

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

Complaint no.:	3832 of 2021
First date of hearing:	12.11.2021
Date of decision:	30.03.2022

1. Manish Gulati
2. Sapna Gulati
Both RR/o A-34, Fateh Nagar, Tilak Nagar, West Delhi-110018

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:

Shashi Kant Sharma (Advocate)
M.K Dang (Advocate)

Complainants
Respondent

ORDER

1. The present complaint dated 30.09.2021 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.	4171, type-D, 17 th floor, tower 4 [annexure C1, page24 of complaint]
8.	Unit measuring	1064 sq. ft. carpet area
9.	Date of execution of flat buyer agreement	06.11.2017 [annexure C1, page23 of complaint]
10.	Payment plan	subvention link payment plan [annexure C1, page 49 of complaint]
11.	Total consideration as per builder buyer agreement dated 06.11.2017	₹ 1,21,83,500/- [annexure C1, page 49 of complaint]



12.	Total amount paid by the complainant as alleged by the complainant on pg-67 of complaint	₹ 1,22,95,674/-	
13.	Due date of delivery of possession as per clause 7.1 of the flat buyer's agreement [Page 29 of complaint]	30.09.2018 (Note: grace period allowed)	
14.	Delay in handing over possession till the date of order i.e., 30.03.2022	3 years 6 months	
15.	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
16.	Offer of possession	09.08.2019 [annexure C7, page 81 of complaint]	

B. Facts of the complaint

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

- a. That the respondent had advertised and represented that respondent is having well known project namely "ATS TOURMALINE" at Sector 109, Gurugram where respondent is going to develop flats under the categories of 3BHK/4BHK. That trusting upon pamphlets, inducement and advertisement of the respondent, complainants have shown their willingness to purchase a flat in the said project of the respondent.
- b. That complainants after going through the inducement of respondent's project wherein the respondent has given huge advertisement and offers on the project shown their willingness to book/purchase a unit no. 4171 measuring 98.85 sq. meter & 1064 sq. ft. on floor 17th, tower 4, at sale consideration of Rs. 1,21,83,500/-. The said flat was booked on 29.09.2017 vide application no. 465 and the buyer's agreement was also executed between complainants and respondent on 06.11.2017.
- c. That as per terms and conditions of the buyer's agreement, respondents were supposed to handover the flat till 30.09.2018. In this connection the relevant para no. 7.1 of the buyer's agreement is reproduced, and it is respectfully submitted that as per the buyer's agreement the respondent/promoter has to deliver the flat till 30.09.2018.
- d. That at the time of booking of the flat the complainants had obtained a loan from PNB Bank and complainants had taken loan a sum of Rs. 75,00,000/- from PNB Bank and thereafter the said loan was transfer to SBI. Thereafter tripartite agreements were also executed between PNB & SBI Bank, complainants and respondent on 04.10.2017 & 18.10.2019 respectively. It is respectfully

submitted that the complainants have made a total sum of Rs. 1,22,95,674/- till date. That after completion period the possession of the flat was supposed to be delivered to complainants, but despite completion of the time it is observed that respondent miserably failed to give the possession of the flat till date. It is also respectfully submitted that the flat is not in a condition to take possession till date.

- e. That the complainants paid the amount from time to time as and when such demands were raised by respondent. That on 09.08.2019 the respondent very kindly issued a letter of offer of possession wherein the respondent demanded a sum of Rs. 24,05,126/- and instructed to clear the outstanding within a period of 22 days i.e., 30.08.2019. In the said offer of possession, the respondent stated that on receipt of the entire payment the respondent will provide possession of the flat within a period of 90 days.
- f. That till September 2019 the complainants cleared all the dues as demanded by the respondent and requested to furnish and ready the flat as soon as possible. The time period for handing over the flat was already completed in December 2019. That in December 2019 the complainants sent various reminders/emails regarding to complete the furnishing work and handing over the flat. In this regard, the complainants also visited personally 2-3 times in the offices of respondent but on each and every visit the respondent continuously gave the answer that the finishing work is going on and the possession of the flat would be delivered very shortly. That during September 2020 when the complainants visited the

- flat personally and astonished to note that no work has been done by the respondent and the flat was in the same condition as before.
- g. That from December 2019 the complainants sent various reminders by mail in addition to telephonic calls, messages to complete the finishing work and handing over the possession of the flat, vide emails dated 12.01.2020, 28.07.2020, 30.07.2020, 15.08.2021 but the respondent has not confirmed any confirm date for physical possession of the apartment. The complainants had communicated financial hardships owing to bank EMIs leading to mental and financial distress with request to handover flat possession on priority. However there had been no update till date on the confirm date of physical possession of the flat.
- h. That complainants had paid the hard-earned money with respondent, on the promise and inducement. That the respondents have cheated complainants with malafide intentions from the very beginning as respondent took the money from the pockets of complainants by way of misrepresentation, inducement and commitment which were totally false and fake from the very beginning. It is very surprising that respondents have duly executed all the necessary documents but after completion of the documents and payments respondent have not honoured their commitment.
- i. That complainants visited respondent personally as well as made various telephonic talks and through emails also requested to complete the work of the flat and handover the physical possession of the flat, but respondents are adamant and have not completed the furnishing work and have not handed over the possession of

the flat till date. From the above it revealed that respondents have cheated and defrauded the complainants from the very beginning to till date and wants to misuse the hard-earned money of complainants.

- j. That due to delay in handing over the possession and cheating and fraud committed by respondent, complainants are no more interested to show their willingness to proceed further.
- k. That at the time of booking of the flat the sale cost indicated was Rs.1,21,83,500/- and complainants total paid a sum of Rs. 1,22,95,674/- to the respondents and after completion of all the payments the respondent failed to handover the peaceful possession of the flat to the complainants till date. The complainants lastly visited on 28.08.2021 and astonished to note that the flat is still lying in highly incomplete state.
- l. That in view of the above facts and circumstances of the case, it is evident that from the date of booking till today respondent is playing a game of cheating and fraud with applicants/complainants in order to grab the precious amount of applicants/complainants.

C. Relief sought by the complainants:

4. The complainants have sought following reliefs:
 - a. Direct the respondent(s) to pay interest @ 10.75% per annum on the amount already paid by the complainants i.e., Rs. 1,22,95,674/- from 30.09.2018 of handing over of the physical possession to till date.
 - b. To direct the respondent that after payment of the above amount of interest, the possession should be handed over to the

complainants within the stipulated time period as per the direction of the Hon'ble authority.

- c. Any other relief which this Hon'ble authority deems fit and proper may also be granted in favour of the complainants.
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 4171 in tower 4 having super built up area of 1750 square feet for a total sale consideration of Rs. 1,21,83,500/-. The

- complainants 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 complainants which was signed and executed by them on 06.11.2017. The complainants 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. It is submitted that the complainants are bound to adhere to the terms of the apartment buyer's agreement which were agreed upon by them vide clauses 21 & 22 of the apartment buyer's agreement.
- 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 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 30.09.2018, 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 the respondent being a customer-oriented developer completed the construction of the unit and applied for the occupation certificate on 19.03.2018 and the same was 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 complainants vide notice of possession dated 09.08.2019.

- f. 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 7.1 of the buyer's agreement and the respondent cannot be held accountable for the same.
- g. 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.
- h. 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. The respondent/promoter has raised the contention that the construction of the project was badly affected 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 7.1 of the buyer's agreement and the respondent cannot be held accountable for the same.
12. In this particular case, the Authority considered the provision of handing over possession after obtaining occupation certificate within a period of two months after obtaining the OC for the said apartment as provided in section 19 (1) and also section 17 (1) of the Act, 2016. Here in this case allottee was willing to take possession of the unit as soon as offer of possession was made after obtaining occupation certificate on 09.08.2019 and he also paid full sale consideration alongwith other dues by September 2019. The occupation certificate is granted by the competent authority on completion of the structure and services as per sanctioned building plan while the possession of the unit by any allottee can be taken after completion of works as per BBA.

The builder should have offered the possession only on completion of works as per BBA or at the most he should have made the unit available for possession to the allottee within 2 months of receiving OC and completing the development works. This time of 2 months available both to the promoter and allottee has relevance in the sense that promoter during this period may complete the works as per BBA and allottee during this period may make necessary arrangement for taking over possession and making payment of dues, if any, at the time of actual handing over of possession. Here in this case, the unit is still not ready to be actually handed over to the allottee after completion of works as per BBA. The counsel for the respondent submitted that the promoter would take other 2 months to complete the work as per BBA and possession shall be handed over thereafter.

13. The Authority decided to allow delayed possession charges w.e.f. 30.09.2018 till actual handing over of possession taking out 6 months period allowed due to Covid-19 situation for which neither the promoter will pay delayed possession charges, nor he will charge delayed payment charges, if any.

G. Findings on the relief sought by the complainant

G.I. Direct the respondent(s) to pay interest @ 10.75% per annum on the amount already paid by the complainant i.e., Rs. 1,22,95,674/- from the due date of possession April 2017 till handing over the possession of the flat.

14. In the present complaint, the complainants intend to continue with the project and is seeking delayed possession charges @ 10.75% interest on the amount paid. Clause 7.1 of the flat 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 30.09.2018, 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."

15. 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.

16. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the apartment by 30.09.2018. 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.

17. **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

18. 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.
19. 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%.

20. 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;"

21. 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.
22. 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 06.11.2017, the possession of the subject apartment was to be delivered by 30.09.2018. 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 30.09.2018.



Though the respondent has offered the possession of the subject apartment on 09.08.2019 but has not handed over the physical possession of the unit 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., 30.09.2018 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.

H. Directions of the authority

23. 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., 30.09.2018 till the handing over of the possession. Further the period of 6 months is allowed due to Covid-19 situation for which neither the promoter will pay delayed possession charges, nor the promoter/respondent will charge delayed payment charges from the complainant if any.
- ii. The arrears of such interest accrued from 30.09.2018 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 10th 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.
24. Complaint stands disposed of.
25. File be consigned to registry.


(Vijay Kumar Goyal)

Member


(Dr. K.K. Khandelwal)

Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 30.03.2022