

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

Complaint no. : 3501of 2021
First date of hearing: 13.10.2021
Date of decision : 10.12.2021

Ishpreet Singh
R/o:- Flat no. 173, GF, Pocket B,
Sarita Vihar New Delhi

Complainant

Versus

M/s Vipul Limited.
Office at: Vipul Tech Square, Golf Course Road,
Sector- 43, Gurugram- 122009

Respondent

CORAM:

Shri K. K. Khandelwal
Shri Vijay Kumar Goyal

**Chairman
Member**

APPEARANCE:

Shri Manish Shukla Advocate
Shri Uma Shankar Advocate

Complainant
Respondent

ORDER

1. The present complaint dated 02.09.2021 has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is *inter alia* prescribed that the promoter shall be responsible for all obligations, responsibilities and functions as provided under the

provision of the Act or the rules and regulations made there under or to the allottee as per the agreement for sale executed *inter se*.

A. Unit and project related details

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

S.No.	Heads	Information
1.	Project name and location	Vipul Lavanya Tower- 2 and 3, Sector- 81, Gurugram
2.	Project area	10.512 acres
	Registered area	2.282 acres
3.	Nature of the project	Group housing complex
4.	DTCP license no. and validity status	26 of 2010 dated 18.03.2010 valid up to 17.03.2020
5.	Name of licensee	Graphic research consultant private limited and 4 others
6.	RERA Registered/ not registered	Registered vide no. 15 of 2018 dated 11.09.2018
7.	RERA registration valid up to	31.12.2019
8.	Unit no.	0802, 8 th floor, tower- 02 [Page no. 21 of complaint]
9.	Unit measuring	1780 sq. ft. [super area]
10.	Date of execution of flat buyer's agreement	22.03.2016 [page no. 20 of complaint]
11.	Date of allotment letter	22.03.2016 [page no. 13 of the complaint]
12.	Payment plan	Time linked payment plan

		[Page no. 40 of complaint]
13.	Total consideration	Rs.85,63,860/- [as per payment schedule page no. 40 of complaint]
14.	Total amount paid by the complainant	Rs.34,45,348/- [as per receipt information page no. 51 to 56 of complaint]
15.	Due date of delivery of possession as per clause 8.1 (a) of the flat buyer's agreement by 36 months from the signing of this agreement plus grace period of 90 days after expiry of 36 months for applying and obtaining the occupation certificate in respect of the group housing complex. [Page 27 of complaint]	22.03.2019 [Note: - 90 days grace period is not allowed]
16.	Delay in handing over possession till the date of order i.e. 10.12.2021	2 years 8 months and 18 days
17.	Occupation Certificate	Not obtained
18.	Status of the project	On going

B. Facts of the complaint

3. The complainant has made the following submissions in the complaint: -

1. That the complainant is a buyer and having a flat in the project of 'Vipul Lavanya' Sector 81, Gurugram, Haryana partly constructed by the respondent and failed to hand over the possession within stipulated time period. The complainant is the law-abiding citizen

of India and have full faith in this Hon'ble Court. The respondent is a limited company registered under the Indian companies act 1956 Act and is doing the real estate business providing the residential and commercial building to its customer.

- II. That the respondent company had entered into an agreement on 22.03.2016 with the complainant towards allotment of flat number 802, tower number 2 at 'Vipul Lavanya' project situated at Sector 81 Gurgaon, Haryana. The respondent company had allotted this said unit to the complainant under the flat buyer agreement dated 22.03.2016.
- III. That the flat buyers agreement contain detailed terms and condition of selling of the flat and other clauses about the right and title of flat. The complainant has never ever been defaulter in making payment to the respondent company and all the installments were paid timely. Further, the respondent company is supposed to hand over the possession of said flat till 21.03.2019 (36 months) as per the clause 8.1 of the buyer's agreement dated 22.03.2019. The case of the complainant is non-fulfillment of the terms and conditions contained in the flat buyer agreement.
- IV. That the complainant had made payment of **Rs.34,45,888/-**till date against the said flat and still waited for possession of the same.

- V. That in other similar matters relating to same prayer, this Hon'ble court may have already decided the question involved in the present case relating to delay in possession, it is further prayed that this authority may be pleased to direct the respondent to adequately compensate for the delay in possession and after the possession the conveyance deed to be executed in favour of the buyer/complainant by the respondent.
- VI. That the complainant is a middle-class family facing financial obligations, hence is extremely required the possession of the flat from the respondent builder as the hard-earned money involved in the said flats otherwise irreparable loss would be occurred to the complainant. This Hon'ble court/authority had already mandate on issue involved the present petition.
- VII. That the said project/tower come under the ambit of the law and will be required occupancy certificate after completion. The complainant seeks permission to file copy of similar case as held by this authority.
- VIII. That that the Indian judiciary has never left a stone unturned whenever it is felt the interest of an innocent party is at stake the underlying principle of the right to a speedy trial is used in expedited court proceedings and the court has followed the same principle by allowing the prayer in the interest & welfare of the society including individuals, therefore it is in harmony with Constitutional principles.

- IX. That the complainant has been diligent throughout, be it means of paying all of their installments in time, following up, reminders time to time with the opposite party regarding construction status and possession but no satisfactory response.
- X. That that the respondent has caused harassment, mental torture and agony to the complainant due to non-fulfillment of terms and condition mentioned in the allotment letter/BBA establishing their egregious unfair trade practices.
- XI. That the great prejudice shall be caused to the complainant if the present complaint with humble submission and reliefs are not allowed. It is in best endeavors to ensure timely action and justice and discourage huge organization such as respondent to use the said pandemic as an excuse to escape responsibilities and legal bindings. Covid-19 pandemic shall not be made an opportunity for the respondent to escape their accountability to give actual possession.
- XII. That on the basis of the facts given by the complainant, this authority may be pleased to decide relevant issues for adjudication.

C. Relief sought by the complainant:

4. The complainant has sought following relief(s):

- (i) Direct the respondent to give actual possession with complete registry of the flat and registered the conveyance deed in favour of the complainant.
- (ii) To pay the delay penalty/interest @18% p.a. till the conveyance deed is not executed in favour of the complainant by the respondent.
- (iii) Any other order which this authority deems fit and proper under the facts and circumstances of the case may kindly be passed in favour of the complainant and against the opposite party.

5. On the date of hearing, the authority explained to the respondent/promoter about the contravention as alleged to have been committed in relation to section 11(4)(a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent

6. The respondent has contested the complaint on the following grounds.

The submissions made therein, in brief are as under: -

- i. That the respondent company denies each and every averment made, contentions raised, projection sought to be given by the complainants in the complaint under reply to the extent the same is contrary to and/or inconsistent with the true and complete facts of the case and/or the submissions made in the present reply and the same is denied in toto and no part thereof may be deemed to be admitted by respondent for want of non-traverse,

except and in so far as that which is specifically admitted by it. The respondent is being represented by its authorized signatory Shri Rakesh Sharma; Sr. Vice President (BD&C) who has been authorized to do so by virtue of board resolution passed in the meeting of board of directors held on 31.07.2006.

- ii. That the respondent is one of India's leading real estate company. It has several projects across the country and has achieved a reputation of excellence for itself in the real estate market in the country by dint of sheer hard work.
- iii. That one of its marvellous project is the "Vipul Lavanya", Sector 81, Gurugram, Haryana having RERA registration no. GGM/283/2018/15, dated 11.09.2018.
- iv. That the complainant approached the respondent, making enquiries about the project and after thorough due diligence and complete information being provided to him, sought to book an apartment in the said project vide application dated 08.03.2016. It is worthwhile to mention here that complainant has gone through terms and conditions in provided in the application form for allotment in detail.
- v. That vide allotment letter dated 22.03.2016 the complainant was allotted flat no. 802 on Eighth Floor, in tower 2 at Vipul Lavanya, Sector 81, Gurugram, for a sale consideration Rs.85,63,860/- which is inclusive of service tax against which the complainant had paid only Rs.34,44,640/-. The complainant was liable to pay

instalments as per the schedule of payments attached with the allotment letter.

vi. That on 22.03.2016, flat buyer's agreement (in short "FBA") was executed between both the parties. It is pivotal to state here that before signing the buyer's agreement, the complainant has gone through each and every clause of the buyer's agreement in detail and read the same very carefully. It is pertinent to mention the relevant clauses of buyer's agreement:

- That as per clause 8.1 (a) the possession of the flat was to be delivered within 36 months from the date of flat buyer's agreement along with an additional grace period of 90 days.
- That in terms of clause 8.1 (b) (i) the respondent is entitled to the extension of time for handing over the possession of the said flat, if the completion of the project including flat is delayed by reason of force-majeure or circumstances beyond the control of the respondent.

vii. That when the construction of the project was in full swing, it was stopped due to order dated 31.10.2016 passed by Deputy Commissioner, and Order dated 08.11.2016 passed by the Hon'ble National Green Tribunal, New Delhi. The complainant was informed by the respondent vide intimation dated 18.11.2016. When again the construction of the project was in full swing and was about to complete, it was again stopped due to order dated 09.11.2017 passed by the Haryana State Pollution

Control Board. In compliance of the order dated 09.11.2017 in case titled as **Vardhman Kaushik Vs Union of India &Ors.** All the construction activities were stopped in the region of Delhi and NCR. The Complainant was informed by the Respondent vide intimation dated 14.11.2017. It is relevant to note that graded response action plan targeting key sources of pollutions has been implemented during the winters of 2017-18 and 2018-19. These short-term measures during smog episodes including shutting down power plant, industrial units, ban on construction, ban on brick kiln, action on waste burning and construction mechanized cleaning of road dust. सत्यमेव जयते

- viii. That after completion of the construction work of the project vide letter dated 03.04.2018 the respondent applied for grant of occupation certificate with the Director, Town and Country Planning, Haryana, in respect of tower 2 and 3 of the project. It is worthwhile to state here that no legal possession of the flat cannot be offered or delivered to the complainant prior to the issuance of the occupation certificate by the competent authorities. The grant of the occupation certificate as on date is under consideration at the office of the competent authority and the company is hopeful that it will soon get the certificate of occupation from the competent authority.
- ix. That delay in delivery of possession is on account of reasons that cannot be attributed to the respondent. It is not out of place to

mention here that buyer's agreement provides that in case the developer/respondent delays in delivery of flat for reasons not attributable to the developer/respondent, then the developer /respondent shall be entitled to extension of time for delivery of the flat.

- x. That the statement of objects and reasons of the Act, inter-alia is an attempt to balance the interests of consumers and promoters by imposing certain responsibilities on both. It is submitted that the complainants have never been at all aggrieved and do not fall under the definition of aggrieved person, but still by filing such false, frivolous, and vexatious complaint, the complainants are not only harassing the respondent company to succumb to their illegal demand, but by filing such false complaint, they are misleading the authority.
- xi. That the complaint of the complainant is not maintainable either on facts or in the eyes of the law, as the complainant has made statements without any basis to substantiate their averments.
- xii. That the complaint of the complainant merits outright dismissal as the same has been filed with the view to pressurize the respondent into paying exorbitant amounts to the complainants contrary to the terms of the agreement. It is submitted that the complainant has not approached this authority with clean hands and are misusing the process of the law to extort money from the respondent. It is submitted that equity begets equity and a person

seeking equitable relief must come with clean hands before the authority.

- xiii. That the complainant has placed reliance on buyer's agreement which has already been placed on record before authority along with the complaint. It may kindly be appreciated that clause 35 of the said flat buyer's agreement provides for resolution of disputes by arbitration. The above clause of this concluded agreement obliges the complainant to seek recourse for any grievance, dispute or claim through arbitration only. It is submitted that by virtue of the arbitration clause, the jurisdiction of a civil court as well as this authority is ousted by implication.
- xiv. That flat buyer's agreement must be read in its entirety. It is settled law that parties to an agreement cannot be allowed to adopt pick and choose the clauses of the agreements which are suitable to them. The complainant is relying on the clauses of flat buyer's agreement which are in favour of the complainant, however on the other side the complainant is disputing the other clauses of the agreement which are not in their favour.
- xv. That the complaint filed by the complainant is not maintainable in view of the settled law in a plethora of decisions of the Hon'ble Supreme Court, whereby it has categorically been laid down that the agreed clauses of contract are binding on the parties and the courts shall not interfere with the terms and conditions agreed to between the parties. The Hon'ble Supreme Court of India in the

judgment in *Secretary, Bhubaneswar Development Authority Versus Susanta Kumar Mishra* reported as [V (2009) SLT, 242], has been pleased to hold that the parties are bound by the unchallenged terms of the contract. The Hon'ble Supreme Court of India in the matter titled; *PUDA (Chief Administrator) and Another Versus Mrs. Shabnam Virk* reported as II (2006) CPJ 1 (SC), has held that an allottee would be bound by the terms and conditions contained in the allotment letter agreed by him. The Hon'ble Supreme Court of India has been pleased to lay down the principles in *Bharati Knitting Company Vs. DHL Worldwide Express Courier Division of Airfreight Ltd.,* reported as II (1996) CPJ 25 (SC), wherein it has been held that the parties are bound by the terms and conditions of a contract.

- xvi. That the present complaint is not maintainable, and the Hon'ble regulatory authority has no jurisdiction whatsoever to decide the present complaint.
- xvii. That the complaint filed by the complainants pertains to the compensation. The complaint was required to be filed before the adjudicating officer under rule 29 of the rules for compensation. That as per section 31 of the Act the aggrieved person may file the complaint before the authority or the adjudicating officer as the case may be for any violation and contravention of the provisions of the Act or the rules and regulations made there under, but the above provisions show that the authority and adjudicating officer

have their own separate scope as prescribed in the Act and the rules. The adjudicating officer is empowered to adjudicate the compensation under section 12, 14, 18 and 19 of the Act, which is to be determined as per the factors provided in section 72 of the Act.

- xviii. That the role, powers and functions of the authority and the adjudicating officer are well defined under the Act and the rules. The authority has been established for regulation and promotion of the real estate sector whereas the adjudicating mechanism for redressal of dispute has been left to the adjudicating officer. The authority is to deal with the penalties provided in sections 59 to 63, 65 and 67 of the Act whereas the adjudicating officer has been invested with the powers to adjudicate the interest and compensation as per sections 71 & 72 of the Act.
- xix. That the Hon'ble appellate authority in case titled as '**Sameer Mahawar Vs. MG Housing Pvt Ltd.**' Appeal No. 6 of 2018 decided on 02.05.2019 has held in Para no. 25 of the judgment that it is only the adjudicating officer, who has power to award compensation and/or interest whereas the authority has the specific powers to levy penalties and to set-aside the order cancelling the allotment and the authority is not empowered to award any relief enumerated in sections 12, 14, 18 and 19 of the Act, which are within the purview of the adjudicating officer.

E. Jurisdiction of the authority

7. The authority has complete territorial and subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I Territorial jurisdiction

8. 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

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.

The provision of delayed possession charges is part of the application form, as per clause 7(b) of the application form dated 04.09.2010. 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.

9. 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 complainant is breach of agreement for non-invocation of arbitration

10. The respondent had raised an objection for not invoking arbitration proceedings as per the provisions of flat buyer's agreement which contains provisions regarding initiation of arbitration proceedings in case of breach of agreement. The clause 35 of the flat buyer's agreement has been incorporated w.r.t arbitration in the buyer's agreement: -

"All or any disputes arising out or touching upon 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 falling which the same shall be settled through Arbitration. The arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory amendments, modifications thereof for the time being in force. The arbitration proceedings shall be held at Gurgaon by a sole arbitrator appointed by the Company Secretary of the VENDOR i.e. M/s Vipul Limited under Arbitration and Conciliation Act, 1996, who shall give a reasoned award in English language. The VENDEE(s) hereby confirms that he/she/they shall have no objection to this appointment.

11. The authority is of the opinion that the jurisdiction of the authority cannot be fettered by the existence of an arbitration clause in the buyer's agreement as it may be noted that section 79 of the Act bars the jurisdiction of civil courts about any matter which falls within the



purview of this authority, or the Real Estate Appellate Tribunal. Thus, the intention to render such disputes as non-arbitrable seems to be clear. Also, section 88 of the Act says that the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. Further, the authority puts reliance on catena of judgments of the Hon'ble Supreme Court, particularly in *National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506*, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force. Consequently, the authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause. Therefore, by applying the same analogy, the presence of arbitration clause could not be construed to take away the jurisdiction of the authority.

12. Further, in *Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017*, the National Consumer Disputes Redressal Commission, New Delhi (NCDRC) has held that the arbitration clause in agreements between the complainants and builders could not circumscribe the jurisdiction of a consumer. The relevant paras are reproduced below:

"49. Support to the above view is also lent by Section 79 of the recently enacted Real Estate (Regulation and Development) Act, 2016 (for short "the Real Estate Act"). Section 79 of the said Act reads as follows: -

"79. Bar of jurisdiction - No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter

which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."

It can thus, be seen that the said provision expressly ousts the jurisdiction of the Civil Court in respect of any matter which the Real Estate Regulatory Authority, established under Sub-section (1) of Section 20 or the Adjudicating Officer, appointed under Sub-section (1) of Section 71 or the Real Estate Appellate Tribunal established under Section 43 of the Real Estate Act, is empowered to determine. Hence, in view of the binding dictum of the Hon'ble Supreme Court in A. Ayyaswamy (supra), the matters/disputes, which the Authorities under the Real Estate Act are empowered to decide, are non-arbitrable, notwithstanding an Arbitration Agreement between the parties to such matters, which, to a large extent, are similar to the disputes falling for resolution under the Consumer Act.

...
56. Consequently, we unhesitatingly reject the arguments on behalf of the Builder and hold that an Arbitration Clause in the afore-stated kind of Agreements between the Complainants and the Builder cannot circumscribe the jurisdiction of a Consumer Fora, notwithstanding the amendments made to Section 8 of the Arbitration Act."

13. While considering the issue of maintainability of a complaint before a consumer forum/commission in the fact of an existing arbitration clause in the builder buyer agreement, the hon'ble Supreme Court in case titled as **M/s Emaar MGF Land Ltd. V. Aftab Singh in revision petition no. 2629-30/2018 in civil appeal no. 23512-23513 of 2017 decided on 10.12.2018** has upheld the aforesaid judgement of NCDRC and as provided in Article 141 of the Constitution of India, the law declared by the Supreme Court shall be binding on all courts within the territory of India and accordingly, the authority is bound by the aforesaid view. The relevant paras are of the judgement passed by the Supreme Court is reproduced below:

"25. This Court in the series of judgments as noticed above considered the provisions of Consumer Protection Act, 1986 as well

as Arbitration Act, 1996 and laid down that complaint under Consumer Protection Act being a special remedy, despite there being an arbitration agreement the proceedings before Consumer Forum have to go on and no error committed by Consumer Forum on rejecting the application. There is reason for not interjecting proceedings under Consumer Protection Act on the strength an arbitration agreement by Act, 1996. The remedy under Consumer Protection Act is a remedy provided to a consumer when there is a defect in any goods or services. The complaint means any allegation in writing made by a complainant has also been explained in Section 2(c) of the Act. The remedy under the Consumer Protection Act is confined to complaint by consumer as defined under the Act for defect or deficiencies caused by a service provider, the cheap and a quick remedy has been provided to the consumer which is the object and purpose of the Act as noticed above."

14. Therefore, in view of the above judgements and considering the provision of the Act, the authority is of the view that complainant is well within her right to seek a special remedy available in a beneficial Act such as the Consumer Protection Act and RERA Act, 2016 instead of going in for an arbitration. Hence, we have no hesitation in holding that this authority has the requisite jurisdiction to entertain the complaint and that the dispute does not require to be referred to arbitration necessarily.

G. Findings on the relief sought by the complainant

G.I. Direct the respondent to give actual possession with complete registry of the flat and registered the conveyance deed on favour of complainant.

15. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the complainant as per the terms and conditions of the buyer's agreement dated 22.03.2016 executed between the parties.

Validity of offer of possession



16. 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;**
- ii. **The subject unit should be in habitable condition;**
- iii. **Possession should not be accompanied by unreasonable additional demands.**

17. In the present matter the respondent has applied for the occupation certificate from the concerned authority on 03.04.2018. There is no proof on record that shows the occupation certificate has been granted and the respondent have not offered the possession of the said unit till now. The respondent shall offer the possession of the unit as prescribed and shall execute the conveyance deed within prescribed time on depositing necessary expenses by the complainant.

G. II. Direct the respondent to pay interest per month at 18% till the conveyance deed is not executed

18. In the present complaint, the complainant intend to continue with the project and is seeking delay possession charges as provided under the



proviso to section 18(1) of the Act. Section 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."*

19. Clause 8.1 (a) of the flat buyer's agreement provides for handing over of possession and is reproduced below: -

8.1 Time of handing over possession.

(a) *Subject to terms of this clause and subject to vendee having complied with all the terms and conditions of this agreement and not being in fault under any of the provisions of this agreement and complied with all the provisions, formalities, documentation etc. as prescribed by the vendor, the vendor proposes to hand over the possession of the flat within a period of 36 months from the date of signing of agreement. The vendee agrees and understands that the vendor shall be entitled to a grace period of 90 days, after the expiry of 36 months, for applying and obtaining the occupation certificate in respect of the Group Housing Complex"*

20. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and application, and the complainant not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling



formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the allotment letter 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.

21. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the apartment with in 36 months from the date of signing of this agreement and further provided in agreement that promoter shall be entitled to a grace period of 90 days for applying and obtaining completion certificate in respect of the group housing complex. The date of execution of flat buyer's agreement is 22.03.2016. The period of 36 months expired on 22.03.2019 in respect of the said unit. As a matter of fact, the promoter has applied occupation certificate on 03.04.2018 (annexure R-1, page 26 of reply) to the concerned authority. There is no record available on the paper book as so show why the occupation certificate has not been granted by the competent authority even after 3 years from its application neither the respondent has given valid and specific reasons to justify this delay. Accordingly the authority keeping in view the above-



mentioned facts considers that the respondent must not have applied a complete application for grant of occupation certificate and have not rectified the defects, if any pointed out by the concerned department. Therefore, as per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 90 days cannot be allowed to the promoter at this stage

22. **Payment of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges at the rate of 18% p.a. 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.

23. 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.



24. 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., **10.12.2021** is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.
25. 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;"*

26. 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.
27. On consideration of the circumstances, the documents, submissions made by the parties and based on the findings of the authority regarding contravention as per provisions of rule 28(2), the authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of clause 8.1 (a) of the flat buyer's agreement



executed between the parties on 22.03.2016, the possession of the subject apartment was to be delivered within 36 months from the date of execution of flat buyer's agreement plus 90 days grace period of applying and obtaining the occupation certificate in respect of the group housing complex. Therefore, the due date of handing over possession is 22.06.2019. The respondent has failed to handover possession of the subject apartment till date of this order. 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. The authority is of the considered view that there is delay on the part of the respondent to offer of possession of the allotted unit to the complainant as per the terms and conditions of the allotment letter cum buyer's agreement dated 22.03.2016 executed between the parties. Further, no OC/part OC has been granted to the project. Hence, this project is to be treated as on-going project and the provisions of the Act shall be applicable equally to the builder as well as allottee.

28. 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 complainants are entitled to delay possession charges at rate of the prescribed interest @ 9.30% p.a. w.e.f. 22.06.2019 till the handing over of possession as per provisions of section 18(1) of the Act read with rule 15 of the rules.

H. Directions of the authority



29. 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. 22.06.2019 till the handing over of possession of the allotted unit after obtaining the occupation certificate from the competent authority.
- ii. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period;
- iii. The arrears of such interest accrued from 22.06.2019 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 allottees before 10th of the subsequent month as per rule 16(2) of the rules;
- 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.



HARERA
GURUGRAM


Complaint No. 3501 of 2021

v. The respondent shall not charge anything from the complainants which is not the part of the allotment letter.

30. Complaint stands disposed of.

31. File be consigned to registry.

V.K. - 
(Vijay Kumar Goyal)
Member


(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 10.12.2021

Judgement uploaded on 25.01.2022



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