. So, it can be concluded from the photographs that the unit is incomplete and is not in a habitable condition at the moment. There are so many deficiencies in

respect of electric fitting, bathroom fitting, cup-board modular kitchen, flooring etc. are not up to the mark finished. Therefore, 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, applying above principle on facts of this case, the respondent is directed to complete the unit 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

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 18 of the agreement executed between the parties on 17.06.2016, the possession of the subject apartment was to be delivered within 36 months from the date of execution of agreement i.e., 17.06.2019. 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 17.06.2020. 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 allottee shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 17.06.2020 till the valid 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

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 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., 17.06.2020 till the date of order i.e., 02.09.2021.
- ii. The arrears of such interest accrued from 17.06.2020 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 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 allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same rate of interest which

the promoters shall be liable to pay the allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

- v. The 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.

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: 02.09.2021

Judgement uploaded on 21.12.2021.

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