BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. :	**1995 of 2023**
Date of Filing Complaint:	**02.05.2023**
Date of Decision:	**03.11.2023**

	Deepak Setia **Surbhi Setia** **Both R/O:** B1/207, Sunshine Apartment, Rohini, Delhi-110085	**Complainants**
	Versus	
	St. Patrick Realty Pvt. Ltd. **Office at:** The Median, Central Park Resort, Off Sohna Road, Sector-48, Gurugram-Haryana	**Respondent**

CORAM:	
Shri Sanjeev Kumar Arora	**Member**
APPEARANCE:	
Sh. Sanat Garg(Advocate)	Complainants
Sh. Venket Rao (Advocate)	Respondent

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 promoter 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 the project, the details of sale consideration, the amount paid by the complainants, date of proposed handing over the possession and delay period, if any, have been detailed in the following tabular form:

S. N.	Particulars	Details
1.	Name and location of the project	"Lake Front Towers at Central Park Flower Valley" situated at sector-32, Gurgaon
2.	Nature of the project	Group Housing Colony
3.	Project area	10.925 acres
4.	DTCP license no.	84 of 2014 dated 09.08.2014 valid upto 08.08.2024
5.	Name of licensee	Ravinder Singh-Balkaran-Vijay
6.	Unit no.	1104, 11th floor, Tower G (As per page no. 54 of complaint)
7.	Unit area admeasuring (super area)	2134 sq. ft. (As per page no. 54 of complaint)
8.	Date of apartment buyer agreement	26.07.2017 (Page no. 53 of complaint)
9.	Tripartite agreement	March 2018 (Page no. 85 of complaint)
10.	Possession clause	**7. Possession** 7.1 The Company shall endeavor to handover the possession of the said Apartment to the Allottee within a period of 36 months with a grace period of another 6 (six) months from the date

		of the Agreement subject to timely payment of sale price, other charges details of payment, Payment Plan and all other payments as per the terms of this Agreement including payment of interest by the Allottee(s).
11.	Due date of possession	26.01.2021 (calculated from the date of agreement including grace period of 6 months)
12.	Basic Sale Consideration	Rs. 1,14,92,870/- (page no. 113 of complaint)
13.	Total sale consideration	Rs. 1,57,39,236/- (page no. 113 of complaint) RS. 1,14,67,240/- (page no. 114 of complaint)
14.	Amount paid by the complainants	Rs. 1,20,75,684/- (page no. 113 complaint)
15.	Occupation certificate	13.01.2023 (page no. 52 of reply)
16.	Offer of possession	16.02.2023 (page no. 106 of complaint)

B. Facts of the complaint:

3. That the complainants after believing the respondent applied for a residential apartment ad-measuring 2134 sq. ft., at a total basic selling price of Rs. 1,14,92,870/- by making payment of Rs. 17,84, 266/- vide cheque bearing number 332704.

4. That the respondent issued a "provisional allotment letter" dated 25.07.2017 in favour of the complainants allotting the apartment no. 1104 in tower G of the project. In this provisional allotment letter dated 25.07.2017 it has been duly recorded and it is matter of record that the complainants opted for the subvention payment plan with respect to the unit, in lieu of offering subvention payment plan to the complainants, the respondent herein charged a higher base selling price/ total selling price along with dedicated subvention charges from the complainants herein.

5. That subsequently an apartment buyers agreement dated 27.07.2017 was executed between the complainants and respondent. As per clause 1.3 of the ABA dated 27.07.2017, the complainants were liable to make various additional payments over and above the total base selling price of the unit.

6. That as per clause 7.1 of the ABA dated 27.07.2017, the respondent were liable to deliver the physical possession of the unit in 36 months from the date of signing of the ABA dated 27.07.2017 which comes out to be 27.07.2020.

7. That to fulfil their obligation under the ABA dated 27.07.2017, the complainants availed a loan facility for Rs. 1,14,43,500/- from the financial institution namely Indiabulls Housing Finance Limited and accordingly a tripartite agreement dated 16.03.2018 was executed between the indiabulls housing finance limited, the complainants and the respondent. That it has been duly recorded in the tripartite agreement dated 16.03.2018, that the respondent as per the subvention scheme and admission, shall be liable to pay the EMI against the said availed loan.

8. That from period 2021 to 2023 the complainants kept on enquiring on multiple occasions from the respondent regarding the handing over of the physical possession of the unit, and the respondent admittedly on one hand showed their inability to hand over the physical possession because of project being in an incomplete stage and on the other hand the respondent herein always provided with the false assurances that the possession will be handed over in a month or two.

9. That the complainants paid a total sum of Rs. 1,21,38,370/- on a regular basis and contacted the respondent regarding the project status, whereby the respondent always provided false assurances, that the project is near completion and the possession will very soon be handed over, but the same till date has been not handed over.

10. That on 16.02.2023, the respondent issued a letter whereby the respondent claimed that it has obtained the occupational certificate on 13.01.2023 for the tower consisting of the unit purchased by the complainants and further that the respondent are ready to offer the possession of the unit to the complainants.

11. That in this letter dated 16.02.2023, the respondent provided payments components along with statement, as per which the respondent raised a demand of Rs. 36,63,553 from the complainants. The said demand raised by the respondent vide letter dated 16.02.2023 were illegible, wrongful and against the rights of the complainants.

12. That the respondent vide letter dated 16.02.2023 have raised a demand of Rs. 11,49,287/- towards escalation cost from the period July' 2017 to October' 2021. Such escalation cost clauses are part of the agreements to safeguard the builder or promoter from the changes occurred over the period.

C. Relief sought by the complainants:

13. The complainants have sought following relief(s):

    (i) Direct the respondent to pay delayed charge at the prescribed rate of interest on the amount paid by the complainants till the handing over of the physical possession.

    (ii) Direct the respondent to handover the physical possession of the said apartment.

    (iii) Direct the respondent to pay the EMI or equivalent amount to the complainants till the handing over the physical possession with respect to said unit.

D. Reply by respondent:

The respondent by way of written reply made following submissions:

14. That in the year 2017, the complainants in search of a residential project learned about the project titled as 'Aqua Front Towers' being developed by the respondent over a piece of land admeasuring 10.925 Acres, situated at Sector 32, Tehsil Sohna, Gurugram, Haryana, India.

15. That after being satisfied with specification and veracity of the project the complainants booked an apartment vide application for provisional allotment dated 27.06.2017, and paid an booking amount of Rs. 17,84,266/-.

16. That the respondent vide provisional allotment letter dated 25.07.2017, provisionally allotted an apartment bearing no. 1104, Tower G, in the aforesaid project admeasuring super area of 2134 sq. ft. having basic sale price of Rs. 5385.60/- per sq. ft. in the said project.

17. That on 26.07.2017, an apartment buyer agreement was executed for the said apartment having total basic sale price of Rs. 1,14,92,870/- excluding all other charges mentioned and agreed by the complainants under the agreement. The said agreement was signed by the complainants voluntarily with free will and consent without any demur.

18. That as per the provision of clause 7.1 of the agreement, the possession of the apartment was proposed to be offered within a period of 36 months along with a grace period of 6 months from the date of the agreement subject to other terms and conditions agreed under the agreement including timely payment of instalments and as per the same the possession was to be handed over on or before 25.01.2021 subject to force majeure circumstances.

19. That the respondent is also entitled for the extension of 6 months' time period on account of the delay so caused due to worldwide spread of covid-19 spread, which the Ld. Authority and other courts had considered as a force majeure circumstance and have allowed extension of 6 months to the promoters at large on account of delay so caused as the same was beyond the control of the respondent. Further, the promoter is also entitled for 70 days extension till 2021 when construction was banned by NGT and EPCA.

20. After considering all force majeure circumstances and the reasons beyond the control of the respondent company, the possession of the unit in question was to be offered on or before 05.10.2021.

21. That on 16.03.2018, a tripartite agreement ("TPA") was executed between the complainants, M/s Indiabulls Housing Finance Limited ("IHFL") and the respondent wherein, the complainants had availed a loan facility of Rs. 1,14,43,500/- against the apartment in question.

22. That in terms of clause 4 of the TPA, the respondent was under obligation to pay Pre-EMI's on behalf of the complainants for the entire liability period as enshrined under schedule I of the TPA.

23. In view of the clause 4 read with schedule I of the TPA, the respondent was under obligation to pay Pre-EMI on behalf of the complainants till 30th June 2020 only.

24. That the respondent in compliance with the above terms of the TPA, has already paid an amount of Rs. 11,90,677/- as Pre-EMI without any delay or default, w.e.f. 01.04.2018 till 30.06.2020, on behalf of the complainants and the same was compensatory in nature.

25. That even after being aware of the payment schedule the complainants had delayed the instalments and owing to such default the respondent herein was constrained to issue intimation of payment due letter dated 05.07.2018, calling upon the complainants to pay an outstanding amount of Rs. 21,94,253/- due as per the subvention payment plan opted by the complainants which was required to be paid by 20.07.2018. However, the complainants failed to pay the same within stipulated period.

26. That upon not receiving the outstanding instalment, respondent, on 13.06.2019, was constrained to send a letter for payment of instalment due and requested the complainants to pay an amount of Rs. 28,29,685/- as per the payment schedule which was payable by 20.06.2019. However, the complainants deliberately delayed the payment and failed to pay the same within stipulated period of time.

27. That the respondent herein had raised an intimation of payment due letter dated 27.01.2021, calling upon the complainants to pay the instalment of Rs. 28,88,769/- due upon completion of plaster which was

payable by 10.02.2021. However, the complainants again delayed the said payment.

28. That the complainants herein had voluntarily agreed to other terms and conditions such as the provision of clause 1.13 of the agreement the complainants had agreed to pay the escalation cost.

29. Further as per the provision of clause 8.2 of the agreement the complainants upon own free will and consent had agreed to pay the maintenance charges including charges for water as per maintenance bills raised by the maintenance agency/company for maintain the common areas and facilities as mentioned in clause 8.1, from the date of offer of possession irrespective of the fact that whether the allottee(s) actually has taken over the possession of the said apartment or not.

30. In accordance, with clause 19 of the agreement the respondent herein was entitled for the extension of period for handing over the possession of the said apartment to the complainants for the delayed period and the complainants agreed that they shall not be entitled to any claim, compensation for such delay.

31. That the respondent herein has already completed the project in question and had received occupation certificate on 13.01.2023, from the Directorate of Town and Country Planning Haryana (DTCP), for the respective tower wherein, the apartment of the complainants was situated.

32. That in view of the occupation certificate the respondent vide offer of possession letter dated 16.02.2023, had offered possession to the complainants and informed that respondent company has commenced with the process of handing over the possession of all the apartments in the project 'aqua front tower'.

33. That vide same offer of possession letter dated 16.02.2023, the respondent even called upon the complainants to pay the balance amount of Rs. 36,63,553/- due upon offer of possession along with details statement of accounts of the complainants.

34. Copies of all the relevant documents have been filed and placed on 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:

35. The authority has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

36. 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

37. 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.

38. 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. Entitlement of the complainants:

(i) Direct the respondent to pay delayed charge at the prescribed rate of interest on the amount paid by the complainants till the handing over of the physical possession.

(ii) Direct the respondent to handover the physical possession of the said apartment.

39. In the present complaint, the complainants intends to continue with the project and is 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."

40. Clause 7 of the buyer's agreement provides the time period of handing over possession and the same is reproduced below:

> *"7. Possession*
> *7.1 The Company shall endeavor to handover the possession of the said Apartment to the Allottee within a period of 36 months with a grace period of another 6 (six) months from the date of the Agreement subject to timely payment of sale price, other charges details of payment, Payment Plan and all other payments as per the terms of this Agreement including payment of interest by the Allottee(s)..."*

41. The authority has gone through the possession clause of the agreement. At the outset, it is relevant to comment on the pre-set 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 provision of this agreement and in compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions is not only vague and uncertain but so heavily loaded in favour 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.

42. The buyer's agreement is a pivotal legal document which should ensure that the rights and liabilities of both builder/promoter and buyer/allottee are protected candidly. The apartment buyer's agreement lays down the terms that govern the sale of different kinds of properties like residentials, commercials etc. between the buyer and builder. It is in the interest of both the parties to have a well-drafted apartment buyer's agreement which would thereby protect the rights of both the builders and buyers in the unfortunate event of a dispute that may arise. It should be drafted in the simple and unambiguous language which may be understood by a common man with an ordinary educational background. It should contain a provision with regard to

stipulated time of delivery of possession of the apartment, plot or building, as the case may be and the rights of the buyer/allottees in case of delay in possession of the unit.

43. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant(s) are seeking delay possession charges. However, 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.*

44. 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.

45. 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., 03.11.2023 is 8.75%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.75% per annum.

46. 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;"*

47. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 10.75% p.a. by the respondent/promoter which is the same as is being granted to the complainants in case of delay possession charges.

48. 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 buyer's agreement executed between the parties, the possession of the subject apartment was to be delivered within a period of 36 months with a grace period of another 6 months from the date of the agreement. As such the due date of handing over of possession comes out to be 26.01.2021.

49. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 13.01.2023. The respondent has offered the possession of the subject unit(s) to the respective

complainants after obtaining occupation certificate from competent authority. 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 he has 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., 26.01.2021 till the expiry of 2 months from the date of offer of possession (16.02.2023) plus two months (i.e., 16.04.2023).

50. Accordingly, it is the failure of the promoter to fulfil its obligations and responsibilities as per the apartment buyer's 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 allottees shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 26.01.2021 till offer of possession plus two months (i.e., 16.04.2023), at the prescribed rate i.e., 10.75 % p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules.

(iii) Direct the respondent to pay the EMI or equivalent amount to the complainants till the handing over the physical possession with respect to said unit.

51. A tripartite agreement ("TPA") was executed between the allottee, builder and financial institution in March 2018. The allottees have

alleged that builder shall pay all the Pre-EMIs/EMI's to the financial institution till offer of possession.

52. The relevant clause of the tripartite agreement is clause 4 and is reproduced hereunder for ready reference:

> *The Borrower has informed IHFL about the scheme of arrangement between the Borrower and the Builder in terms whereof the Builder hereby agrees to pay the PEMI interest payable by the Borrower to IHFL during the period to be referred to as the "Liability Period" from the date of first disbursement of loan facility till 30th June 2020 (the Liability period is referred to as "Assumed Liability for the Builder"). It is however agreed that during the liability period the payment of assumed liability is joint and several by and between the Borrower and the Builder. The assumption of liability by the Builder in no manner whatsoever releases, relinquishes and/ or reduces the liability of the Borrower and that same shall not be affected in any manner on account of any difference and/or dispute between the Borrower and the Builder under the arrangement between them.*

53. Similarly the Schedule I of the tripartite agreement is also relevant and reproduced hereunder for ready reference:

Details of the Subvention Scheme	
Liability Period (Definition)	*Liability Period shall mean and include the liability assumed by the Developer on account of interest payable by the Borrower to IHFL*
Duration of Liability Period	June 30, 2020 from the date of first disbursal
Broken Period, if any (disbursal in mid of month)	
Subvention Period	From 01.04.2018 to 30.06.2020
Commencement of the scheme	01.04.2018
End of the scheme	30.06.2020

Date of commencement of Borrower's liability to pay pre-EMI/EMI interest on Balance term of laon	From 01.07.2020

54. However, a bare perusal of clause 4 of the TPA and schedule I makes is apparent that the liability of the builder for paying the pre EMI is from the date of disbursal till 30.06.2020. The date of first disbursal is 01.04.2018 so, the builder will pay pre Emi from 01.04.2018 till 30.06.2020.

55. Therefore, the authority cannot read the terms of the TPA outside its express meaning until and unless there is any ambiguity in the agreement. In view of the same, complainants are not entitled for the said relief.

H. Directions of the Authority:

56. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoters as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016:

i) The respondent is directed to handover physical possession of the subject unit within 60 days from the date of this order as occupation certificate of the project has already been obtained by it from the competent authority.

ii) The complainants are entitled to delayed possession charges as per the proviso of section 18(1) of the Real Estate (Regulation and Development) act, 2016 at the prescribed rate of interest i.e., 10.75%p.a. for every month of delay on the amount paid by him to the respondent from the due date of possession i.e., 26.01.2021 till the offer of the possession i.e., 16.02.2023 plus two months i.e., till 16.04.2023 as per the provisions of section 18(1) of the Act read with rule 15 of the rules.

iii) Also, the amount of Rs.11,90,667/- so paid by the respondent towards pre-EMI shall be adjusted towards the delay possession charges to be paid by the respondent in terms of proviso to section 18(1) of the Act.

iv) The promoter shall not charge anything which is not part of the buyer's agreement

v) The respondent is directed to pay arrears of interest accrued, if any after adjustment in statement of account; within 90 days from the date of this order as per rule 16(2) of the rules.

vi) The rate of interest chargeable from the allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 10.75% by the respondent/promoter which is the same rate of interest which the promoter 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

57. Complaint stands disposed of.

58. File be consigned to the registry.

(Sanjeev Kumar Arora)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 03.11.2023