BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.:	**212 of 2021**
First date of hearing:	**24.02.2021**
Date of decision:	**30.03.2022**

Anita Sharma
R/o Hno. 8298, Sector C, Pocket-8, Vasant Kunj, South West Delhi-110070 **Complainant**

Versus

M/s Almond Infrabuild Pvt. Ltd.
Office address: 711/92, Deepali, Nehru Place, New Delhi-110019 **Respondent**

CORAM:
Dr. K. K. Khandelwal **Chairman**
Shri Vijay Kumar Goyal **Member**
APPEARANCE:
Shri Ambuj Tiwari (Advocate)
Shri Vijay Kumar (Husband) Complainant
Dhirendra Pandey (AR of the respondent) Respondent

ORDER

1. The present complaint dated 18.01.2021 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	"Tourmaline", Sector-109, Gurugram
2.	Project area	10.41875 acres
3.	Nature of the project	Commercial colony
4.	DTCP license no. and validity status	250 of 2007 dated 02.11.2007 valid up to 01.11.2019
5.	Name of licensee	Raj Kiran and ors. C/o Chintels India Ltd.
6.	RERA registration details	41 of 2017 dated 10.08.2017 valid up to 6 years from EC
7.	Commercial space no.	09 [annexure 2, page 22 of complaint]
8.	Unit measuring	205 sq. ft. carpet area
9.	Date of execution of unit buyer agreement	11.07.2018 [annexure 2, page 20 of complaint]
10.	Payment plan	down payment plan [annexure 2, page 49 of complaint]
11.	Possession clause	7.1 *The promoter assures to handover possession of the commercial space for commercial usage along with car parking (if applicable)* ***on or before 31.03.2019****, unless there is delay due to force majeure, court orders, government policy/guidelines,*

		decisions affecting the regular development of the real estate project. If the completion of the project is delayed due to the above conditions, then the allottee agrees that the promoter shall be entitled to the extension of time for delivery of possession of the apartment for commercial usage. [emphasis supplied] (Page 29 of complaint)	
12.	Total consideration as per applicant ledger dated 03.11.2020	₹ 32,88,298/- [annexure 3, page 52 of complaint]	
13.	Total amount paid by the complainant as per applicant ledger dated 03.11.2020	₹ 32,88,297/- [annexure 3, page 52 of complaint]	
14.	Due date of possession	31.03.2019	
15.	Delay in handing over possession till the date of this order i.e., 30.03.2022	2 years 11 months 30 days	
16.	Occupation certificate	09.08.2019 Tower-1 Pocket-A, Tower-2 Pocket-A, Tower-3 Pocket A, Tower-4 Pocket-A, Tower-5 Pocket-A, EWS Block, Community Building, Convenient Shopping in Community Building, Lower and Upper Basement	12.02.2019 Tower-3 to 5, EWS Block etc
17.	Offer of possession	09.08.2019	

		[annexure 4, page 55 of complaint]

B. Facts of the complaint

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

a. The respondent, M/s Almond Infrabuilds Private Limited advertised about its new project namely 'Almond Tourmaline' (hereinafter called as 'the project'). The respondent painted a rosy picture of the project in its advertisements making tall claims regarding providing the world class facilities in the said project.

b. The complainant Anita Sharma W/o Sh. Vijay Sharma booked a commercial space in the project by paying an amount of Rs. 3,50,000/- towards the booking a commercial space bearing no. 9 having a carpet area of 19.04 sq.mt. equivalent to 205 sq.ft. on ground floor in the project of the complainant.

c. That as per the demand raised by the respondent and as per the payment plan, the complainant paid a sum of Rs. 30,86,756/- towards the said apartment from 01.07.2018 till date against the total sale consideration. It is pertinent to mention here that the entire sale consideration has been paid by the complainant.

d. That the complainant contacted the respondent on several occasions regarding wrongful demand of parking charges and also some unfair and arbitrary clauses in the agreement. Also, a clarification was sought on the development of project and the date of delivery. However, no answer was received from the respondent.

e. The respondent had to deliver the possession on 31.03.2019 as per builder buyer agreement dated 11.07.2018 but the respondent

failed to deliver the project within the stipulated period as per builder buyer agreement dated 11.07.2018. It is pertinent to mention here that despite failed in handing over the possession of the said space, the respondent has charged Rs.35,000/- on account of maintenance charges and the same is clear contravention of the RERA Act and Rules.

f. That the purchased space is not ready for possession till date and the offer of possession dated 09.08.2019 has been sent by the respondent in order to evade themselves from the liability of interest on account of delayed possession.

g. That, accordingly, the complainant herein is entitled to get interest on the paid amount at the rate as prescribed by the Haryana Real Estate (Regulation and Development) Rules, 2017 from due date of possession till the date of actual handing over of possession.

C. Relief sought by the complainant:

4. The complainant has sought following reliefs:

a. Direct the respondent to handover the possession of the said commercial space bearing no. 9 by installing split AC as agreed by the respondent.

b. Direct the respondent to pay delayed possession charges on the principal amount paid by the complainant towards the said space bearing no. 9 at prescribed rate of interest from the due date of possession, i.e., 31.03.2019 till actual handing over of possession.

c. Any other relief which this Hon'ble authority deems fit and proper may also be granted in favour of the complainant.

5. On the date of hearing, the authority explained to the respondents/promoters 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:

   a. That the respondent is a reputed real estate company having immense goodwill, comprised of law abiding and peace-loving persons and has always believed in satisfaction of its customers. The respondent has developed and delivered several prestigious projects in and around NCR region such as ATS Greens-I, ATS Greens-II, ATS Village, ATS Paradiso, ATS Advantage Phase-I & Phase-II, ATS One Hamlet, ATS Pristine, ATS Kocoon, ATS Prelude & ATS Dolce and in these projects large number of families have already shifted after having taken possession and resident welfare associations have been formed which are taking care of the day to day needs of the allottees of the respective projects.

   b. That the complainant, after checking the veracity of the project namely, 'Tourmaline', Sector 109, Gurugram had applied for allotment of commercial space vide booking registration no. 498 dated 16.06.2018 and has been allotted commercial space no. 09 having carpet area of 19.04 sq. mtrs. equivalent to 205 sq. ft. on ground floor. Further the complainant agreed to be bound by the terms and conditions of the documents executed by the parties to the complaint.

c. That based on it, the respondent sent copies of the apartment buyer's agreement to the complainant which was signed and executed by them on 11.07.2018. The complainant had booked the unit in question and had executed the apartment buyer's agreement on their own free will and after reading, understanding and verifying the terms and conditions stipulated thereto.

d. That the possession of the unit was supposed to be offered to the complainant in accordance with the agreed terms and conditions of the buyer's agreement. It is submitted that clause 7.1 of the buyer's agreement states that *"The promoter assured to handover possession of the apartment for residential usage along with car parking (if applicable) on or before 31.03.2019, unless there is delay due to force majeure, court orders, government policy/guidelines, decisions affecting the regular development of the real estate project. If the completion of the project is delayed due to the above conditions, then the allottee agrees that the promoter shall be entitled to the extension of time for delivery of possession of the apartment for residential usage"*

e. That from the aforesaid terms of the agreement for sale, it is evident that only the construction of the commercial space in dispute was to be completed on or before 31 March, 2019 from the date of the agreement and the same would be extended on account of any force majeure condition, outside the control of the respondent as defined in the agreement for sale.

f. That it is submitted that the respondent company has been constructing the project in a timely manner and as per the terms of

the Agreement for Sale and no default whatsoever has been committed by it. It is pertinent to mention herein that the project was badly affected on account of a restraint order dated 23.04.2014 passed by the SDM Kapashera on the basis of a report submitted by Halka Patwari, Kapashera that the respondent was making encroachment on the Gram Sabha Land. In the restraint order dated 23.04.2014, it was stated that a case titled as Dilbagh Singh vs GNCTD of Delhi pertaining to the land in dispute was pending before the Delhi High Court and SDM, Gurugram was requested to conduct joint demarcation. It is pertinent to mention herein that the order passed by the SDM Kapashera is covered under the ambit of the definition of Force Majeure Event' as stipulated in the mutually agreed terms of the Agreement for Sale.

g. That as soon as the restraint order dated 23.04.2014 was set aside, the respondent completed the construction of the project, and an application was made to the concerned authorities for the grant of Occupation Certificate vide application dated 19.03.2018. It is submitted that there is no default on the part of the respondent to complete the project and as per Clause 7.1 of the agreement for sale, the respondent was entitled to an extension of time from the expiry of the completion date if the construction delayed on account of a Force Majeure Event. It is pertinent to mention herein that the Occupation Certificate has been granted by the concerned authorities on 09.08.2019. It is pertinent to mention herein that the respondent has already offered the possession of the unit to the complainant vide Offer of Possession dated 09.08.2019.

h. That the complainant is real estate investors who have made the booking with the respondent in order to gain profit in a short span of time. However, on account of slump in the real estate market, their calculations went wrong and now they have filed the present baseless, false and frivolous complaint before this hon'ble authority in order to somehow harass, pressurize and blackmail the respondent and illegally extract benefits from it.

7. Copies of all the documents have been filed and placed on record. The authenticity is not in dispute. Hence, the complaint can be decided on the basis of theses undisputed documents.

E. 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.

E.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.

E.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.

F. **Findings on the objections raised by the respondent**

F.I. Objection raised by the respondent regarding force majeure condition

11. To give justification of the delay, the respondent pressed upon the fact that in the case titled as ***Dilbagh Singh vs GNCTD of Delhi, Hon'ble Delhi High Court*** requested SDM(Gurgaon) vide letter no. 625-55 dated 01.04.2014 for joint demarcation. The said demarcation report by SDM (Gurugram) was submitted on 26.03.2015 & 27.03.2015. The relevant para of the said report is reproduced below:

> *"Now according to the revenue record of village Babupur, I got measured from point 'A' to 1 and thereafter I found that the measurement of rectangle No. 3 Killa No. 11 (5 kanal 7marla), the owner of which are M/s Rajkiran Pvt. Ltd. 748/2684 share, M/s Vidu Properties Pvt. Ltd 588/2684 share, M/s Mandhyanchal leasing Pvt. Ltd 680/2684 Share, Mr. Ashok Solman S/o E. H. Solman 668/2684 Share through Khewat No/ Khata No 155/164 vide Jamabandi years 2008 2009. The above said landowners has given the construction work to ATS company. The ATS company has erected boundary wall of the said land excluding their 98 Square Yards (3 Marla 2 Sarsai) land in north direction in Killa no. 3//11 of village Babupur Tehsil & District Gurgaon which is adjoining to khasra no 110/1 of the south direction of Village Raghupur (New Delhi), The ATS Company has not encroached the public rasta between village Raghopur (New Delhi and village Babupur tehsil & District Gurgaon, of about two gatha of 16.5 feets wide and 220 feet long. Besides this company has left their own land measuring 98 Square Yards towards the rasta/other land village raghopur Delhi which measurement are below and shown in Aks Shijra in green color."*

12. Also, SDM Kapashera on the basis of a report submitted by Halka patwari, Kapashera about the fact that the respondent was making encroachment on the Gram Sabha Land passed a restraint order dated 23.04.2014 restraining further unauthorized construction on the said

land. The above titled case which was sub-judice before the Hon'ble Delhi High Court was finally dismissed on 12.10.2017. Accordingly, the respondent is contending that the restraint order as passed by the SDM Kapashera is covered under the ambit of the definition of 'Force Majeure Event' as stipulated in the mutually agreed terms of the apartment buyer's agreement.

13. The respondent further stated that as soon as the case was dismissed the respondent carried on the construction activities and submitted an application for part OC on 23.08.2018 and 10.05.2019 before the competent authority and received the same on 12.02.2019 and 09.08.2019 respectively.

14. According to the possession clause 7.1 of the buyer's agreement dated 11.07.2018, the possession of the subject unit was to be handed over by 31.03.2019. Accordingly, the due date of possession comes out to be 31.03.2019. In line with aforesaid facts, the written submissions filed by the parties and the documents already placed on record, the main question which arise before the authority for the purpose of adjudication is that "whether the period of restraint order till the dismissal of the case before Delhi High Court be treated as force majeure event while calculating the due date of possession?"

15. As, the due date of possession was in the year 2019 and any situation or circumstances which could have a reason for not carrying out the construction activities in the project prior to this date due are allowing to be taken into consideration by the authority. To treat the above circumstance as force majeure event, it is pertinent to go through the clause of force majeure as per the buyer's agreement. Having devoted

the attention to the clause 7.1 of buyer's agreement the developer shall be entitled for extension of time in case of existence of any injunction, stay, order, prohibitory order or directions by any court, tribunal, body, or competent authority.

16. From the very instance it can be clearly interpreted that the buyer's agreement was executed between the parties after the case was dismissed and the promoter was at full liberty to extend the date of possession if construction activities were not likely to be completed by the due date of possession. Moreover, it is presumed that all the major construction activities were completed except the finishing works till the application of occupation certificate. Accordingly, the authority is affirmatively of the view that the above said period i.e., from the date of restraint order by SDM(Kapashera) i.e., 23.04.2014 till the case titles as ***Dilbagh Singh vs GNCTD of Delhi*** was dismissed i.e., 12.10.2017 cannot be taken as the force majeure event and accordingly the due date of possession remains to be 31.03.2019. Moreover, the respondent is at fault for not handing over the possession to the complainant despite of the full payment made by the complainant with respect to the said unit and offer of possession being issued on 09.08.2019.

G. Findings on the relief sought by the complainant

G.I. Direct the respondent to handover the possession of the said commercial space bearing no. 9 by installing split AC as agreed by the respondent.

17. The counsel for the complainant and the complainant himself being present submitted that they are not pressing this relief and the same be dropped.

G.II. Direct the respondent to pay delayed possession charges on the principal amount paid by the complainant towards the said space bearing no. 9 at prescribed rate of interest from the due date of possession, i.e., 31.03.2019 till actual handing over of possession.

18. In the present complaint, the complainant intends to continue with the project and is seeking delayed possession charges interest on the amount paid. Clause 7.1 of the unit buyer agreement (in short, agreement) provides for handing over of possession and is reproduced below: -

> *"The promoter assured to handover possession of the apartment for residential usage along with car parking (if applicable) on or before 31.03.2019, unless there is delay due to force majeure, court orders, government policy/guidelines, decisions affecting the regular development of the real estate project. If the completion of the project is delayed due to the above conditions, then the allottee agrees that the promoter shall be entitled to the extension of time for delivery of possession of the apartment for commercial usage."*

19. 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 favor 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 unit buyer agreement 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.

20. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the apartment by 31.03.2019. Since in the present matter the BBA incorporates qualified reason for grace period/extended period in the possession clause subject to force majeure. The force majeure reasons provided by the promoter, are taken not into consideration by the authority for the reasons quoted above. Accordingly, the authority disallows grace period of 6 months to the promoter at this stage.

21. **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 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

22. 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.

23. 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., **30.03.2022** is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.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;"

24. 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.

25. 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. By virtue of clause 7.1 of the agreement executed between the parties on 11.07.2018, the possession of the subject apartment was to be delivered by 31.03.2019. 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 31.03.2019. Though the respondent has offered the possession of the subject apartment on 09.08.2019 but have not hand over of the physical possession till date. 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., 31.03.2019 till the actual handing over of the possession of the unit, 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.

H. Directions of the authority

26. 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., 31.03.2019 till the actual handing over of the possession.

ii. The arrears of such interest accrued from 31.03.2019 till the date of this order i.e., 30.03.2022 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 allottee before 10th of the subsequent month as per rule 16(2) of the rules

iii. The attention of the authority was drawn towards clause 1.8 of BBA wherein it is mentioned that commercial space along with car parking shall be treated as a single indivisible unit for all purposes. The attention of the authority was also drawn towards schedule-B regarding description of commercial space and parking of the BBA wherein very categorically one number of parking has been shown. Accordingly, promoter is directed to handover the earmarked space of the parking as per BBA within 15 days of this order.

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 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 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. 3864-3889/2020.

28. Complaint stands disposed of.

29. File be consigned to registry.

(Vijay Kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 30.03.2022