



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

Complaint no.:	5167 of 2019
First date of hearing:	03.12.2019
Date of decision:	12.01.2022

Anil Kumar Mittal

R/o: - Hno. 80, Gali Sunar Wali, Near Shri Ram Satsang
Bhawan, Badshahpur, Gurugram

Complainant

Versus

M/s ADTV Communication Pvt. Limited
Having Regd. office at:- 8-B, Basement Floor, Jangpura,
Main Mathura Road, New Delhi-110014

Respondent

CORAM:

Dr. K.K. Khandelwal
Shri Vijay Kumar Goyal

**Chairman
Member**

APPEARANCE:

Sh. K.K. Ahuja (Advocate)
None

**Complainant
Respondent**

HARERA
EX-PARTE ORDER
GURUGRAM

1. The present complaint dated 25.11.2019 has been filed by the complainants/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 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.	Project name and location	"Aloha", Sector 57, Gurugram
2.	Project area	4.50 acres
3.	Nature of the project	Group Housing Colony
4.	DTCP license no. and validity status	34 of 1996 dated 21.03.1996 valid up to 20.03.2015
5.	Name of licensee	SM Towers Pvt. Ltd.
6.	RERA registration details	Not registered
7.	Unit no.	104, Tower D6, 1 st floor [page 15B of complaint]
8.	Unit measuring	2244 sq. ft.
9.	Date of execution of flat buyer agreement	21.11.2005 [page 14 of complaint]
10.	Payment plan	Construction link
11.	Total consideration	₹ 57,61,969/- [As per account statement dated 15.09.2018, page 28 of complaint]
12.	Total amount paid by the complainant	₹ 43,82,330/-



		[As per account statement dated 15.09.2018, page 28 of complaint]
13.	Due date of delivery of possession as per clause 10 of the flat buyer agreement: within 36 months from the date of the start of the construction of the tower in which the said flat is located or from the execution of this agreement whichever is later [Page 17B of complaint]	23.01.2009 [Note: Due date calculated from the date on which demand on start of construction on basement roof slab is 23.01.2006 as the date of execution of BBA is prior to this date]
14.	Occupation certificate	Not yet obtained
15.	Handing over- Taking over (Offer of possession for fit-out)	15.09.2018 [page 29 of complaint]
16.	Delay in handing over possession till the Offer of possession for fit-out i.e., 15.09.2018	9 years 7 months 23 days

B. Facts of the complaint

3. The complainant has pleaded the complaint on the following facts:

- a) That the respondent company, M/s S.M. Towers Pvt. Ltd., now known as ADTV Communications Private Ltd., allotted a flat no. D6-104 in the project "ALOHA" in Sector 57, Gurugram to the complainant/petitioner vide allotment letter dt.19/11/2005 for a basic price of Rs. 48,31,900/ (copy of the allotment letter annexed).



The purchaser/complainant has paid full amount to the respondent company for the price of the flat, as has been verified by the company in the statement by the company along with the letter of "Handing Over - Taking Over". Both were dated 15.09.2018.

- b) That as per the "flat buyer's agreement" dated 21.11.2005 which was executed by the respondent company with the complainant, clause 10 of the said agreement states "the possession of the said premises is likely to be delivered by the company to the allottee within 36 months from the date of the start of the construction of the tower in which the said flat is located or from the execution of this agreement whichever is later".
- c) That as per the terms of the "flat buyer's agreement" executed by the respondent company with the purchaser/complainant and reproduced in clause 10 above the respondent company was under obligation to give possession of the said flat no. D6-104 to the purchaser/complainant latest by 20.11.2008.
- d) That it is apparently clear that there has been a delay of "9 years 10 months plus", in handing over the possession and even this possession is complainant only for carrying on the "fit-out in his fiat. The same is amply clear as per the flat buyer's agreement read with your letter dated 15.09.2018 for "handing over-taking over" and clause of agreement.
- e) That as per the above proviso to sec 18 (1) the respondent is liable to pay interest for the period of delay in handing over the possession which, as stated above, was "9 years 10 months" from the date of commitment in your flat buyers' agreement till the actual date of handing over on the amount paid by my client i.e.



36,60,300/- highest MCLR of SBI plus 2% (which is at present 10.5%) as is prescribed by the Haryana RERA Rules.

- f) That for the above default of the respondent company the petitioner has already sent the appropriate legal notice to the respondent company which is dated 01.07.2019 and has been sent by speed post on 02.07.2019 and has been duly received by the respondent company on 03.07.2019. That the respondent company has neither complied with the legal notice, nor have they sent any reply for the same to the petitioner.

C. Relief sought by the complainant:

4. The complainant has sought following reliefs:

a) Direct the respondent to pay the complainant for delay in handing over by paying delayed possession charges @ as may be adjudicated by this authority on the amount paid by the complainant for the period of delay in handing over of the flat.

5. The present complaint was filed on **25.11.2019** and registered as **complaint no. 5167 of 2019**. As per the registry, complainant has sent copy of complaint along with annexures through speed post as well as through email. The tracking report of the same has been submitted by the complainant at page A of the complaint. The proof regarding the delivery of the complaint along with annexures made to the respondent, has been submitted by the complainant as available in the file. The registry of the authority sent a notice with a copy of the complaint along with annexures through speed post and the same returned unclaimed. The tracking report of the speed post is available in the file. Registry has also sent the notice along with a copy of the complaint through email and the mail was bounced back.



6. The registry also issued fresh noticed to the respondent on new addresses, but they also returned unclaimed. The tracking for the same is also available in the file. Lastly, on 03.12.2021 the authority before proceeding ex-parte against the respondent ordered to issue public notice in the daily newspaper. But despite this the respondent failed to submit any reply till date therefore authority is left with no option but to proceed ex-parte against the respondent.
7. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided based on these undisputed documents and submission made by the complainant.

D. Jurisdiction of the authority

8. The authority observed that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

D.I. Territorial jurisdiction

9. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram District, therefore this authority has complete territorial jurisdiction to deal with the present complaint.

D.II. Subject matter jurisdiction

10. The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as per provisions of section 11(4)(a) of the Act leaving aside compensation



which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

E. Findings on the relief sought by the complainant

E.I. Direct the respondent to pay the complainant for delay in handing over by paying delayed possession charges @ as may be adjudicated by this authority on the amount paid by the complainant for the period of delay in handing over of the flat.

11. In the present complaint, the complainant intend to continue with the project and is seeking delayed 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."

12. Clause 10 of the flat buyer agreement (in short, agreement) provides for handing over of possession and is reproduced below: -

"10 SCHEDULE FOR POSSESSION OF THE SAID PREMISES:

The possession of the said premises is likely to be delivered by the Company to the Allottee **within 36 months from the date of the start of the construction of the tower in which the said flat is located or from the execution of this agreement whichever is later**, subject to force majeure circumstances, & on receipt of all payments punctually as per agreed terms and on receipt of complete payment of the basic sale price and other charges due and payable up to the date of possession according to the Payment Plan applicable to the Allottee. The company would pay penalty to its customers @ Rs 5/- per sq. ft. per month for handing over the flat beyond the committed period as stated herein above subject to punctual payment of instalment the allottee."

13. 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 complainants not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoters. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favor of the promoters and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoters may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the flat buyer agreement by the promoters are just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

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

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

(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.:
Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates

which the State Bank of India may fix from time to time for lending to the general public.

15. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.
16. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., **12.01.2022** is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.
17. The definition of term 'interest' as defined under section 2(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;"*
18. 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.



19. On consideration of the documents available on record and submissions made regarding contravention of provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. As the respondent has offered possession for fit outs on 15.09.2018 and thereafter no valid offer of possession has been issued by the respondent. Also as reflected from the LC report dated 28.07.2021 the finishing works with respect to tower D6 are still pending. The concluding paragraph of the LC report is reproduced as under:

"The site of project namely "Aloha" sector-57, Gurugram being developed M/s ADTV Communication Pvt. Ltd. has been inspected and it is concluded that:

- 1. The promoter has completed all the work in the four towers i.e., B3, B4, B5, D5 towers and handed over the possession to mostly allottees of respective towers. Further the primary works (ie., Structure work, brick works, plaster works, door frames, windows) are completed whereas balance finishing works (i.e., flooring, painting, electrical fitting, plumbing etc.) in the units of tower D6, are pending. The work in common area for tower D6 has been completed except out of three lifts only two lifts have been installed. The promoter has offered possession of units to the allottees on the fit-out basis in this particular tower.*
- 2. The internal development works in the projects i.e., internal roads, entrance gate, streetlights, boundary wall, landscaping, STP and WTP are completed and are operational. Further the works for the swimming pool and clubhouse are pending.*
- 3. As per the information furnished by the residents of the project and available on the website of DTCP, Haryana no occupation certificate/ completion certificate has been received by the promoter for the project till date. Further as per status of the project recorded from site, it is clear that the project is incomplete. Therefore, the projects fall under the definition of ongoing project and the promoter is liable for registration of the project under the section 3 of the Real Estate (Regulation & Development) Act, 2016.*



20. Considering the above-mentioned facts, the authority calculated due date of possession according to clause 10 of the agreement dated 21.11.2005 i.e., 36 months from the date of start of construction or date of execution whichever is later. Accordingly, the due date is calculated from date of start of construction i.e., 23.01.2006 as this is later than that of date of execution therefore, the allottee is entitled for DPC with effect from the due date of possession i.e., 23.01.2009. It is a very interesting situation where allottee on one side is demanding completion of all requisite infrastructure and amenities and then offer physical possession in the name of legally valid physical possession whereas he has already taken over the physical possession on 15.09.2018 as confirmed by the counsel for the complainant although offer was for fit-out possession. The allottee is certainly entitled for delayed possession charges under proviso to section 18 (1) of the Act but only up to the date on which he has taken physical possession and allottee is enjoying the fruit of the property for which he has invested with the promoter. Although the promoter has given physical possession and allottee has accepted physical possession on the basis of offer for fit-out possession which may not be the legally valid offer of possession without obtaining occupation certificate. Both the promoter and the allottee have acted not as per the spirit of law but as per their own convenience. The promoter is liable for action for offering physical possession without obtaining OC and allottee cannot be allowed to take benefit of delay possession charges beyond the time he has taken physical possession. Accordingly, it is the failure of the respondent/promoter to fulfil its obligations and responsibilities as per the agreement to hand over the possession within the stipulated period.



Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with proviso to section 18(1) of the Act on the part of the respondent is established. As such the allottee shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 23.01.2009 till the date of taking over the physical possession of the said unit i.e., 15.09.2018, at prescribed rate i.e., 9.30 % p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules.

F. Directions of the authority

21. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligations casted upon the promoters as per the functions entrusted to the authority under section 34(f):
- i. The respondent is directed to pay interest at the prescribed rate of 9.30% p.a. for every month of delay from the due date of possession i.e., 23.01.2009 till the date of taking over the physical possession of the said unit i.e., 15.09.2018.
 - ii. The respondent is directed to obtain occupation certificate from the competent authority and then make a valid and lawful offer of possession post that execution of conveyance deed be done within 3 months from the valid offer of possession as per provisions of section 17 of the Act, 2016.
 - 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 promoters shall be liable to pay the allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

- v. The respondent shall not charge anything from the complainant which is not the part of the agreement. However, holding charges shall not be charged by the promoters at any point of time even after being part of agreement as per law settled by hon'ble Supreme Court in civil appeal no. 3864-3889/2020.
22. Complaint stands disposed of.
23. File be consigned to registry.

v.1 - 3
(Vijay Kumar Goyal)
Member

(Dr. K.K Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 12.01.2022

HARERA
GURUGRAM