

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

Complaint no. : 3810 of 2021
Date of filing complaint : 28.09.2021
First date of hearing : 11.11.2021
Date of decision : 05.04.2022

1. Rajni Mahajan 2. Satish Mahajan Both R/O: - 704-E, Mayur Vihar, Phase-2, New Delhi-110091	Complainants
Versus	
1. M/s BPTP Limited Regd. office at: - M-11, Middle Circle, Connaught Circus, New Delhi -110001 2. Countrywide Promoters Private Limited Regd. office at:- OT-14, 3 rd Floor, Next Door Parklands, Sector 76, Faridabad- 121004.	Respondents

CORAM:	
Dr. K.K. Khandelwal	Chairman
Shri Vijay Kumar Goyal	Member
APPEARANCE:	
Sh. Nishant Jain	Advocate for the complainants
Sh. Venket Rao	Advocate for the respondents

ORDER

1. The present complaint 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 promoters shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the rules and regulations made there under or to the allottee as per the agreement for sale executed inter se.

A. Unit and project related details

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

Project related details		
The License no. 58 of 2010 and 45 of 2011 comprising of total land area 108.068 Acres were previously sold by the promoters by the project name i.e., Amstoria.		
1.	Name of the promoter	M/s Countrywide Promoters Private Limited
2.	Name of the project	'Amstoria'

3.	Location of the project	Sector-102 & 102A, Gurugram, Haryana.
4.	Nature of the project	residential plotted colony
5.	Whether project is new or ongoing	Ongoing
6.	Registered as whole/phase	Whole
7.	RERA registered/ unregistered	Registered
8.	HARERA registered no.	31 of 2020 dated 09.10.2020 valid upto 30.04.2024
9.	DTCP license no.	58 of 2010 dated 03.08.2010
10.	License validity/ renewal period	30.04.2024
11.	Licensed area	126.674 acres
12.	Name of the license holder for 58 of 2010	M/s Shivanand Real Estate Pvt. Ltd. and 9 others.
12.	Unit no.	A-132-GF, ground floor (annexure R-10 on page no. 82 of reply)
13.	Unit admeasuring	1999 sq. ft. (annexure R-10 on page no. 82 of reply)
14.	Date of building plan	05.10.2012 (as per DTCP report)
15.	Date of execution of floor buyer's agreement	28.02.2013 (annexure R-10 on page no. 76 of reply)
16.	letter for substitution of name	10.02.2012 (annexure R-6 on page no. 61 of reply)
17.	Total consideration	Rs. 73,27,249.63/- (annexure R-2 on page no. 56

		of reply)
18.	Total amount paid by the complainants	Rs. 55,28,167.95/- (vide payment receipts annexed as annexure A on page no. 17 to 29 and 33 to 37 of complaint)
19.	Possession clause	<p>“5.1 Possession: -</p> <p>Subject to force majeure, as defined in clause 14 and further subject to purchaser(s) having complied with all its obligations under the terms and conditions of this agreement and the purchaser(s) not being in default under any part of this agreement including but not limited to the timely payment of each and every instalment of the total sale consideration including but not limited to the timely payment of each and every instalment of the total sale consideration including DC, Stamp duty and other charges and also subject to the Purchaser(s) having complied with all formalities or documentation as prescribed by the Seller/confirming party, the Seller/confirming party proposes to hand over the physical possession of the said unit to the purchaser(s) within a period of 24 months from the date of sanctioning of the building plan or execution of Floor Buyer’s Agreement, whichever is later. (Commitment</p>

		<p>Period). The Purchaser(s) further agrees and understands that the seller/confirming party shall additionally be entitled to a period of 180 days (“Grace Period”) after the expiry of the said Commitment Period to allow for filing and pursuing the Occupancy Certificate etc. from DTCP under the Act in respect of the entire colony.”</p> <p>(Emphasis supplied)</p>
20.	Due date of delivery of possession	28.02.20115 (Calculated from the date of building plan as it being later)
21.	Occupation certificate	not obtained
22.	Offer of possession	not offered
23.	Grace period utilization	Grace period is not allowed in the present complaint.

B. Facts of the complaint

3. That the complainants booked a flat bearing number A-132-GF, Amstoria, sector-102, Gurgaon, in “Amstoria” (hereinafter referred to as “Said Unit”) a project of respondents.
4. That the respondent no. 1 is a company incorporated on 11 August, 2003 under the Companies Act, 1956 and engaged in the activity of building of complete constructions or parts thereof; civil engineering, and the respondent no. 2 is a

company incorporated on 30 January, 1996 under the Companies Act, 1956 and engaged in the real estate activities with own or leased property.

5. That on 28.02.2013 the respondents and the complainants executed and entered into a buyers agreement with respect to the said unit. The complainants paid an amount Rs. 2,00,000/- (rupees two lakhs only/-) vide cheque dated 12.07.2011 as an advance amount for booking the said unit and received a customer copy for the amount paid dated 26.07.2011.
6. That the complainants have paid all the demands as raised by the respondents on time. In total an amount of Rs. 55,29,167.95/- has been paid by the complainants to the respondents. It is pertinent to mention here that the status of the construction of the said unit is at stand still and no update is being provided by the respondents despite several requests. There has already been a delay of more than 6 years by the respondents.
7. That on 10.12.2013 and 22.12.2014 the complainants wrote emails to the customer care of the respondent no. 1 seeking update on the progress of the booked flat to which the complainants received revert emails dated 17.12.2013 and 08.01.2015 respectively wherein revert email dated 17.12.2013 mentioned possession of booked flat by august 2014, whereas revert email dated 08.01.2015 mentioned

commencement of the brickwork of the booked flat and the status with respect to possession timeframe will be communicated further.

8. That on 21.03.2017 the complainants paid Rs. 54,953/- (rupees fifty four thousand nine hundred and fifty three only) as VAT liability vide cheque dated 21.03.2017.
9. That it is quintessential to mention herein that, the complainants have performed each and every obligation as mandated under the aforementioned agreement. Despite of the fact that all the payments were duly made on time without incurring any default, it is noteworthy to mention herein that the respondents have failed to offer timely possession of the said unit within the stipulated period as mentioned in buyer's agreement. It may be mentioned that 75% of payment has been made by the complainants as demanded by the respondents from time to time.
10. That it is also noteworthy to mention herein that the tower in which the complainants booked the flat bearing number A-132-GF, the construction of the abovementioned tower has not yet completed which was proposed to be handed over (physical possession) by august 2015. It is shocking that the construction of the complainant's unit is still at the stage of "completion of brick work" as no demand has been raised thereafter.
11. That as mentioned in the Clause 5.1 of the buyer's agreement entered between the complainants and the Respondents dated 28th february, 2013, it clearly states that ".....the

seller/confirming party proposes to hand over the physical possession of the said unit to the purchaser(s) within a period of 24 months from the date of sanctioning of the building plan or execution of floors buyers agreement, whichever is later.....".The respondents miserably failed to adhere to the terms of the agreement. It is quintessential to mention herein that as per clause 6 of the buyer's agreement dated 28th february, 2013 which states that, "subject to the conditions contained herein, if the seller/confirming party fails to offer the possession of the said floor to the purchaser(s) within the stipulated period it shall be liable to pay to the purchaser(s) the compensation calculated at the following rate ("delay compensation") for every month of delay until the actual date fixed by the seller/confirming Party to hand over the possession of the said Floor to the Purchaser(s). The Purchaser(s) shall not be entitled to any other compensation for direct or indirect losses, interest etc. for delay in handling over the possession by the seller/confirming party:

- i) Rs. 10/per sq ft. /month- of the Built up area of the floor per month for the first six (6) months of delay.*
- ii) Rs. 20/per sq ft. /month-. of the Built up area of the floor per month for the next six (6) months of delay Rs. 30/sq ft. /month for the built up area of the floor per month for any*

delay.” entered between our client and you the notices No. 1 & 4 through notice No. 8.

12. That it is well settled principle under the law that the basic foundation of an agreement/contract is when both the parties to the contract fulfil its obligations so to maintain the essence of the agreement/contract. The respondents have failed to adhere to the terms of the contract (builder buyer agreement dated 28.02.2013) and have committed breach of contract. Due to the said breach, the complainants have suffered huge loss mentally as well monetarily as the complainants being a reputed government servant have invested their life time savings in the flat that the respondents were duty bound to handover within 24 months, which the respondents have miserably failed.
13. Thus thereafter a legal notice dated 10.08.2021 was sent to the respondents for handing over of the physical possession of the said unit along with compensation for delay in handing over of the possession on the basis of the buyers agreement dated 28th February, 2013 executed between the complainants and the respondents under the four corners of law.
14. That the cause of action for filing of the present complaint arose when the complainants despite regular and timely payments of the amounts as and when demanded have not yet received the physical possession of the booked flat. The cause of action is continuing one and still subsisting hence, the present complaint

C. Relief sought by the complainants.

15. The complainants have sought following relief:

- (i) Direct the respondents to handover the possession along with delay interest @18% of Rs. 55,29,167.95/-from the date of payments made to the respondents.

D. Reply by the respondents.

16. That the complaint filed by the Complainants grossly misconceived, erroneous, wrong, unjustified and untenable in law besides being clearly extraneous and irrelevant having regard to facts and circumstances of this case. The complainants approached the respondents out of their own freewill and consent and also after carrying out the necessary due diligence and further after evaluating the commercial viability of the project of the respondent with the other options available in the vicinity.
17. The relief(s) sought by the complainants are unjustified, baseless and beyond the scope/ambit of the agreement duly executed between the parties, which forms a basis for the subsisting relationship between the parties. The complainants entered into the said agreement with the respondents with open eyes and is bound by the same. The relief(s) sought by the complainants travels way beyond the four walls of the agreement duly executed between the parties. The complainants while entering into the agreement

have accepted and are bound by each and every clause of the said agreement.

18. That the complainants have approached this authority for redressal of their alleged grievances with unclean hands, i.e., by not disclosing material facts pertaining to the case at hand and, by distorting and/or misrepresenting the actual factual situation with regard to several aspects. It is further submitted that the hon'ble apex court in plethora of decisions has laid down strictly, that a party approaching the court for any relief, must come with clean hands, without concealment and/or misrepresentation of material facts, as the same amounts to fraud not only against the respondents but also against the court and in such situation, the complaint is liable to be dismissed at the threshold without any further adjudication. The respondents have contented on the following grounds: -

- That the complainants have concealed for this Hon'ble Authority that the complainants have approached the respondents through the broker after due diligence and research.
- That the complainants have misrepresented this Hon'ble Authority that the possession of the unit was to be delivered within 24 months from the date of execution of the FBA, however it is submitted that the complainants at the time of the booking as well as FBA was aware of the fact that the possession timeline of the unit was dependent on force majeure clause as well

as timely payment of each instalment. It is further submitted that the complainants are abysmal defaulter.

- That the complainants falsely stated in the present complaint that the timely payments were made by the complainants as and when demanded by the respondents, however, as detailed in the reply to list of dates, it is submitted that the complainants made defaults in making timely payments.
- That the complainants have concealed the fact that they have committed defaults in making timely payments of various instalments within the stipulated time despite having clearly agreed that timely payment is the essence of the agreement between the parties as is evident from Clause 7.1 of the FBA.
- That the complainants have further concealed from this Hon'ble Authority that the respondents being a customer centric organization vide numerous emails has kept updated and informed the complainants about the milestone achieved and progress in the developmental aspects of the project. The respondents vide various emails has shared photographs of the project in question. respondents have always acted bonafidely towards its customers including the complainants, and thus, has always maintained a transparency with regard project progress. In addition to updating the complainants, the respondents on numerous occasions, on each and every issue/s and/or

query/s upraised in respect of the unit in question has always provided steady and efficient assistance. However, notwithstanding the several efforts made by the respondents to attend to the queries of the complainants to their complete satisfaction, the complainants erroneously proceeded to file the present vexatious complaint before this Hon'ble Authority against the respondents.

From the above, it is very well established, that the complainants have approached this Hon'ble Authority with unclean hands by distorting/ concealing/ misrepresenting the relevant facts pertaining to the case at hand. It is further submitted that the sole intention of the Complainants are to unjustly enrich themselves at the expense of the respondents by filing this frivolous complaint which is nothing but gross abuse of the due process of law. It is further submitted that in light of the law laid down by the Hon'ble Apex Court, the present complaint warrants dismissal without any further adjudication.

19. It is pertinent to mention that on 16.03.2010, DTCP, Haryana (the statutory body for approval of real estate projects) issued self-certification policy vide notification dated 16.03.2010. respondents in accordance with the policy and other prevailing laws submitted detailed drawings and designs plans for relevant buildings along with requisite charges and fees. In terms of the said policy, any person

could construct building in licensed colony by applying for approval of building plans to the director or officers of the department delegated with the powers for approval of building plans and in case of non-receipt of any objection within the stipulated time, the construction could be started. The building plans were withheld by the DTCP, Haryana, despite the fact that these building plans were well within the ambit of building norms and policies. That the respondents applied for approval of building plans under the self-certification scheme. Although the department did not object to the building plans however, to ensure that there are no legal issues/ complications at a later date, the respondents also applied for approval of building plans under the regular scheme, which were subsequently approved.

20. It is however pertinent to point out that while the respondents were granted license bearing no. 58/2010 for setting up a residential plotted colony on land admeasuring 108.068 acres at village kherki majra and dhankot, sector 102, 102 A, tehsil and district, Gurgaon for which the layout was also approved, subsequently additional license bearing no. 45/2011 was issued by DTCP for setting up plotted colony on land admeasuring 18.606 acres and at the stage of grant of additional license bearing no. 45/ 2011 for Amstoria, layout for the entire colony was also revised vide drg. no. DTCP-5618 dated 16.09.2016, by DTCP. The revised planning of the entire colony submitted to the DTCP has affected the

infrastructure development of the entire colony including 'Amstoria Floors'. The said revision in demarcation was necessary considering the safety of the allottees and to meet the area requirement for community facilities in the area. In view of the said major changes, it is imperative that the said approvals are in place before the floors are offered for possession to the various allottees. Hence, the delay if any, in completing construction of the unit in question and offering possession to the various allottees is due to factors beyond the control of the respondents

21. The construction of project has been completed and the occupation certificate for the same has also been received where after, the respondents have already offered possession to the complainants vide letter dated 07.10.2019. However ,despite repeated requests made by the respondents, the complainants failed to clear the outstanding dues. The complainants, being investors do not wish to take possession as the real estate market is down and there are no sales in secondary market, thus has initiated the present frivolous litigation
22. The relief(s) sought by the complainants are unjustified, baseless and beyond the scope/ambit of the flat buyer's agreement duly executed between the parties, which forms a basis for the subsisting relationship between the parties. The complainants entered into the said agreement with the respondents with open eyes and is bound by the same.

Therefore, the relief sought by the complainants travel way beyond the four walls of the agreement.

23. That the complainants at the time of purchasing the unit has conducted the due diligence to their satisfaction and was acquainted with the terms and condition so the application for allotment and/or the FBA prior to the signing of the same and other documents. While entering into the agreement the complainants have read the terms and condition of the application/FBA and has accepted and is bound by each and every clause of the said form/agreement, including clause 20 of the application for allotment which has been further reiterated under clause 6 of the FBA which per se provides for delayed penalty in case of delay in delivery of possession of the said unit by the respondents. The detailed relief claimed by the complainants goes beyond the jurisdiction of this authority under the Real Estate (Regulation and Development) Act, 2016 and therefore the present complaint is not maintainable qua the reliefs claimed by the complainants.
24. That at the stage of entering into the agreement and raising vague allegations and seeking baseless reliefs beyond the ambit of the agreement, the complainants are blowing hot and cold at the same time which is not permissible under law as the same is in violation of the '*Doctrine of Aprobate & Reprobate*'. Therefore, in light of the settled law, the reliefs sought by the complainants in the complaint under reply cannot be granted by this authority.

25. Copies of all the relevant do have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submission made by the parties.

E. Jurisdiction of the authority

The respondents have raised an objection regarding jurisdiction of authority to entertain the present complaint. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana ,the jurisdiction of Haryana Real Estate Regulatory Authority, Gurugram shall be entire Gurugram district for all purposes. In the present case, the project in question is situated within the planning area of Gurugram district. Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

E. II Subject-matter jurisdiction

Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

Section 11(4)(a)

Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter 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 respondents.

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

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

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

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

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

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

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

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

F. II Objection regarding untimely payments done by the complainant.

The respondent have contended that the complainants have made defaults in making payments as a result thereof, the respondents had to issue reminder letters dated 05.10.2012. The respondents have further submitted that the complainants have still not cleared the dues. The counsel for the respondent stressed upon clause 7.1 of the buyer's agreement wherein it is stated that timely payment of instalment is the essence of the transaction, and the relevant clause is reproduced below:

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

7.1 The timely payment of each installment of the Total Sale Consideration 1.e. Basic Sale Price and other charges as stated herein is the essence of this transaction / agreement. In case payment of any instalment as may be specified is delayed, then the Purchaser(s) shall pay interest on the amount due @18% p.a compounded at the time of every succeeding installment or three months, whichever is earlier However, if the Purchaser(s) neglects, omits, ignores, or fails for any reason whatsoever to pay in time to the Seller any of the installments or other amounts and charges due and payable by the Purchaser(s) within three (3) months from the due date of the outstanding amount or if the Purchaser(s) any other way fails to perform, comply or observe any of the terms and conditions on his/her part herein contained within the time stipulated or agreed to, the Seller/Confirming Party may at its sole option forfeit the amount of Earnest Money and other charges including late payment charges and interest deposited by the Purchaser(s), and any other amount of a non-refundable nature including Incentive, brokerage charges paid by the Seller/Confirming Party to the broker in case the booking is done through a broker, etc....."

29. At the outset, it is relevant to comment on the said clause of the agreement i.e., “7. *TIMELY PAYMENT ESSENCE OF CONTRACT. TERMINATION, CANCELLATION AND FORFEITURE*” wherein the payments to be made by the complainants have been subjected to all kinds of terms and conditions. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favor of the promoters and against the allottee that even a single default by the allottees in making timely payment as per the payment plan may result in termination of the said agreement and forfeiture of the earnest money. Moreover, the authority has observed that despite complainants being in default in making timely payments, the respondents have not exercised his discretion to terminate the buyer’s agreement. The attention of authority was also drawn towards clause 7.2 of the flat buyer’s agreement whereby the complainants would be liable to pay the outstanding dues together with interest @ 18% p.a. compounded quarterly or such higher rate as may be mentioned in the notice for the period of delay in making payments. In fact, the respondents have charged delay payment interest as per clause 7.2 of the buyer’s agreement and has not terminated the agreement in terms of clause 7.1 of the buyer’s agreement. In other words, the respondents have already charged penalized interest from the complainants on account of delay in making payments as per

the payment schedule. However, after the enactment of the Act of 2016, the position has changed. Section 2(z) of the Act provides that the rate of interest chargeable from the allottees by the promoter, in case of default, shall be equal to the rate of interest which the promoter would be liable to pay the allottees, in case of default. Therefore, interest on the delay payments from the complainants would be charged at the prescribed rate i.e., 9.30% by the respondents which is the same as is being granted to the complainants in case of delay possession charges.

G. Findings on the relief sought by the complainants.

Relief sought by the complainants: The complainants have sought following relief:

- i. Direct the respondents to handover the possession along with delay interest @18% of Rs. 55,29,167.95/- from the date of payments made to the respondents.

30. In the present complaint, the complainants intend to continue with the project and are seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under.

“Section 18: - Return of amount and compensation

18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building,

—

.....

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the

promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.”

31. Clause 5.1 of the floor buyer’s agreement provides for handing over of possession and is reproduced below:

“5.1 Possession: -

Subject to force majeure, as defined in Clause 14 and further subject to purchaser(s) having complied with all its obligations under the terms and conditions of this agreement and the purchaser(s) not being in default under any part of this agreement including but not limited to the timely payment of each and every instalment of the total sale consideration including but not limited to the timely payment of each and every instalment of the total sale consideration including DC, Stamp duty and other charges and also subject to the Purchaser(s) having complied with all formalities or documentation as prescribed by the Seller/ confirming party, the Seller/confirming party proposes to hand over the physical possession of the said unit to the purchaser(s) within a period of 24 months from the date of sanctioning of the building plan or execution of Floor Buyer’s Agreement, whichever is later. (Commitment Period). The Purchaser(s) further agrees and understands that the seller/confirming party shall additionally be entitled to a period of 180 days (“Grace Period”) after the expiry of the said Commitment Period to allow for filing and pursuing the Occupancy Certificate etc. from DTCP under the Act in respect of the entire colony.”

32. 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 the complainants not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoters. The drafting of this clause and incorporation

of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoters and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoters 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 buyer's agreement by the promoters are just to evade the liability towards timely delivery of subject unit and to deprive the allottees of their right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottees is left with no option but to sign on the dotted lines.

33. The counsel for the respondents submitted that this particular plot is under dispute with the collaborator alongwith few other plots, accordingly the subject unit situated on this plot cannot be offered to the complainants. The respondents submitted a list of 8 different units out of which 4 are on the ground floor. The counsel for the complainants submitted that the complainants being an old lady require unit only on the ground floor or on other floor with a provision of lift. The list of 8 units was handed over to the counsel for the complainants and the complainants were directed to indicate her preference within 15 days to the respondents with a copy in the registry of the Authority. The respondents agrees accordingly and matter is disposed of

with the direction to pay DPC from the due date of possession to date of handing over of the possession of the unit taking out the Covid 19 period of 6 months for which neither the DPC would be applicable nor the delayed payment charges by the allottees shall be payable. In case no consent regarding taking of unit out of the offered once is received within the allowed time then the respondents shall be free to refund the amount alongwith interest at the prescribed rate without any deduction and complainants shall be free to lodge her matter for compensation, if required. The counsel of the respondents stated at bar that they will submit an affidavit regarding non availability of the allotted unit. It was also clarified to the complainants by the counsel for the respondents that OC of the offered units is still to be obtained from the competent authority. The offered unit shall be on the same rate as has been the rate as per FBA and shall be in habitable condition at the time of offer of possession. The respondents shall not charge anything which is either impressible and not in the FBA.

34. **Admissibility of grace period:** The promoters have proposed to hand over the possession of the said unit within period of 24 months from the date of sanction of building plans or execution of the buyer's agreement, whichever is later. In the present complaint, the date of building plan i.e., 05.10.2012 being later than the execution of the agreement i.e., 28.02.2013. So, the due date is calculated from the date of execution of the agreement. Therefore, the due date of

handing over possession comes out to be 28.02.2015. It is further provided in agreement that promoters shall be entitled to a grace period of 180 days for filing and pursuing the occupancy certificate etc. from DTCP. There is no material evidence on record that the respondents-promoters had completed the said project within this span of 24 months and had started the process for filling and obtaining the occupation certificate. As a matter of fact, the promoters have not offered the possession within the time limit prescribed by the promoters in the floor buyer's agreement nor has the promoters offered the possession till date. Accordingly, this grace period of 180 days cannot be allowed to the promoters. Relevant clause regarding grace period is reproduced below: -

“The Purchaser(s) further agrees and understands that the seller/confirming party shall additionally be entitled to a period of 180 days (“Grace Period”) after the expiry of the said Commitment Period to allow for filing and pursuing the Occupancy Certificate etc. from DTCP under the Act in respect of the entire colony.”

35. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges at the prescribed rate of interest on amount already paid by them. However, proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoters, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed

under rule 15 of the rules. Rule 15 has been reproduced as under:

Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]

(1) *For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.*

Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.

36. 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.
37. 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%.
38. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottees by the promoters, in case of default, shall be equal to the rate of interest which the promoters shall be liable to pay

the allottees, in case of default. The relevant section is reproduced below:

“(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.

Explanation. —For the purpose of this clause— the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default.

the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;”

39. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 9.30% by the respondents/promoters which is the same as is being granted to the complainants in case of delayed possession charges.
40. On consideration of the documents available on record and submissions made by both the parties, the authority is satisfied that the respondents are in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of 5.1 of the floor buyer's agreement executed between the parties on 28.02.2013, the possession of the subject unit was to be delivered within 24 months from the date of sanctioning of building plan or execution of the agreement, whichever is later. The date of building plan i.e., 05.10.2012 being later than the execution of the agreement i.e., 28.02.2013, the due date is calculated from

the date of execution of floor buyer's agreement. Therefore, the due date of handing over possession is 28.02.2015. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over possession is 28.02.2015, there is no material evidence on record that the respondents-promoters had completed the said project within span of 24 months and had started the process for filling and obtaining the occupation certificate. The authority is of the considered view that there is delay on the part of the respondents to offer physical possession of the allotted unit to the complainants as per the terms and conditions of the flat buyer's agreement dated 28.02.2013 executed between the parties. It is the failure on part of the promoters to fulfil its obligations and responsibilities as per the flat buyer's agreement to hand over the possession within the stipulated period.

41. Section 19(10) of the Act obligates the allottees to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, there is no material evidence on record that the respondents had started the process for filling and obtaining the occupation certificate. Therefore, in the interest of natural justice, the complainants should be given 2 months' time from the date of offer of possession. This 2 months of reasonable time is being given to the complainants keeping in mind that even after intimation of possession, practically they have to arrange a lot of logistics and requisite documents including but not limited

to inspection of the completely finished unit, but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e., 28.02.2015 till the expiry of 2 months from the date of offer of possession and taking out the Covid 19 period of 6 months for which neither the DPC would be applicable nor they delayed payment charges by the allottees shall be payable.

42. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondents are established. As such, the complainants are entitled to delay possession at prescribed rate of interest i.e., 9.30% p.a. w.e.f. 28.02.2015 till offer of possession as per provisions of section 18(1) of the Act read with rule 15 of the rules and section 19 (10) of the Act.

H. Directions of the authority

43. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoters as per the function entrusted to the authority under section 34(f):

- i. The respondents are directed to pay interest at the prescribed rate of 9.30% p.a. for every month of delay from the due date of possession i.e., 28.02.2015 till the date of offer of possession of the unit taking out the covid-19 period of 6 months for which neither the DPC

would be applicable nor the delayed payment charges by the allottee shall be payable plus 2 months to the complainants as per section 19(10) of the Act.

- ii. The complainants are directed to indicate their preference in the list of 8 different units out of which 4 are on the ground floor submitted by the respondent within 15 days to the respondent with a copy in the registry of the authority. In case no consent regarding taking of unit out of the offered once is received within the allowed time then the respondents shall be free to refund the amount along with interest at the prescribed rate without any deduction and complainants shall be free to lodge the matter for compensation, if required.
- iii. The arrears of such interest accrued from 28.02.2015 till the offer of possession shall be paid by the promoters to the allottees within a period of 90 days from date of this order as per rule 16(2) of the rules.
- iv. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
- v. The rate of interest chargeable from the allottees by the promoters, in case of default shall be charged at the prescribed rate i.e., 9.30% by the respondents/promoters which is the same rate of interest which the promoters shall be liable to pay the allottees, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.



vi. The respondents shall not charge anything from the complainants which is not the part of the agreement. However, holding charges shall also not be charged by the promoters at any point of time even after being part of agreement as per law settled by the Hon'ble Supreme Court in civil appeal no. 3864-3889/2020 dated 14.12.2020.

44. Complaint stands disposed of.

45. File be consigned to registry.

V.I - S
(Vijay Kumar Goyal)
Member

[Signature]
(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 05.04.2022