

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

Complaint no.:	419 of 2019
First date of hearing:	09.07.2019
Date of decision:	05.07.2022

Rattan Chugh

R/o H No. D-6, Uniworld City, Sector-30, Gurugram-
122001

Complainant

Versus

1. M/s BPTP Ltd.

Office address: M-11, 1st Floor, middle circle,
Connaught place, New delhi-110001

2. M/s Anjali Promoters & Developers Pvt. Ltd.

Office address: 7, Barakhamba Road, New Delhi-
110001

Respondents

CORAM:

Dr. K. K. Khandelwal
Shri Vijay Kumar Goyal

**Chairman
Member**

APPEARANCE:

Shri. Sukhbir Yadav (Advocate)

Shri. Venkat Rao (Advocate)

**Complainant
Respondents**

ORDER

1. The present complaint dated 26.11.2019 has been filed by the complainant/allottee 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 complainant, 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	"CENTRA ONE", Sector-61, Gurugram
2.	Project area	3.675 acres
3.	Nature of the project	Commercial Complex
4.	DTCP license no. and validity status	277 of 2007 dated 17.12.2007 valid up to 16.12.2019
5.	Name of licensee	Saixpo Overseas Pvt. Ltd.
6.	RERA registration details	Not Registered
7.	Unit no.	014-1409 [annexure R4, pg. 50 of reply]
8.	Unit measuring	1000 sq. ft. [annexure R4, pg. 50 of reply]
9.	Revised unit area as per offer of possession	1087 sq. ft. [pg. 93 of complaint]
10.	Date of execution of flat buyer agreement	10.12.2008 [annexure P7, pg. 47 of complaint]
11.	Possession clause	Clause 2.1 <i>The possession of the said Premises shall be endeavoured to be delivered to the Intending Purchaser by 31st December 2011, however, subject to clause 9 herein and strict adherence to the terms and conditions of this Agreement by the Intending Purchaser. The intending seller shall give notice of possession to the intending purchaser with regard to the date of handing over of possession, and in</i>



		<p><i>the event the intending purchaser fails to accept and take the possession of the said premises on such date specified in the notice to the intending purchaser shall be deemed to be custodian of the said premises from the date indicated in the notice of possession and the said premises shall remain at the risk and cost of the intending purchaser.</i></p> <p><i>2.2 The intending purchaser shall only be entitled to the possession of the said premises after making full payment of the consideration and other charges due and payable. Under no circumstances shall the possession of the said premises be given to the intending purchaser unless all the payments in full, along with interest due, if any, have been made by the intending purchaser to the intending seller. However, subject to full payment of consideration along with interest by the intending purchaser, if the intending seller fails to deliver the possession of the said premises to the intending purchaser by 30th June 2012, however, subject to clause 9 herein and adherence to the terms and condition of this agreement by the intending Purchaser, then the intending seller shall be liable to pay penalty to the intending purchaser @ Rs.15/- per sq. ft. per month up till the date of handing over of said premise by giving appropriate notice to the intending purchaser in this regard. If the intending seller has applied to DTCP/any other competent authority for issuance of occupation and/or completion certificate by 30th April 2012 and the delay, if any, in making offer of possession by 30th June 2012 is attributable to any delay on part of DTCP/ competent authority, then the Intending Seller shall not be required to pay any penalty under this clause.</i></p> <p><i>(Emphasis supplied)</i> <i>[annexure P7, pg. 54 of complaint]</i></p>
12.	Due date of possession	<p>30.06.2012</p> <p>[Note: Grace period included]</p>

13.	Basic Sale consideration as per BBA dated 10.12.2008	₹ 57,75,000/- [pg. 50 of complaint]
14.	Total sale consideration as per statement of account annexed with offer of possession dated 29.11.2018	₹ 80,52,952 /- [Pg. 93 of complaint]
15.	Amount paid by the complainant as per statement of account annexed with offer of possession dated 29.11.2018	₹ 66,42,175/- [pg. 93 of complaint]
16.	Delay in handing over possession till the date of offer of possession plus two months i.e., 29.01.2019	6 year 6 months 30 days
17.	Occupation certificate	09.10.2018
18.	Offer of possession	29.11.2018 [In respect of unit no. 015-1509 measuring 1087 sq. ft. and increase in area of unit by 87 sq. ft] [annexure P18, pg. 91 of complaint]

B. Facts of the complaint

3. The complainant has pleaded the following facts:

- a. That on 26.10.2006, complainant booked an office space admeasuring 1000 sq. ft. bearing office no. 014-1409 in BPTP Centra One, Sector - 61, Gurugram and paid Rs. 11,55,000/- as booking amount along with a pre-printed application form. The office was purchased under the time link payment plan for sale consideration of Rs. 63,76,000/-.



- b. That on 02.01.2007, respondent no. 1 raised a demand of Rs.8,66,250/-. The complainant paid the said demand on 02.01.2007 vide cheque no. 173625 drawn on standard chartered bank and respondent(s) issued payment receipt on 02.02.2007.
- c. That on 21.12.2007, respondent no. 2 sent a letter informing that the company was shortly going to allot the office space in the aforesaid project in the early next year to the customer who make the payment of 10% of the basic price as agreed as per payment schedule on or before 30th December, 2007...", and raised the demand of Rs. 5,77,500/- which was paid by complainant on 08.01.2008 vide cheque no. 697722 drawn on standard chartered bank. It is pertinent to mention here that complainant had already paid 31% of total cost i.e., Rs. 20,21,250/- by 02.01.2007.
- d. That on 10.06.2008, respondent no. 2 issued an allotment letter conforming office no. 014-1409, measuring 1000 sq. ft. in project Centra One at sector-61, Gurgaon. Respondent no. 2 called Rs. 8,89,750/- against extra charges for EDC & IDC, PLC and car parking and the complainant paid the said demand on 23.06.2008 vide cheque no. 052264 drawn on HSBC Bank. Respondent no. 2 issued payment receipt on 25.06.2008.
- e. That on 01.09.2008, respondent no. 2 raised a demand of Rs. 4,33,125/- which was paid by complainant on 12.09.2008 vide cheque no. 167848 drawn on HSBC Bank.
- f. That on 10.12.2008, a pre-printed office buyer agreement was executed between complaint and respondent no. 2. As per clause no. 2.1 of office buyer agreement, respondents have to give the possession of office space "by 31 December, 2011".



- g. That on 15.05.2009, respondent no.2 sends a letter to complainant informing 10% timely payment discount on called BSP with every upcoming instalment. Further, one would get an additional discount of 10% on net inflow of uncalled BSP in case, he decides to opt for pre/ upfront payment. To strengthen commitment for timely delivery of the project, enhancing the compensation on delayed delivery by 100% i.e., Rs. 30/- per sq. ft. per month from Rs. 15/- per sq. ft. per month.
- h. That on 12.05.2010, respondent no. 2 raised a demand of Rs. 4,33,125/- on construction stage "start of raft". Complainant paid the said demand on 25.05.2010 vide cheque no. 273830 drawn on HSBC Bank and respondent no. 2 issued a payment receipt on 27.05.2010.
- i. That on 17.09.2013, respondent no. 2 send a statement of account of subject office space, which shows that till date, respondent(s) called Rs. 65,94,464/- i.e., more than 95% of total sale consideration and complainant had paid Rs. 65,73,634/-. Further, first-time, respondent no. 2 showed are interest dues of Rs. 20,830/- which was neither demanded nor informed to complainant.
- j. That on 06.12.2016, on demand of respondent no. 2, complainant paid VAT of Rs. 68,541/-. That the main grievance of the complainant in the complaint is that in spite of having paid more than 95% of the actual amount of office spaces and ready and willing to pay the remaining amount, the respondent(s) asking the unjustified and unfair and non-agreed amount to deliver the possession of office space.



C. Relief sought by the complainant:

4. The complainant has sought following reliefs:

- a. Direct the respondents to handover the possession of office space to the allottee immediately, complete in all respects and execute all required documents for transferring/conveying the ownership of the respective office space.
- b. Direct the respondents to pay interest at the prescribed rate for every month of delay from due date of possession till the handing over of the possession, on the amount paid by the complainant.
- c. Direct the respondents to refund the VAT amount of Rs.86,541/-
- d. Refrain the respondents from raising the demand of GST.
- e. Refrain the respondents from raising demand of electrification charges.
- f. Refrain the respondents from raising demand of interest amounting to Rs.20,830/- as the demands have been paid by the complainant on time.
- g. Refrain the respondents from raising demand of firefighting charges of Rs.85,873/-.
- h. Refrain the respondents from raising the demand of cost escalation.
- i. Refrain the respondents from giving effect to the unfair clauses unilaterally incorporated in the office space buyer's agreement.
- j. Direct the respondents to complete and seek necessary governmental clearances regarding infrastructural and other facilities including road, water, sewerage, electricity, environmental etc. before handing over the physical possession of office space.

5. On the date of hearing, the authority explained to the respondents/promoters about the contravention as alleged to have

been committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent

6. The respondents have contested the complaint on the following grounds:

- a. That the project 'Centra One' is a Greenfield project, located at Sector 61, Gurgaon. All the customers including the complainant was well informed and conscious of the fact that timely payment of all the demands was of essence to the contract. Majority of customers opted for construction linked payment plan after clearly understanding that and agreed upon to tender the payment as per the construction milestones. It is pertinent to mention here that, given the choice of payment plan and terms of the agreement, all the customers including the complainant specifically understood that a default in tendering timely payment by significant number of customers, would delay the construction activity. It is a matter of fact and record that the space/unit holders as a group have defaulted in making timely payments which has caused major set-back to the development work.
- b. That in the 1st year (FY 07) demands amounting to Rs.20.84 Crores were raised by the respondent in accordance with the payment plans chosen by customers, and only Rs.15.83 Crores was paid by them. Over 43% customers defaulted in making timely payment in FY 2007, and percentage of defaulting customers swelled to 56%, 40% and 68% in the FY 09, 10 and 11 respectively.
- c. It is submitted that the complainant has approached this hon'ble authority for redressal of his alleged grievances with unclean hands,



i.e., by not disclosing material facts pertaining to the case at hand and also, by distorting and/or misrepresenting the actual factual situation with regard to several aspects. It is further submitted that the hon'ble apex court in plethora of decisions has laid down strictly, that a party approaching the court for any relief, must come with clean hands, without concealment and/or misrepresentation of material facts, as the same amounts to fraud not only against the respondents but also against the court and in such situation, the complaint is liable to be dismissed at the threshold without any further adjudication.

- d. That the complainant has concealed and misrepresented from this hon'ble authority that the complainant on 26.10.2006 approached the respondents through his broker namely 'Yash Realtors for booking a commercial space in the project developed by the respondents at Faridabad, thereby tendered a cheque amounting to Rs. 11,55,000/- towards booking amount. The complainant voluntarily and willingly again approached the respondents and further desired to surrender/cancel the booking made in the project at Faridabad. The respondents with an intent to secure booking rights of the complainant, cancelled the said booking the complainant after conducting due diligence and out of his own volition desired to seek allotment in another project developed by the respondents at Gurgaon. Thereby, the complainant submitted fresh application form and thus, already deposited amount was transferred/adjusted towards new booking/allotment.
- e. That the complainant has concealed from this hon'ble authority that vide clause 9 of the application form which was further reiterated

vide clause 6.3 of the executed SBA, that the complainant agreed and accepted to deposit charges towards electrification and STP (E STP) as and when demanded by the respondents. The demand towards E_STP was placed upfront and made known to the complainant on two occasions, while submitting application form and while executing SBA.

- f. That the complainant has also concealed from this hon'ble authority that vide clause 8 of the application form which was further reiterated vide clause 1.1 and clause 6.1 of the SBA, that the complainant has agreed and accepted to deposit charges demanded towards 'any other statutory demand/charges even if it is retrospective in nature.
- g. That the complainant has concealed from this hon'ble authority. That with the motive to encourage the complainant to make payment of the dues within the stipulated time, the respondents also gave additional incentive in the form of timely payment discount (TPD) to the complainant and in fact, till date, the complainant has availed TPD of Rs.2,06,214.31/-.
- h. That the respondents after issuance of OOP letter dated 29.11.2018, as a goodwill gesture have granted a special credit amounting to Rs.8,15,250/- towards unit in question.
- i. Thus, it is further evident that the customers as a group defaulted in making timely payments, which obviously had a rippling effect on the development of the project and hence, the possession timelines also stood diluted accordingly. Further, in view of the same, the complainant is not liable to demand any delay penalty when he himself has hugely defaulted in making timely payment. It is further



submitted that in case, the complainant wants to withdraw the booking of the unit in question, the same shall be governed by the duly agreed clauses of the agreement executed between both the parties.

j. It is however pertinent to point out that the construction of the project as well as the unit in question is complete. The respondents have received occupation certificate on 09.10.2018 and in accordance with which they vide letter dated 29.11.2018 have already offered possession letter to the complainants thereby requesting him to clear the outstanding dues and complete the documentation in order to initiate the process of physical handover of possession of the unit in question. As a goodwill gesture, the respondents further after issuance of OOP letter, has also granted special credit discount amounting to Rs. 8,15,250/- to the complainant with regard to the said unit.

7. Copies of all the documents have been filed and placed on record. The authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents.

E. Jurisdiction of the authority

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

E.I. Territorial jurisdiction

9. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the

project in question is situated within the planning area of Gurugram District, therefore this authority has complete territorial jurisdiction to deal with the present complaint.

E.II. Subject matter jurisdiction

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

F. Findings on the objections raised by the respondent

F.I. Objection raised by the respondent regarding force majeure conditions.

11. The respondents have submitted the following contentions to be taken into note by the authority for granting grace period on account of force majeure:

- a. That the complainant is the allottee of a shop bearing no. 15-1509 in the commercial project of the respondent company, Centra One, situated in Gurugram, Haryana. The complainant in the present complaint is inter alia seeking interest on account of delay in handing over possession. The project, Centra One, is a business complex situated in Gurugram's sector 61, spread over an area of 3.675 acres. The said commercial complex has been developed by M/s Anjali Promoters Pvt. Ltd. in collaboration with M/s Saiexpo Overseas Pvt. Ltd. and M/s Countrywide Promoters Pvt. Ltd (collectively referred to as 'Company'). Subsequently, Department of Town and Country Planning, Haryana ("DTCP") has issued a license bearing no. 277 of 2007 to M/s Countrywide Promoters Pvt. Ltd. for developing a commercial complex on the said land.



- b. That the timeline for possession as per the space buyers agreement, was proposed to be by 31st December, 2011 with a further grace period of 6 months. Thus, possession of the unit in question was proposed to be handed over by 30th June, 2012. It is further submitted that the said timeline for possession was subject to force majeure and timely payment of installments by the complainant.
- c. That it is pertinent to point out that both the parties as per the application form duly agreed that the respondent shall not be held responsible or liable for any failure or delay in performing any of its obligations or undertakings as provided for in the agreement, if such performance is prevented, delayed or hindered by delay on part of or intervention of statutory authorities like DTCP or the local authorities or any other cause not within the reasonable control of the Respondent. In such cases, the period in question shall automatically stand extended for the period of disruption caused by such operation, occurrence or continuation of force majeure circumstance(s).
- d. The possession timelines for the said project were subject to force majeure circumstances and timely payment of called installments by the allottees. "Force Majeure", a French term equivalent to "Vis majeure", in Latin, means "superior force". A force majeure clause is defined under the Black's Law Dictionary as 'A contractual provision allocating the risk if performance becomes impossible or impracticable, especially as a result of an event or effect that the parties could not have anticipated or controlled.
- e. That delay, if any, in handing over of possession of the units of the said project is due to reasons beyond the control of the company.

In this regard it is pertinent to point out that on 29.05.2008, the company applied for grant of approval of building plans from the DTCP.

- f. That on 21.07.2008, in the meeting of the building plan approval committee, the committee members concurred with the report of Superintending Engineer (HQ), HUDA and STP, Gurgaon who had reported that the building plans were in order. The said members also took note of the report of the STP (E&V)'s observation on the building plans. The members stated that the said observations were "minor in nature" and hence approved the building plans subject to corrections.
- g. That DTCP vide letter dated 30.07.2008 approved the building plans of the company subject to certain rectification of deficiencies. There were in total 3 deficiencies which were asked to be corrected by the company, namely, NOC from AAI to be submitted, covered area not correct and lastly fire safety measures were not provided.
- h. That in compliance with the directions issued by DTCP vide office memo no. ZP-345/6351 dated 30.07.2008, the company submitted revised building plans on 27.08.2008 vide letter dated 25.08.2008. It is pertinent to point out that since there were no further objections conveyed to the company for the release of the building plans it was assumed that the building plans would be released automatically. Since no communication was received by the company for almost 5 months, the company on its own volition enquired the reasons for delay in release of the building plans by DTCP. To its astonishment, it came to the company's knowledge that the same was being withheld by DTCP on account of EDC dues.



However, no formal communication qua the same was received by the company. Nonetheless, the company on 15.01.2009 and 16.01.2009 requested DTCP to release its building plans while submitting an undertaking to clear the EDC dues within a specified time period. It is pertinent to point out that there were no provisions in the Haryana Development and Regulation of Urban Areas Act, 1975 or the Haryana Development and Regulation of Urban Areas Rules, 1976 or any law prevalent at that time which permitted DTCP to withhold release of a building plan on account of dues towards EDC.

- i. That DTCP on 27.02.2009 after a lapse of almost six months from the date of submission of the revised building plans, conveyed the company to clear EDC/IDC dues while clearly overlooking the undertakings given by the company.
- j. That it is stated that the company, on 03.08.2010 deposited full EDC/IDC with the department. It is pertinent to mention herein that in terms of the license granted and the conditional approval of the building plans, the company had started developing the project. That to its surprise, the company received a notice by DTCP dated 19.03.2013 directing the company to deposit composition charges of Rs.7,37,15,792/- on account of alleged unauthorized construction of over an area of 34238.64 sq. mtr. The said demand was questioned by the company officials in various meetings with DTCP officials. Various representations were made by the company on 04.09.2013, 22.10.2013, 11.11.2013, 02.12.2013, 14.03.2014, 15.04.2014, 07.07.2014, 13.11.2014, 09.02.2015, 07.04.2015. The



company in its representation dated 05.06.2015 pointed out all the illegalities in the demand of composition charges of Rs.7.37 crores.

k. That instead of clarifying the issue, DTCP further issued a demand letter on 31.12.2015 directing the company to deposit Rs. 7.37 crores as composition charges, Rs. 54,72,889 as labour cess and Rs. 55,282 on account of administrative charges. That the company succumbed to the undue pressure and on 13.01.2016 deposited Rs. 7.37 crores with DTCP as composition charges and further requested for release of its building plans. The company on 13.01.2016 further deposited an amount of Rs.41,68,171/- towards the balance labour cess.

l. That even after clearing the dues of EDC/IDC and payment of composition charges, building plan was not released by DTCP, instead, the company was asked to apply for sanction of building plan again as per the new format. The same was duly done by the company on 16.06.2017. Further, the company, on completion of construction applied for grant of occupation certificate on 29.07.2017. That the company on the very next day i.e., 25.10.2017 replied to the DTCP justifying the concern while submitting the building plan again for approval. In the meantime, the company also paid composition charges to the tune of Rs.43,63,127/- for regularization of construction of the project.

m. That, finally on 12.01.2018 the building plan was approved for the Centra One, post approval of the same, the company on 21.05.2018, in continuation to its application dated 31.07.2017, again requested DTCP for grant of occupation certificate for its project. It is stated that occupation certificate was duly granted by DTCP on



- 09.10.2018. Thus, even after having paid the entire EDC dues in the year 2010 the building plans for the project in question was not released by DTCP. It is reiterated that release/approval of building plan at that point in time was not linked with payment of EDC.
- n. It is pertinent to mention that in 2013 the company received a surprise demand of Rs.7.37 crores for composition towards unauthorized construction without considering the fact that construction at the project site was carried out by the company on the basis of approval of building plan in the meeting of the building plan approval committee on 21.07.2008. Even after payment of the composition charges, the building plan was not released by DTCP instead, the company was asked to apply for sanction of building plan again as per the new format. The same was duly done by the company on 16.06.2017. However, it is after almost a lapse of 10 years from the date of first application that the building plan was finally approved on 12.01.2018. Thus, the circumstances as mentioned hereinabove falls squarely into the definition and applicability of the concept of 'force majeure'.
- o. That in addition to the above, the project also got delayed due to a complete ban on extraction of ground water for construction by the Central Ground Water Board. On 13.08.2011, the Central Ground Water Board declared the entire Gurgaon district as 'notified area' which in turn led to restriction on abstraction of ground water only for drinking / domestic use. Hence, the developer/company had to use only treated water for construction and/or to buy water for construction.

- p. That the *Hon'ble Supreme Court recently in Puri Constructions Pvt. Ltd. Vs. Dr. Viresh Arora (Civil Appeal No. 3072 of 2020)* on 3rd September 2020 while allowing the appeal preferred by the Developer company against an order passed by the Ld. NCDRC directed the Ld. Commission to decide afresh on the matter in issue while taking into consideration the force majeure circumstances pleaded by the developer.
- q. The Hon'ble Supreme Court conceded with the submissions made by the Developer Company that though the NCDRC noted that the developer pleaded force majeure on the ground that
- (i) the construction of the flats could not proceed due to a stay granted by the National Green Tribunal on construction during the winter months; and
 - (ii) demonetization affected the real estate industry resulting in delays in completion, the submission has not been dealt with
- r. The second submission which was urged on behalf of the developer was that in similar other cases, the NCDRC has condoned the delay of the nature involved in the present case in handing over possession, having regard to the quantum of delay involved.
- s. Thus, delay, if any, in handing over possession to allottees of Centra One has been due to reasons beyond control of the company and the same need to be taken into consideration by RERA in so awarding delay possession compensation while also giving the company an extension of 10 years so as to complete the project by 2018-19.
12. As far as this issue is concerned the authority the authority has already settled this issue in complaint bearing no. **1567 of 2019** titled as ***Shruti Chopra & anr. V/s Anjali Promoters & Developers Pvt. Ltd.*** wherein



the authority is of the considered view that if there is lapse on the part of competent authority in granting the required sanctions within reasonable time and that the respondent was not at fault in fulfilling the conditions of obtaining required approvals then the respondent should approach the competent authority for getting this time period i.e., 31.12.2011 till 19.11.2018 be declared as "zero time period" for computing delay in completing the project. However, for the time being, the authority is not considering this time period as zero period and the respondent is liable for the delay in handing over possession as per provisions of the Act.

G. Findings on the relief sought by the complainant

G.I. DPC and possession.

13. In the present complaint, the complainant intends to continue with the project and is seeking delayed possession charges interest on the amount paid. Clause 2.1 & 2.2 of the buyer's agreement (in short, agreement) provides for handing over of possession and is reproduced below: -

"2.1 The possession of the said Premises shall be endeavored to be delivered to the Intending Purchaser by 31st December 2011, however, subject to clause 9 herein and strict adherence to the terms and conditions of this Agreement by the Intending Purchaser. The intending seller shall give notice of possession to the intending purchaser with regard to the date of handing over of possession, and in the event the intending purchaser fails to accept and take the possession of the said premises on such date specified in the notice to the intending purchaser shall be deemed to be custodian of the said premises from the date indicated in the notice of possession and the said premises shall remain at the risk and cost of the intending purchaser.

2.2 The intending purchaser shall only be entitled to the possession of the said premises after making full payment of the consideration and other charges due and payable. Under no circumstances shall the possession of the said premises be given to the intending purchaser unless all the payments in full, along with interest due, if any, have been made by the intending purchaser to the intending seller.

However, subject to full payment of consideration along with interest by the intending purchaser, if the intending seller fails to deliver the possession of the said premises to the intending purchaser by 30th June 2012, however, subject to clause 9 herein and adherence to the terms and condition of this agreement by the intending Purchaser, then the intending seller shall be liable to pay penalty to the intending purchaser @ Rs.15/- per sq. ft. per month up till the date of handing over of said premise by giving appropriate notice to the intending purchaser in this regard. If the intending seller has applied to DTCP/any other competent authority for issuance of occupation and/or completion certificate by 30th April 2012 and the delay, if any, in making offer of possession by 30th June 2012 is attributable to any delay on part of DTCP/ competent authority, then the Intending Seller shall not be required to pay any penalty under this clause."

14. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and application, and the complainant not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favor of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the flat buyer agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.



15. **Admissibility of delay possession charges at prescribed rate of interest:** Proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

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

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

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

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. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., **05.07.2022** is 7.50%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.50%.
18. The definition of term 'interest' as defined under section 2(z a) 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:

"(z a) "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;"

19. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., **9.50%** by the respondent/promoter which is the same as is being granted to the complainant in case of delayed possession charges.
20. On consideration of the documents available on record and submissions made regarding contravention of provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 2.1 of the buyer's agreement executed between the parties on 10.12.2008, the possession of the subject apartment was to be delivered by 31.12.2011. As far as grace period is concerned, the same is allowed being unqualified. The respondents have offered the possession of the subject unit on 29.11.2018. Accordingly, it is the failure of the respondent/promoter to fulfil obligations and responsibilities as per the agreement to hand over the possession within the stipulated period.
21. 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 09.10.2018. The respondent offered the possession of the unit in question to the complainant only on 29.11.2018. So, it can be said that the complainant came to know



about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the complainant should be given 2 months' time from the date of offer of possession. This 2 month of reasonable time is being given to the complainant keeping in mind that even after intimation of possession, practically one has to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit, but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e., 30.06.2012 till the expiry of 2 months from the date of offer of possession (29.11.2018) which comes out to be 29.01.2019.

22. 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 respondents is established. As such, the allottee shall be paid, by the promoters, interest for every month of delay from due date of possession i.e., 30.06.2012 till the date of offer of the possession of the unit plus two months i.e., till 29.01.2019, at prescribed rate i.e., 9.50 % p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules
23. The respondents have already offered the possession of the subject unit on 29.11.2018 after the grant of OC. Therefore, the complainant is directed to take the possession of the subject unit after clearing the instalments due if, any within 15 days from the date of this order.

G. II. Direct the respondents to refund the VAT amount of Rs.86,541/-.

24. The Govt. of Haryana, Excise and Taxation Department vide **notification no. S.O.89/H.A.6/2003/S.60/2014 dated 12.08.2014**

provided a lump-sum scheme in respect of builders/developers which was further amended vide another **notification no. 23/H.A.6/2003/S.60/2015 dated 24.09.2015** according to which the builder/developer can opt for this scheme **w.e.f. 01.04.2014**. Under the above scheme, a developer had an option to pay lump sum tax in lieu of tax payable by him under the Act, by way of lump sum tax calculated at the compounded rate of 1% of entire aggregate amount specified in the agreement or value specified for the purpose of stamp duty, whichever is higher, in respect of the said agreement.

25. The builder/developer opting for this scheme here-in-after shall be referred to as the 'Composition Developer'. **This scheme remained in force till 30.06.2017**. The purpose of the lump sum scheme was to mitigate the hardship being caused in determining the tax liability of the builders/ developers. Again, most of the builders opted/availed the benefit of the scheme. The list of the builders who opted the scheme is also available on the website of Excise and Taxation Department, Haryana. **Thus, the VAT liability for developer/builder opted for this scheme for the period 01.04.2014 to 30.06.2017 comes to 1.05%.**

26. Further, in case any builder/ developer had not opted for any of the above two schemes, then the VAT liability comes to approximately 4-5 percent (maximum). It is noteworthy that the amnesty scheme was available up to 31.03.2014. However, the same was silent on the issue of charging VAT @ 1.05% from the buyers/ prospective buyers whereas in the lump-sum/ composition scheme under rule 49(a) of the HVAT Rules, 2003, it was specifically mentioned that incidence of cost has to be borne by the promoter/ builder/developer only. **Thus, the**



builders/developers who opted for the lump-sum scheme, were not eligible to charge any VAT from the buyers/prospective buyers during the period 01-04-2014 to 30-06-2017. In other words, the developer/builder has to discharge the VAT liability out of their own pocket.

27. The promoter is entitled to charge VAT from the allottee for the period up to 31.03.2014 @ 1.05% (one percent VAT + 5 percent surcharge on VAT) under the amnesty scheme. The promoter shall not charge any VAT from the allottees/prospective buyers during the period 01.04.2014 to 30.06.2017 since the same was to be borne by the promoter-developer only. The respondent-promoters are directed to adjust the said amount, if charged from the allottee with the dues payable by the allottee or refund the amount if no dues are payable by the allottee.

G.III. Refrain the respondents from raising the demand of GST.

28. The authority has decided this issue in the complaint bearing no. **4031 of 2019** titled as **Varun Gupta V/s Emaar MGF Land Ltd.** wherein the authority has held that for the projects where the due date of possession was prior to 01.07.2017 (date of coming into force of GST), the respondent/promoter is not entitled to charge any amount towards GST from the complainant/allottee as the liability of that charge had not become due up to the due date of possession as per the buyer's agreements.
29. In the present complaint, the possession of the subject unit was required to be delivered by 30.06.2012 and the incidence of GST came into operation thereafter on 01.07.2017. No doubt as per clause 1.1 of the builder buyer's agreement, the complainant/allottee has agreed to

pay all the Government charges, rates, tax or taxes of all and any kind by whatsoever name called whether levied now or in future, as the case may be, effective from the date of this agreement. The delay in delivery of possession is the default on the part of the respondent/promoters and the possession was offered on 29.11.2018 by that time the GST had become applicable. But it is settled principle of law that a person cannot take benefit of his own wrong/default. So, the respondent/promoters is not entitled to charge GST from the complainant/allottee as the liability of GST had not become due up to the due date of possession as per the agreements.

G.IV. Refrain the respondents from raising demand of electrification charges.

30. The authority has decided this in the complaint bearing no. **4031 of 2019** titled as **Varun Gupta V/s Emaar MGF Land Ltd.** wherein it has held that the basic sale price of a unit also include electrification as street lighting is an integral part of internal development works and also includes disposal of sewage and sullage, water, fire protection and fire safety requirements, streetlight, electricity supply, transformers, etc. Some of these internal development works have to be done by the promoter.
31. In the considered opinion of this authority, if the allottee has already paid these charges, then it would be unjust for him to pay further charges under the head "electrification charges" despite there being a condition for payment of these charges in the builder buyer's agreement, the allottee should not be made or compelled to pay amount towards electrification charges.

G.V. Refrain the respondents from raising demand of interest amounting to Rs.20,830/- as the demands have been paid by the complainant on time.



32. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period. The rate of interest chargeable from the complainant /allottee by the promoters, in case of default shall be charged at the prescribed rate i.e., 9.50% by the respondent/promoters which is the same rate of interest which they shall be liable to pay the allottee, in case of default i.e., the delay possession charges as per section 2(za) of the Act.

G.VI. Refrain the respondents from raising demand of firefighting charges of Rs.85,873/-.

33. In the instant matter, clause 1.1 para 4 of the BBA dated 10.12.2008 clearly specifies that the firefighting charges will be part of maintenance charges and are not included in the consideration of the unit. But it is evident that after receipt of occupation certificate of the project on 09.10.2018, the respondents have offered the possession of the allotted unit to the complainant on 29.11.2018. While offering possession, they annexed statement of account as annexure "A" wherein demand of Rs.85,873/- on the pretext of firefighting charges as agreed between the parties while executing the buyer's agreement dated 10.12.2008 was raised. So, the demand raised in this regard by the respondents are as per agreement for sale and thus, the respondents are right in charging aforesaid expense.

G.VII. Refrain the respondents from raising the demand of cost escalation.

34. There is neither any clause with respect to cost escalation in the BBA nor there is any mention in the statement of account annexed with the offer of possession under this head. Therefore, this relief stands redundant.

G.VIII. Refrain the respondent from giving effect to the unfair clauses unilaterally incorporated in the office space buyer's agreement.

35. No such unfair and arbitrary clauses are specifically mentioned by the complainant in its complaint therefore, the authority shall not deliberate upon this relief specifically.

G.IX. Direct the respondent to complete and seek necessary governmental clearances regarding infrastructural and other facilities including road, water, sewerage, electricity, environmental etc. before handing over the physical possession of office space.

36. The occupation certificate of the project was received by the respondents on 09.10.2018, and which led to offer of possession of the allotted unit to the complainants vide letter dated 29.11.2018. An occupation certificate of the project is issued only when the competent authority is satisfied that the documents submitted by the builder of the project where the allotted units are located is fit for human habitation. So, if the project is lacking any facility after receipt of occupation certificate, then the matter can be taken up with the competent authority.

H. Directions of the authority

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

- i. The respondent no. 2 is directed to pay interest at the prescribed rate of 9.50% p.a. for every month of delay from the due date of possession i.e., 30.06.2012 till the date of offer of the possession plus two months i.e., 29.01.2019.
- ii. The arrears of such interest accrued from 30.06.2012 till 29.01.2019 shall be paid by the promoter to the allottee within a period of 90 days from date of this order.



- iii. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
- iv. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.50% by the respondent/promoter which is the same rate of interest which the promoters shall be liable to pay the allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.
- v. The respondent shall not charge anything from the complainant which is not the part of the agreement. However, holding charges shall not be charged by the promoter at any point of time even after being part of agreement as per law settled by Hon'ble supreme court in civil appeal no. 3864-3889/2020.
38. Complaint stands disposed of.
39. File be consigned to registry.

V.I - 3
(Vijay Kumar Goyal)

Member

(Dr. K.K. Khandelwal)

Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 05.07.2022

Judgement Uploaded on 17.08.2022

