BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 252 of 2020
First date of hearing : 27.02.2020
Date of decision : 30.07.2021

Mapsko Builders Pvt. Ltd.
Address:- Baani the address, 6th floor, No.1, Golf Course Road, Sector-56, Gurugram-122011

Complainant

Versus

Pradeep Bhaskar
Address:- House No. 460 Gali No.8 Jyoti Park, Gurugram

Respondent

CORAM:
Shri Samir Kumar — **Member**
Shri V.K. Goyal — **Member**

APPEARANCE
Ms. Shriya Takkar — Advocate for the complainant
Shri Gaurav Bhardwaj and Ms. Surbhi Garg — Advocate for the respondent

ORDER

1. The present complaint dated 14.02.2020 has been filed by the complainant/promoter in Form CRA 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 19(6) (7) and (10) of the Act.

A. Project and unit related details

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

S.No.	Heads	Information
1.	Name and location of the project	"Mapsko Mount Ville" Sector-78-79, Gurugram.
2.	Nature of the project	Group housing complex
3.	Project Area	16.369 acres
4.	RERA registration status	Registration no. 328 of 2017 dated 23.10.2017 to 30.11.2019 **Extension no. 08 of 2019 dated 23.12.2017 valid till 30.08.2020**
5.	DTCP license no.	38 of 2012 dated 22.04.2012 valid upto 21.04.2020
6.	Name of licensee	Mapsko Builders
7.	Apartment/unit no.	803, 8th floor, Block- C
8.	Unit area	1490 sq. ft.
9.	Date of execution of apartment buyer's agreement	12.12.2012 (Page 63 of the complaint)
10.	Payment plan	Construction linked payment plan
11.	Total sales consideration	Rs. 84,12,304/- (Page 58 of the complaint)
12.	Total amount paid by allottee	Rs. 27,47,236/- (Page 118-119 of the complaint)
13.	Due date of delivery of possession as per clause 18 (a) -48 months from the date of execution of agreement	12.06.2017 (Due date calculated from the date of execution of agreement) **[Note:** grace period is allowed]

	with the buyer and 6 months grace period	
14.	Date of offer of possession	04.06.2020
15.	OC received on	03.06.2020
16.	Delay in handing over possession till offer of possession i.e. 04.06.2020 plus 2 months i.e. 04.08.2020	3years 2months 23days

B. Facts of the complaint

3. The complainant has submitted that the respondent approached the complainant/developer through their real estate agent m/S property junction realtors Pvt. Ltd. for booking of a flat in the Mapsko Mount Ville. The respondent through the aforesaid real estate agent submitted an application form dated 25.09.2012 which was duly signed by the respondent and included the indicative terms and conditions of the allotment. All the terms and conditions including the cost of the flat, size/super area of the flat etc. were clearly mentioned in the said application along with other terms and conditions. That the respondent opted for the Installment (construction) linked payment plan. That the flat buyer's agreement was executed between the parties on 12.12.2012. It is pertinent to mention that while executing the flat buyer's agreement, it was agreed by the complainant and

the respondent that they would be bound by the terms and conditions of the flat buyer's agreement as illustrated therein.

4. That vide demand letter dated 25.04.2013 the complainnat raised the third demand due in the start of excavation. The same was payable on or before 15.05.2013. That the complainnat has raised various demands due on completion of floor wise slab but no payments were made by the allottee. That since the respondent failed to make the payments as demand earlier the complainnat vide letter dated 16.07.2019 sent the final reminder to the respondent to clear his outstanding dues, as on 16.07.2019 for an amount of Rs. 41,72,153/- approximately plus interest.

5. The complainant further submitted that vide demand letter dated 09.11.2019 the complainant raised the demand due on completion of internal plaster. The same was payable on or before 16.10.2019 however, no payment thereof was made by the allottee. That since the respondent failed to make the payments as demanded earlier, the complainant vide letter dated 09.11.2019 the developer raised the demand due on completion of brick work. The same was payable within 20 days of issuing of this demand however no payment thereof was made by the allottee.

6. That it is pertinent to mention here that as per the agreed terms and conditions the complainant was supposed to handover the flat to the respondents within 48 months from the date of execution of the flat buyer's agreement plus 6

months grace period, however further subject to force majeure conditions. That in the intervening period when the construction and development was under progress there were various instances and scenarios when the development and construction work had to be put on hold due to reasons beyond the control of the complainant. The parties have agreed that if the delay is on account of force majeure conditions, the developer shall not be liable for performing its obligations. That the project got delayed and proposed possession timelines could not be completed on account of following reasons among others as stated below:

i. In the year, 2012 on the directions of the hon'ble Supreme Court of India, the mining activities of minor minerals (which includes sand) were regulated. The hon'ble Supreme Court directed framing of Modern Mineral Concession Rules. Reference in this regard may be had to the judgment of ***"Deepak Kumar v. State of Haryana, (2012) 4 SCC 629".*** The competent authorities took substantial time in framing the rules and in the process the availability of building materials including sand which was an important raw material for development of the said Project became scarce in the NCR as well as areas around it. Further, developer was faced with certain other force majeure events including but not limited to non-availability of raw material due to various stay orders of hon'ble Punjab & Haryana High Court and National Green Tribunal thereby stopping/regulating the mining

activities, brick kilns, regulation of the construction and development activities by the judicial authorities in NCR on account of the environmental conditions, restrictions on usage of water, etc. That the National Green Tribunal in several cases related to Punjab and Haryana had stayed mining operations including in O.A No. 171/2013, wherein vide order dated 2.11.2015 mining activities by the newly allotted mining contracts by the state of Haryana was stayed on the Yamuna Riverbed. These orders inter-alia continued till the year 2018. Similar orders staying the mining operations were also passed by the hon'ble High Court and the National Green Tribunal in Punjab and Uttar Pradesh as well. The stopping of mining activity not only made procurement of material difficult but also raised the prices of sand/gravel exponentially. It was almost 2 years that the scarcity as detailed above continued, despite which all efforts were made, and materials were procured at 3-4 times the rate and the construction continued without shifting any extra burden to the customer. That the above said restrictions clearly fall within the parameter "reasons beyond the control of the promoter" as described under of Clause 18 (b) of the flat buyer agreement.

ii. That on 19th February 2013 the office of the executive engineer, HUDA Division No. II, Gurgaon vide memo No. 3008-3181 had issued instruction to all developers to lift tertiary treated effluent for construction purpose for

sewerage treatment plant Behrampur. Due to this instruction, the company faced the problem of water supply for a period of several months as adequate treated water was not available at Behrampur.

iii. Orders passed by hon'ble High Court of Punjab and Haryana wherein the hon'ble Court has restricted use of groundwater in construction activity and directed use of only treated water from available sewerage treatment plants. However, there was lack of number of sewage treatment plants which led to scarcity of water and further delayed the project. That in addition to this, labour rejected to work using the STP water over their health issues because of the pungent and foul smell coming from the STP water as the water from the S.T.Ps of the state/corporations had not undergone proper territory treatment as per prescribed norms.

iv. Further, no-construction notice was issued by the hon'ble National Green Tribunal for period of several weeks resulting in a cascading effect. That in the year 2017,2018 and 2019 there was a blanket ban on construction and allied activities during the months of October and November, which caused massive interruption in construction work. There being a shutdown of construction for at least a few months approximately each year. Thus since 2017 the Promoter has suffered months of stoppage of construction work till 2019.

v. That due to the above-mentioned factors stoppage of construction work done by the Judicial/Quasi-Judicial authorities played havoc with the pace of construction as once the construction in a large-scale project is stalled it takes months after it is permitted to start for mobilizing the materials, machinery and labour. Once the construction is stopped the labour becomes free and after some time when the construction is re-started it is a tough task to mobilize labour again as by that time, they either shift to other places/cities or leave for their hometown and the **labour shortage occurs**. That after the blanket ban on construction was lifted, the cold climatic conditions in the month of December to February have also been a major contributing factor in shortage of labour, consequently hindering the construction of the project. That cold weather impacts workers/labourers beyond normal conditions and results in the absenteeism of labour from work. This is entirely beyond the control of the project developers as many or most of the labourers refuse to work in extreme cold weather conditions. It is submitted that, in current scenario where innumerable projects are under construction all the developers in the NCR region including the complainant suffer from the shortage of labour due to cold weather conditions. That the projects of not only the complainant but also of all the other developers have been suffering due to such shortage of labour and has resulted in delays

in the projects beyond the control of any of the developers. That in addition it is stated that all this further resulted in increasing the cost of construction to a considerable extent. Moreover, due to active implementation of social schemes like National Rural Employment Guarantee and Jawaharlal Nehru National Urban Renewal Mission, there was also more employment available for labourers at their hometown despite the fact that the NCR region was itself facing a huge demand for labour to complete the projects. That the said fact of labour shortage shall be substantiated by way of newspaper articles elaborating on the above-mentioned issues hampering the construction projects in NCR. That this was certainly never foreseen or imagined by the complainant while scheduling the construction activities. It is submitted that even today, in current scenario where innumerable projects are under construction all the developers in the NCR region including the complainant are suffering from the after-effects of labour shortage. That the said shortage of labour clearly falls within the parameter reasons beyond the control of the promoter as described under of Clause 18 (b) of the flat buyer agreement .

vi. That the Ministry of environment and Forest and the Ministry of mines had imposed certain restrictions as per directions passed by the hon'ble Supreme Court/Hon'ble High Courts and Hon'ble National Green Tribunal, which

resulted in a drastic reduction in the availability of bricks and availability of Sand which is the most basic ingredient of construction activity. That said ministries had barred excavation of topsoil for manufacture of bricks and further directed that no more manufacturing of bricks be done within a radius of 50 km from coal and lignite-based thermal power plants without mixing 25% of ash with soil.

vii. That shortage of bricks in region has been continuing ever since and the complainant had to wait many months after placing order with concerned manufacturer who in fact also could not deliver on time resulting in a huge delay in project. Apart from this, Brick Klins remained closed for a considerable period of time because of change in technology in firing to Zig Zag method etc., which again restricted the supply of Bricks.

viii. That crusher which is used as a mixture along with cement for casting pillars and beams was also not available in the adequate quantity as is required since mining department imposed serious restrictions against crusher from the stone of Aravalli region. That this acute shortage of crusher not only delayed the project of the complainant but also shoot up the prices of crusher by more than hundred percent causing huge losses to complainant.

ix. That in addition the current Govt. has on 8th Nov. 2016 declared demonetization which severely impacted the

operations and project execution on the site as the labourers in absence of having bank accounts were only being paid via cash by the sub-contractors of the company and on the declaration of the demonetization, there was a huge chaos which ensued. That in addition to the above, demonetization affected the buyer's in arranging/ managing funds which resulted in delayed payments/ defaults on the part of the Buyers. That due to lack/ delayed payments, the project was also affected since it was difficult for the Complainant also to arrange funds during the stress in the market during the said demonetization period.

x. That in addition to above all the projects in Delhi NCR region are also affected by the blanket stay on construction every year during winters on account of AIR pollution which leads to further delay the projects. That such stay orders are passed every year either by hon'ble Supreme Court, NGT or/and other pollution boards, competent courts, Environment Pollution (Prevention & Control) authority established under Bhure Lal Committee, which in turn affect the project. That to name few of the orders which affected the construction activity are as follows: (i) Order dated 10.11.2016 and 09.11.2017 passed by the hon'ble National Green Tribunal, (ii) Notification/ orders passed by the Pollution control board dated14.06.2018, 29.10.2018 and (iii) Letter dated 01.11.2019 of EPCA along with orders dated 04.11.2019,

06.11.2019 and 25.11.2019 of the hon'ble Supreme Court of India.

7. That it is all important to bring out and highlight here that on account of non-payment of instalments/dues this construction linked allotment by the respondents and other similar allottees, which amount had accumulated to approximately Rs.62.21 crores plus interest, the complainant in order to continue with the construction had to take an additional loan to the tune of Rs.72 crores from PNB HFL. This additional loan taken on account of non-payment of dues by the allottees had made the petitioner developer suffer an amount of Rs.5.63 crores of interest burden alone on the aforesaid borrowing. It appears that it has become a trend amongst the allottees nowadays to first not to pay of the instalments due or considerably delay the payment of the same and later on knock the doors of the various courts seeking refund of the amount along with compensation or delayed possession compensation, thus taking advantage of their own wrongs, whereas the developer comes under severe resource crunch leading to delays in construction or/and increase in the cost of construction thereof putting the entire project in jeopardy. The crux of the matter which emerges from the aforesaid submission is that had the respondents as well as other similarly situated persons paid of their instalments in time, the petitioner developer would not have borrowed additional Rs.72 crores, rather it would have paid off a part of the earlier loan taken reducing the interest liability on the company as

well as continuity with the construction at full pace. By failing to deposit the instalments on time the respondents have violated their contractual commitment and are estopped from raising any plea of delay in construction. RERA having been enacted by the legislature with the motive of balancing the rights and liabilities of both the developer as well as the allottees, the present petition is liable to be allowed as prayed for by this hon'ble authority.

8. That despite the aforementioned circumstances, the complainant completed the construction of the project diligently, without imposing any cost implications of the aforementioned circumstances on the allottees. That respondents are in breach of their contractual obligations as they have failed to make timely payments. However, despite the failure to make the timely payment, the complainant has constructed the said flat/project. Upon completion of the construction the complainant applied for the grant of Occupation Certificate for the said tower on 18.10.2019 with the competent authorities.

9. That it is submitted that the construction of the project stands completed, and the Occupation Certificate has been applied on 18.10.2019. It is relevant to add here that the complainant has at the request of the allottees raised certain demands at a later stage so as to give time to its allottees to make payments and clear their dues. Since the construction in the last quarter was extensive and because of which the allottees were burdened with continuous demands on a frequent note, therefore these

demands were delayed at the request of different allottees so that they could get some time to make the payments.

10. That from the perusal of the above it can be stated that the respondent has failed to make payments despite several reminders, such an action gives a cause of action in favour of the complainant to file the present complaint under section 19 of the Act seeking interest as prayed for in the present complaint. In addition, since section 32 also protect the promoters, the balance lies in allowing the present complaint by directing the respondent to make the payment as per the terms and conditions of the flat buyer's agreement executed between the parties along with interest thereupon.

11. That the all the demands have been raised in accordance with the payment plan opted by the respondent on the completion of the relevant construction milestones, however, the respondent has defaulted in making timely payments despite sending reminder notices. It is submitted that the respondent till date have paid an amount of Rs.26,73,599/- plus taxes against the total dues of Rs.84,12,304/- till date, thus falling short of Rs.57,38,705/- plus interest and taxes.

12. That the complainant is also entitled to the interest on the payments due, which were delayed by the respondent- as per the provisions of the Real Estate (Regulation and Development) Act, 2016.

13. That the hon'ble High Court of Bombay in the matter titled **Neelkamal Realtors Suburban Pvt. Ltd. and Anr vs. Union**

of India has already held that RERA strikes the balance between the promoter and allottees, the relevant paragraph is reproduced herein below:

> *In the case of Cellular Operators Association of India and ors. vs. Telecom Regulatory Authority of India and ors. (Supra), the Supreme Court held that there cannot be any dispute in respect of settled principles governing provisions of Articles 14, 19(1)(g) read with Article 19(6). But a proper balance between the freedom guaranteed and the social control permitted by Article 19(6) must be struck in all cases. **We find that RERA strikes balance between rights and obligations of promoter and Allottees. It is a beneficial legislation in the larger public interest occupying the field of regulatory nature which was absent in their country so far.***

14. That the cause of action to file the present case is still continuing as respondent continue to fail to make timely payments as per the terms and conditions of the flat buyer's agreement and the payment plan opted by the respondent. Further cause of action also arose when despite repeated follow ups by the complainant and the complainant having performed their contractual obligations the respondent withheld his contractual obligations.

C. Relief sought by the complainant

15. The complainant has filed the present complaint for seeking following reliefs:

    i. To clear its outstanding dues along with delayed interest as per section 19 of the RERA Act 2016.

16. On the date of hearing, the authority explained to the respondent about the contravention as alleged to have been

committed in relation to section 19 (6) (7) of the Act to plead guilty or not to plead guilty.

D. Reply of the respondent

17. The respondent contested the complaint on the following grounds:-

i. It is submitted that the complaint filed by the complainant is baseless, vexatious and is not tenable in the eyes of law therefore the complaint deserves to be dismissed at the threshold. That the authority is sans jurisdiction to entertain the complaint filed by the complainant as the provisions of the Act are not retrospective as the flat buyer's agreement was executed between the parties on 12.12.2012. That, furthermore, the present proceedings against the respondent are liable to be dismissed in view of the fact that the same are initiated with mischievous intentions of intimidating the respondent to submit to the unjustified demands of the complainant.That the complainant has concealed the material fact that the complainant himself has been defaulting in completing the project as per representations and promises made by him at the time of booking.

ii. That the complainant has not disclosed the fact that there has been gross negligence on their part in raising the construction timely over the said project and they have wilfully and intentionally delayed the said project and

furthermore, they have also not adhered to all the terms of the buyer's agreement and they have also not compensated nor have paid the delayed interest to the respondent and other allottees regarding delay in handing over possession of the project. That the respondent would suffer irreparable loss and injury should the complainant be allowed to continue to participate or proceed with the instant complaint before the authority and/or initiate or assert any rights pursuant to such complaint.

A. <u>The complainant is defaulter in terms of the said agreement dated 01.04.2013</u>

It is submitted that on 12.12.2012, the respondent entered into the said agreement with the complainant company, which provided for the delivery of possession of the said unit to the respondent within 48 months from the date of signing of said agreement along with a period of 6 months as grace period for 'force majeure' conditions. As per the said agreement, the total sale consideration of the said unit was Rs. 84,12,304/- , which also included the charges towards 'Preferential Location' and 'Car Parking Construction'. The respondent made a payment of Rs. 27,47,236/- in accordance with the demands of the complainant. However, the demands raised by the complainant were completely unjustified and against the payment plan agreed between the parties.That the aforementioned payments were made by the respondent so as to ensure that there is no delay on his part and that the possession of the said unit could be handed over to the

respondent on the date represented by the complainant i.e. by 12.12.2016. That the demands raised by the complainant were completely arbitrary keeping in view the snail-paced construction work at the project site. Upon making payment of first two instalments, when the respondent visited the project site in December 2013, they were shocked to see that there was no considerable progress at the project site from the date of booking. Rather, even the foundation had not begun, as is evident from the payment demand made by the complainant 'upon completion of foundation' which was raised on 21.03.2015, thus clearly showing that it was only in 2015 that the foundation was done. Upon questioning the complainant about the same, they simply said that the project will be delivered as per schedule. However, the complainant miserably failed in carrying out the construction work as per schedule and there was an inordinate delay in completion of project.

B. <u>The conduct of the complainant company constitutes deficiency of service and unfair/restrictive trade practices</u>

That the complainant had induced the respondent into purchasing the said unit on the basis of 'Preferential Location' being allocated to them for which they have charged the respondents 'Preferential Location Charges' as in the said agreement to ensure that the respondent would be provided the best in the said project. However, it is

pertinent to note that the said unit is surrounded by other buildings, which by no stretch of imagination can be termed as a 'Preferential Location' as promised by the complainant. That at the time of booking, it was assured to the respondent that the project shall be having a strong structure and excellent workmanship sans any form of structural defects with facilities like proper sewerage, world class lifts and no seepage problem. However, when the respondent visited the site in November, 2014, they were taken aback by the poor workmanship and structural defects on the site. The condition and ratio of the materials used was not proper. Rather, the project was smelling bad owing to improper drainage system. Upon this, the respondent made an enquiry from allottees of other projects of the respondent namely, 'Mapsko Casabella' and 'Mapsko Royale Ville' and they got to know that those projects are also marred with structural defects and the complainant has failed to stick to his commitments made to them and the structure quality and strength is very poor. This left the respondent completely devastated. Upon this, he sought a refund of the amount paid by them on account of breach of agreement as the construction was not going as per schedule and whatever construction was going on, had been of poor and inferior quality, but to no avail as the complainant said that they will forfeit the entire amount paid by the respondent and will not refund any amount. At the time of booking of the apartment, it was presented that there shall be a

seamless, uninterrupted and exclusive corridor connecting the project to the main road which will segregate the project from adjoining villages. However , there is no such exclusive passage that makes the said project not in a liveable condition and was not developed with the promised infrastructure and facilities. It is pertinent to note that the said project is inhabitable as there are no proper roads, lightning. It is clear that the complainant has employed unfair and restrictive trade practices as they continue to hold on to the consideration amount paid by the Respondent till date despite the fact that the respondent clearly expressed their intention to withdraw from the project and sought a refund of the amount paid by them.

iii. It is further submitted that the respondent is not on the same footing as the complainant, which is a large body corporate and the respondents had no other alternative but to agree to such unconscionable and unreasonable terms in the said agreement.It is pertinent to note that the said agreement entitles the complainant to charge an interest of 21% p.a. on account of any delay in payment of instalments from the respondents whereas, the complainant is liable to pay only Rs. 5 per sq. ft. calculated on the super area of the said Unit for every month of delay beyond the grace period towards delay in delivering the possession of the said Unit. That the hon'ble Supreme Court in a similar factual matrix in ***Pioneer Urban Land & Infrastructure Ltd. v. Govindan Raghavan (Civil Appeal No. 12238 of 2018),*** wherein it has

held that the incorporation of one-sided clauses in a builder-buyer agreement constitutes an unfair trade practice.

18. 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 theses undisputed documents.

F. Jurisdiction of the authority

19. The authority observed that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

F.I Territorial jurisdiction

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 completed territorial jurisdiction to deal with the present complaint.

F.II Subject matter jurisdiction

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 and

duties of the allottee as per section 19(6), (7) and (10) of the Act leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainnat at a later stage.

G. Findings of the authority on the objections raised by the respondent: -

20. Objection regarding jurisdiction of authority w.r.t buyers agreement executed prior to coming into force of the Act

The respondent contested that authority is deprived of the jurisdiction the complaint filed by the complainant is baseless, vexatious and is not tenable in the eyes of law therefore the complaint deserves to be dismissed at the threshold. That the authority is sans jurisdiction to entertain the complaint filed by the complainant as the provisions of the Act are not retrospective as the flat buyer's agreement was executed between the parties on 12.12.2012. The authority is of 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 provision 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 the 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 provision of RERA cannot be challenged. The Parliament is competent enough to legislative 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 RERSA has 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."*

21. Also, in appeal no. 173 of 201,9 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 provision of the Act is 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 is 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 charge 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."*

22. 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 buyer's 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 the Act and are not unreasonable or exorbitant in nature.

23. **Whether the terms and conditions contained in the agreement amount to unfair trade practice?**

It has been contended on behalf of the respondent/allottee that the agreement in question is wholly one sided, arbitrary and amount to unfair trade practice and hence the same

should be held to be not binding on the allottee. To this, the contention raised on behalf of the promoter is that before signing the agreement the allottee had carefully read, understood, and verified the terms and conditions stipulated therein and, hence, now it does not lie in his mouth to say that the agreement suffers from one sidedness or arbitrariness, or its terms and conditions amount to unfair trade practice. This question has already been raised and decided by different adjudicatory authorities including the hon'ble apex court while dealing with the provisions contained in the Consumer Protection Act. The term "unfair trade practice" has been defined in section 2(1) (r) of that Act in very exhaustive words. In **Pioneer Urban Land & Infrastructure Ltd. V/s Govindan Raghavan (2019) 5 SCC 725** while dealing with this question the court observed and held as follows: -

6.1 .....

6.2.....

6.3 The National Commission in the impugned order dated 23-10-2018 [Geetu Gidwani Verma v. Pioneer Urban Land and Infrastructure Ltd., 2018 SCC OnLine NCDRC 1164] held that the clauses relied upon by the builder were wholly one-sided, unfair and unreasonable, and could not be relied upon. The Law Commission of India in its 199th Report, addressed the issue of —Unfair (Procedural & Substantive) Terms in Contract||. The Law Commission inter alia recommended that a legislation be enacted to counter such unfair terms in contracts. In the draft legislation provided in the Report, it was stated that:

—... a contract or a term thereof is substantively unfair if such contract or the term thereof is in itself harsh, oppressive or unconscionable to one of the parties.

6.7 A term of a contract will not be final and binding if it is shown that the flat purchasers had no option but to sign on the dotted line, on a contract framed by the builder. The contractual terms of the agreement dated 8-5-2012 are ex facie one-sided, unfair and unreasonable. The incorporation of such one-sided clauses in an agreement constitutes an unfair trade practice as per Section 2(1)(r) of the Consumer Protection Act, 1986 since it adopts unfair methods or practices for the purpose of selling the flats by the builder."

This judgement was followed in a subsequent judgement rendered in **Wg. Cdr. Arifur Rahman Kahn and Aleya Sultana and Ors. V/s DLF Southern Homes Pvt Ltd Civil Appeal No. 6239 of 2019 with Civil Appeal No. 6303 of 2019 decided on 24.08.2020** and it was held that the terms of the agreement authored by the developer do not maintain a level platform between the developer and the flat purchaser. The stringent terms imposed on the flat purchaser are not in consonance with the obligation of the developer to meet the timelines for construction and handing over possession, and do not reflect an even bargain. The failure of the developer to comply with the contractual obligation to provide the flat within the contractually stipulated period, would amount to a deficiency of service. Given the one-sided nature of the apartment buyer's agreement, the consumer fora had the

jurisdiction to award just and reasonable compensation as an incident of the power to direct removal of deficiency in service.

24. **The same question again arose for consideration In Ireo Grace Realtech Pvt. Ltd. vs. Abhishek Khanna civil appeal no. 5785 of 2019 decided on 11.01.2021 and the court held as follows: -**

> *"19.7 We are of the view that the incorporation of such one-sided and unreasonable clauses in the Apartment Buyer's Agreement constitutes an unfair trade practice under Section 2(1)(r) of the Consumer Protection Act. Even under the 1986 Act, the powers of the consumer fora were in no manner constrained to declare a contractual term as unfair or one-sided as an incident of the power to discontinue unfair or restrictive trade practices. An —unfair contract|| has been defined under the 2019 Act, and powers have been conferred on the State Consumer Fora and the National Commission to declare contractual terms which are unfair, as null and void. This is a statutory recognition of a power which was implicit under the 1986 Act.*

In view of the above, we hold that the developer cannot compel the apartment buyers to be bound by the one-sided contractual terms contained in the apartment buyer's agreement."

25. Thus, the law laid down on the subject by the highest court of the country is settled. Where such an agreement is one sided or amounts to unfair trade practice, the allottee in the case of a real estate project is not bound by the terms of the agreement and can seek appropriate remedy of his grievances.

The same analogy shall apply to the cases to be decided under the Act. The term "unfair practice means" has been defined in the Act as a practice which, for the purpose of promoting the sale or development of any real estate project adopts any unfair method or unfair or deceptive practice including any of the following practices, namely: -

> *(A) The practice of making any statement, whether in writing or the visible representation which, -*
>
> *(i) falsely represents that the services are of a particular standard or grade;*
>
> *(ii)represents that the promoter has approval or affiliation which such promoter does not have;*
>
> *(iii)makes a false or misleading representation concerning the services;*
>
> *(B)the promoter permits the publication of any advertisement or prospectus whether in any newspaper or otherwise of services that are not intended to be offered;*
>
> *(d)the promoter indulges in any fraudulent practices. [Section-7 (1)(c) of the Act]*

26. Therefore, the definition of the word **"unfair practices" as used in the Consumer Protection Act and "unfair practice means"** as defined in the Act are almost akin to each other and hence the law laid down by the hon'ble Apex Court under the Consumer Protection Act can very safely and lawfully be followed in the cases to be decided under the Act. Having reached to this conclusion, the authority now proceeds to consider whether the terms and conditions contained in the agreement in question executed between the parties are one

sided, arbitrary and amount to unfair trade practice and, if so, whether the allottee is entitled to oust himself from the clutches of the said agreement. The authority has very carefully gone through the stipulation contained in the agreement. The authority may give some examples to demonstrate that the terms contained in the agreement are infect one sided and amount to unfair trade practice. **Clause 15 (b) of the agreement provides** "that if any dues/charges remain as payable by the buyer to the promoter after sale/transfer of the said flat, the promoter shall have the first lien and charge on the said flat in respect of such dues/charges and recovery will be made with interest @ 21% p.a. thereon from the existing buyer/owner of the said flat". Clause 18 has been reproduced hereinabove. It clearly provides that in case of delay in handing over possession within the stipulated period of 48 months the allottee shall not be entitled to claim any damages/compensation other than charges at the rate of Rs. 5 per sq. ft. per month. This is a discriminatory clause and does not maintain even level between the parties. Rather, it shows that the promoter was in a dominant position and the allottee was hapless before the promoter. It amounts to unfair trade practices.

27. **Whether the respondent/allottee is bound to make the up-to-date payment along with interest to the complainant/promoter and accept physical possession of the flats?**

The authority observed that as per section 19(6) every allottee who has entered into an agreement or sale to take an apartment, plot or building as the case may be under section 19 shall be responsible to make necessary payments in the manner and within the time as specified in the said agreement for sale and shall pay at the proper time and place the share of the registration charges, municipal taxes, water and electricity charges, ground rent, and other charges, if any. Section 19 of the Act deals with rights and duties of allottee. Sub-section (6) and sub-section (7) of section 19 read as follows:

"(6) Every allottee, who has entered into an agreement for sale to take an apartment, plot or building as the case may be, under section 13, shall be responsible to make necessary payments in the manner and within the time as specified in the said agreement for sale and shall pay at the proper time and place, the share of the registration charges, municipal taxes, water and electricity charges, maintenance charges, ground rent, and other charges, if any.

(7) The allottee shall be liable to pay interest, at such rate as may be prescribed, for any delay in payment towards any amount or charges to be paid under sub-section (6)".

28. Thus, these sub-sections of section 19 cast a duty upon the allottee to make the timely payment of the instalments and in case he makes a delay to pay the interest at the prescribed rate.

The sub-sections are couched in a mandatory form and the allottee is bound to make the payments of the instalments along with interest, if any, as per the time schedule given in the flat buyer agreement/agreement for sale. Clauses 14 and 15 of the flat buyer agreements executed between the parties are relevant for the decision of the complaint and they are reproduced as hereunder: -

> *"That the timely payments of due instalments as specified in the opted payment plan are the essence of this agreement. It shall be incumbent on the Buyer to comply with all the terms of payment and it shall not be obligatory for the Promoter to serve any demand notice/reminder to the Buyer. In case the installment(s) dues as specified in payment plan are delayed, the Buyer shall be liable to pay the interest @ 21% p.a., payable on outstanding amounts from the due date of payment till the date of credit in the promoter's account and further all the payment(s) made by the buyer(s), the Promoter shall be authorised to adjust the amount first towards the interest due on installment(s) and then towards the principal amount of Installment(s).*

Defaults in Due installments

15. *a. That in case the Buyer fails to pay due installment(s) within 60 days from the due date or non-compliance of opted payment plan or breach of any terms/conditions of this agreement, the Promoter shall forfeit the earnest money without any notice thereof, out of the amount paid by the Buyer and this agreement shall stand cancelled of consequent whereof the buyer shall be left with no right, claim or lien whatsoever on the said Flat. However, the amount, if any paid over and above the earnest money will be refunded to the Buyer whose name mentioned first in the application form, without interest after re-allotment of the said Flat to a new buyer and after compliance of certain formalities & submission of the necessary documents by the Buyer.*

b. *That any if dues/charges remains payable by the Buyer to the Promoter after sale/transfer of the said Flat, the Promoter shall have the first lien and charge on the said Flat in respect of such dues/charges and recovery will be made with interest @21% p.a. thereon from the existing Buyer/owner of the said flat".*

29. Admittedly, the allottee has not adhered to the payment schedule provided on page 45 of the complaint and has made continuous defaults. The payments made by him vary from 20% to 40%. The complainant had already received occupation certificate on 03.06.2020 and issued notice of offer of possession which was dispatched on 04.06.2020 upon the respondent. The complainant vides the said notice of offer of possession advised and requested the respondent to clear the outstanding dues and take the possession of the apartment.

G. Finding on the relief sought by the complainant

30. **Relief sought by the complainant:**

(i) Direct the respondent/allottee to clear its outstanding dues along with delayed interest as per section 19 of the RERA Act 2016.

31. In the present complaint, the complainant/promoter intend to give the possession of the apartment which is ready and as per section 19(10) the Act, allottees shall take physical possession of the apartment, plot, building as the case may be, within a period of two months of the occupancy certificate issued for the said apartment, plot or building as the case may be. Section 19(10) proviso read as under.

"Section 19: - Right and duties of allottees.-

.....

19(10) states that every allottee shall take physical possession of the apartment, plot or building as the case may be within a period of two months of the occupancy certificate issued for the said apartment, plot or building, as the case may be.

The respondent/allottee has failed to abide by the terms of agreement by not making the payments in timely manner and take the possession of the unit in question as per the terms and conditions of the apartment buyer's agreement and the payment plan opted by the respondent/allottee. Further cause of action also arose when despite repeated follow-ups by the complainant and the complainant having performed their contractual obligations, the respondent/allottee withheld their contractual obligation. The respondent/allottee shall make the requisite payment as per the provision of section 19(6) of the Act and as per section 19(7) to pay the interest at such rate as may be prescribed for any delay in payments towards any amount or charges to be paid under sub-section (6). Proviso to section 19(6) and 19(7) reads as under.

"Section 19: - Right and duties of allottees.-

.....

19(6) states that every allottee, who has entered into an agreement for sale to take an apartment, plot or building as the case may be, under section 13[1], shall be responsible to make necessary payments in the manner and within the time as specified in the said agreement for sale and shall pay at the proper time and place, the share of the registration charges, municipal taxes, water and

electricity charges, ***maintenance charges,*** *ground rent, and other charges, if any.*

19(7) states that the allottee shall be liable to pay interest, at such rate as may be prescribed, for any delay in payment towards any amount or charges to be paid under sub-section (6).

32. 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 promoters, in 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;"*

33. Therefore, interest on the delay payments from the allottee shall be charged at the prescribed rate i.e. 9.30% by promoter. 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., 30.07.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

34. On consideration of the documents available on record and submissions made by both the parties regarding contravention of provisions of the Act, the authority is satisfied that the respondent/allottee is in contravention of the section 19(6), 19(7) and 19(10) of the Act by not making the payment on time and not taking the possession as per the agreement. By virtue of clause 18(a) of the agreement executed between both the parties on 12.12.2012 the possession of the subject apartment was to be delivered within 48 months the date of signing of this agreement with the buyer or within an extended period of six months, i.e. 12.06.2017. Accordingly, it is the failure of the complainant/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 complainant 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., 12.06.2017 till the handing over of the possession i.e. 04.06.2020 at the 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. 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 03.06.2020. However, the complainant offered the possession of the unit on 04.06.2020, so it can be said that the respondent came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, he should be given 2 months' time from the date of offer of possession. This 2 month of reasonable time is being given to the respondent/allottee 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., 12.06.2017 till the expiry of 2 months from the date of offer of possession (04.06.2020) which comes out to be 04.08.2020.

35. Accordingly, it is the failure of the allottee/respondent to fulfil their obligations, responsibilities as per the buyer's agreement dated 12.12.2012 to take the possession within the stipulated

period. Accordingly, the non-compliance of the mandate contained in section 19(6), 19(7) and 19(10) of the Act on the part of the respondent is established.

H. Directions of the authority: -

36. 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 promoter as per the function entrusted to the authority under section 34(f) of the Act:

i. The respondent/allottee shall make the requisite payments and take the possession of the subject apartment as per the provisions of section 19(6), (7) and (10) of the Act, within a period of 30 days.

ii. Interest on the delay payments from the respondent shall be charged at the prescribed rate of interest @9.30% p.a. by the promoter which is the same as is being granted to the respondent/allottee in case of delayed possession charges.

iii. The arrears of such interest accrued from the due date of possession i.e. 12.06.2017 till the date of offer of possession i.e. 04.06.2020 plus two months i.e. 04.08.2020 shall be paid by the complainant/promoter to the respondent/allottee within a period of 90 days from the date of this order.

iv. The complainant/promoter shall not charge anything from the respondent/allottee which is not the part of the agreement. However, holding charges shall not be charged by the

promoters 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 decided on 14.12.2020.

37. Complaint stands disposed of.

38. File be consigned to registry.

(Samir Kumar)
Member

(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 30.07.2021

Judgement uploaded on 06.10.2021