

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

Complaint no. : 4694 of 2021
Date of filing complaint : 26.11.2021
First date of hearing : 18.01.2022
Date of decision : 24.03.2022

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| 1. Tarun Walia R/O: - D-5/901, Puri Pranayam, Sector 82-85, Faridabad. | Complainant |
| Versus | |
| 1. M/s BPTP Limited 2. Countrywide Pvt. Ltd. Both Regd. Office at: - M-11, Middle Circle, Connaught Circus, New Delhi -110001 | Respondents |

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| CORAM: | |
| Dr. K.K. Khandelwal | Chairman |
| Shri Vijay Kumar Goyal | Member |
| APPEARANCE: | |
| Sh. Sushil Yadav | Advocate for Complainant |
| Sh. Venket Rao | Advocate for Respondents |

ORDER

1. The present complaint 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. | Project name and location | 'Park Terra', Sector 37-D, Gurugram, Haryana. |
| 2. | Project area | 23.814 Acres |
| 3. | Nature of the project | Group Housing Towers |
| | a) DTCP license no. | 94 of 2011 dated 24.10.2011 |
| | b) License valid up to | 23.10.2019 |
| | c) Name of the licensee | Countrywide Promoters Pvt. Ltd. and 6 others. |
| 4. | a) RERA registered/not registered | Registered |
| | b) Registration certificate no. | Registered vide no. 299 of 2017 for 10.23 acres dated 13.10.2017 valid up to 12.10.2020 |
| | c) Extension no. | Not applied |
| 5. | Unit no. | 603, 6th floor, tower-T25 (annexure R-5 on page no. 72 of reply) |



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| 6. | Unit admeasuring | 1998 sq. ft. (annexure R-5 on page no. 72 of reply) |
| 7. | Date of building plan | 21.09.2012 (vide project detail received from planning branch of the authority) |
| 8. | Date of execution of the flat buyer's agreement | 29.01.2013 (annexure R-5 on page no. 67 of reply) |
| 9. | Total consideration | Rs. 1,33,11,226.00/- (vide statement of account on page no.24 of complaint) Rs. 1,19,82,223.77/- (vide statement of account dated 03.07.2021 on page no. 33 of the complaint) |
| 10. | Total amount paid by the complainant | Rs. 1,32,58,725.54/- (vide statement of account on page no.24 of complaint) Rs. 1,00,92767.12/- (vide statement of account dated 03.07.2021 on page no. 33 of the complaint) |
| 11. | Possession clause | <p>Clause 5.1- The Seller/Confirming Party proposes to offer possession of the unit to the Purchaser(s) within the Commitment period. The Seller/Confirming Party shall be additionally entitled to a Grace period of 180 days after the expiry of the said Commitment Period for making offer of possession of the said unit.</p> <p>Clause 1.6 "FBA" "Commitment Period" shall mean, subject to Force Majeure circumstances;</p> |



| | | |
|-----|------------------------------------|--|
| | | <p>intervention of statutory authorities and Purchaser(s) having timely complied with all its obligations, formalities or documentation, as prescribed/requested by Seller/Confirming Party, under this Agreement and not being in default under any part of this Agreement, including but not limited to the timely payment of instalments of the sale consideration as per the payment plan opted, Development Charges (DC), stamp duty and other charges, the Seller/Confirming Party shall offer the possession of the Unit to the Purchaser(s) within a period of 42 months from the date of sanction of the building plan or execution of Flat Buyers Agreement, whichever is later."</p> <p>(Emphasis supplied)</p> |
| 12. | Due date of delivery of possession | 29.07.2016 (Calculated from the date of execution of agreement as being later) |
| 13. | Occupation certificate | Not obtained |
| 14. | Offer of possession | Not offered |
| 15. | Grace period utilization | in the present case, the promoter is seeking a grace period of 180 days after the expiry of the said committed period for making offer of possession of the said unit. The respondent is claiming this grace period of 180 days for making offer of possession of the said unit. There is no material evidence on record that the respondent |



| | | |
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| | | <p>promoter had completed the said project within this span of 42 months and had started the process of issuing offer of possession after obtaining the occupation certificate. As a matter fact, the matter has not offered the possession within the time limit prescribed by the promoter in FBA nor has the promoter offered the possession till date. Therefore the grace period allowed, and the due date of possession comes out to be 29.07.2016.</p> |
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B. Facts of the complaint

3. The respondents advertised in various leading newspapers about their forthcoming project named "Terra", in Sector-37, Gurgaon promising various advantages, including world class amenities and timely completion/execution of the project. Relying on such promises and undertakings made by the respondents in the aforementioned advertisements, the complainant booked an apartment/flat measuring 1998 Sq ft. in respondent's "Terra" project for total sale consideration is **Rs 133,11,226 /-** which includes BSP, car parking, IFMS, Club Membership, PLC etc. But **Rs. 1,31,41,156/-** given while filing reply at page no. 151 in the statement of account and also mentioned in the zimni, the complainant made payment of **Rs. 13,258,752/-** to the respondents via different cheques on different dates but shown as payment of **Rs. 95,92,767/-** in



the statement of account at page no. 151 of the reply and same amount was mentioned in the zimni.

4. That As per the flat buyers agreement (the "**Buyers Agreement**"), the respondents allotted a Unit/Flat bearing No. T25-603 having super area of 1998 sq. ft.(hereinafter referred to as the **Flat**) to the complainant. As per clause no. 5.1 of the buyers agreement, the respondents had agreed to deliver the possession of the Flat within 42 months from the date of signing of the buyers agreement or sanctioning of building plan, whichever was later, with an extended grace period of six months.
5. That over the years, the complainant regularly visited the flat site but was repeatedly surprised to see that construction work as stipulated in the buyers agreement was not in progress, and there was no one present at the flat site to address such of the complainant's concerns. Following such incidents and in review of all correspondence between the complainant and the respondents, it is evident that the complainant was subject to a fraud and severe misrepresentation by the respondents. The respondent's only intention was to continue to take payments for the Flat, without completing the aforementioned development and handing over possession in time. The respondent's mala-fide and dishonest motives and intention to defraud the complainant is evident through their lack of co-operation in this matter. Despite receiving approximately 99% of the



- payments on time for the flat and despite repeated requests and reminders over phone calls and personal visits from the complainant, the respondents have failed to deliver the possession of the allotted flat to him within stipulated period.
6. That it becomes evident that the construction of the block in which the flat was booked with a promise of delivery on 29.07.2016, by the respondents, but was never completed on time for the reasons best known to them, clearly depicts their ulterior motive to fraudulently extract money from innocent people such as the complainant, and many others alike.
 7. That owing to such fraudulent acts by the respondents, the complainant has been suffering from disruption on his living arrangement, mental torture, and agony and also continues to incur severe financial losses. That could have been avoided if the respondents had fulfilled their obligations as per the buyers agreement and given possession of the flat on time. As per clause no. 6 of the buyers agreement, it was agreed by the respondents that in case of any delay, they would pay the complainant a compensation @ Rs.5/- per sq.ft. per month of the super area of the Flat. It is however, pertinent to mention here that a clause of compensation at such a nominal rate of Rs.5/- per sq.ft per month for the period of delay is unjust and inequitable as the respondents have exploited the complainant by not providing the possession of the flat even after a delay from the agreed possession plan. The respondents cannot escape all liability merely by stipulating



a compensation clause in the buyer's agreement, especially as the delay in handing over possession to this extent would represent a breach of a material term of the buyers agreement, for which a remedy so minimal is not equitable and severely unjust. If one to calculate the amount in terms of financial charges, the result would be approximately@ 2% per annum rate of interest whereas the respondents charges 18% per annum interest on any delayed payment This further goes to represent the disparity of remedies, which both parties are allowed under the biased and one-sided buyers agreement.

8. That on the ground of parity and equity, the respondents should also be subjected to pay the same rate of interest, i.e. that of 18% per annum, since the breach of the possession term has been materially averse to the complainant's position. Therefore, the respondents should be liable to pay interest on the amount paid by the complainant from the promise date of possession till the date on which the Flat is actually delivered to the complainant.
9. That the complainant has made several requests to the respondents through telephone calls and several personal visits to the respondent's office to request them to deliver the possession of the flat, along with the prescribed interest on the amount deposited by them. However, in keeping with their uncooperative attitude towards the matter, the respondents have clearly refused to do so. Thus, it clear that

the respondents, in a pre-planned manner defrauded the complainant with his hard-earned money to wrongfully extract money for their own benefit and cause wrongful loss to the complainant.

C. Relief sought by the complainant.

10. The complainant has sought following relief:

- (i) Direct the respondents to handover possession of the allotted unit along with prescribed interest p.a. from the promissory date of delivery of the allotted unit, till the date of actual delivery of the allotted unit.

D. Reply by the respondents.

11. That the respondents had diligently applied for registration of the project in question i.e. "Terra" located at sector-37D, Gurugram including towers-T-20 to T-25 & EWS before this Hon'ble Authority and accordingly, registration certificate dated 13.10.2017 was issued by this Hon'ble Authority.
12. That the complainant approached this Hon'ble Authority for redressal of the alleged grievances with unclean hands, i.e. by not disclosing material facts pertaining to the case at hand and also, by distorting and/or misrepresenting the actual factual situation with regard to several aspects. It is further submitted that the Hon'ble Apex Court in plethora of cases has laid down strictly, that a party approaching the court for any relief, must come with clean hands, without concealment and/or misrepresentation of material facts, as the same



tantamount to fraud not only against the respondents but also against the adjudicating authority and hence, the complaint is liable to be dismissed *in limine*.

- The complainant has concealed from this Hon'ble Authority that on various occasions he has conveniently defaulted in remitting the timely payments qua the demands raised by the respondents due to which they on various occasions were constrained to issue/ send reminder letters/ notices such as reminder Letter - I on 25/06/2013, reminder Letter - II on 25/07/2013, reminder Letter - III on 26/08/2013 and reminder notice - I dated 10/08/2016 requesting therein for the immediate payment of the outstanding dues. Hence, the herein mention acts of the complainant are in complete derogation to the terms and provisions of the Act of 2016 and Clause 7 of the agreement between the contesting parties.
- The complainant has further attempted to conceal from this Hon'ble Authority that the construction of his Unit as well as the tower in which the said unit is situated has been duly completed by the respondents in terms of the FBA. Subsequent to which an application for the grant of occupancy certificate ("OC") has been made by the respondents to the Department of Town and Country Planning ("DTCP"), Haryana, on 18/01/2021. It is pertinent to mention herein that prior to the receipt of

OC the respondents are lawfully bound to not to release the offer of possessions to the complainant for the unit in question.

13. That the complaint is unjustified, baseless and beyond the scope/ambit of the agreement duly executed between the parties, which forms a basis for the subsisting relationship between the parties. The complainant entered into the said agreement with the respondents with open eyes and is bound by the same. That the relief(s) sought by the complainant travel way beyond the four walls of the agreement duly executed between the parties. The complainant while entering into the agreement has accepted and is bound by each and every clause of the said agreement. The detailed relief claimed by the complainant goes beyond the jurisdiction of this Hon'ble Authority under the Real Estate (Regulation and Development) Act, 2016 and therefore the present complaint is not maintainable qua the reliefs claimed by the complainant.
14. That at the stage of entering into the agreement, and raising vague allegations and seeking baseless reliefs beyond the ambit of the agreement, the complainant is blowing hot and cold at the same time which is not permissible under law as the same is in violation of the '*Doctrine of Aprobate & Reprobate*'. In this regard, the respondents reserves the right to refer to and rely upon decisions of the Hon'ble Supreme Court at the time of arguments, if required. Therefore, in light



of the settled law, the reliefs sought by the complainant in the

complaint under reply cannot be granted by this Hon'ble Authority.

15. That the project in question was launched by the respondents in August' 2012. It is submitted that while the total number of flats sold in the project "Terra" is 401, for non- payment of dues, 78 bookings/ allotments have since been cancelled. Further, the number of customers of the Project "Terra" who are in default of making payments for more than 365 days are 125. Hence, there have been huge default in making payments of various instalments by large number of applicants in the Project. The projected timelines for possession was based on the cash flow. It was not in the contemplation of the respondents that the allottee would hugely default in making payments and hence, cause cash flow crunch in the project. In addition to aforesaid, the construction was also affected on account of the NGT order prohibiting construction (structural) activity of any kind in the entire NCR by any person, private or government authority. It is submitted that vide its order NGT placed sudden ban on the entry of diesel trucks more than ten years old and said that no vehicle from outside or within Delhi would be permitted to transport any construction material. Since the construction activities were suddenly stopped, after the lifting of the ban it took some time for mobilization



of the work by various agencies employed with the respondents.

16. The Environment Pollution (Prevention and Control) Authority, EPCA, expressing alarm on severe air pollution level in Delhi-NCR issued press note vide which the construction activities were banned within the Delhi-NCR region. The ban was commenced from 31/10/2018 and was initially subsisted till 10/11/2018 whereas the same was further extended till 12/11/2018 and in 2019, the Hon'ble Supreme Court of India on 04/11/2019, in M.C. Mehta v. Union of India banned all the construction activities. The said ban was partially lifted by the Hon'ble Supreme Court on 09/12/2019 whereby relaxation was accorded to the builders for continuing the construction activities from 6:00 am to 6:00 pm. whereas the complete ban was lifted by the Hon'ble Apex Court on 14/02/2020.
17. That the construction of the project was going on in full swing, however, the changed norms for water usage, not permitting construction after sunset, not allowing sand quarrying in faridabad area, shortage of labour and construction material, liquidity crunch and non-funding of real estate projects and delay in payment of instalments by customers etc. were the reasons for delay in construction and after that government took long time in granting necessary approvals owing to its cumbersome process. Furthermore, the construction of the unit was going on in full swing and



the respondents were confident to handover possession of the units in question. However, it be noted that due to the sudden outbreak of the coronavirus (COVID 19), from past 2 years, the construction came to a halt and it took some time to get the labour mobilized at the site. It was communicated to the complainant vide email dated 26.02.2020 that the construction was nearing completion and the respondents were confident to handover possession of the unit in question by March 2020. However, it be noted that due to the sudden outbreak of the coronavirus (COVID 19), construction came to a halt and it took some time to get the labour mobilized at the site.

18. That despite all aforesaid force majeure circumstances, the respondents have duly completed the construction of project as well as of the tower in which the unit is located has been completed and has also made an application for the grant of the occupancy certificate ("OC") to the Department of Town and Country Planning ("DTCP"), Haryana, on 18/01/2021. It is pertinent to mention herein that prior to the receipt of OC, the respondents were lawfully bound to not to release the offer of possessions to the complainant for the Unit in question

E. Jurisdiction of the authority

The respondents have 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 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.

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 promoters 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 respondents.

F. I Objection regarding untimely payments done by the complainants.

19. The respondents have contended that the complainant has made defaults in making payments as a result thereof, they have to issue reminder letters dated 25.06.2013, 25.07.2013 and 26.08.2013. The respondents have further submitted that the complainant has still not cleared the dues. The counsel for the respondents placed reliance upon clause 7.1 of the buyer's agreement wherein it is stated that timely payment of instalment is the essence of the transaction, and the relevant clause is reproduced below:

*"7. TIMELY PAYMENT ESSENCE OF CONTRACT.
TERMINATION, CANCELLATION AND FORFEITURE"*

7.1 The timely payment of each instalment of the Total Sale Consideration i.e., COP and other charges as stated herein is the essence of this transaction/Agreement. In case the Purchaser(s) neglects, omits, ignores, defaults, delays or fails, for



any reason whatsoever, to pay in time any of the instalments or other amounts and charges due and payable by the Purchaser(s) as per the payment schedule opted or if the Purchaser(s) in any other way fails to perform, comply or observe any of the terms and conditions on his/her part under this Agreement or commits any breach of the undertakings and covenants contained herein, the Seller/Confirming Party may at its sole discretion be entitled to terminate this Agreement forthwith and forfeit the amount of Earnest Money and Non-Refundable Amounts and other amounts of such nature..."

20. At the outset, it is relevant to comment on the said clause of the agreement i.e., "7. *TIMELY PAYMENT ESSENCE OF CONTRACT. TERMINATION, CANCELLATION AND FORFEITURE*" wherein the payments to be made by the complainant has been subjected to all kinds of terms and conditions. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favor of the promoters and against the allottees that even a single default by the allottee in making timely payment as per the payment plan may result in termination of the said agreement and forfeiture of the earnest money. Moreover, the authority has observed that despite complainant being in default in making timely payments, the respondents have not exercised his discretion to terminate the buyer's agreement. The attention of authority was also drawn towards clause 7.2 of the flat buyer's agreement whereby the complainant shall be liable to pay the outstanding dues together with interest @ 18% p.a. compounded quarterly or such higher rate as may be



mentioned in the notice for the period of delay in making payments. In fact, the respondents have charged delay payment interest as per clause 7.2 of the buyer's agreement and has not terminated the agreement in terms of clause 7.1 of the buyer's agreement. In other words, the respondents have already charged penalized interest from the complainant on account of delay in making payments as per the payment schedule. However, after the enactment of the Act of 2016, the position has changed. Section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoters, in case of default, shall be equal to the rate of interest which the promoters shall be liable to pay the allottee, in case of default. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 9.30% by the respondents which is the same as is being granted to the complainant in case of delay possession charges.

F. II Objection regarding jurisdiction of authority w.r.t. buyer's agreement executed prior to coming into force of the Act.

21. Another contention of the respondents is that authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the apartment buyer's agreement executed between the parties and no agreement for sale as referred to under the provisions of the Act or the said rules has been executed inter se parties. The authority is of the view that the Act nowhere provides, nor can



be so construed, that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreements have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. The numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of **Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)** which provides as under:

"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter....."

122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the



Standing Committee and Select Committee, which submitted its detailed reports."

22. Also, in appeal no. 173 of 2019 titled as ***Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya***, in order dated 17.12.2019 the Haryana Real Estate Appellate Tribunal has observed-

"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."

23. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no scope left to the allottees to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of any other Act, rules, statutes, instructions, directions issued thereunder and are not unreasonable or exorbitant in nature.

G. Findings on the relief sought by the complainant.

Relief sought by the complainant: The complainant has sought following relief:

- (i) Direct the respondents to handover possession of the allotted unit along with prescribed interest p.a. from the promissory date of delivery of the allotted unit, till the date of actual delivery of the allotted unit.

24. 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."

25. Clause 5.1 read with clause 1.6 of the flat buyer's agreement provides the time period of handing over possession and the same is reproduced below:

"Clause 5.1- The Seller/Confirming Party proposes to offer possession of the unit to the Purchaser(s) within the Commitment period. The Seller/Confirming Party



shall be additionally entitled to a Grace period of 180 days after the expiry of the said Commitment Period for making offer of possession of the said unit.

Clause 1.6 "FBA" "Commitment Period" shall mean, subject to Force Majeure circumstances; intervention of statutory authorities and Purchaser(s) having timely complied with all its obligations, formalities or documentation, as prescribed/requested by Seller/Confirming Party, under this Agreement and not being in default under any part of this Agreement, including but not limited to the timely payment of instalments of the sale consideration as per the payment plan opted, Development Charges (DC), stamp duty and other charges, the Seller/Confirming Party shall offer the possession of the Unit to the Purchaser(s) within a period of 42 months from the date of sanction of the building plan or execution of Flat Buyers Agreement, whichever is later."

26. At the inception it is relevant to comment on the pre-set possession clause of the flat buyer's agreement wherein the possession has been subjected to innumerable terms and conditions, force majeure circumstances and innumerable terms and conditions. The drafting of this clause is not only vague but so heavily loaded in favour of the promoters that even a single default by the allottees in fulfilling obligations, formalities and documentations etc. as prescribed by the promoters may make the possession clause irrelevant for the purpose of allottees and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoters is just to evade the liability towards timely delivery of subject unit and to deprive the allottees 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 allottees are left with no option but to sign on the dotted lines.

27. **Admissibility of grace period:** The promoters has proposed to hand over the possession of the apartment within a period of 42 months from the date of sanction of the building plan or execution of flat buyer's agreement, whichever is later. The flat buyer's agreement was executed on 29.01.2013 and the building plan was approved on 21.09.2012. The flat buyer's agreement being executed later, the due date is calculated from the date of execution of flat buyer's agreement. The said period of 42 months expires on 29.07.2016. Further it was provided in the flat buyer's agreement that promoter shall be entitled to a grace period of 180 days after the expiry of the said committed period for making offer of possession of the said unit. In other words, the respondents are claiming this grace period of 180 days for making offer of possession of the said unit. There is no material evidence on record that the respondent-promoter had completed the said project within this span of 42 months and had started the process of issuing offer of possession after obtaining the occupation certificate. As a matter of fact, the promoters have not offered the possession within the time limit prescribed by them in the flat buyer's agreement nor has they offered the possession till date. As per the settled law, one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 180 days cannot be allowed to the promoters at this stage.

28. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges at the prescribed rate of interest on amount already paid by him. However, 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.

29. 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.

30. 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., 24.03.2022 is 7.30%. Accordingly, the



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

31. 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—
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 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;"*

32. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 9.30% by the respondents/promoters which is the same as is being granted to the complainant in case of delayed possession charges.
33. On consideration of the documents available on record and submissions made by both the parties regarding contravention of provisions of the Act, the authority is satisfied that the respondents are 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 clause 5.1 read with clause 1.6 of the flat buyer's agreement executed between the parties on 29.01.2013, the possession of the subject apartment was to be delivered within stipulated time i.e., by 29.07.2016. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over possession is 29.07.2016. The respondents have failed to handover possession of the subject apartment till date of this order. Accordingly, it is the failure of the respondents to fulfil obligations and responsibilities as per the flat buyer's agreement to hand over the possession within the stipulated period.

34. 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 complainant 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., 29.07.2016 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.

35. 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 respondents are established. As such the allottee shall be paid, by the promoters, interest for every month of delay from due date of possession i.e., 29.07.2016 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.

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 promoters as per the function entrusted to the authority under section 34(f):
- i. The respondents are 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., 29.07.2016 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.



- ii. The respondents are directed to handover the physical possession of the subject unit after obtaining OC from the competent authority.
- iii. The arrears of such interest accrued from 29.07.2016 till date of this order shall be paid by the promoters to the allottee within a period of 90 days from date of this order and interest for every month of delay shall be payable by the promoters to the allottees before 10th day of each subsequent month as per rule 16(2) of the rules.
- iv. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
- v. The rate of interest chargeable from the allottee by the promoters, in case of default shall be charged at the prescribed rate i.e., 9.30% by the respondents/promoters 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.
- vi. The respondents shall not charge anything from the complainant which is not the part of the agreement. However, holding charges shall also not be charged by the promoters at any point of time even after being part of agreement as per law settled by the Hon'ble Supreme Court in civil appeal no. 3864-3889/2020 dated 14.12.2020.

37. Complaint stands disposed of.



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38. File be consigned to registry.

V.1-3

(Vijay Kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 24.03.2022



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