

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

New Complaint no. : 3372 of 2020
First date of hearing: 02.12.2020
Date of decision : 18.08.2021

1. Col. Sukhdeep Singh Babra
2. Sh. Jasdeep Singh Babra
Both RR/o: - House No. 89A, SJS avenue,
Airport Road, Amritsar.

Complainants

Versus

M/s Supertech Limited
Regd. Office at: - 1114, 11th Floor, Hemkunt
Chambers, 89, Nehru Place, New Delhi-
110019

Respondent

CORAM:

Shri Samir Kumar
Shri Vijay Kumar Goyal

Member
Member

APPEARANCE:

Sh. Manish Kumar
Sh. Bhrigu Dhani

Advocate for the complainants
Advocate for the respondent

ORDER

1. The present complaint dated 19.10.2020 has been filed by the complainants/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is *inter alia* prescribed that the promoter shall be responsible for all obligations, responsibilities and functions as provided under the provision

of the Act or the Rules and regulations made there under or to the allottee as per the agreement for sale executed *inter se*.

A. Unit and project related details

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

S. No.	Heads	Information
1.	Project name and location	"Araville", Sector- 79, Gurugram.
2.	Project area	10.0 acres
3.	Nature of the project	Group housing Project
4.	DTCP license no. and validity status	37 of 2011 dated 26.04.2011 valid till 25.04.2019
5.	Name of licensee	M/s Tirupati Buildplaza Private Limited
6.	RERA Registered/ not registered	Registered vide no. 16 of 2018 Dated 13.10.2018 (Tower No. A to F)
7.	RERA registration valid up to	31.12.2019
8.	Unit no.	1701, 17 th floor, tower- D [Page no. 47 of complaint]
9.	Unit measuring	1295 sq. ft. [Super area]
10.	Date of execution of flat buyer agreement	26.10.2017 [page no. 46 of complaint]

11.	Payment plan	Possession linked payment plan [Page 48 of complaint]
12.	Total consideration	Rs.88,95,630/- [Page no. 48 of complaint]
13.	Total amount paid by the complainants	Rs.57,15,288 /- [as per statement of payment received dated 02.08.2020 page 63 of complaint]
14.	Due date of delivery of possession as per clause E (1) of the allotment letter: by May 2018 plus 6 months grace period to cover any unforeseen circumstances and subject to timely payment. [Page no. 53 of complaint]	31.05.2018 [Note: - 6 month grace period is not allowed]
15.	Delay in handing over possession till the date of order i.e. 18.08.2021	3 years 2 months and 18 days

B. Facts of the complaint

3. The complainants have made the following submissions in the complaint:

- I. That the complainants have entered into a flat buyer's agreement with respondent company and entered into the agreement by paying booking amount on 11.05.2013 and thereafter the flat buyer's agreement was signed on 28.05.2013. The cost of the flat was Rs.1,33,21,010/- (basic price) and the total cost was Rs.1,54,42,260/- and as per buyer's agreement, the unit allotted consisting of

three bedrooms plus servant room on fifth floor unit bearing no. A-0504 measuring super area 2215 sq. ft. at Araville in Sector 79, Gurugram.

- II. They have paid the amount as per the agreement without any delay. At the time of booking, payment of Rs.7.50 lakhs were made by the complainants vide cheque no. 541003 dated 13.05.2013. Thereafter, second installment was given on 30.07.2013 vide cheque no. 923663 amounting to Rs.25 Lakhs and on 06.08.2013 vide cheque no. 541016 amounting to Rs.15,56,421/-. The complainants further made payment without any delay on 14.12.2016 amounting Rs.50,467/- (showed as VAT charges) and on 01.06.2017 amounting to Rs.28,813/-.
- III. Thereafter making the above payments realized the status of the flat/unit booked by him and the progress of the construction was much slow, and the builder company gave an option to the complainants for change of flat/unit, as the construction of the other flats/units was in full swing. The builder company was able to convince the complainants that the present unit/flat booked by them shall not be available as per the due date, as the delay had already occurred, and the super structure was not even complete. The possession was to be offered in June 2016. Looking at the entire scenario and the

situation, the builder company convinced the complainants to change of unit/flat.

- IV. That the complainants entered into a fresh buyer's agreement with the builder company on 26.10.2017, wherein the booking date was shown to be 11.05.2013 and the flat/unit was downgraded to two bedrooms at 17th floor unit bearing no.1701/R032D01701 in tower- D for super area measuring 1295 sq. ft. at Araville Gurugram in Sector 79, Gurugram. The basic price was Rs.77,88,130/- and the total costs of the flat/unit including car parking, IDC, EDC, IFMS club membership, electric power backup etc. was Rs.88,95,630/-.
- V. That the complainants could not seek the refund of the flat buyers agreement as the builder company informed that in case the refund is sought they shall deduct the amount and the seeking of the refund shall be prerogative of the builder company. The only option left with the complainants was to enter into fresh agreement for ready to move in Unit in which the construction was almost complete. The amount already paid by the complainants in the year 2013 was adjusted in the fresh buyer's agreement.
- VI. That the possession of the unit/flat was to be delivered by May 2018 and on the demand of builder company, the

complainants deposited an amount of Rs.9,30,521/- with them vide cheque no.38894 dated 31.05.2018. Thus, the total amount paid by the complainants is Rs.57,67,755/-.

- VII. That the complainants were again frauded and cheated by the builder company as the possession of the unit was to be delivered by May 2018 but the same seemed to be a distant dream, as the project was nowhere near completion and on the site, there was nothing concrete. The complainants have no other option but still to wait for a positive response from the respondent for giving the possession. As per the fresh buyer's agreement, the booking date was construed from 11.05.2013 and the project was majorly delayed. The deposited amount of the complainants was struck with the builder company.
- VIII. That the complainants got to know that the builder company has cheated the complainants by charging extra amount for two EHK whereas on their official website, the cost of the book unit was shown as Rs.74,46,250/- and this was the total cost of the unit which included the EDC/IDC charges, club membership, car parking etc. The complainants confronted the same from the builder company regarding the fraud played by them by making them into agreement at exorbitant rate which was not the market value and further the total cost was only

Rs.74,46,250/- which is shown on the official website of the respondent company. This act of the builder company itself shows it is a clear way to cheat a gullible consumer of its hard-earned money.

- IX. That the complainants regularly requested the respondent company to correct the amount as the exorbitant price has been charged which is against the principle of natural justice and frauding the customer.
- X. That without giving a proper response to the same, the builder company sent an offer of possession as well as demand notice. The intimation regarding pre-possession was given on 12.04.2020 for the unit booked by the complainants. However, it was surprising that there was no occupation certificate issued to the builder company for the use of building and the construction was not equally complete which was assured by the builder company while advertising. The complainants were given calculation of the remaining amount and the interest on the delayed payment.
- XI. That the complainants had taken a loan over the property/unit booked by them and was regularly paying EMIs to the bank. That the complainants are burdened to pay the interest for the loan amount and there is a delay of more than 7 years from the date on which the

possession was to be delivered i.e. in the month of May 2013.

XII. That the complainants have waited for an indefinite period for seeking the possession of the unit/flat booked by them and the entire transaction was in a fraudulent manner as the builder company had charged exorbitant rate from the complainants. Therefore, the builder company has no right to defend themselves as fraud vitiates everything. The present situation of the unit/flat offered by them is in a dilapidated condition and the entire interior work is still left. The bathrooms and the tile works are not done. It is a matter of abundant knowledge that the incomplete possession offered by the builder company is no possession. The act of the builder company in frauding the complainants is clear.

XIII. That the buyer's agreement is unjustifiable and in violation to business ethics. It nowhere states anything about failure of services by the promoter; in case they fail to hand over the possession they shall continue to pay meager compensation for delayed period but the allottee cannot walk out of the project. Therefore, the buyer's agreement is totally one sided protecting the rights of the developers and in violation to RERA. Thus, this Act has naturally caused a huge financial loss and mental stress to

complainants and his family. The promoter/developer is liable to pay interest to the allottees as per rule 15 of the Act.

- XIV. That the respondent company, which states that any delay in paying installment to promoter would lead to 2% per month compensation to the promoter and implies that this is irrespective of any long delay by the promoter to deliver flats. The complainants have already paid 75% of the total cost as per the constructions linked payment plan and there was no delay in the installments. The project is nowhere near completion even after the booking of the unit/flat, it is more than 7 years and the time to hand over the flat as per the buyer's agreement is over. Hence, the complainants shall be given back the hard-earned money which stands deposited with the builder company along with interest, compensation and damages and the relief claimed in complaint in detail. Hence, the complainants be given back the interest on the delayed payment and the benefit of the price at which the unit is being sold to others be also corrected accordingly. Therefore, the complainants are approaching this authority, which is a benevolent legislation to protect the right of the interest of the allottees/consumers in an efficient and transparent manner.

XV. That the complainant no.1 is always travelling for his job work internationally and sometimes he has to stay abroad for the various projects for months and it becomes very difficult for him to travel back in India due to his professional job and avocation for livelihood and therefore, the complainant no.1 through complainant no. 2 is filing the present complaint and is authorizing his brother being his GPA as well as joint applicant in the unit. In future if any decision is to be taken regarding the filing of any application, complaint, appeal, writ, execution, or any other application or engaging any lawyer, complainant no. 2 shall be competent to take a decision on my behalf. An authority letter/GPA to this extent has already been issued in the name of my brother Shri Jasdeep Singh Babra S/o Shri Harminder Singh Babra, resident of House No.3077, First Floor, Sector 38-D, Chandigarh.

C. Relief sought by the complainants.

4. The complainants have sought following relief(s):
 - (i) To pay interest @ 15% per annum on the delayed possession starting from 2013 till date from the respective dates of deposits by the complainants to the builder company as specified in section 18 of the Act.

(ii) To direct the respondent to complete the project as assured and to complete the project as assured in the terms and conditions of the agreement and brochure and to provide all the amenities, which are assured in the agreement. The present offer to be declared incomplete offer and as the project is not complete which is evident from the fact that the occupation certificate is also not issued to the builder company.

5. On the date of hearing, the authority explained to the respondent/promoter about the contravention as alleged to have been committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent.

6. The respondent contested the complaint on the following grounds. The submission made therein, in brief is as under: -

- I. That the complainant booked an apartment being number no. 1701, in tower D, 17th floor admeasuring 1295 sq. ft. (approx.) for a total consideration of Rs.88,95,630/- vide a booking form;
- II. That consequentially, after fully understanding the various contractual stipulations and payment plans for the said apartment, the complainant executed the flat buyer agreement dated 26.10.2017. Thereafter, the possession of the unit of the agreement, the possession of

- the apartment was to be given by May 2018, with an additional grace period of 6 months i.e. November, 2018;
- III. That as per clause I of the agreement under the heading, "Possession of the Unit", possession of the apartment would only be given to the allottees, after payment of all dues.
- IV. That in interregnum, the pandemic of covid19 gripped the entire nation since March 2020. The Government of India has itself categorized the said event as a 'Force Majeure' condition, which automatically extends the timeline of handing over possession of the apartment to the complainant. Thereafter, it would be apposite to note that the construction of the Project is in full swing, and the delay if at all, has been due to the government-imposed lockdowns which stalled any sort of construction activity. Till date, there are several embargos qua construction at full operational level.
- V. That the said project is registered with this Hon'ble authority vide registration no. 16 of 2018 dated 13.10.2018 and the completion date as per the said registration is 31.12.2019.
- VI. That the delay if at all, has been beyond the control of the respondents and as such extraneous circumstances would be categorized as 'Force Majeure', and would

extend the timeline of handing over the possession of the unit, and completion the project.

- VII. The delay in construction was on account of reasons that cannot be attributed to it. It is most pertinent to state that the flat buyer agreement provide that in case the developer/respondent delays in delivery of unit for reasons not attributable to the developer/respondent, then the developer/respondent shall be entitled to proportionate extension of time for completion of the said project. The relevant clause which relates to the time for completion, offering possession extension to the said period are "clause I under the heading "possession of allotted floor/apartment" of the "allotment agreement". The respondent seeks to rely on the relevant clause of the agreement at the time of arguments.
- VIII. The force majeure clause, it is clear that the occurrence of delay in case of delay beyond the control of the respondent, including but not limited to the dispute with the construction agencies employed by the respondent for completion of the project is not a delay on account of the respondent for completion of the project.
- IX. That the timeline stipulated under the flat buyer agreement was only tentative, subject to force majeure reasons which are beyond the control of the respondent.

The respondent in an endeavor to finish the construction within the stipulated time, had from time to time obtained various licenses, approvals, sanctions, permits including extensions, as and when required. Evidently, the respondent had availed all the licenses and permits in time before starting the construction;

X. That apart from the defaults on the part of the allottee, like the complainant, the delay in completion of project was on account of the following reasons/ circumstances that were above and beyond the control of the respondent:

- shortage of labour/ workforce in the real estate market as the available labour had to return to their respective states due to guaranteed employment by the Central/ State Government under NREGA and JNNURM Schemes;
- that such acute shortage of labour, water and other raw materials or the additional permits, licenses, sanctions by different departments were not in control of the respondent and were not at all foreseeable at the time of launching of the project and commencement of construction of the complex. The respondent cannot be held solely responsible for things that are not in control of the respondent.

- XI. The respondent has further submitted that the intention of the force majeure clause is to save the performing party from the consequences of anything over which he has no control. It is no more *res integra* that force majeure is intended to include risks beyond the reasonable control of a party, incurred not as a product or result of the *negligence or malfeasance* of a party, which have a materially adverse effect on the ability of such party to perform its obligations, as where non-performance is caused by the usual and natural consequences of external forces or where the intervening circumstances are specifically contemplated. Thus, in light of the aforementioned it is most respectfully submitted that the delay in construction, if any, is attributable to reasons beyond the control of the respondent and as such the respondent may be granted reasonable extension in terms of the allotment letter.
- XII. It is public knowledge, and several courts and quasi-judicial forums have taken cognisance of the devastating impact of the demonetisation of the Indian economy, on the real estate sector. The real estate sector is highly dependent on cash flow, especially with respect to payments made to labourers and contractors. The advent of demonetisation led to systemic operational hindrances

in the real estate sector, whereby the respondent could not effectively undertake construction of the project for a period of 4-6 months. Unfortunately, the real estate sector is still reeling from the aftereffects of demonetisation, which caused a delay in the completion of the project. The said delay would be well within the definition of 'Force Majeure', thereby extending the time period for completion of the project.

- XIII. The respondent has submitted that the completion of the building is delayed by reason of non-availability of steel and/or cement or other building materials and/ or water supply or electric power and/ or slow down strike as well as insufficiency of labour force which is beyond the control of respondent and if non-delivery of possession is as a result of any act and in the aforesaid events, the respondent shall be liable for a reasonable extension of time for delivery of possession of the said premises as per terms of the agreement executed by the complainant and the respondent. The respondent and its officials are trying to complete the said project as soon as possible and there is no malafide intention of the respondent to get the delivery of project, delayed, to the allottees. It is also pertinent to mention here that due to orders also passed by the Environment Pollution (Prevention & Control)

Authority, the construction was/has been stopped for a considerable period day due to high rise in Pollution in Delhi NCR.

XIV. That the enactment of Real Estate (Regulation and Development) Act, 2016 is to provide housing facilities with modern development infrastructure and amenities to the allottees and to protect the interest of allottees in the real estate market sector. The main intension of the respondent is just to complete the project within stipulated time submitted before the HARERA authority. According to the terms of the builder buyer agreement also it is mentioned that all the amount of delay possession will be completely paid/adjusted to the complainant at the time final settlement on slab of offer of possession. The project is ongoing project and construction is going on. It is pertinent to note that occupation certificate for tower B and C has already been obtained and occupation certificate for tower D has already been applied.

XV. That the respondent further submitted that the Central Government has also decided to help bonafide builders to complete the stalled projects which are not constructed due to scarcity of funds. The Central Government announced Rs.25,000 Crore to help the bonafide builders

for completing the stalled/ unconstructed projects and deliver the homes to the homebuyers. It is submitted that the respondent/ promoter, being a bonafide builder, has also applied for realty stress funds for its Gurgaon based projects.

- XVI. That compounding all these extraneous considerations, the Hon'ble Supreme Court vide order dated 04.11.2019, imposed a blanket stay on all construction activity in the Delhi- NCR region. It would be apposite to note that the 'Hues' project of the respondent was under the ambit of the stay order, and accordingly, there was next to no construction activity for a considerable period. It is pertinent to note that similar stay orders have been passed during winter period in the preceding years as well, i.e. 2017-2018 and 2018-2019. Further, a complete ban on construction activity at site invariably results in a long-term halt in construction activities. As with a complete ban the concerned labor was let off and they traveled to their native villages or look for work in other states, the resumption of work at site became a slow process and a steady pace of construction as realized after long period of time.
- XVII. The respondent has further submitted that graded response action plan targeting key sources of pollution

has been implemented during the winters of 2017-18 and 2018-19, These short-term measures during smog episodes include shutting down power plant, industrial units, ban on construction, ban on brick kilns, action on waste burning and construction, mechanized cleaning of road dust, etc. This also includes limited application of odd and even scheme.

XVIII. That the pandemic of covid-19 has had devastating effect on the world-wide economy. However, unlike the agricultural and tertiary sector, the industrial sector has been severally hit by the pandemic. The real estate sector is primarily dependent on its labour force and consequentially the speed of construction. Due to government-imposed lockdowns, there has been a complete stoppage on all construction activities in the NCR Area till July 2020. In fact, the entire labour force employed by the respondent were forced to return to their hometowns, leaving a severe paucity of labour. Till date, there is shortage of labour, and as such the respondent has not been able to employ the requisite labour necessary for completion of its projects. The Hon'ble Supreme Court in the seminal case of **Gajendra Sharma v. UOI & Ors, as well Credai MCHI & Anr. V. UOI & Ors**, has taken cognizance of the devastating conditions

of the real estate sector, and has directed the UOI to come up with a comprehensive sector specific policy for the real estate sector. According to Notification no. **9/3-2020 HARERA/GGM (Admn) dated 26.5.2020**, passed by this hon'ble authority, registration certificate date upto 6 months has been extended by invoking clause of force majeure due to spread of corona-virus pandemic in Nation, which is beyond the control of respondent.

- XIX. The respondent has further submitted that the authority vide its Order dated 26.05.2020 had acknowledged the covid-19 as a force majeure event and had granted extension of six months period to ongoing projects. Furthermore, it is of utmost importance to point out that vide notification dated 28.05.2020, the Ministry of Housing and Urban Affairs has allowed an extension of 9 months vis-à-vis all licenses, approvals, end completion dates of housing projects under construction which were expiring post 25.03.2020 in light of the force majeure nature of the covid pandemic that has severely disrupted the workings of the real estate industry. That the pandemic is clearly a "Force Majeure" event, which automatically extends the timeline for handing over of possession of the apartment.

7. Copies of all the relevant documents 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

8. The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as per provisions of section 11(4)(a) of the Act leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

F. Findings on the objections raised by the respondent

F. I. Objection regarding the project being delayed because of force majeure circumstances and contending to invoke the force majeure clause.

9. From the bare reading of the possession clause of the buyer developer agreement, it becomes very clear that the possession of the apartment was to be delivered by **May 2018**. The respondent in its contention pleaded the force majeure clause on the ground of Covid- 19. The High Court of Delhi in case no. *O.M.P (I) (COMM.) No. 88/2020 & I.As. 3696-3697/2020 title as M/S HALLIBURTON OFFSHORE SERVICES INC VS VEDANTA LIMITED & ANR. 29.05.2020* held that the past non-performance of the Contractor cannot be condoned due to the COVID-19 lockdown in March 2020 in India. The



Contractor was in breach since September 2019. Opportunities were given to the Contractor to cure the same repeatedly. Despite the same, the Contractor could not complete the Project. The outbreak of a pandemic cannot be used as an excuse for non-performance of a contract for which the deadlines were much before the outbreak itself. Now, this means that the respondent/promoter has to complete the construction of the apartment/building by May 2018. It is clearly mentioned by the respondent/promoter for the same project, in complaint no. 4140 of 2020 (on page no. 39 of the reply) that only 85% of the physical progress has been completed in the project. The respondent/promoter has not given any reasonable explanation as to why the construction of the project is being delayed and why the possession has not been offered to the complainant/allottee by the promised/committed time. The lockdown due to pandemic- 19 in the country began on 25.03.2020. So the contention of the respondent/promoter to invoke the force majeure clause is to be rejected as it is a well settled law that ***"No one can take benefit out of his own wrong"***. Moreover there is nothing on the record to show that the project is near completion, or the developer applied for obtaining occupation certificate. Rather it is evident from its submissions that the project is complete upto 42% and it may take some more time to get occupation certificate. Thus, in

such a situation, the plea with regard to force majeure on ground of Covid- 19 is not sustainable.

G. Findings on the relief sought by the complainants.

Relief sought by the complainants:

a) To pay interest @ 15% per annum on the delayed possession starting from 2013 till date from the respective dates of deposits by the complainants to the builder company as specified in section 18 of the Act.

10. 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.”*

11. Clause E (1) of the flat buyer agreement (in short, agreement) provides for handing over of possession and is reproduced below: -

E. Possession of Unit

*1. The possession of the allotted unit shall be given to the Allottee(s) by the company by **MAY 2018**. However, this period can be extended due to unforeseen circumstances for a further grace period of 6 months to cover any unforeseen circumstances. The possession period clause is subject to timely payment by the Allottee(s) and the Allottee(s) agrees to abide by the same in this regard.”*

12. The authority has gone through the possession clause of the agreement and observes that this is a matter very rare in nature where builder has specifically mentioned the date of handing over possession rather than specifying period from some specific happening of an event such as signing of buyer developer agreement, commencement of construction, approval of building plan etc. This is a welcome step, and the authority appreciates such firm commitment by the promoter regarding handing over of possession but subject to observations of the authority given below.
13. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to timely payment and all kinds of terms and conditions of this agreement and application, and the complainant not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in 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. The

incorporation of such clause in the buyer developer agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

14. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the apartment by 31.05.2018 and further provided in agreement that promoter shall be entitled to a grace period of 6 months for unforeseen circumstances and subject to timely payment by the allottee. The respondent has not mentioned any grounds/ circumstances on the happening of which he would become entitled for the said extension of period. As per statement of payment received dated 02.08.2020 clearly shows that the complainants have fulfilled the terms and condition of the schedule of payment and buyer's agreement and there is no document available on record to show the allottees are in default w.r.t timely payments. As per buyer agreement the construction of the project is to be completed by May 2018 which is not completed till date. It may be stated that asking for the extension of time in completing the construction is not a statutory right nor has it been provided in the rules.

Accordingly, this grace period of 6 months cannot be allowed to the promoter at this stage.

15. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges at the rate of 15% p.a. 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.

16. 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.

17. Taking the case from another angle, the complainant-allottee was entitled to the delayed possession charges/interest only at the rate of Rs.5/- per sq. ft. per month as per relevant clauses of the buyer's agreement for the period of such delay; whereas the promoter was entitled to interest @ 24% per annum compounded at the time of every succeeding installment for the delayed payments. The functions of the authority are to safeguard the interest of the aggrieved person, may be the allottee or the promoter. The rights of the parties are to be balanced and must be equitable. The promoter cannot be allowed to take undue advantage of his dominate position and to exploit the needs of the home buyers. This authority is duty bound to take into consideration the legislative intent i.e., to protect the interest of the consumers/allottees in the real estate sector. The clauses of the buyer's agreement entered into between the parties are one-sided, unfair and unreasonable with respect to the grant of interest for delayed possession. There are various other clauses in the buyer's agreement which give sweeping powers to the promoter to cancel the allotment and forfeit the amount paid. Thus, the terms and conditions of the buyer's agreement are ex-facie one-sided, unfair, and unreasonable, and the same shall constitute the unfair trade practice on the part of the

promoter. These types of discriminatory terms and conditions of the buyer's agreement will not be final and binding.

18. 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., 18.08.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

19. 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;"

20. 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.

(b). To direct the respondent to issue valid offer of possession after obtaining occupation certificate.

21. **Validity of intimation of pre possession:** At this stage, the authority would express its views regarding the concept of 'valid offer of possession'. It is necessary to clarify this concept because after valid and lawful offer of possession the liability of promoter for delayed offer of possession comes to an end. On the other hand, if the possession is not valid and lawful, liability of promoter continues till a valid offer is made and the allottees remains entitled to receive interest for the delay caused in handing over valid possession. The authority after detailed consideration of the matter has arrived at the conclusion that a valid offer of possession must have following components:

22. **Possession must be offered after obtaining occupation certificate-** The subject unit after its completion should have received occupation certificate from the department concerned certifying that all basic infrastructural facilities have been laid and are operational. Such infrastructural facilities include water supply, sewerage system, storm water drainage, electricity supply, roads, and street lighting.

23. **The subject unit should be in habitable condition-** The test of habitability is that the allottee should be able to live in the subject unit within 30 days of the offer of possession after carrying out basic cleaning works and getting electricity, water, and sewer connections etc from the relevant authorities. In a habitable unit all the common facilities like lifts, stairs, lobbies, etc should be functional or capable of being made functional within 30 days after completing prescribed formalities. The authority is further of the view that minor defects like little gaps in the windows or minor cracks in some of the tiles, or chipping plaster or chipping paint at some places or improper functioning of drawers of kitchen or cupboards etc. are minor defects which do not render unit uninhabitable. Such minor defects can be rectified later at the cost of the developers. The allottees should accept possession of the subject unit with such minor defects under protest. This authority will award suitable relief for rectification of minor defects after taking over of possession under protest.

However, if the subject unit is not habitable at all because the plastering work is yet to be done, flooring works is yet to be done, common services like lift etc. are non-operational, infrastructural facilities are non-operational then the subject unit shall be deemed as uninhabitable and offer of possession

of an uninhabitable unit would not be considered a legally valid offer of possession.

24. **Possession should not be accompanied by unreasonable additional demands-** In several cases, additional demands are made and sent along with the offer of possession. Such additional demands could be unreasonable which puts heavy burden upon the allottees. An offer accompanied with unreasonable demands beyond the scope of provisions of agreement should be termed as invalid offer of possession. Unreasonable demands itself would make an offer unsustainable in the eyes of law. The authority is of the view that if respondent has raised additional demands, the allottees should accept possession under protest.
25. The authority observes that the respondent/builder has not yet obtained occupation certificate of the project in which the allotted unit of the complainant is located. So, without getting occupation certificate, the builder/respondent is not competent to issue any intimation regarding prepossession. It is well settled that for a valid offer of possession there are three pre-requisites as detailed earlier. Hence, the intimation regarding prepossession offered by respondent promoter on 12.04.2020 is not a valid or lawful offer of possession.
26. On consideration of the circumstances, the documents, submissions made by the parties and based on the findings of

the authority regarding contravention as per provisions of rule 28(2), the Authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of clause E (1) of the agreement executed between the parties on 26.10.2017, the possession of the subject apartment was to be delivered within stipulated time i.e., by 31.05.2018. 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 31.05.2018. The respondent has failed to handover possession of the subject apartment till date of this order. Accordingly, it is the failure of the respondent/ promoter to fulfil its obligations and responsibilities as per the agreement to hand over the possession within the stipulated period. The authority is of the considered view that there is delay on the part of the respondent to offer of possession of the allotted unit to the complainant as per the terms and conditions of the buyer developer agreement dated 26.10.2017 executed between the parties. Further no OC/part OC has been granted to the project. Hence, this project is to be treated as on-going project and the provisions of the Act shall be applicable equally to the builder as well as allottee.

27. 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 respondent is established. As such the complainants are

entitled to delay possession charges at rate of the prescribed interest @ 9.30% p.a. w.e.f. 31.05.2018 till the handing over of possession as per provisions of section 18(1) of the Act read with rule 15 of the Rules.

H. Directions of the authority

28. 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):

- i. The respondent is directed to pay interest at the prescribed rate of 9.30% p.a. for every month of delay from the due date of possession i.e. 31.05.2018 till the handing over of possession of the allotted unit after obtaining the occupation certificate from the competent authority.
- ii. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period;
- iii. The arrears of such interest accrued from 31.05.2018 till the date of order by the authority shall be paid by the promoter to the allottees within a period of 90 days from date of this order and interest for every month of delay shall be paid by the promoter to the allottees before 10th of the subsequent month as per rule 16(2) of the rules.

- iv. The rate of interest chargeable from the allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same rate of interest which the 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.
- v. The respondent shall not charge anything from the complainants which is not the part of the buyer developer agreement. The respondent is debarred from claiming holding charges from the complainants/allottees at any point of time even after being part of apartment buyer's agreement as per law settled by hon'ble Supreme Court in civil appeal no. 3864-3889/2020 decided on 14.12.2020.
29. Complaint stands disposed of.
30. File be consigned to registry.

(Samir Kumar)

Member

Haryana Real Estate Regulatory Authority, Gurugram

(Vijay Kumar Goyal)

Member

Dated: 18.08.2021

Judgement uploaded on 15.10.2021