

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

Complaint no. : 3413 of 2020
First date of hearing: 18.11.2020
Date of decision : 08.09.2021

1.Saroj Mittal
R/O: 29FF, The White House, Sector 57,
Gurugram-122003

Complainant

Versus

1. M/S Pivotal Infrastructure Pvt. Ltd.
Regd. Office: 309, 3rd Floor, JMD Pacific
Square, Sector-15, Part-II, Gurugram-122001

Respondent

CORAM:

Shri Samir Kumar
Shri Vijay Kumar Goyal

**Member
Member**

APPEARANCE:

Shri Anubhav Bansal
Shri Rohan Gupta

Advocate for the complainant
Advocate for the respondent

ORDER

1. The present complaint dated 13.10.2020 has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with Rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or

the rules and regulations made thereunder 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:

S. No.	Heads	Description
1.	Name of the project	"Devaan" sector 84, Gurugram
2.	Nature of the project	Affordable Housing Policy
3.	Project area	5.175-acres
4.	DTCP license no. and validity status	13 of 2014 issued on 10.06.2014 valid up to 09.03.2020
5.	Name of the license holder	Pivotal infrastructure Pvt. Ltd.
6.	Date of environment clearance	05.02.2015 [as per project details]
7.	Date of building plans approval date	06.08.2014 [as per project details]
8.	Unit no.	Apartment no. 0201, 2 nd floor, tower-T-8 [annexure 3 on page no. 24 of complaint]
9.	Unit area admeasuring	474 sq. ft. of super area [annexure 3 on page no. 24 of complaint]
10.	Date of execution of flat buyer's agreement	06.07.2015 [annexure 3 on page no. 23 of complaint]
11.	Total consideration (Basic sale price)	Rs. 19,46,000/- [page no. 26 of complaint]
12.	Total amount payable by the complainant	Rs.20,91,169/- [Page no. 26 of complaint]

13.	Due date of delivery of possession as per the clause 8.1 mentioned in the agreement i.e., "The company shall handover the possession of the said apartment within a period of 4 years from the date of grant of sanction of building plans for the project or the date of receipt of all the environmental clearance necessary for the completion of the construction and development of the project, whichever is later."	05.02.2019 [calculated from the date of environment clearance as it is later than sanction of building plans]
14.	Occupation certificate date	06.03.2020 [annexure R-2 on page no. 11 of reply]
15.	Offer of possession	14.03.2020 [annexure R-3 on page no. 14 of reply]
16.	Delay in handing over the possession till the date of offer of possession i.e., 14.03.2020 plus 2 months i.e., 14.05.2020	1 year 3 month 9 days
17.	Status of project	Ongoing

B. Facts of the complaint

B. Facts of the complaint

The complainant has submitted as under: -

3. That M/s. Pivotal Infrastructure Private Limited the developer of the project issued an advertisement, inviting applications for allotment of residential apartment in the affordable housing project "DEVAAN" located at sector 84, Gurgaon, Haryana.
4. That a brochure of the property was handed over by the respondent. The agreement dated 04.07.2014 was made between the complainant and the respondent company. A cheque amounting to Rs.1,00,000/- was submitted by the complainant to respondent as advance deposit for booking the apartment in the project.
5. That the complainant has been allotted the apartment in project "Devaan" at sector 84, Gurgaon, Haryana by respondent i.e., M/s. Pivotal Infrastructure Private Limited under affordable housing policy 2013 of Government of Haryana, vide provisional allotment letter dated 27.04.2015 i.e., flat bearing no. 201 of tower -T8, having carpet area of 474 sq. ft. on total sale consideration of Rs. 19,46,000/- and demanded Rs.4,01,532/- as 25% of the allotment amount. The said amount was duly deposited on 08.05.2015.
6. That the respondent demanded the first instalment of Rs. Rs.2,51,294.74/- as 12.5% amount. The said amount was duly deposited on 27.10.2015.

7. That the respondent demanded the second instalment of Rs.2,43,249.75/- as 12.5% amount. The said amount was duly deposited on 05.05.2016.
8. That the respondent demanded the third instalment of Rs. 2,43,249.75/- as 12.5% amount. The said amount was duly deposited on 04.11.2016 as per demand.
9. That the respondent demanded the fourth instalment of Rs. 2,43,249.75/- as 12.5% amount. The said amount was duly deposited on 02.06.2017 as per demand.
10. That the respondent demanded the fifth instalment of Rs. 2,72,439.96/- as 12.5% amount. The said amount was duly deposited on 28.10.2017 as per demand.
11. That the respondent demanded the sixth instalment of Rs. 2,63,360/- as 12.5% amount. The said amount was duly deposited on 05.05.2018 as per demand.
12. That the respondent demanded the VAT of Rs. 49,563.70. The said amount was duly deposited on 17.09.2019.
13. That the respondent has sent letter for "offer of Possession" and acknowledged the receipt of the aforesaid amount of Rs.20,91,169/- as duly paid by the complainant for the aforesaid apartment.
14. That the allotment of the aforesaid apartment was made in April 2015 in terms of application for allotment dated 04.07.2014. As such the possession was to be delivered by May 2019. The instalments were to be raised in terms of the construction and the possession was to be delivered

accordingly. The delay in construction has caused delay in delivery of the possession. The possession of the said apartment has not been delivered to the complainant as per agreed terms. The construction of the project was grossly delayed by more than 10 months. The construction has not been carried out as per timelines and as such possession offered has delayed.

C. Relief sought by the complainant:

15. The complainant has sought following relief(s):
- (i) Direct the respondent to deliver the possession of the apartment to the complainant as per the agreement.
 - (ii) Direct the respondent to pay an interest at the rate of 24% per annum from the date of payments till the date of possession of flat.
15. 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.

The respondent has contested the complaint on the following grounds: -

16. 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 and

with an intent to gain wrongfully by avoiding the due and outstanding payments to the respondent.

17. That the respondent is very well committed to the development of the real estate project and has already received the occupation certificate vide memo dated 06.03.2020.
18. That the respondent has in all its bona fides completed the construction of the project against various factors beyond the control of the respondent including but not limited to the annual bans to construction activity imposed by the NGT from time to time in the months of October - November, delay in permissions and sanctions by the Government Authorities, extra registration & compliance under the provisions of Act of 2016, labour and material shortages, vendor related delays particularly the installation of lifts and electrical fittings, GST, demonetisation, multiple draws for sale of the flats, non-payment of the sale consideration as per the agreed payment plan by the allottee including the complainant, and despite such factors leading to multiple delays which are per se beyond the control of the respondent, the respondent could complete the construction and apply for the grant of occupation certificate on 5.12.2018 and finally on receipt of the occupation certificate the respondent has offered the physical possession and on the other hand the complainant is trying to take unfair advantage by not paying the due outstanding payments since last 1 year and has now ventured

into this wrongful attempt of seeking compensation for the delay.

19. That the complainant has herself breach the terms and conditions of the agreed payment plan by not paying the due amounts in a timely and agreed manner and there is an amount of Rs. 18,915.47/ outstanding against the complainant and an amount of Rs. 68,788.17/ as per the demand letter dated 14.03.2020 which has not been paid so far. That apart from the complainant there has been many others not complying with the agreed time schedule of payment leading to further hardships upon the respondent when the entire real estate industry is under pressure and slowdown.
20. That the complainant is estopped to file the present complaint due to his own acts and conduct as the complainant has not complied with the demands of the due amounts as made by the respondent at the time of offer of possession and instead is wrongfully filing the present complaint. The entire obligations of completion of the project are upon the respondent and the failure to pay the due amounts in a timely manner by so many of the allottee including the complainant have led to multiple problems and extra costs on the respondent leading to further delays.
21. 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. The complainant has primarily filed the present complaint seeking compensation

for the delay in possession by way of interest on the amount paid, though the complainant is not entitled to any such a relief, however such relief and cause of action could only be adjudicated by the adjudicating officer under Section 71 of the Act of 2016 and the hon'ble authority does not have any power to adjudicate upon the complaint and hence the complaint is beyond the jurisdiction of the hon'ble authority and the same is liable to be rejected.

22. That the complainant does not suffer by any delay occasioned in offer of possession and the respondent does not gain anything in causing any delay in handing over of the possession and in fact the complainant is trying to harass the respondent by creating a bad precedent of filing cases by misuse of the process of law of the hon'ble authority.

E. Jurisdiction of the authority

23. The respondent had raised objection regarding jurisdiction of authority to entertain the present complaint and the said objection stands rejected. The authority observed that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.1 Territorial jurisdiction

24. 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

25. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per agreement for sale.

Section 11(4)(a) is reproduced as hereunder:

Section 11(4)(a)

Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

26. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter 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 objections raised by the respondent.

F.1 Objection regarding untimely payments done by the complainant.

27. The respondent has contended that the complainant has made defaults in making payments as a result thereof, the respondent had to issue various reminder letters. Clause 7.3 of the buyer's agreement wherein it is stated that timely payment of instalment is the essence of the transaction, and the relevant clause is reproduced below:

"7.3. Time is of essence"

'Notwithstanding anything to the contrary contained herein, it is hereby expressly and unconditionally agreed to by the allottee that time is of the essence with respect to the allottee's obligations to make any and all payments hereunder including the payment of any part of the Total price, payment of any and all other applicable charges, considerations, interest, deposits, penalties and other payments such as applicable stamp duty, registration fee etc. and other charges as is stipulated under this agreement.'

28. At the outset, it is relevant to comment on the said clause of the agreement i.e., "7.3. TIME IS OF ESSENCE" wherein the payments to be made by the complainant had been subjected to all kinds of terms and conditions. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favor of the promoter and against the allottee that even a single default by the allottee in making timely payment as per the payment plan may result in termination of the said agreement and forfeiture of the earnest money. Moreover, the authority has observed that despite complainant being in default in making timely payments, the

respondent has not exercised his discretion to terminate the buyer's agreement.

G. Findings on the relief sought by the complainant.

Relief sought by the complainant: The complainant has sought following relief(s):

- i. Direct the respondent to deliver the possession of the apartment to the complainant as per the agreement.
- ii. Direct the respondent to pay an interest at the rate of 24% per annum from the date of payments till the date of possession of flat.

29. In the present complaint, the complainant intends to continue with the project and is seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under: -

"Section 18: - Return of amount and compensation

18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building, —

.....

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."

30. Clause 8 of the flat buyer's agreement provides the time period of handing over possession and the same is reproduced below:

"Clause 8- 8.1 Except where any delay is caused on account of reasons expressly provided for under this agreement and other situations beyond the

reasonable control of the Company and subject to the Company having obtained the occupation/completion certificate from the competent authorities, the company shall endeavour to complete the construction and handover the possession of the said apartment within a period of 4 years from the date of grant of sanction of building plans for the project the date of receipt of all the environmental clearances necessary for the completion of the construction and development of the project, whichever is later, subject to timely payment by the Allottee of all the amounts payable under this agreement and performance by the Allottee of all other obligations hereunder."

31. At the inception it is relevant to comment on the pre-set possession clause of the flat buyer's agreement wherein the possession has been subjected to in numerous terms and conditions, and in numerous terms and conditions. The drafting of this clause is not only vague but so heavily loaded in favour of the promoter that even a single default by the allottee in fulfilling obligations, formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the

agreement and the allottee is left with no option but to sign on the dotted lines.

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

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

(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.

33. 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.
34. 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., 08.09.2021 is 7.30%. Accordingly, the

prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

35. 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;"

36. 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.

37. On consideration of the circumstances, the evidence and other record and submissions made by the parties, 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. It is a matter of fact that the date of commencement of the subject tower, where the flat in question is situated is 05.02.2015. By virtue of flat buyer's agreement executed between the parties on 06.07.2015, the possession of the booked unit was to be delivered within 4 years of the commencement of construction of the particular tower/ block in which the flat is located which comes out to be 05.02.2019.

38. 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 06.03.2020. The respondent offered the possession of the unit in question to the complainant only on 14.03.2020, so it can be said that the complainant came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the complainant should be given 2 months' time from the date of offer of possession. This 2 month of reasonable time is being given to the complainant 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., 05.02.2019 till the expiry of 2 months from the date of offer of possession 14.03.2020 which comes out to be 14.05.2020.

39. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainant is entitled to delay possession at prescribed rate of interest i.e., 9.30% p.a. w.e.f. 05.02.2019 till 14.05.2020 as per provisions of section 18(1) of the Act read with rule 15 of the rules and as per section 19(10) of the act.

H. Directions of the authority

40. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):
- i. The respondent is directed to pay interest at the prescribed rate of 9.30% p.a. for every month of delay from the due date of possession i.e., 05.02.2019 till the date of offer of possession i.e., 14.03.2020 + 2 months i.e., 14.05.2020 to the complainant as per section 19(10) of the Act.
 - ii. The arrears of such interest accrued from 05.02.2019 till 14.05.2020 shall be paid by the promoter to the allottee within a period of 90 days

from date of this order 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 complainant is directed to take possession of unit within a period of one month from the date of this order.

41. Complaint stands disposed of.

42. File be consigned to registry.


(Samir Kumar)
Member


(V.K Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Date 08.09.2021

Judgement uploaded on 22.12.2021.