

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

Complaint no. : 3001 of 2020
Date of filing complaint : 06.10.2020
Date of decision : 25.07.2022

1.	Gagan Joshi	Complainants
2.	Lata Joshi R/O: - E/2A, Vrindavan Garden, Pranami Mandir Road, Siliguri, West Bengal-734008	
Versus		
1.	M/s BPTP Limited	Respondents
2.	Country Wide Promoters Regd. Office at: - Z8, ECE House, First Floor, K.G Marg, New Delhi	

CORAM:	
Dr. K.K. Khandelwal	Chairman
Shri Vijay Kumar Goyal	Member
APPEARANCE:	
Shri Sukhbir Yadav	Advocate for the complainants
Sh. Pankaj Chandola	Advocate for the respondent

ORDER

- The present complaint has been filed by the complainant/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of

section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the rules and regulations made there under or to the allottees 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:

CR/3001/2020

S. No.	Heads	Description
1.	Name of the project	'Park Mansion Prime', Sector 66, Gurugram, Haryana.
2.	Nature of the project	Group Housing Colony
3.	Project area	11.068 Acre
4.	DTCP license no. and validity status	31 of 2008 dated 18.02.2008 Valid upto 17.02.2020
5.	Name of the license holder	Shyam and 4 others
6.	RERA registration number	Not registered
7.	Date of execution of flat buyer's agreement	21.10.2010 (page no. 59 of complaint)
8.	Unit no.	MA4-1203, Tower-M (on page no. 61 of complaint)
9.	Unit area admeasuring	2764 sq. ft. (on page no. 62 of complaint)

10	Revised unit area	3044 sq. ft. (as per offer of possession on page no. 164 of reply)
11.	Total consideration (Basic sale price)	Rs.1,50,99,622/- (vide statement of accounts of page no. 167 of reply)
12.	Total amount paid by the complainants	Rs. 1,07,63,264/- (vide statement of accounts of page no. 167 of reply)
13	Date of booking	23.04.2010 (on page no. 41 of complaint)
13.	Possession Clause	<p>3.1 Possession Clause</p> <p>Subject to Clause 10 herein or any other circumstances not anticipated and beyond the reasonable control of the Seller/Confirming Party and any restraints/restrictions from any courts/authorities and subject to the Purchaser(s) having complied with all the terms and conditions of this Agreement and not being in default under any of the provisions of this Agreement and having complied with all provisions, formalities, documentation, etc, as prescribed by the Seller/Confirming Party, whether under this Agreement or otherwise,</p>

from time to time, the Seller/Confirming Par Party proposes to hand over the possession of the Flat to the Purchaser(s) within a period of 36 months from the date of booking/registration of the Flat The Purchaser(s) agrees and understands that the Seller/Confirming Party shall be entitled to a grace period of 180 (One Hundred and after the expiry of 36 months, for applying and obtaining the occupation certificate in respect of the and Eighty) days, Colony from the Authority. The Seller / Confirming Party shall give Notice of Possession in writing to the Purchaser with regard to the handing over of possession, whereafter, within 30 days, the Purchaser(s) shall clear all his outstanding dues and complete documentary formalities and take physical possession of the Flat. In case, the Purchaser(s) raises any issue with respect to any demand, the same would not entitle to the Purchaser(s) for an extension of the time for taking over possession of the Flat

13.	Due date of delivery of possession	23.04.2013 (Calculated from the date of booking)
14.	Occupation Certificate	14.02.2020 (on page no. 161 of reply)
15.	Offer of possession	05.03.2020 (on page no. 164 of reply)
16.	Reminder letters	02.04.2020, 06.05.2020, 29.06.2020 and 10.08.2020
17.	Termination letter	14.09.2020
16.	Grace period utilization	In the present case, the promoters are seeking a grace period of 180 days for applying and obtaining the occupation certificate in respect of the colony from the authority. The period of 36 months from the date of booking expired on 23.04.2013. But there is no material on record that during this period, the promoters have applied to any authority for obtaining the necessary approvals with respect to this project. On perusal of the part completion certificate also, it was observed the promoter applied for the issuance of occupation certificate only on 14.02.2020 when the period of 36 months had already expired. So, the promoter cannot claim the benefit of grace period of 180 days. Consequently, the learned authority has rightly determined the due date of possession. Therefore, the grace period is not allowed, and the due date of possession comes out to be 23.04.2013.

B. Facts of the complaint

The complainants have submitted as under: -

3. That the complainants booked a plot in the project BPTP 'Mansions Park Prime' being developed by the respondents in Sector 66 Gurgaon.
4. That on 23.04.2010, the marketing staff of the respondents allured the complainants with the colourful brochure and proposed specification and assured for timely delivery of flat, they booked one 4 BHK flat admeasuring 2764 sq. ft. bearing flat No. MA4-1204 and paid Rs. 7,86,358/- towards the booking amount and signed application form under the construction linked plan for a sale consideration of Rs. 1,09,46,639/-
5. That a flat buyer agreement w.r.t the allotted unit was executed between the parties on 21.10.2010 setting out the terms and conditions of allotment , sale consideration, the dimension of the unit, payment plan and other particulars . the due date for the completion of the project and offer of possession of the allotted unit was fixed as 23.04.2013.
6. That the respondent(s) kept raising the demands as per the stage of construction and the complainants kept paying the demands and till 25.11.2014, they paid Rs. 1,06,55,431/- i.e. more than 97% of total the sale consideration. That on 05.03.2020, the respondent(s) issued a letter of offer of possession of the unit and demanded Rs. 43,36,357/-. The said demand letter contains several unreasonable

demands i.e. Rs. 18,65,972/- under the head "Cost Escalation" and Rs. 2,48,086/- under the head "Electrification and STP Charges". It is pertinent to mention here that as per apartment buyer agreement, Cost of electrification charges+ fire fighting + power back-up charges are Rs. 50/- per sq. ft., hence demand under a different head is completely unreasonable. Moreover, they increased the super area of the flat by 280 sq. ft. without any justification and demanded Rs. 8,38,600/-. It is again highly pertinent to mention here that without prejudice if the super area of the flat is 3044 Sq. ft. then also the total cost of the flat would be Rs. 1,19,84,869/-.

7. That on 09.05.2020, the complainants sent a grievance letter to the respondents regarding excess and arbitrary billing concerning the unit and raised their various major concerns such as Increase in super area, cost escalation charges, electrification and STP charges, VAT and service taxes, GST input credit & interest for delay in delivery but they did not pay any heed towards the just and reasonable concerns of them.
8. It is pertinent to mention here that the respondents send several emails of construction updates, which were not showing the actual status of the project. Moreover, the respondents kept boast about the project status but never informed about the firm date of possession. It is again highly pertinent to mention here that till today (more than 9 years from the date of booking), civil and machinal work is not yet complete.

9. That the work on other amenities, like external, internal MEP has not yet been completed. Now, it more than ten years from the date of booking and even the constructions of towers is not complete, clearly showing the negligence of the builder. As per project site conditions, it seems that the project would take further more than one year complete in all respect, subject the willingness of respondents to complete the project.
10. That in light of the above stated facts and circumstances, the complainants are eligible for payment of interest in terms of section 18 of RERA. The said interest is payable with the offer of possession and ought to have been adjusted with the last demand issued with the offer of possession. The interest is therefore; payable until the date it is actually paid to the complainants.

C. Relief sought by the complainants:

- (i) Direct the respondent to pay interest at the prescribed rate for every month of delay from the due date of possession till the handing over the possession, on the paid amount.
- (ii) To get an order in their favour by directing the respondent party to provide super area calculation
- (iii) Direct the respondent parties to provide the correct calculation of cost escalation along with a certificate from cost accountant/ architect.
- (iv) Direct the respondent to provide actual cost of STP, without mark-up.

- (v) Direct the respondent to provide GST input credit details.
- (vi) Direct the respondent to give possession without any undertaking/indemnity.
- (vii) Direct the respondent to refrain the demand of cost escalation
- (viii) Direct the respondent to refrain from giving effect to the unfair clauses unilaterally incorporated in the flat buyer agreement.
- (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 the flats.
- (x) Direct the respondent to handover the possession immediately , not later than six months from the judgement, complete in all respects, and execute all required documents for transferring/conveying the ownership of the respective flats.
- (xi) Direct the respondent to handover the club house and car parking.
- (xii) The respondent party may kindly be directed to provide for third party audit to ascertain/measure accurate areas of the flats and facilities, more particular as to 'super area' and build-up area'

11. On the date of hearing, the authority explained to the respondent/promoters about the contraventions 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 respondents.

The respondents have contested the complaint on the following grounds: -

12. That the complainants have approached this Hon'ble Authority for redressal of 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 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. In this regard, a reference may be made to the following instances which establish concealment /suppression /misrepresentation on the part of the complainant:

- That the complainants have concealed from this Hon'ble Authority that via offer of possession dated 05.03.2020, the respondents had, as a goodwill gesture, provided compensation amounting to Rs. 2,87,122.00/- to them. However, the complainants failed to pay the demand as per the offer of possession. Hence, the respondents were

constrained to issue reminder letters dated 02.04.2020, 06.05.2020, 26.06.2020 and 10.08.2020. Even after repeated reminders, the complainants failed to pay the final demand as per the offer of possession. Thus, a termination letter dated 14.09.2020 was issued by the respondents whereby the allotment of unit in question was terminated due to the default in payments made by the complainants even after repeated reminders.

- That the complainants have concealed from this Hon'ble Authority that with the motive to encourage the complainants to make payment of the dues within the stipulated time, the respondents also gave additional incentive in the form of timely payment discount to them and in fact, till date, they have availed timely payment discount of Rs. 160,323.27/-. The complainants have concealed from this Hon'ble Authority that the respondents at the stage of booking, offered an inaugural discount on basic sale price (BSP) amounting to Rs. 413,909/-. Thus, the net BSP charged from the complainants is less than the original amount of the unit.

From the above, it is very well established, that the complainants have approached this Hon'ble Authority with unclean hands by distorting/ concealing/ misrepresenting the relevant facts pertaining to the case at hand. It is further submitted that the sole intention of the complainants is to unjustly enrich themselves at the expense of the respondents

by filing this frivolous complaint which is nothing but gross abuse of the due process of law. It is further submitted that in light of the law laid down by the Hon'ble Apex Court, the present complaint warrants dismissal without any further adjudication.

13. It is clarified that while offering possession, the respondents vide annexure "E" attached to the offer of possession dated 05.03.2020 duly explained the basis for calculation of the cost escalation. The respondents had considered the cost escalation for the period ending till April 2014, on the basis of Clause 12.11 of the FBA and no further escalation has been charged beyond April 2014. With regard to electrification and STP charges, it is submitted that the parties had agreed as per Clause 2.3 of the duly executed FBA that the complainants shall be liable to pay electrification charges and cost of installing sewerage treatment plant as may be required or as specified by the Authorities.
14. It is submitted that the construction was affected on account of the NGT order prohibiting construction (structural) activity of any kind in the entire NCR by any person, private or government authority. It is submitted that vide its order, NGT placed sudden ban on the entry of diesel trucks more than ten years old and said that no vehicle from outside or within Delhi was permitted to transport any construction material. Since, the construction activity was suddenly stopped, after the lifting

of the ban, it took some time for mobilization of the work by various agencies employed with the respondents.

15. 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 those undisputed documents and submissions made by the parties.
16. Since, common issues with regard to super area, cost escalation, STP charges, electrification charges, taxes viz GST and VAT etc, advance maintenance charges, car parking charges, holding charges, club membership charges, PLC, development location charges and utility connection charges, EDC/IDC charges, fire fighting/power backup charges were involved in this cases and others of this project as well as in other projects developed by the respondents, so vide orders dated 06.07.2021 and 17.08.2021, a committee headed by Sh. Manik Sonawane IAS (retired), Sh. Laxmi Kant Saini CA and Sh. R.K. Singh CTP (retired) was constituted and was asked to submit its report on the above mentioned issues. The representatives of the allottees were also associated with the committee. A report was submitted and the same along with annexures was uploaded on the website of the authority. Both the parties were given an option to file objections to that report if any. The complainants did not file any objection and the respondents/ builders sought time to file the same but did not opt for the same despite time given in this regard.

E. Jurisdiction of the authority

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

F. I Territorial jurisdiction

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

F. II Subject matter jurisdiction

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

Section 11(4)(a)

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

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the

real estate agents under this Act and the rules and regulations made thereunder.

18. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

G. Findings on the objections raised by the respondents.

G-1 Objection regarding jurisdiction of authority w.r.t. buyer's agreement executed prior to coming into force of the Act.

19. The other contention of the respondents is that authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the apartment buyer's agreement executed between the parties and no agreement for sale as referred to under the provisions of the Act or the said rules has been executed inter se parties. The authority is of the view that the Act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. The numerous provisions of the Act save the provisions of the agreements

made between the buyers and sellers. The said contention has been upheld in the landmark judgment of **Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)** decided on 06.12.2017 which provides as under:

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

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

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

"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still

in the process of completion. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."

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

G-II Objections regarding the complaint in breach of agreement for non-invocation of arbitration.

22. The respondents have raised an objection that the complainants have not invoked the arbitration proceedings as per clause 33 of buyer's agreement dated 21.10.2010 which contain a specific provision regard initiation of arbitration proceedings in case of breach of agreement. The following

clause has been incorporated with regard arbitration in the buyer's agreement:

All or any dispute arising out of or touching upon or in relation to the terms of this agreement or its termination, including the interpretation and validity thereof and the respective rights and obligations of the parties shall be settled amicably by mutual discussion failing which the same shall be settled through arbitration. The arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory amendments, modifications thereof for the time being in force. A sole arbitrator, who shall nominated by the Seller/Confirming Party's Managing Director, shall hold the arbitration proceedings at Gurgaon. The Purchaser(s) hereby confirm that he shall have no objection to this appointment of the sole arbitrator by the managing director of the seller, even if the person so appointed, as a sole arbitrator, is an employee or advocate of the Seller/Confirming Party or is otherwise connected to the Seller/Confirming Party and the purchaser(s) confirms that notwithstanding such relationship/connection, the purchaser(s) shall have no doubts as to the independence or impartiality of the said sole arbitrator. The courts at NEW Delhi and Delhi High Court at New Delhi alone shall have the jurisdiction.

23. It is contended on behalf of respondents that as per terms and conditions of the Agreement duly executed between the parties, it was specifically mentioned that in the eventuality of any dispute, the same shall be settled in arbitration proceedings. However, the Authority is of the view that its jurisdiction cannot be fettered by the existence of any arbitration clause in Buyer's agreement. It may be noted that section 79 of the Act, 2016 bars the jurisdiction of civil courts about any matter falling within the purview of the Authority or the Appellate Tribunal. Thus, as the intention to render such disputes a non-arbitrable seems to be clear. Also, Section 88 of the Act says that the provisions of this Act shall be in addition to and no in derogation of the provision of any other law for the

time being in force. Further, the Authority puts reliance on catena of judgments of the Hon'ble Supreme Court, particularly in **National Seeks Corporation Limited Vs M. Madhusudhan Reddy & Anr(2012) 2 CC 506, Emmar MGF Land and Ors Vs Aftab Singh and Ors in Civil Appeal 23512/23513 of 2017 decided on 10.12.2018** and wherein it was held that the remedies provided under the Consumer Protection Act, 1986 are in addition to and not in derogation of other laws in force. It was also held that under Article 141 of the Constitution of India that the law declared the Supreme Court shall be binding on all the courts within the territory of India. So, in view of law laid down in the above cases, the Authority is bound by the same and cannot refer the parties to arbitration, even if the agreement between the parties had an arbitration clause. Thus, the Authority has no hesitation in holding that it has the jurisdiction to entertain the complaint and the dispute does not require to be referred to arbitration

H. Findings on the relief sought by the complainants.

24. Relief sought by the complainants: The complainants have sought following relief(s):

- i. Direct the respondent to pay interest at the prescribed rate for every month of delay from the due date of possession till the handing over the possession, on the paid amount..
- ii. To get an order in their favour by directing the respondent party to provide super area calculation

- iii. Direct the respondent parties to provide the correct calculation of cost escalation along with a certificate from cost accountant/ architect.
- iv. Direct the respondent to provide actual cost of STP, without mark-up.
- v. Direct the respondent to provide GST input credit details.
- vi. Direct the respondent to give possession without any undertaking/indemnity.
- vii. Direct the respondent to refrain the demand of cost escalation
- viii. Direct the respondent to refrain from giving effect to the unfair clauses unilaterally incorporated in the flat buyer agreement.
- 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 the flats.
- x. Direct the respondent to handover the possession immediately , not later than six months from the judgement, complete in all respects, and execute all required documents for transferring/conveying the ownership of the respective flats.
- xi. Direct the respondent to handover the club house and car parking.
- xii. The respondent party may kindly be directed to provide for third party audit to ascertain/measure accurate areas of the flats and facilities, more particular as to 'super area' and build-up area'

25. The respondents have contended that the complainant have made default in making timely payments as a result thereof, they had to issue reminder letters dated 02.04.2020, 06.05.2020, 29.06.2020 and 10.08.2020 as mentioned above but complainants failed to make the remaining payments. No doubt, a number of reminders for due payments were issued by the respondents to the complainants but cancellation of subject unit was issued only on 14.09.2020. There is nothing on the record to show that the respondents-builder took action against the allottee as per the provision of 11.1 of FBA dated 21.10.2010. It is provided in that provision that in case the allottee fails to make timely payment, then the respondents at sole discretion may terminate the agreement forthwith and forfeit the amount of earnest money and non-refundable amounts and other amounts of such nature. But that was not done despite default in making payment as per the version of respondents, leading to issuance of a number of reminders detailed above. Admittedly, the allottees have paid more than 75% of total sale consideration to the respondents. So, the respondents were bound to return the remaining amount to the complainants after deducting earnest money. Even there is nothing on record to show that after cancelation of the allotted unit and deduction of 10% of the sale price the remaining amount was sent to the complainants by the respondents through any bank instrument Thus, the termination of allotted unit is not sustainable in the eyes of law and the same is hereby ordered to be set aside. The allottees are directed to clear the

outstanding dues at an equitable rate of interest as per section 2(za) of the Act of 2016 and to take the possession of the unit after being offered the same by the respondents. Thus, the respondents are directed to revoke the termination of the allotted unit issued vide letter dated 14.09.2010 after receiving outstanding dues. The complainants shall also further take possession of the allotted unit within 2 months from the date on which the possession is offered by the respondents.

I.I Delay Possession Charges

26. 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."

27. Clause 3 of the flat buyer's agreement provides the time period of handing over possession and the same is reproduced below:

"Clause 3.1 Subject to Clause 10 herein or any other circumstances not anticipated and beyond the reasonable control of the Seller/Confirming Party and any restraints/restrictions from any courts/authorities and subject to the Purchaser(s) having complied with all the

terms and conditions of this Agreement and not being in default under any of the provisions of this Agreement and having complied with all provisions, formalities, documentation, etc, as prescribed by the Seller/Confirming Party, whether under this Agreement or otherwise, from time to time, the Seller/Confirming Party proposes to hand over the possession of the Flat to the Purchaser(s) within a period of 36 months from the date of booking/registration of the Flat. The Purchaser(s) agrees and understands that the Seller/Confirming Party shall be entitled to a grace period of 180 (One Hundred and Eighty) days, Colony from the Authority. The Seller / Confirming Party shall give Notice of Possession in writing to the Purchaser with regard to the handing over of possession, whereafter, within 30 days, the Purchaser(s) shall clear all his outstanding dues and complete documentary formalities and take physical possession of the Flat. In case, the Purchaser(s) raises any issue with respect to any demand, the same would not entitle to the Purchaser(s) for an extension of the time for taking over possession of the Flat.

28. The authority has gone through the possession clause of the agreement. At the outset, it is relevant to comment on the pre-set possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and the complainants not being in default under any provision of this agreement and in compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions is not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and

the commitment date for handing over possession loses its meaning.

29. The buyer's agreement is a pivotal legal document which should ensure that the rights and liabilities of both builder/promoter and buyer/allottee are protected candidly. The flat agreement lays down the terms that govern the sale of different kinds of properties like residentials, commercials etc. between the builder and the buyer. It is in the interest of both the parties to have a well-drafted buyer's agreement which would thereby protect the rights of both the builder and buyer in the unfortunate event of a dispute that may arise. It should be drafted in the simple and unambiguous language which may be understood by a common man with an ordinary educational background. It should contain a provision with regard to stipulated time of delivery of possession of the unit, plot or building, as the case may be and the right of the buyer/allottee in case of delay in possession of the unit.
30. **Admissibility of grace period:** The promoters proposed to hand over the possession of the said unit within period of 36 months from the date of booking i.e 23.04.2010. The period of 36 months from the date of booking /registration of flat expired on 23.04.2013. So, the due date for handing over possession of the allotted unit comes to 23.04.2013. However, there is no material on record that during the period of 180 days ,the period sought as grace period, the promoters have applied to any authority for obtaining the necessary approvals

with respect to this project. On perusal of the occupation certificate also, it is observed the promoters applied for the issuance of occupation certificate only on 17.05.2017 when the period of 36 months had already expired. So, the promoters cannot claim the benefit of grace period of 180 days. Consequently, the authority has rightly determined the due date of possession. Thus, the grace period is not allowed, and the due date of possession comes out to be 23.04.2013.

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

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

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

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

32. 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.

33. 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., 25.07.2022 is 7.80%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.80%.

34. 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;"

35. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 9.80% by the respondents/promoters which is the same as is being granted to them in case of delayed possession charges.

I-II Cost Escalation

36. The buyers agreement duly accepted and signed between the parties, the cost escalation is to be borne by the allottees. The committee while deliberating on this issue took into consideration the estimated cost of construction at the time of booking/agreement, absorption of 5% inflation by the developer, measurement of cost inflation based on CPWD Index and inflation benefits to be provided for the period up to the date of actual offer of possession or up to the date of committed date of offer of possession. So, taking into consideration all these factors and a certificate of chartered accountant, the committee allowed escalation cost of Rs. 309 per square feet instead of Rs. 723 as raised by the developer. The view taken by the committee in this regard is a reasonable one and the authority agrees to the same and allow the developer to charge cost of escalation of the allotted unit at Rs. 309 per square feet instead of Rs. 723 per sq. ft. from the allottees.

I-III Car Parking Charges

37. The complainants had already agreed to pay Car Parking Charges as per clause 8 of the Booking Form and clause 2.1 (e) of the duly executed flat buyer's agreement. The committee observes that the allottees are to pay INR 3, 00,000/- for car parking slot. However, the term car parking charges has been used. This gives an impression as allotted on lease basis, whereas the car parking slot is an inseparable part of the

apartment meant for exclusive use of its owner for parking. Hence, the respondents are to be directed to include the term car parking slot along with its cost in the conveyance deed to be executed with the allottees of the project.

I-IV Club membership

38. It was contended by the complainants that the respondents have charged a sum of Rs. 1,00,000/- as club membership charges in the letter for offer of possession despite the fact that the construction of the club has not been completed till date. On the other hand, respondents denied that the construction of club has not finished. The respondents have been raising demands as per their whims and fancies. The authority concurs with the recommendations made by the committee and holds that the club membership charges (CMC) shall be optional. The respondents shall refund the CMC if any request is received from the allottees. Provided that if an allottee opts out to avail this facility and later approaches the respondents for membership of the club, then he shall pay the club membership charges as may be decided by the respondents and shall not invoke the terms of flat buyer's agreement that limits CMC to Rs.1,00,000/-.

I-V GST

39. The allottees have also challenged the authority of the respondent-builders to raised demand by way of goods and services tax. It is pleaded by the complainants that while issuing offer of possession, the respondents had raised a

demand of Rs.4,86,256/- under the head GST which is illegal and is not liable to repeat to be paid by him.

40. Though the version of respondents is otherwise, but this issue was also referred to the committee and who after due deliberations and hearing the affected parties, submitted a report to the authority wherein it was observed that in case of late delivery by the promoter, only the difference between post GST and pre-GST should be borne by the promoter. The promoter is entitled to charge from the allottees the applicable combined rate of VAT and service tax. Though, specifically the committee did not deal with that issue but observed that its finding would be applicable as given under the heading **other projects**. The relevant extract of the report representing the amount to be refunded is as follows:

Particulars	Spacio	Park Generation	Astire Garden	Terra	Amstoria	Other Project
HVAT (after 31.03.2014) (A)	4.51%	4.51%	4.51%	4.51%	4.51%	4.51%
Service Tax (B)	4.50%	4.50%	4.50%	4.50%	4.50%	4.50%
Pre-GST Rate (C = A+B)	9.01%	9.01%	9.01%	9.01%	9.01%	9.01%
GST Rate (D)	12.00%	12.00%	12.00%	12.00%	12.00%	12.00%
Incremental Rate E= (D-C)	2.99%	2.99%	2.99%	2.99%	2.99%	2.99%

Less: Anti-Profiteering benefit passed if any till March 2019 (F)	2.63%	2.46%	0.00%	2.58%	0.00%	0.00%
Amount to be refund Only if greater than (E- F) (G)	0.36%	0.53%	2.99%	0.41%	2.99%	2.99%

41. In this present complaint, the due date of possession is prior to the date of coming into force of GST i.e. 01.07.2017. In view of the above, the authority is of the view that the respondent-promoters are not entitled to charge GST from the complainant/allottees as the liability of GST had not become due up to the due date of possession as per the flat buyer's agreement. The authority concurs with the findings of the committee on this issue and holds that the difference between post GST and pre-GST shall be borne by the promoter

G-III STP Charges

42. While issuing of offer of possession of the allotted unit, the respondent-builders demanded a sum of Rs. 2,48,086/- under the head electrification and STP charges. It is pleaded on behalf of complainants that they are not liable to pay that amount and demand for the same has been raised illegally. But the plea advanced in this regard is devoid of merit. The authority concurs with the recommendations made by the committee

and Rs. 81.50 per sq ft. would be charged towards electrification & STP charges from the allottees.

G-IV Increased Super Area

43. It is contended that the respondents have increased the super area of the subject unit vide letter of offer of possession dated 05.03.2020 without giving any formal intimation, by taking any written consent from the allottees. The said fact has not been denied by the respondents in their reply. On perusal of record, the super area of the unit was 2764 sq. ft. as per the flat buyer's agreement and it was increased by 280 sq. ft. vide letter of offer of possession, resulting in total super area of 3044 sq. ft. The authority holds that the super area (saleable area) of the flat in this project has been increased and as found by the committee, the saleable area/specific area factor stands reduced from 1.352 to 1.338. Accordingly, the super area of the unit would be revised and reduced by the respondents and they shall pass on this benefit to the complainant/allottee(s) as per the recommendations of the committee.

H. Directions of the authority

44. 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 termination of allotted unit is not sustainable in the eyes of law and the same is hereby ordered to be set aside

- The respondents are directed to revoke the termination of the allotted unit issued vide letter dated 14.09.2020 after receiving outstanding dues.
- ii. The respondents are directed to pay interest at the prescribed rate of 9.80% p.a. for every month of delay from the due date of possession i.e. 23.04.2013 till the date of offer of possession i.e. 05.03.2020 plus two months i.e. 05.05.2020 to the complainant(s) as per section 19(10) of the Act.
 - iii. The arrears of such interest accrued from due date of possession till its admissibility as per direction (i) above shall be paid by the promoters to the allottees within a period of 90 days from date of this order as per rule 16(2) of the rules.
 - iv. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period against their unit to be paid by the respondents.
 - v. The rate of interest chargeable from the allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.80% by the respondents/promoters which is the same rate of interest which the promoters shall be liable to pay the allottees, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.
 - vi. **Club membership charges:** The authority in concurrence with the recommendations of committee decides that the club membership charges (CMC) shall be

optional. The respondents shall refund the CMC if any request is received from the allottees. Provided that if an allottee opts out to avail this facility and later approaches the respondents for membership of the club, then he shall pay the club membership charges as may be decided by the respondents and shall not invoke the terms of flat buyer's agreement that limits CMC to Rs.1,00,000/-

- vii. **STP Charges and Electrification Charges:** The authority concurs with the recommendations made by the committee that Rs. 81.50 per sq. ft. would be charged towards electrification & STP charges from the allottees
- viii. **GST** The due date of possession of the allotted unit is prior to the date of coming into force of GST i.e. 01.07.2017. The respondents/promoters are not entitled to charge GST from the complainant/allottees as the liability of GST had not become due up to the due date of possession as per the flat buyer's agreements. The authority concurs with the findings of the committee on this issue and holds that the difference between post GST and pre-GST shall be borne by the promoters. The promoters are entitled to charge from the allottees the applicable combined rate of VAT and service tax as detailed in para 40 of this order
- ix. **Cost escalation:** The authority is of the view that escalation cost would be charged only @ 309 per sq. ft. instead of Rs. 723 per sq. ft. as demanded by the developer

- x. **Increase in area:** The authority holds that the super area (saleable area) of the flat in this project has been increased and as found by the committee, the saleable area/specific area factor stand reduced from 1.352 to 1.338 . Accordingly, the super area of the unit be revised and be reduced by the respondents and they shall pass on this benefit to the complainant/allottee(s) as per the recommendations of the committee.
- xi. The respondents shall not charge anything from the complainant(s) which is not part of the flat buyer's agreement save and except in the manner as prescribed in this order. The holding charges shall not be recoverable from the allottees even being part of builder buyer agreement as per the directions of the Hon'ble Supreme Court in civil appeal nos. 3864-3899/2020 decided on 14.12.2020 (supra).
45. The complaint stand disposed off.
46. File be consigned to registry.


(V.K Goyal)
Member


(Dr. K.K Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram
Date: 25.07.2022