

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

|                        |              |
|------------------------|--------------|
| Complaint no.:         | 3181 of 2021 |
| First date of hearing: | 24.09.2021   |
| Date of decision:      | 05.04.2022   |

1. Radhika Kapur  
2. Pritam Kapur  
**Both RR/o C-63, South Extension Part-II, New Delhi-  
110049**

**Complainants**

Versus

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

**Respondent****CORAM:**

Dr. K. K. Khandelwal  
Shri Vijay Kumar Goyal

**Chairman  
Member****APPEARANCE:**

Priyanjali Singh (Advocate)  
M.K Dang (Advocate)

**Complainants  
Respondent****ORDER**

1. The present complaint dated 03.09.2021 has been filed by the complainants/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is *inter alia* prescribed that the promoter shall be responsible for all obligations, responsibilities and functions as provided under the



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

**A. Unit and project related details**

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

| S no. | Heads                                     | Information   |
|-------|---|---|
| 1.    | Project name and location                 | "Tourmaline", Sector-109, Gurugram  |
| 2.    | Project area                              | 10.41875 acres  |
| 3.    | Nature of the project                     | Group housing 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.    | Unit no.                                  | 5141, 14 <sup>th</sup> floor, tower 5<br>[annexure P1, page 27 of complaint]  |
| 8.    | Unit measuring                            | 1750 sq. ft. super area   |
| 9.    | Date of execution of flat buyer agreement | 17.01.2014<br>[annexure P1, page 23 of complaint]   |
| 10.   | Possession clause                         | 6.2<br><i>The Developer endeavour to complete the construction of the apartment within 42 months from the date of this agreement (completion date). The company will send</i> |



|     |   |   |   |
|-----|---|---|---|
|     |   | <i>possession notice and offer possession of the Apartment to the applicant as and when the company receives the occupation certificate from the competent authority.</i><br><i>(Emphasis supplied)</i><br>[page 37 of complaint] |   |
| 11. | Payment plan  | Construction link payment plan<br>[annexure P1, page 58 of complaint]   |   |
| 12. | Total sale consideration as per details of consideration attached with BBA dated 17.01.2014                                     | ₹ 1,45,31,250/-<br>[annexure P1, page 58 of complaint]  |   |
| 13. | Amount paid by the complainants as a sum of the receipts annexed by the complainants at annexure P4 from pg-84-134 of complaint | ₹ 1,51,51,945/-   |   |
| 14. | Due date of possession  | 17.01.2018<br>[Note: Grace period of 6 months allowed]  |   |
| 15. | Delay in handing over possession till the date of order i.e., 05.04.2022  | 4 year 2 months 19 days   |   |
| 16. | Occupation certificate  | 09.08.2019<br>Tower-1 Pocket-A, Tower-2 Pocket-A, Tower-3 Pocket A, Tower-4 Pocket-A, Tower-5 Pocket-A, EWS Block, Community  | 12.02.2019<br>Tower-3 to 5, EWS Block etc |



|     |                     |  |   |
|-----|---------------------|--|---|
|     |                     |  | Building,<br>Convenient<br>Shopping in<br>Community<br>Building, Lower<br>and Upper<br>Basement |
| 17. | Offer of possession |  | 09.08.2019<br>[annexure P3, page 79 of<br>complaint]  |

**B. Facts of the complaint**

3. The complainants have pleaded the complaint on the following facts:

- a. That the complainants (hereinafter referred to in singular as "complainant" for convenience), and respondent for allotment of unit no. 5141, tower no. 5 (hereinafter called "flat") in the project "ats tourmaline" in sector 109, Gurgaon to complainant (hereinafter called "project").
- b. Despite complainant having paid 100% of the cost of flat and despite around four years having passed since the promised date of possession, respondent has failed to deliver possession of the flat till today. Demands were raised by respondent and paid by complainant as follows:

| Sr. No. | Receipt Date | Receipt No. | Amount     |
|---------|--------------|-------------|------------|
| 1       | 26-Aug-13    | 238         | ₹9,64,246  |
| 2       | 26-Aug-13    | 239         | ₹35,754    |
| 3       | 26-Aug-13    | 240         | ₹35,754    |
| 4       | 26-Aug-13    | 241         | ₹29,14,838 |
| 5       | 26-Aug-13    | 242         | ₹1,09,408  |

| Sr. No. | Receipt Date | Receipt No. | Amount     |
|---------|--------------|-------------|------------|
| 6       | 8-Oct-13     | 792         | ₹22,662    |
| 7       | 8-Oct-13     | 793         | ₹840       |
| 8       | 5-Aug-14     | 2536        | ₹12,23,876 |
| 9       | 5-Aug-14     | 2537        | ₹45,381    |
| 10      | 8-Oct-14     | 2900        | ₹3,28,125  |
| 11      | 8-Oct-14     | 2901        | ₹88,624    |
| 12      | 8-Oct-14     | 2902        | ₹8,10,950  |
| 13      | 8-Oct-14     | 2903        | ₹33,356    |
| 14      | 23-Feb-15    | 3706        | ₹20,000    |
| 15      | 23-Feb-15    | 3707        | ₹69,340    |
| 16      | 23-Feb-15    | 3708        | ₹2,571     |
| 17      | 26-Feb-15    | 3717        | ₹34,118    |
| 18      | 26-Feb-15    | 3716        | ₹8,81,665  |
| 19      | 26-Feb-15    | 3715        | ₹38,460    |
| 20      | 26-Feb-15    | 3719        | ₹836       |
| 21      | 26-Feb-15    | 3718        | ₹22,539    |
| 22      | 14-Apr-15    | 3933        | ₹16,014    |
| 23      | 14-Apr-15    | 3932        | ₹1         |
| 24      | 14-Apr-15    | 3931        | ₹4,31,888  |
| 25      | 14-Apr-15    | 3930        | ₹18,592    |
| 26      | 14-Apr-15    | 3929        | ₹4,86,862  |
| 27      | 14-Apr-15    | 3928        | ₹14,546    |
| 28      | 8-Jul-15     | 4564        | ₹18,340    |
| 29      | 8-Jul-15     | 4563        | ₹4,36,660  |
| 30      | 8-Jul-15     | 4568        | ₹13,905    |



| Sr. No.  | Receipt Date | Receipt No. | Amount                |
|--|--------------|-------------|-----------------------|
| 31   | 8-Jul-15     | 4567        | ₹3,31,095             |
| 32   | 8-Jul-15     | 4566        | ₹6,342                |
| 33   | 8-Jul-15     | 4565        | ₹1,50,994             |
| 34   | 3-Sep-15     | 4685        | ₹38,588               |
| 35   | 3-Sep-15     | 4684        | ₹3,28,125             |
| 36   | 2-Sep-15     | 4683        | ₹9,18,750             |
| 37   | 27-Nov-15    | 5073        | ₹36,779               |
| 38   | 27-Nov-15    | 5072        | ₹8,45,496             |
| 39   | 6-Jan-16     | 5333        | ₹3,129                |
| 40   | 6-Jan-16     | 5332        | ₹71,934               |
| 41   | 25-Jan-16    | 5407        | ₹1,320                |
| 42   | 25-Jan-16    | 5409        | ₹39,640               |
| 43   | 25-Jan-16    | 5408        | ₹9,09,945             |
| 44   | 23-May-16    | 6677        | ₹33,946               |
| 45   | 23-May-16    | 6676        | ₹7,71,563             |
| 46   | 23-May-16    | 6675        | ₹8,805                |
| 47   | 31-Aug-16    | 7206        | ₹396                  |
| 48   | 31-Aug-16    | 7205        | ₹8,792                |
| 49   | 10-Oct-16    | 7466        | ₹339                  |
| 50   | 10-Oct-16    | 7465        | ₹391                  |
| 51   | 10-Oct-16    | 7464        | ₹7,145                |
| <i>By the due date of possession i.e. 17.06.2017, Respondent had recovered ₹1,36,33,665/- from the Complainant</i> |              |             |                       |
| 52   | 30-Aug-19    | RTGS        | ₹15,18,280            |
| <b>TOTAL PAID</b>  |              |             | <b>₹1,51,51,945/-</b> |



- c. As per cl. 6.2 of apartment buyer agreement, flat ought to have been completed and possession delivered within a period of 42 months from the date of execution of apartment buyer agreement. Hence, construction ought to have been completed and possession ought to have been given by 17.06.2017. However, not only did respondent fail to complete the flat by the promised date but also failed to offer any explanation for the delay despite being chased by complainant.
- d. It is around 26 months after the promised date of completion, that respondents issued letter dated 09.08.2019 offering possession and demanding the final payment. This letter also claimed that occupation certificate had been received but strangely, despite full payment by the complainant, possession has not been delivered till today. Presumably, either the claim of having occupation certificate is false or the occupation certificate has been obtained prematurely without completion of the Flat.
- e. Despite complainant's demand for adequate interest/compensation for delay in delivery of possession, the complainant was willing to adjust only @ ₹ 5 per sq. ft. pm and hence demanded ₹15,18,280/-. The complainant issued a letter and email dated 28.08.2019 stating that payment was being made "**under protest**" and "**without prejudice**" to all claims including claim for adequate compensation. The complainant made the full payment of ₹15,18,280/- by RTGS on 30.08.2019 within three weeks of having received the offer of possession. The complainant issued another email on 30.08.2019 stating that payment had been made "**under protest**" and "**without prejudice**".



- f. As per the letter of offer of possession, respondent assured delivery of possession within 90 days from the date of payment. Hence, respondent ought to have delivered possession to complainant by 30.11.2019. Unfortunately, while complainant has been chasing respondent for possession, respondent has failed to deliver possession till today, making different excuses at different times. In response to complainant's email of 17.12.2019, respondent claimed in its email of 21.12.2019 that it was stopped by the NGT construction ban and promised to handover possession at the earliest. In the email of 01.08.2020 and 21.08.2020, respondent made the excuse of COVID and vaguely promised to handover possession without committing to any specific date.
- g. On 11.01.2021, complainant issued an email demanding to know when possession would be given but respondent ignored this email. Therefore, complainant another email on 19.03.2021 protesting that they had paid the final amount more than two years back and now they are being informed that it would take months to complete the flat. However, there was no response to this email also.
- h. That another consequence of the delay in possession is the substantial increase in the tax burden by way of GST. Had the flat been completed on schedule, the complainant would have faced lesser tax liability than the GST that he will now has to pay. Respondent is liable to bear this additional tax liability of ₹86,602/- resulting from respondent's delay in completion of the flat.





**C. Relief sought by the complainants:**

4. The complainants have sought following reliefs:

- a. Respondent should be directed to deliver legal possession of flat forthwith together with completed amenities and facilities including lifts, water, electricity etc., occupation certificate/completion certificate, execution of registered conveyance and deed of apartment as per law.
- b. Respondent should pay interest on delay in completion and possession of flat from 17.06.2017 till the respondent delivers legal possession to the complainant @MCLR+2% PA on the amounts paid.
- c. Respondent should bear additional tax burden arising from GST.
- d. Respondent should pay to complainants the costs of litigation and legal expenses.

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 complainants, after checking the veracity of the project namely, 'Tourmaline', Sector 109, Gurugram had applied for allotment of an apartment and were accordingly allotted apartment number 5141 in tower 5 having super built up area of 1750 square feet for a total sale consideration of Rs. 1,45,31,250/-. The complainants agreed to be bound by the terms and conditions of the documents executed by the parties to the complaint.
- c. That the complainants have made the part-payment out of the total sale consideration. However, it is submitted that the respondent had sent the payment notice to the complainants vide letter dated 06.06.2014. however, the due amount was paid by the complainants only after a notice dated 24.07.2014 was sent by the respondent to the complainants.
- d. That the possession of the unit was supposed to be offered to the complainants in accordance with the agreed terms and conditions of the buyer's agreement. It is submitted that clause 6.2 of the buyer's agreement states that "*The developer endeavors to complete the construction of the apartment within 42(forty-two) months from the date of this agreement (completion date). The company will send possession notice and offer possession of the apartment to the applicant(s) as and when the company receives the occupation certificate from the competent authorities.*

*Notwithstanding the same, the developer shall be entitled for an extension of time from the expiry of the completion date if the completion of construction is delayed on account of any of the following reasons..... "*

- e. That from the aforesaid terms of the apartment buyer's agreement, it is evident that only the construction was to be completed within a period of 42 months 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 apartment buyer's agreement. The possession of the unit had to be offered to the complainants only after grant of occupation certificate from the concerned authorities. It is submitted that the term 'force majeure event' as defined in clause 1 of the apartment buyer's agreement states that it shall mean and include:

*"... court, case, decree, stay, any notice, order, rule, notification of the Government and/or other public or Competent Authority delay in obtaining any approvals from the competent authority or any other causes or nay other event or reason which is beyond the control of or unforeseen by the developer"*

- 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 apartment buyer's agreement, 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 apartment buyer's agreement. It is submitted that in the demarcation report dated 26.03.2015 and 27.03.2015 it was specifically mentioned that the respondent has not committed any encroachment. Furthermore, the case titled as *Dilbagh Singh vs GNCTD of Delhi* was ultimately dismissed vide order dated 12.10.2017.

- 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 6.2(f) of the apartment buyer's agreement, the respondent was entitled to an extension of time from the expiry of the completion date if the construction was 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. The respondent has already offered the possession of the unit to the complainants vide notice of possession dated 09.08.2019.
- h. However, on account of the ban on construction activities by the Hon'ble Supreme Court and several authorities, the implementation of the finishing work of some of the units of the project have been affected. Moreover, the outbreak of the deadly

Covid-19 virus has resulted in significant delay in completion of the construction of the projects in India and the real estate industry in NCR region has suffered tremendously. The outbreak resulted in not only disruption of the supply chain of the necessary materials but also in shortage of the labour at the construction sites as several labourers have migrated to their respective hometowns. The Covid-19 outbreak which has been classified as 'pandemic' is an act of God and the same is thus beyond the reasonable apprehension of the respondent. It is submitted that the same falls under the ambit of the definition of 'force majeure' as defined in clause 6.2 of the buyer's agreement and the respondent cannot be held accountable for the same.

- i. That this hon'ble authority has also adopted the similar view and has provided extension of the completion date as per its order no. 9/3-2020 HARERA/ GGM (Admin) dated 26.05.2020.
  - j. That the complainants are 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 these 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 complainants 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 Morla 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 Raghupur (New Delhi and village Babupur tehsil & District Gurgaon, of about two gacha of 16.5 feet 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 6.2 of the buyer's agreement dated 17.01.2014, the possession of the subject unit was to be handed over

by the respondent within 42 months from the date of execution of the buyer's agreement. Accordingly, the due date of possession comes out to be 17.07.2017. 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 2017 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. "Force majeure event" as defined in the buyer's agreement is produced below:

*"Force Majeure Event" shall mean and include any act of God, fire, flood, drought, earthquake, cyclone, explosion, epidemics, natural disasters, accidents, air crashes, war, riot, hostilities of war, civil commotion, terrorist acts, sabotage, inability to procure or general shortage/ non-availability of steel, cement, other building materials, water or supply of energy, labour, equipment, facilities, materials or supplies, failure of transportation, strikes, lock outs, action of labour unions, court case, decree, stay, any notice, order, rule, notification of the Government and/or other public or Competent Authority, delay in obtaining any Approvals from the Competent Authority or any other causes (whether similar or dissimilar to the foregoing) or any other event or reason which is beyond the control of or unforeseen by the Developer"*

16. Having devoted the attention to the above stated definition and clause 6.2(b) 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.



17. While enunciating the above issue, the authority considers the fulcrum of the submissions made by both the parties, where on one hand the respondent raised the plea that he was restrained from carrying out the construction activities on the said project land and on the other the respondent was raising the demands from the complainants as is evident from the copy of the receipts annexed in the complaint. In particular, the fact that the respondent has also applied for occupation certificate with respect to the said tower on 23.08.2018 and received the same on 12.02.2019 cannot be denied. From the very instance it can be clearly interpreted that construction activities were likely to be completed by the respondent except the finishing works till the application of occupation certificate. Accordingly, the authority unambiguously declare 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 17.07.2017. 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.
18. As per the statement of counsel for the respondent, the respondent would take around further 90 days to hand over the possession of the unit after completing the works as per BBA. Even after obtaining of OC on 09.08.2019 the respondent failed to complete the works as per BBA. The counsel for the complainant shall also make the requisite

balance payment as per BBA and delayed payment charges, if any, shall be payable as per provisions of the Act.

19. For the COVID-19 period six months relaxation shall be available to both the parties for which no delay payment charges, or delayed possession charges shall be payable to both the parties as applicable. Accordingly, the authority decided to allow DPC w.e.f., 17.01.2018 till actual handing over of possession after completing the works as per BBA and offer of possession will be issued again after completion of works as per BBA.

**G. Findings on the relief sought by the complainant**

**G.I. Respondents should be directed to deliver legal possession of flat forthwith together with completed amenities and facilities including lifts, water, electricity etc., occupation certificate/completion certificate, execution of registered conveyance and deed of apartment as per law.**

**G.II. Respondent should pay interest on delay in completion and possession of flat from 17.06.2017 till the respondent delivers legal possession to the complainant @MCLR+2% PA on the amounts paid.**

20. In the present complaint, the complainants intend to continue with the project and is seeking delayed possession charges interest on the amount paid. Clause 6.2 of the flat buyer agreement (in short, agreement) provides for handing over of possession and is reproduced below: -

*"The developer endeavor to complete the construction of the apartment within 42 (forty-two) months from the date of this agreement ("completion date"). The company will send possession notice and offer possession of the apartment to the applicant(s) as and when the company receives the occupation certificate from the competent authority(ies)....."*

21. 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 flat 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.
22. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the apartment by 17.07.2017. 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 into consideration by the authority for the reasons quoted above. Accordingly, the authority allows grace period of 6 months to the promoter at this stage.

23. **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*

24. 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.
25. 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., **05.04.2022** is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.
26. 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;”*

27. 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.
28. 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 6.2 of the agreement executed between the parties on 17.01.2014, the possession of the subject apartment was to be delivered by 17.07.2017. As far as grace period is concerned, the same is allowed for the reasons quoted above. Therefore, the due date of handing over possession is 17.01.2018. Though the respondent has offered the possession of the subject apartment on 09.08.2019 but have not handed over the physical possession of the unit. 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., 17.01.2018 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.

**G.III. Respondent should bear additional tax burden arising from GST.**

29. The authority has decided this issue in the complaint bearing no. **4031 of 2019** titled as **Varun Gupta V/s Emaar MGF Land Ltd.** wherein the authority has held that for the projects where the due date of possession was prior to 01.07.2017 (date of coming into force of GST), the respondent/promoter is not entitled to charge any amount towards GST from the complainant/allottee as the liability of that charge had not become due up to the due date of possession as per the buyer's agreements.
30. In the present complaint, the possession of the subject unit was required to be delivered by 17.07.2017 and the incidence of GST came into operation thereafter on 01.07.2017. So, the respondent is entitled to charge GST from the complainants/allottees as the liability of GST had become due up to the due date of possession as per the said agreement but only upon the last payment i.e., on offer of possession because even if the delivery of the said unit was not delayed then also the complainant have paid the last demand on offer of possession after 01.07.2017.

**G.IV. Respondent should pay to complainants the costs of litigation and legal expenses.**



31. The complainants are claiming compensation in the above-mentioned reliefs. The authority is of the view that it is important to understand that the Act has clearly provided interest and compensation as separate entitlement/rights which the allottee can claim. For claiming compensation under sections 12, 14, 18 and section 19 of the Act, the complainants may file a separate complaint before Adjudicating Officer under section 31 read with section 71 of the Act and rule 29 of the rules.

**H. Directions of the authority**

32. 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., 17.01.2018 till the actual handing over of the possession.
- ii. The arrears of such interest accrued from 17.01.2018 till the date of this order 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 10<sup>th</sup> of the subsequent month as per rule 16(2) of the rules.
- iii. The respondent is directed to hand over the physical possession of the unit within 2 months from 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.
- vi. 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.
33. Complaint stands disposed of.
34. File be consigned to registry.

  
(Vijay Kumar Goyal)

Member

  
(Dr. K.K. Khandelwal)

Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 05.04.2022

HARERA  
GURUGRAM