

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

Complaint no.:	4303 of 2021
First date of hearing:	21.01.2022
Date of decision:	30.03.2022

1. Yuvraj Singh Rana
2. Liza Vatsa

Both RR/o B-74, Seema Apartments, Plot No. 7, Sector
11, Dwarka-110075

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:

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

**Complainants
Respondent**

ORDER

1. The present complaint dated 03.11.2021 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.	5PH1, top floor, tower 5 [annexure C1, page27 of complaint]
8.	Unit measuring	5087 sq. ft. carpet area
9.	Date of execution of flat buyer agreement	23.06.2017 [annexure C1, page25 of complaint]
10.	Payment plan	subvention link payment plan [annexure C1, page 57 of complaint]
11.	Total sale consideration as per details of consideration attached with BBA dated 23.06.2017	₹ 3,15,78,947/- [annexure C1, page 56 of complaint]



12.	Amount paid by the complainants as per statement of account dated 12.10.2021	₹ 3,30,82,139/- [annexure C1, page 78 of complaint]	
13.	Due date of possession	23.06.2021 [Note: grace period of 6 months due to covid-19 is allowed to the promoter]	
14.	Delay in handing over possession till the date of order i.e., 30.03.2022	9 months 7 days	
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 C5, page 79 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 an apartment bearing no. 5PH1 with 5 car parking measuring super area of 6086 sq. ft. (i.e., 565.403 sq. mtrs.) on top floor, tower 5, at sale consideration of Rs. 3,15,78,947/-. The said flat was booked on 16.05.2017 and the buyer's agreement was also executed between complainants and respondent on 23.06.2017.
- c. That as per terms and conditions of the buyer's agreement, respondents were supposed to handover the flat within a period of 42 months date of the buyer's agreement.
- d. That at the time of booking of the flat respondent had offered one "Subvention Scheme". That against the said scheme complainants had to apply for loan from ICICI Bank. After obtaining the said scheme the complainant has taken a loan for sum of Rs. 2,36,85,000/- from ICICI bank. In this regard a tripartite agreement was also executed between ICICI bank, complainants and respondent on the same day i.e., 24.06.2017. It is respectfully submitted that the complainant has made a total sum of Rs. 3,30,82,139/- till 23.08.2019. It is relevant to mention here that



according to the tripartite agreement the respondent/developer is liable to pay the pre-EMI Interest to the bank for the period of 36 months or till possession whichever is earlier. It is also respectfully submitted that the respondent miserably failed to hand over the physical possession of the flat as well as respondent is failure to make the payment of the PRE EMI interest to banker or complainant.

- 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. 46,46,403/- and instructed to clear the outstanding within a period of 21 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 hand over the possession of the apartment with full furnished within a period of 90 days. It is pertinent to mention here that the respondent has given a separate lift for the particular flat and respondent has taken extra amount to the tune of Rs. 7,50,000/- plus GST for this facility but the respondent miserably failed to complete this facility and assured to complainants that they will refund this amount shortly. But till date respondent has refund only 50% of 7,50,000/- to the complainants.
- f. That on 23.08.2019 the complainants cleared all the dues as demanded by the respondent and on the same day complainants requested to furnish and ready the flat as soon as possible. That according to offer of possession letter 09.08.2019 respondent was supposed to handover the full furnished apartment till 22.11.2019

- but till date no physical possession intimation given by the respondent even the apartment is still not in condition to take possession. It is respectfully submitted that respondent issued offer of possession only to save the PRE EMI interest and from that day till date complainants suffer huge loss. It is respectfully submitted that in September 2019 the complainants have switched their loan from ICICI Bank to SBI Bank.
- g. That from November 2019 the complainant sent various reminders by mail in addition to telephonic calls, messages to complete the finishing work and handing over the possession of the flat as well as refund of lift charges, vide Emails dated 02.03.2020, 06.12.2020, 17.03.2021, 02.05.2021, 17.06.2021, 25.07.2021, 12.08.2021, 21.08.2021 and 03.09.2021 but the respondent has not confirmed any confirm date for physical possession of the apartment.
- h. That at the time of booking of the flat the sale cost indicated was Rs. 3,15,78,947/- and complainants total paid a sum of Rs. 3,30,82,139/- 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 in September 2021 and astonished to note that the flat is still lying in highly incomplete stage. That on 06.10.2021 respondent sent an email in which they have admitted that they are not able to hand over the flat till date.

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. 3,30,82,139/- from 22.11.2019 till actual handing over of the physical possession.
 - b. To direct the respondent that after payment of the above amount of delayed interest and pending bank loan EMI, the possession should be handed over to the complainants within the stipulated time period as per the direction of the hon'ble authority.
 - c. To direct the respondent to pay the pending bank loan EMI and interest thereon from august 2019 till handing over the physical possession of the unit.
 - d. To direct the respondent to refund the remaining lift charges i.e., ₹ 4,50,000/- + GST along with 18% interest per annum.
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 5PH1 having super built up area of 5087 square feet for a total sale consideration of Rs. 3,15,78,947/-. 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 complainants are bound to make payment towards the remaining due amount along with stamp duty, registration charges and other charges, interest as well. The complainants are trying to unilaterally wriggle out of their obligations under the guise of the present complaint and they cannot be allowed to succeed in their malafide motives.
- 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 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. To give justification of the delay, the respondent stated that as soon as the construction activities were completed the respondent 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. Furthermore, on account of ban on construction activities by Hon'ble Supreme Court and outbreak of deadly Covid-19 virus, the implementation of the finishing work of units in the project have been affected greatly resulting in delay in completion of construction of the project.
12. According to the possession clause 6.2 of the buyer's agreement dated 23.06.2017, the possession of the subject unit was to be handed over within 42 months from the date of this agreement. However, the peculiar facts of the complaint are that the possession has already been offered on 09.08.2019 after receipt of occupation certificate from the competent authority on 09.08.2019. Copies of the same have already been placed on record. 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 receipt of occupation certificate from the competent authority. Furthermore, while

elucidating the provisions of section 19(10) of the Act, the complainant was under obligation to take the possession of the subject unit within 2 months from the date of receipt of occupation certificate i.e., 09.10.2019. The goodwill of the complainants is clearly evident from the statement of account dated 12.10.2021, whereby the complainants have made a payment of ₹ 3,30, 82,139/- by 30.08.2019 against the total sale consideration of ₹ 3,15,78,947/-. It is beyond the comprehension of the authority as to why the respondent has failed to hand over the possession of the subject unit despite offering the possession of the subject unit after receipt of occupation certificate and receiving more than the total sale consideration of the unit.

13. However, it is the respondent who has failed to hand over the possession of the subject unit even after lapse of reasonable time to complete the finishing work of the subject unit despite offering the possession on 09.08.2019.
14. 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 along with other dues by 30.08.2019. 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.

15. 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.
16. The Authority decided to allow delayed possession charges w.e.f. 23.12.2020 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 complainants i.e., Rs. 3,30,82,139/- from 22.11.2019 till actual handing over of the physical possession.

17. 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 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)....."

18. 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.
19. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the apartment by 23.12.2020. 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.

20. **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

21. 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.
22. 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%.

23. 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 23.06.2017, the possession of the subject apartment was to be delivered by 23.12.2020. 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 23.06.2021. 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 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., 23.06.2021 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.II. To direct the respondent to pay the pending bank loan EMI and interest thereon from August 2019 till handing over the physical possession of the unit.

26. The authority attention was drawn towards para 26 of the tripartite agreement wherein it has been mentioned that the developer is to pay the pre-EMI interest amount during subvention period i.e. for a period of 36 months from first disbursement or possession whichever is earlier on behalf of the borrower which was otherwise payable by the borrower. The date of first disbursement is 29.06.2017 and the liability of the builder to pay pre-EMI extend up to 36 months from the date of first disbursement which comes out to be 29.12.2020 as possession has still not been handed over. Accordingly, promoter is directed to make payment of pre-EMI to the Bank if not paid by the allottee till 29.12.2020. If the pre-EMI has been paid by the allottee to the bank, then same shall be paid to allottee by the promoter as per the tripartite agreement. The DPC in this case has been allowed from 23.12.2020, accordingly the pre-EMI liability shall be up to 23.12.2020

as the nature of both the liability is same and only one out of both is allowed by the Authority favourable to the allottee as has been the stand of the authority in similar cases.

G.III. To direct the respondent to refund the remaining lift charges i.e., ₹ 4,50,000/- + GST along with 18% interest per annum

27. The complainants in their complaint stated that it was agreed between both the parties that a separate lift for the particular flat will be provided by the respondent for which the complainants have already paid a sum of ₹ 7,50,000/- but due to some reasons the lift could not be installed in lieu of which the respondent have refunded only ₹ 3,00,000/- and a sum of ₹ 4,50,000/- is still pending. The respondent in its reply has also admitted the above stated fact. Therefore, the authority hereby directs the respondent to refund the amount of ₹ 4,50,000/- to the complainants within 15 days of this order.

H. Directions of the authority

28. 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., 23.06.2021 till the actual handing over of the possession.
- ii. The arrears of such interest accrued from 23.06.2021 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.
29. Complaint stands disposed of.
30. File be consigned to registry.


(Vijay Kumar Goyal)

Member


(Dr. K.K. Khandelwal)

Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 30.03.2022