

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

Complaint no. : 3064 of 2020
First date of hearing: 18.11.2020
Date of decision : 08.03.2022

Anand Kumar Pandey
R/O: - A-250 SF, Bunkar Colony,
Ashok Vihar 4, Delhi-110052

Complainant

Versus

Pivotal Infrastructure Private Limited
Regd. Office at: - 309, 3rd Floor,
JMD Pacific Square, Sector-15,
Part-II, Gurugram-122001

Respondent

CORAM:

Shri KK Khandelwal
Shri Vijay Kumar Goyal

**Chairman
Member**

APPEARANCE:

Shri Anand Kumar Pandey Complainant in Person
Shri Rohan Gupta Advocate for the respondent

ORDER

1. The present complaint dated 07.10.2020 has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with Rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia

prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the rules and regulations made 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.	Name and location of the project	"Devaan" at Sector-84, Gurgaon
2.	Nature of the project	Affordable housing policy
3.	Project area	5.175 acres
4.	DTCP license no.	13 of 2014 issued on 10.06.14 valid up to 09.06.2019
5.	Name of Licensee	Pivotal infrastructure private limited
6.	RERA Registered/ not registered	Registered vide no. 229 of 2017 dated 19.09.2017 valid up to 09.06.2019
7.	Unit no.	Unit no.507 on 5 th floor of tower T-1 [page no. 20 of complaint]



8.	Unit measuring	481 sq. ft. [page no. 20 of complaint]
9.	Date of execution of Flat buyer's agreement	10.08.2015 [page no. 19 of complaint]
10.	Date of environment clearance	05.02.2015 [annexure R-1 on page no. 11 of reply]
11.	Date of approval of building plans	06.08.2014 [page no. 50 of complaint]
12.	Total consideration	Rs. 19,74,000/- [as per the agreement on page no. 22 of complaint]
13.	Total amount paid by the complainant	Rs. 20,47,235/- [as per demand letter on page no.25 of additional documents submitted by complainant]
14.	Due date of delivery of possession	05.02.2019 [calculated from the date of environment clearance i.e., 05.02.2015]
15.	Possession clause	8. POSSESSION 8.1 "The company shall endeavour to complete the construction and handover the possession of the said apartment within a period of 4 years from the date of grant of sanction of building plans for project or date of receipt of all the environment clearances necessary for the completion of the construction and development of projects, whichever is later, subject to timely payment by the allottee of all the amounts payable under this

		agreement and performance by the allottee of all other obligations hereunder.
16.	Occupation certificate	06.03.2020 [as per annexure R5 on page no. 28 of reply]
17.	Offer of possession	14.03.2020 [as alleged by the respondent on page no.06 of reply, due to prevailing situation of Covid-19, the same was sent to the complainant on 19.05.2020] [annexure R6 on page no. 31 of reply]

B. Facts of the complaint

3. That the complainant has applied in the 'Devaan' project vide application no. 14117, dated 15.07.2014 for a flat under affordable housing policy 2013, issued by the Government of Haryana vide town and country planning department's notification dated 19.08.2013 and got allotment in the residential apartment of 'Devaan' project constructed by pivotal infrastructure private limited.
4. That the complainant submitted that on 10.08.2015, he executed an apartment buyer's agreement with the respondent. As per clause 8.1 of the said agreement, possession of the apartment was to be delivered to the

complainant within a period of 4 years from the date of grant of sanction of building plans for the project or the date of receipt of all the environmental clearances.

5. That it is further submitted the project is still not complete as per BBA, but builder has got OC and offered the possession on 19.05.2020.

C. Relief sought by the complainant:

6. The complainant has sought the following relief:

- (i) Direct the respondent to provide delay penalty charges @15% per annum from the completion of project i.e., 05.02.2019 till the possession of the flat as per the BBA.
- (ii) Direct the respondent not to charge any maintenance charges from the buyers as it is already paid.
- (iii) Direct the respondent not to charge IFMS charges which is not a part of BBA.
- (iv) Direct the respondent to provide VAT calculation sheet is required and proof of collected amount of VAT deposited to the government.

7. 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.

8. That the respondent made an allotment of the unit bearing no. 507, 5th floor, tower-1 in 'Devaan' located at sector-84, Gurugram, Haryana vide allotment letter dated 30.06.2015 to the complainant and thereafter flat buyer agreement dated 10-8-2015 was executed by the complainant governing the terms and conditions of the said allotment between the parties.
9. That the respondent had obtained the fire NOC for the project on 27/05/2019 vide memo bearing no. FS/2019/122.
10. That the respondent had applied for the grant of occupation certificate in respect of the developed building in accordance with the terms of the licence bearing no. 13 of 2014 as well as in accordance with the terms of the affordable housing policy, 2013 within the specified period of 4 years vide letter dated 6-8-2018. However, the occupation certificate for the said

project was granted by the Directorate of Town and Country Planning, Haryana vide memo no. ZP-975/AD/(RA)/2020-6280 dated 6-3-2020.

11. That the directorate of town and country planning, Haryana delayed the grant of occupation certificate to the respondent for which the respondent cannot be held liable as it had completed the construction of the project well before the expiry of the period of 4 years from the date of sanction of building plans or grant of occupation certificate, whichever is later.
12. That soon after the receipt of the occupation certificate on 6-3-2020, due to the current pandemic situation, the possession to the allottee was offered in May 2020. The offer of possession letter was sent to the complainant on 19-5-2020.
13. That in view of the above submissions, it is hereby submitted that there is no delay on the part of the respondent in delivering the possession of the allotted unit to the complainant. Hence, the respondent is not liable to pay any delay penalty as alleged by the complainant in the present complaint.

14. That as is evident from the aforementioned list of facts that the respondent got completed the project well within the time period of 4 years, granted under the terms of the affordable housing policy, 2013 as well as under the terms of the licence and HRERA registration, and therefore, the respondent cannot be held guilty for the lapses on the part of the directorate of town and country planning, Haryana, for the delay in granting the occupation certificate on the application of the respondent which was filed on 6-12-2018.
15. That further the respondent had offered the physical possession to 848 allottees of the project and out of the said total allottees of the project, 300 allottees had taken over the physical possession of their respective allotted units and 150 families have already started staying in the project. Therefore, it implies that the families who are staying in the project are being well taken care of by the respondent and they are receiving all the amenities and services as were promised by the respondent in terms of the flat buyer agreement.

16. That the demand of interest free maintenance security by the respondent is to ensure that the allottees of the project should not avail the services without making the payment of their dues and is not at all unreasonable.
17. That the complainant may get the conveyance deed executed and registered on his own costs and expenses and the complainant need not pay any administrative charges to the respondent.
18. That the respondent had demanded the VAT that was payable by the complainant and has not been paid by him till date, which is a breach of the terms of the flat buyer dated 10-8-2015. Thus, in view of the above submissions, none of the alleged issues remain to be decided and the complaint is liable to be dismissed on this ground alone.

E. Jurisdiction of the authority

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

E. I Territorial jurisdiction

20. 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

21. 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 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.

22. 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 relief sought by the complainant.

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

- (i) **Direct the respondent to provide delay penalty charges @15% per annum from the completion of project i.e., 05.02.2019 till the possession of the flat as per the BBA.**

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

"Section 18: - Return of amount and compensation

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

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

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

"Clause 8.1- Except where any delay is caused on account of reasons expressly provided for under this agreement and other situations beyond the reasonable control of company and subject to the company having obtained the occupation/completion certificate from the competent authorities, the company shall endeavour to complete the construction and handover the possession of the said apartment within a period of 4 years from the date of grant of sanction of building plans for the project or the date of receipt of all the environmental clearances necessary for the completion of the construction and development of the project, whichever is later, subject to timely payment by the allottee of all the amounts payable under this agreement and performance by the allottee of all other obligations hereunder.

24. The authority has gone through the possession clause of the agreement. At the outset, it is relevant to comment on the pre-set possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and the complainant not being

in default under any provisions of this agreements and in 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.

25. The buyer's agreement is a pivotal legal document which should ensure that the rights and liabilities of both builders/promoters and buyers/allottee are protected candidly. The apartment 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 apartment buyer's 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 buyer/allottee in case of delay in possession of the unit. In pre-RERA period it was a general practice among the promoters/developers to invariably draft the terms of the apartment buyer's agreement in a manner that benefited only the promoters/developers. It had arbitrary, unilateral, and unclear clauses that either blatantly favoured the promoters/developers or gave them the benefit of doubt because of the total absence of clarity over the matter.

26. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges and proviso to section 18 provides that where an allottee does not intends 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.

27. 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.
28. 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 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30% per annum.
29. The definition of term 'interest' as defined under section 2(z) 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;"*

30. Therefore, interest on the delay payments from the complainant 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 complainant in case of delay possession charges.

31. On consideration of the circumstances, the evidence and other record and submissions made by the parties, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. It is a

matter of fact that flat buyer's agreement executed between the parties on 10.08.2015 and the possession of the booked unit was to be delivered within a period of 4 years from the date of grant of sanction of building plans for the project or the date of receipt of all the environmental clearances whichever is later. The due date of possession is calculated from date of environmental clearance i.e., 05.02.2015, which comes out to be 05.02.2019.

32. 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, complainant is 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 complainant to the respondent from the due date of possession i.e., 05.02.2019 till the offer of possession (14.03.2020) of the subject flat after obtaining occupation certificate from the competent authority as per the provisions of section 18(1) of the Act read with rule 15 of the rules.

(ii) Direct the respondent not to charge any maintenance charges from the buyers as it is already paid:

33. As per page no.56 of complaint, the respondent has demanded maintenance charges from 01.04.2020 to 31.03.2021. It is an affordable housing project. So, as per clause 4(v) of affordable housing policy 2013, the component of maintenance charges is included in the total price for enabling the colonizer to maintain the colony free-of-cost for a period of 5 years from the date of grant of occupation certificate, after which the colony shall stand transferred to the "association of apartment owners. The relevant part of the policy is reproduced hereunder: -

"Maintenance of colony after completion of project: A commercial component of 4% is being allowed in the project to enable the coloniser to maintain the colony free-of-cost for a period of five years from the date of grant of occupation certificate, after which the colony shall stand transferred to the "association of apartment owners" constituted under the Haryana Apartment Ownership Act 1983, for maintenance. The coloniser shall not be allowed to retain the maintenance of the colony either directly or indirectly (through any of its agencies) after the end of the said five years Period. Engaging any agency for such maintenance works shall be at the sole discretion and terms and conditions finalised by the "association of apartment owners" constituted under the Apartment Ownership Act 1983".

34. The respondent has stated at the bar that the charges are on account of extra facilities being provided by the promoter

such as housekeeping, diesel power backup, water storage tank cleaning, etc. The authority is of the view that the promoter cannot charge anything under the head maintenance charges as the maintenance is to be carried by the builder free of charge for a period of 5 years. If there are any other valid charges, the same may be raised by the builder along with justification.

(iii) Direct the respondent not to charge IFMS charges which is not a part of BBA: -

35. The authority is of the view that the promoter may be allowed to collect a reasonable amount from the allottees under the head 'IFMS'. However, the authority directs and passes an order that the promoter must always keep the amount collected under this head in a separate bank account and shall maintain the account regularly in a transparent manner. If any allottee of the project requires the promoter to give the details regarding the availability of IFMS amount and the interest accrued thereon, the promoter must provide details to the allottee. It is further clarified that out of this IFMS/IBMS, no amount can be spent by the promoter for the

expenditure he is liable to incur to discharge his liability under section 14 of the act. The interest free maintenance security is to be transferred to the association of allottees as when it is formed, and maintenance is transferred to it as per provisions of the policy and law.

H. Directions of the authority

36. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

- i. The respondent is directed to pay interest at the prescribed rate of 9.30% p.a. for every month of delay from the due date of possession i.e., 05.02.2019 till the offer of possession i.e., 14.03.2020. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order as per the rule 16(2) of the rules.
- ii. The complainant is also directed to pay the outstanding dues, if any.

- iii. The authority also directs that the amount collected as IFMS from the allottees by the promoter be kept under separate head in the bank and the same be maintained in a transparent manner and be transferred to the association of allottees after a period of 5 years from the date of grant of OC.
- iv. The respondent promoter is directed to provide the VAT calculation sheet of the subject unit to the complainant.
- v. The respondent shall not charge anything from the complainant which is not part of the builder buyer agreement. However, holding charges shall also not be charged by the promoter at any point of time even after being part of agreement as per law settled by Hon'ble Supreme Court in civil appeal no. 3864-3899/2020 dated 14.12.2020.
37. Complaint stands disposed of.
38. File be consigned to registry.


(Vijay Kumar Goyal)
Member


(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 08.03.2022



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