

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

Complaint no. : 3598 of 2021
Date of filing complaint: 15.09.2021
First date of hearing : 06.10.2021
Date of decision : 06.10.2021

1. Sapna Sehra 2. Aghosh Hasija Both RR/O: - H.no. 1959, Sector-16-17, Hisar, Haryana	Complainants
Versus	
1. M/s Imperia Structures Ltd. Regd. Office at: - A-25, Mohan Cooperative, Industrial Estate, Mathura Road, New Delhi- 110044	Respondent

CORAM:	
Shri. Samir Kumar	Member
Shri Vijay Kumar Goyal	Member
APPEARANCE:	
Sh. Deepanshu Singla and Sh. Gaurav Rawat (Advocates)	Complainants
Ms. Tanya Swarup (Advocate)	Respondent

ORDER

1. The present complaint 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 under the provision of the Act or the rules and regulations made there under or to the allottees as per the agreement for sale executed inter se.

A. Unit and project related details

2. The particulars of unit details, sale consideration, the amount paid by the complainants, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S. No.	Heads	Information
1.	Name and location of the project	"Esfera Phase-II", Sector-37-C, Gurugram
2.	Project area	60460 sq. mtrs.
3.	Nature of the project	Group housing colony
4.	DTCP license no. and validity status	64 of 2011 dated 16.07.2011 valid till 15.07.2017
5.	Name of the license holder	M/s prime Infoways Pvt. Ltd. And Ors.
6.	RERA registered/ not registered	Registered Registered vide 352 of 2017 dated 17.11.2017
7.	RERA registration valid up to	31.12.2020
8.	Unit no.	302, 3 rd floor, tower-E (annexure- C1 on page no 36 of the complaint)
9.	Unit admeasuring	1435 sq. ft.

		[super area] (annexure- C1 on page no 36 of the complaint)
10.	Date of flat buyer's agreement	16.04.2013 (annexure- C1 on page no 36 of the complaint)
11.	Payment plan	Construction linked plan (annexure- C1 on page no 71 of the complaint)
12.	Total consideration	Rs. 62,40,675/- (annexure- C1 on page no 36 of the complaint)
13.	Total amount paid by the complainants	Rs. 56,61,227/- (annexure- C2 on page no 80 of the complaint)
14.	Possession clause	10.1 The Developer/Company based on its present plans and estimates and subject to all just exceptions, contemplates to complete construction of the said Building/said Apartment within a period of three and half years from the date of execution of this Agreement unless there shall be delay or there shall be failure due to reasons mentioned in Clauses 11.1, 11.2, 11.3 and Clause 41 or due to failure of Intending Allottee(s) to pay in time the price of the said Apartment along with

		other charges and dues in accordance with the schedule of payments given in Annexure F or as per the demands raised by the Developer/Company from time to time or any failure on the part of the intending Allottee(s) to abide by all or any of the terms or conditions of this Agreement. (emphasis supplied)
15.	Due date of delivery of possession	16.10.2016 (Calculated from the date of execution of flat buyer's agreement)
16.	Occupation Certificate	Not obtained w.r.t the subject tower 07.02.2018 (for tower- G,H, I and EWS block)
17.	Offer of possession	07.09.2021 (annexure- R3 on page no. 47 of the reply) Not a valid/ lawful offer of possession
18.	Delay in handing over of possession till date of order i.e.,06.10.2021	4 years, 11 months, 20 days

B. Facts of the complaint: -



3. That the complainants have purchased a residential unit (hereinafter referred to as the said 'unit') in the advertised residential colony of the respondent company.
4. That the subject project is being developed by the respondent company in the name of 'The Esfera', located at sector 37-C, Gurugram, Haryana. (hereinafter referred as the said 'project'). The said project is being developed under the licence no. 64 of 2011 dated 13.11.2017 issued by Director General Town and Country Planning, Haryana on a land parcel of 17 acres. Therefore, this authority has the requisite jurisdiction to adjudicate upon the present complaint as per section 2(p) of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as 'The Act') as the subject matter property/land falls within the local jurisdiction of this authority.
5. That the respondent advertised about the said project in the year 2011, when the original allottees came to know about the said project and decided to book a unit in the said project of the respondent company.
6. That at the time of booking the unit and execution of the apartment buyer's agreement Mrs. Sapna Sehra and Mr. Sunil Hasija were the original allottees but vide an indemnity cum undertaking dated 29.11.2017 Mr. Sunil Hasija substituted



himself with Mr. Aghosh Hasija and made him the co-applicant in the subject unit with Mrs. Sapna Sehra. The said Indemnity cum Undertaking was also accepted and acknowledged by the respondent on 06.12.2017.

7. That the complainants after enquiring about the project of the respondent company made an application for booking of a flat along with the 5% of the total cost of the flat. The booking of the subject unit was done by the complainants on 03.09.2011. That the subject unit was allotted to the complainants on 04.06.2012 i.e., after a period of 9 months from the date of booking.
8. That the complainants paid an amount of Rs. 9,12,608/- between the date of booking and the date of allotment of the subject unit.
9. That an apartment buyer's agreement (hereinafter referred as the 'ABA') was executed between the parties herein on 16.04.2013 for the sale of an apartment bearing no. E-302, 3rd floor, block-E admeasuring 1435 sq. ft. (hereinafter referred as the said 'unit') for a total sale consideration of Rs. 62,40,675/-.
10. That the complainants paid an amount of Rs. 19,53,370/- between the date of allotment of the unit and the date of the agreement.

11. That as per clause 10.1 of the subject agreement the respondent was liable to handover the possession of the subject unit to the complainants within a period of three and half years from the date of the execution of the agreement which comes out to be 16.10.2016.
12. That believing on the false assurances given by the respondent the complainants never made any default in making the payments as the payment plan opted by them or they paid every instalment along with interest if imposed any. Till the date of this complaint, against the total sale consideration of Rs. 62,40,675/- the complainants have paid an amount of Rs. 61,42,878/- to the respondent company.
13. That even after receiving more than 90% of the total amount of sale consideration till date, the respondent has failed to handover the possession of the subject unit to the complainants i.e., there has been a delay of 4 years 10 months and 7 days from the due date of possession and the date of filing this complaint.
14. That the respondent with malafide and deceitful intentions took the hard-earned money of the complainants and never bothered to fulfil its own liabilities and duties towards the complainants.

15. That as per clause 11.1 of the subject agreement the respondent was also liable to pay delayed possession charges to the complainants @Rs. 5/- per sq. ft. per month for the period of delay beyond the due date of handing over the possession, but no delayed interest has been ever paid by the respondent to the complainants.
16. That when the due date of handing over the possession passed over the complainants tried to make calls to the respondent, and they got a response stating that the construction work is going on at the project and it will be handed over soon to the latter.
17. That the wrongful and malafide intentions of the respondent are clearly seen from the registration certificate issued by this authority. The respondent has got the registration certificate only for the Phase-II of the project.
18. That the respondent never had any intention of delivering the project on time as it applied for the grant of occupation certificate on 20.06.2017 i.e., after the due date of handing over of the possession. The occupation certificate was granted by the competent authority to the respondent on 07.02.2018. it is to bring to the knowledge of the authority that the said occupation certificate was granted only for towers G, H, I and EWS block of the project. As the subject

unit of this complaint is situated in block E of the project, thus no occupation certificate is yet available for the subject apartment.

19. That as per the payments made by the complainants till now an amount of Rs. 97,797/- only is due on the part of the complainants.
20. That the respondent even called the complainants and told them that the initial super area of the unit of 1435 sq. ft. has been increased and the complainants now have to pay as per the increased area of the subject unit and the respondent asked the complainants to pay more than the outstanding amount on their part over the phone call.

C. Relief sought by the complainants.

21. The complainants have sought following relief(s):
 - (i) Direct the respondent to pay the delayed possession charges at the prescribed rate of interest to the complainants for the period of delay in handing over the possession.
 - (ii) Direct the respondent to handover the peaceful, uncontested, complete in all respects and physical possession of the subject unit to the complainants.
 - (iii) Direct the respondent to receive the occupation certificate from the competent authority for the subject tower.



D. Reply by the respondent.

22. The respondent is a company duly registered under the provisions of the Companies Act, 1956 and Mr. Varun Kumar is authorized representative of the respondent company, to sign, verify and file this reply before this authority.
23. That, it is submitted that the present complaint has been filed by the complainant against the respondent company in respect of the tower- "E" being developed by the respondent company in its group housing project titled as "Esfera Phase II" situated at sector-37c, Gurgaon, Haryana (hereinafter 'said project').
24. That, it is submitted that the flat no. E-302, (hereinafter 'Said Flat') in tower-E (hereinafter 'Said Tower') situated in the said project, had been allotted to the complainant by the respondent company vide allotment letter dated 04.06.2012 (hereinafter 'allotment letter') on the terms and condition mutually agreed by the allottee/complainant and the respondent company.
25. It is submitted that clause 10.1 of the agreement has been duly agreed by the complainant. In view of the same, the respondent company had intended to complete the construction of the said flat on time. It is pertinent to mention that the respondent company had successfully



completed the construction of the said tower and procured the occupancy certificates for three towers out of 9 towers in the said project. However, the construction of all the towers is completed and in habitable stage, in fact the respondent company had already applied for grant of occupation certificate for rest of the towers of project including the tower - "E", where the allotted unit situates. Further it is pertinent to mention here that respondent company already intimated the complainant about the factum of its OC Application though due to certain force majeure circumstance, majorly the outbreak of second COVID wave in April 2021 and subsequent lockdown in Haryana State, the DTCP, Haryana could not issue the OC well in time enabling the respondent to offer the physical possession of the allotted unit to the complainant. That it is reiterated that allotted unit is ready for fit out possession, and communication with regard to this aspect have already been sent to all eligible allottees including the complainant herein. That it is important to mention here that the project "ESFERA" comprises of 2 phases whereas OC of the Phase I of the project is duly issued by "Town And Country Planning Development Haryana" on 07.02.2018 and more than 100 happy allottee(s) are residing in that phase. That the physical

possession of the unit will be tentatively delivered to its respective allottee(s) soon with respective OC on the said project.

26. That, the respondent company is in extreme liquidity crunch at this critical juncture, the company has also been saddled with orders of refund in relation to 15 apartments in the project, on account of orders passed by various other courts. The total amount payable in terms of these decrees exceeds an amount of Rs.10 crores. The said project involving hundreds of allottees, who are eagerly awaiting the possession of their apartments, will be prejudiced beyond repair in case any mandatory order be passed when the project is almost completed.
27. That, on account of many allottees exiting the project and many other allottees not paying their instalment amounts, the company, with great difficulty, in these turbulent times has managed to secure a last mile funding of Rs.99 crores from SWAMIH Investment Fund - I. The said Alternate Investment Fund (AIF) was established under the special window declared on 6.11.2019 by the Hon'ble Finance Minister to provide priority debt financing for the completion of stalled, brownfield, RERA registered residential developments that are in the affordable housing /mid-

income category, are net-worth positive and require last mile funding to complete construction. The company was granted a sanction on 23.09.2020 after examination of the status of the company and its subject project "Esfera" for the amount of Rs.99 crores. However, the funding is still to be received, and the company is hoping for the same to be released shortly.

28. That, it is humbly submitted that this authority may be pleased to consider the bona fide of the respondent company and distinguish the respondent company from the bad repute being imparted to real-estate builders. It is pertinent to mention here that the respondent company is extremely committed to complete the phase - 2 of the said project. In fact, the super structure of all towers in phase - 2 (incl. tower -E) has already been completed, the internal finishing work and MEP works is going in a full swing with almost 300 construction labourers are working hard to achieve the intent of the appellant to complete the entire project despite all prevailing adversaries.

29. That, it is relevant to mention herein that several allottees have withhold the remaining payments, which is further severally affecting the financial health of the respondent company and further due to the force majeure conditions and



circumstances/reasons, which were beyond the control of the respondent company as mentioned herein below, the construction works got delayed at the said project. Both the parties i.e. the complainant as well as the respondent company had contemplated at the very initial stage while signing the allotment letter/agreement that some delay might have occurred in future and that is why under the force majeure clause as mentioned in the allotment letter, it is duly agreed by the complainant that the respondent company shall not be liable to perform any or all of its obligations during the subsistence of any force majeure circumstances and the time period required for performance of its obligations shall inevitably stand extended. It is unequivocally agreed between the complainant and the respondent company that the respondent company is entitled to extension of time for delivery of the said flat on account of force majeure circumstances beyond the control of the respondent company. And inter-alia, some of them are mentioned herein below:

- That, the respondent company started construction over the said project land after obtaining all necessary sanctions/approvals/ clearances from different state/central agencies/authorities and after getting



building plan approved from the authority and named the project as "Esfera II". The respondent company had received applications for booking of apartments in the said project by various customers and on their requests, the respondent company allotted the under-construction apartments/ units to them.

- That, owing to unprecedented air pollution levels in Delhi NCR, the Hon'ble Supreme Court ordered a ban on construction activities in the region from 04.11.2019 onwards, which was a blow to realty developers in the city. The Air Quality Index (AQI) at the time was running above 900, which is considered severely unsafe for the city dwellers. Following the Central Pollution Control Board (CPCB) declaring the AQI levels as not severe, the SC lifted the ban conditionally on 09.12.2019 allowing construction activities to be carried out between 6 am and 6 pm, and the complete ban was lifted by the Hon'ble Supreme Court on 14.02.2020.
- That, when the complete ban was lifted on 14.02.2020 by the Hon'ble Supreme Court, the Government of India imposed National Lockdown on 24.03.2020 due to pandemic COVID-19, and conditionally unlocked it in



03.05.2020. However, this has left the great impact on the procurement of material and labour. The 40-day lockdown in effect since March 24, which was further extended up to May 3 and subsequently to May 17, led to a reverse migration with workers leaving cities to return back to their villages. It is estimated that around 6 lakh workers walked to their villages, and around 10 lakh workers are stuck in relief camps. The aftermath of lockdown or post lockdown periods has left great impact and scars on the sector for resuming the fast-paced construction for achieving the timely delivery as agreed under the "allotment letter".

- That initially, after obtaining the requisite sanctions and approvals from the concerned authorities, the respondent company had commenced construction work and arranged for the necessary infrastructure including labour, plants and machinery, etc. However, since the construction work was halted and could not be carried on in the planned manner due to the force majeure circumstances detailed above, the said infrastructure could not be utilized and the labour was also left to idle resulting in mounting expenses, without there being any progress in the construction work.



Further, most of the construction material, which was purchased in advance, got wasted/deteriorated causing huge monetary losses. Even the plants and machineries, which were arranged for the timely completion of the construction work, got degenerated, resulting into losses to the respondent company running into crores of rupees.

- Moreover, it is also pertinent to mention here that every year the construction work was stopped / banned / stayed due to serious air pollution during winter session by the Hon'ble National Green Tribunal (NGT), and after banned / stayed the material, manpower and flow of the work has been disturbed / distressed. Every year the respondent company had to manage and rearrange for the same and it almost multiplied the time of banned / stayed period to achieve the previous workflow.
- The real estate sector so far has remained the worst hit by the demonetization as most of the transactions that take place happen via cash. The sudden ban on Rs.500/- and Rs.1000/- currency notes has resulted in a situation of limited or no cash in the market to be parked in real estate assets. This has subsequently

translated into an abrupt fall in housing demand across all budget categories. Owing to its uniqueness as an economic event, demonetisation brought a lot of confusion, uncertainty – and, most of all, - especially when it came to the realty sector. No doubt, everyone was affected by this radical measure, and initially all possible economic activities slowed down to a large extent, which also affected the respondent company to a great extent, be it daily wage disbursement to procuring funds for daily construction, and day-to-day activities, since construction involves a lot of cash payment/transactions at site for several activities.

- It is a well-known fact that there is extreme shortage of water in state of Haryana and the construction was directly affected by the shortage of water. Further the Hon'ble Punjab and Haryana High Court vide an Order dated 16.07.2012 in CWP No. 20032 of 2009 directed to use only treated water from available sewerage treatment plants (hereinafter referred to as "STP"). As the availability of STP, basic infrastructure and availability of water from STP was very limited in comparison to the requirement of water in the ongoing constructions activities in Gurgaon District, it was

becoming difficult to timely schedule the construction activities. The availability of treated water to be used at construction site was thus very limited and against the total requirement of water, only 10-15% of required quantity was available at construction sites.

30. That, owing to the above said force majeure circumstances and reasons beyond the control of the respondent company, it was extremely necessary to extend the intended date of offer of possession mentioned in the allotment letter.
31. That for the purpose of ensuring the delivery of the possession, despite lockdown, the respondent company was seeking permission to resume construction of the said project. The respondent company got the permission certificate on 01.05.2020 by the municipal Corporation of Gurugram, Haryana subject to certain safety restriction and conditions. Therefore, it is humbly submitted that this authority may be pleased to consider the bona fide of the respondent company and distinguish the respondent company from the bad repute being imparted to real-estate builders. It is pertinent to mention here that the respondent company is extremely committed to complete the phase - II of the said projects in fact super structure/ civil works in all the towers in phase - II has already been completed despite

all prevailing adversaries, only final finishing work is remaining now.

32. The respondent company craves leave of this authority to add, amend or alter this reply, if found necessary, at any stage of the proceedings. The respondent company shall submit any documents or details as may be required by this authority. The respondent company also craves leave of this authority to make further submissions at the appropriate stage, if so advised.
33. Copies of all the relevant do have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submission made by the parties.

E. Jurisdiction of the authority

34. The respondent has raised an objection regarding jurisdiction of authority to entertain the present complaint. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana the jurisdiction of Haryana Real Estate Regulatory Authority, Gurugram shall be entire Gurugram district for all purposes. 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

Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottees 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;

The provision of assured returns is part of the builder buyer's agreement, as per clause 15 of the BBA dated..... Accordingly, the promoter is responsible for all obligations/responsibilities and functions including payment of assured returns as provided in Builder Buyer's Agreement.

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.

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 complainants at a later stage.

F. Findings on the relief sought by the complainants.

F.I Delay possession charges.

Relief sought by the complainants: Direct the respondent to pay the delayed possession charges at the prescribed rate of interest to the complainants for the period of delay in handing over the possession.

35. In the present complaint, the complainants intend to continue with the project and are 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.

36. Clause 10.1 of the flat buyer's agreement, provides for handing over possession and the same is reproduced below:

10.1 Schedule for possession of the said apartment

The Developer/Company based on its present plans and estimates and subject to all just exceptions, contemplates to complete construction of the said Building/said Apartment within a period of three and half years from the date of execution of this Agreement unless there shall be delay or there shall be failure due to reasons mentioned in Clauses 11.1, 11.2, 11.3 and Clause 41 or due to failure of Intending

Allottee(s) to pay in time the price of the said Apartment along with other charges and dues in accordance with the schedule of payments given in Annexure F or as per the demands raised by the Developer/Company from time to time or any failure on the part of the intending Allottee(s) to abide by all or any of the terms or conditions of this Agreement.

37. A flat buyer's agreement is a pivotal legal document which should ensure that the rights and liabilities of both builders/promoters and buyers/allottees are protected candidly. Flat buyer's agreement lays down the terms that govern the sale of different kinds of properties like residentials, commercials etc. between the buyer and builder. It is in the interest of both the parties to have a well-drafted agreement which would thereby protect the rights of both the builder and buyer in the unfortunate event of a dispute that may arise. It should be drafted in the simple and unambiguous language which may be understood by a common man with an ordinary educational background. It should contain a provision with regard to stipulated time of delivery of possession of the apartment, plot or building, as the case may be and the right of the buyers/allottees in case of delay in possession of the unit.
38. The respondent promoter has proposed to handover the possession of the subject apartment within a period of three and half years from the date of execution of this agreement



unless there shall be delay or there shall be failure due to reasons mentioned in clauses 11.1, 11.2, 11.3 and Clause 41 or due to failure of intending allottee(s) to pay in time the price of the said apartment along with other charges and dues in accordance with the schedule of payments given in annexure-F or as per the demands raised by the developer/company from time to time or any failure on the part of the intending allottee(s) to abide by all or any of the terms or conditions of this agreement.

39. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges, proviso to section 18 provides that where an allottees 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.

40. 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.
41. 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., 06.10.2021 is 7.30% p.a. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30% p.a.
42. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottees by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottees, 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;"

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

44. **Validity of offer of possession:** At this stage, the authority will clarify 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 concerned department certifying that all the

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 an apartment uninhabitable. Such minor defects can be rectified later at the cost of the developers. The allottee should accept possession of an apartment with such minor defects under protest. This authority will award suitable relief or compensation for rectification of minor defects after taking over of possession under protest.

However, if the subject unit is not at all habitable 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 of minor nature, or they could be significant and unreasonable which puts heavy burden upon the allottee. 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 the additional demands are made by the developer, the allottee may accept possession under protest or decline to take possession raising objection against unjustified demands.

45. In light of the above-mentioned reasoning, the offer of possession dated 07.09.2021 made by the promoter in the present matter is not a valid/ lawful offer of possession as the same has been made before obtaining OC from the



competent authority which is a necessary pre-requisite. The OC for the subject unit has not been obtained by the respondent promoter till date.

46. 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. By virtue of flat buyer's agreement executed between the parties on 16.04.2013, the possession of the booked unit was to be delivered within a period of three and half years from the date of execution of this agreement which comes out to be 16.10.2016.
47. Section 19(10) of the Act obligates the allottees to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. These 2 months' of reasonable time is being given to the complainants keeping in mind that even after intimation of possession practically he has 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., 16.10.2016 till offer of possession of the subject flat after obtaining occupation certificate from the competent authority plus two months or handing over of possession whichever is earlier as per the provisions of section 19(10) of the Act.

48. Accordingly, 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 complainants are entitled to delayed possession charges at the prescribed rate of interest i.e., 9.30% p.a. for every month of delay on the amount paid by the complainants to the respondent from the due date of possession i.e., 16.10.2016 till the offer of possession of the subject flat after obtaining occupation certificate from the competent authority plus two months or handing over of possession whichever is earlier as per the provisions of section 18(1) of the Act read with rule 15 of the rules and section 19 (10) of the Act.

H. Directions of the authority

49. 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., 16.10.2016 till the offer of possession of the subject flat after obtaining occupation certificate from the competent authority plus two months or handing over of possession whichever is earlier as per section 19 (10) of the Act.
- II. The arrears of such interest accrued from 16.10.2016 till date of this order shall be paid by the promoter to the allottees within a period of 90 days from date of this order and interest for every month of delay shall be payable by the promoter to the allottees before 10th day of each subsequent month as per rule 16(2) of the rules.
- III. The respondent is directed to handover the physical possession of the subject unit after obtaining OC from the competent authority.
- IV. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
- V. The rate of interest chargeable from the allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the

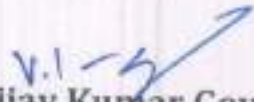
allottees, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

VI. The respondent shall not charge anything from the complainants which is not the part of the agreement.

50. Complaint stands disposed of.

51. File be consigned to registry.


(Samir Kumar)
Member


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 06.10.2021