BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 6152 of 2019
First date of hearing: 07.02.2020
Date of decision : 21.07.2022

1. Subhash Chander
2. Ankit Bansal

Both RR/o: House no. 1200, Sector -1, Rohtak, Haryana **Complainants**

Versus

M/s Shree Vardhman Buildprop Pvt. Ltd.
Regd. office: 3rd floor, Indra Prakash Building, 21-Barakhamba Road, New Delhi-110001 **Respondent**

CORAM:
Dr. KK Khandelwal **Chairman**
Shri Vijay Kumar Goyal **Member**

APPEARANCE:
Smt. Priyanka Agarwal Advocate for the complainants
Shri Gaurav Rawat Advocates for the respondent

ORDER

1. The present complaint dated 10.12.2019 has been filed by the complainants/allottees in Form CRA under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations,

responsibilities and functions to the allottee as per the agreement for sale executed inter-se them.

A. Unit and Project related details:

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

S. No.	Heads	Information
1.	Project name and location	"Shree Vardhman Mantra", Sector-67, Gurugram.
2.	Project area	11.262 acres
3.	Nature of the project	Group housing colony under the policy of low cost/affordable housing
4.	a) DTCP license no.	69 of 2010 dated 11.09.2010
	b) Validity status	Valid till 30.04.2022
	c) Name of the licensee	DSS Infrastructure Private Limited
	a) RERA registered/not registered	**Not Registered**
5.	Unit no.	B-007 on ground floor, tower- B [As per page no. 24 of the complaint]
6.	Unit measuring	520 sq. ft. [As per page no. 24 of the complaint]
7.	Date of execution of flat buyer's agreement	11.11.2011 [As per page no. 13 of the reply]
8.	Payment plan	Time linked payment plan [As per page no. 41 of the complaint]
9.	Total consideration	Rs. 19,80,175/- [As per page no. 19 of complaint]
10.	Total amount paid by the complainants	Rs. 17,22,218/- [As per page no. 19 of complaint]

11.	Possession clause	**9.(a)** *The construction of the flat is likely to be completed* ***within a period of thirty six(36) months from the date of start of foundation of the particular tower in which the flat is located with a grace period of six(6) months,*** *on receipt of sanction of the building plans/revised building plans and approvals of all concerned authorities including the fire service department, civil aviation department, traffic department, pollution control department as may be required for commencing and carrying of the construction subject to force majeure restrains or restrictions from any courts/ authorities, non-availability of building materials or dispute with contractors/workforce etc. and circumstances beyond the control of company and subject to timely payments by the flat buyer(s).*
12.	Date of start of foundation	Cannot be ascertained
13.	Due date of delivery of possession	11.11.2014 (Calculated from the date of execution of agreement i.e., 11.11.2011) **(Grace period is not allowed)**
14.	Zero period	**2 years, 10 months, 29 days** i.e., from 01.11.2017 to 30.09.2020 (Vide order of DTCP, Haryana Chandigarh dated 03.03.2021)
15.	Occupation certificate	23.07.2021 [As per affidavit dated 23.09.2021 on behalf of the respondent by its A.R]

16.	Offer of Possession	Not offered
17.	Delay in handing over the possession (after deducting zero period) till the date of decision i.e., 27.01.2022	**3 years 11 months 20 days** [**2 years 11 months 21 days** (from 11.11.2014 to 01.11.2017) plus 11 **months 29 days** (from 30.09.2020 to 27.01.2022)] **Note:** Separate calculation of period of delay is done due to the declaration of 'zero period' w.e.f. 01.11.2017 to 30.09.2020 as per the order dated 03.03.2021 of DTCP, Haryana Chandigarh.

B. Facts of the complaint

3. That the complainants approached the respondent for booking of a flat admeasuring 520 sq. ft. carpet area, 2 BHK in "Shree Vardhman Mantra" Sector- 67, Gurugram and paid a booking amount of Rs. 400000/-.

4. That the complainants were allotted the flat bearing no. B-007 on ground floor of tower B admeasuring 520 sq. ft. carpet area, 2 BHK in the project of the respondent.

5. That the respondent to dupe the complainants in their nefarious net even executed a buyer's agreement signed between complainants and M/S Shree Vardhman Buildprop Pvt. Ltd. on dated 11.11.2011, just to create a false belief that the project would be completed in time bound manner, but in the garb of this agreement persistently raised demands due to which they were able to extract huge amount of money from the complainants. On the same

day, the builder also executed an addendum to buyer's agreement to develop a understanding among the parties that seller would always maintain minimum 30 days gap between the demands to be raised for payments of consideration and charges.

6. That the total cost of the said flat was Rs. 19,80,175/- (Basic Sale Price Rs. 1600000/-) and out of this, a sum of Rs. 17,22,218/- has been paid by the complainants in time bound manner.

7. That it is pertinent to mention here that according to the statement, the complainants have paid a sum of Rs 17,22,218/-to the respondent till 2017 and only last installment remains as per the statement. The said instalment was demanded by the respondent without doing appropriate work on the said project, which is illegal and arbitrary.

8. That as per clause 9(a) of buyer's agreement, the respondent was liable to hand over the possession of a said unit before 10.05.2015 (as the date of start of foundation cannot be ascertained, thus calculated from the date of execution of the agreement). As per construction status and absence of basic amenities, the respondent would take more time get the unit completed.

9. That the complainants have paid all the installments in timely manner and deposited Rs. 17,22,218/-. The respondent to extract money from allottees devised a payment plan under which respondent linked more than 25 %

amount of total paid against as an advance whereas rest 70% amount linked with time linked payment plan only.

10. That the respondent embossed delay penalty on delay installments at the rate of 24 % p.a. and extracted amount of Rs 74,636.65/- which is illegal, arbitrary and unilateral.

11. That respondent is recovering money from innocent buyers under threats and diverted such funds in its other projects and does not construct the flats for which the payments were received. Moreover, the developer has very cunningly inserted a clause 9(c) of the agreement to pay meagre amount of Rs. 5/- per sq. ft. per month on delayed in delivery of possession of the flat whereas as per clause 5(b), the developer charges, interest @ 24% p.a. on any delay in payments by the buyers.

12. That as the delivery of the apartment was due on May 2015 i.e.,which was prior to the coming into of force of the GST Act, 2016 i.e., 01.07.2017, it is submitted that the complainants are not liable to bear additional financial burden of GST due to the delay caused by the respondent. Therefore, the respondent is liable to pay the GST on behalf of the complainants at the time of last instalment when demanded by builder.

13. That the respondent has indulged in all kinds of tricks and blatant illegality in booking and drafting of buyer's agreement with a malicious & fraudulent intention and caused deliberate & intentional mental as well as physical

harassment to the complainants. The dreams, hopes and expectations of the complainants and the family has been rudely and cruelly dashed to the ground.

14. That keeping in view the snail-paced work at the construction site and half-hearted promises of the respondent, trick of extract more and more money from complainants pocket seems bleak and that the same is evident of the irresponsible and desultory attitude of the respondent. Consequently, injuring the interest of the buyers including the complainants who has spent entire hard-earned savings in order to buy their home and stand at a crossroads to nowhere to go. The inconsistent and lethargic manner, in which the respondent conducted its business and the lack of commitment in completing the project on time, has caused the complainants great financial and emotional loss.

C. Relief sought by the complainants:

15. The complainants have sought following relief:

    i. Direct the respondent to quash the one-sided clause mentioned in the FBA.

    ii. Direct the respondent to pay delay interest on the amount paid by the complainants amount to Rs. 17,22,218/- from May 2015 till actual handing over of possession at the rate of 24%.

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

D. Reply by the respondent:

17. That the complainants have sought reliefs under section 18 of the Act of 2016, but the said section is not applicable in the facts of the present case and as such the complaint deserves to be dismissed. It is submitted that the operation of section 18 is not retrospective in nature and the same cannot be applied to the transactions that were entered prior to the RERA Act came into force. The parties while entering into the said transaction could not have possibly taken into account the provisions of the Act and as such cannot be burdened with the obligations created therein. In the present case also the, flat buyer agreement (hereinafter "FBA") was executed much prior to the date when the Act of 2016 came into force and as such section 18 of the Act cannot be made applicable to the present case. Any other interpretation of the Act would not only be against the settled principles of law as to retrospective operation of law but will also lead to an anomalous situation and would render the very purpose of the Act nugatory. The expression "agreement to sell" occurring in section 18 (1)(a) of the Act covers within its folds only those agreements to sell that have been executed after Act came into force and the FBA executed in the present case is not covered under the

said expression, the same having been executed prior to the date the Act came into force.

18. That the complainants cannot be allowed to seek any relief which is in conflict with the said terms and conditions of the FBA. The complainants signed the agreement only after having read and understood the terms and conditions mentioned therein and without any duress, pressure or protest and as such the terms thereof are fully binding upon the complainants. The said agreement was executed much prior to RERA Act coming into force and the same has not been declared and cannot possibly be declared as void or not binding between the parties.

19. That That the FBA executed in the present case did not provide any definite date or time frame for handing over of possession of the apartment to the complainants and on this ground alone, the refund and/or compensation and/or interest cannot be sought under RERA Act. Even the Clause 9 (a) of the FBA merely provided a tentative/estimated period for completion of construction of the flat and filing of application for occupancy certificate with the concerned authority. After completion of construction, the respondent was to make an application for grant of Occupation Certificate (OC) and after obtaining the OC, the possession of the flat was to be handed over.

20. That the residential group housing project in question i.e., "Shree Vardhman Mantra" Sector-67, Gurugram, Haryana (hereinafter said "Project") has been developed by the respondent on a piece of land measuring 11.262 acres

situated at village Badshahpur, Sector-67, Gurugram, Haryana under a license No. 69 of 2010 dated 11.09.2010 granted by the Town and Country Planning Department, Haryana under the provisions of the Haryana Development and Regularization of Urban Areas Act, 1975 under the Policy of Govt. of Haryana for low cost/affordable housing project. The license has been granted to M/s DSS Infrastructure Limited and the respondent company has developed/constructed the project under an agreement with the licensee company.

21. That the construction of the phase of the project wherein the apartment of the complainants is situated has already been completed and awaiting the grant of occupancy certificate from the Director General, Town and Country Planning (DTCP), Haryana. The occupancy certificate has already been applied by the licensee vide application dated 27.07.2017 to concerned authority for grant of occupancy certificate. However, till date, no occupancy certificate has been granted by the concerned authority despite follow up. The grant of such occupancy certificate is a condition precedent for occupation of the flats and habitation of the project.

22. That in fact the office of the Director General, Town and Country Planning, Haryana is unnecessarily withholding grant of occupation certificate and other requisite approvals for the project, despite having approved and obtained concurrence of the Government of Haryana. It is submitted that in terms of order dated 01.11.2017 passed by the Hon'ble Supreme Court of

India in Civil Appeal No.8977/2014 titled as ***Jai Narayan @ Jai Bhagwan & Ors. vs. State of Haryana & Ors.***, the CBI is conducting an inquiry in release of land from acquisition in Sectors 58 to 63 and Sector 65 to 67 in Gurugram, Haryana. Due to pendency of the said inquiry, the office of the DTCP, Haryana has withheld, albeit illegally, grant of approvals and sanctions in the projects falling within the said sectors. Aggrieved by the situation created by the illegal and unreasonable stand of the DTCP, a CWP No. 22750 of 2019 titled as ***DSS Infrastructure Private Limited Vs Government of Haryana*** and others had been filed by the licensee before the Hon'ble High Court of Punjab and Haryana for a direction to the office of DTCP to grant requisite approvals to the project in question. The said CWP has been disposed of vide order dated 06.03.2020 in view of the statements made by DTCP that they were ready to grant OC and other approvals. However, despite the same, the grants of approvals was pending and continuous efforts are being made by the licensee/respondent.

23. That in the meantime, as the flats were ready, various allottees of the project in question approached the respondent with the request for handover of temporary possession of their respective flats to enable them to carry out the fit out/furnishing work in their flats. Considering the difficulties being faced by the allottees due to non-grant of occupancy certificate by the department in question, the respondent acceded to their request and handed

over possession of their respective flats to them for the limited purpose of fit out.

24. That after various efforts and representations made by the respondent before the DTCP, the occupation certificate regarding the project in question was issued on 23.07.2021.

25. That in the FBA, no definite period for handing over possession of the apartment was given or agreed to. In the FBA, only a tentative period for completion of the construction of the flat in question and for submission of application for grant of occupancy certificate was given. Thus, the period indicated in clause 9(a) of FBA was the period within which the respondent was to complete the construction and was to apply for the grant of occupancy certificate to the concerned authority. It is clearly recorded in the said clause itself that the date of submitting an application for grant of occupancy certificate would be treated as the date of completion of flat for the purpose of the said clause. Since the possession could be handed over to the complainants after grant of OC by DTCP Haryana and the time likely to be taken by DTCP in grant of OC was unknown to the parties, hence the period/date for handing over possession of the apartment was not agreed and not given in the FBA. The respondent completed the construction of the flat in question and applied for grant of occupancy certificate on 27.07.2017 and as such the said date is to be taken as the date for completion of construction of the flat in question. It is submitted without prejudice and in

view of the said fact, the respondent cannot otherwise be held liable to pay any interest or compensation to the complainants for the period beyond 27.07.2017.

26. That as per the FBA, the tentative period given for completion of construction was to be counted from the date of receipt of sanction of the building plans/revised plans and all other approvals and commencement of construction on receipt of such approvals. The last approval being consent to establish was granted by the Haryana State Pollution Control Board on 01.05.2015 and as such, the period mentioned in clause 9(a) would start counting from 02.05.2015 only.

27. It is submitted, without prejudice to the fact that the respondent completed the construction of the flat within the time indicated in the FBA, that even as per clause 9(a), the obligation of the respondent to complete the construction within the time tentative time frame mentioned in said clause was subject to timely payments of all the installments by the complainants and other allottees of the project. As various allottees and even the complainants failed to make payments of the installments as per the agreed payment plan, the complainants cannot be allowed to seek compensation or interest on the ground that the respondent failed to complete the construction within time given in the said clause. The obligation of the respondent to complete the construction within the time frame mentioned

in FBA was subject to and dependent upon time payment of the installment by the complainants and other allottees.

28. That the tentative period as indicated in FBA for completion of construction was not only subject to force majeure conditions, but also other conditions beyond the control of respondent. The non-grant of OC and other approvals including renewal of license by the DTCP Haryana is beyond the control of the respondent. The DTCP Haryana accorded it's in principal approval and obtained the concurrence from the Government of Haryana on 02.02.2018. It did not grant the pending approvals including the renewal of license and OC due to pendency of a CBI investigation ordered by Hon'ble Supreme Court of India. The said approvals have not been granted so far despite the fact that the state counsel assured to the Hon'ble High Court of Punjab and Haryana to grant approvals/OC as aforesaid. The unprecedented situation created by the Covid-19 pandemic presented yet another force majeure event that brought to halt all activities related to the project including construction of remaining phase, processing of approval files etc. The Ministry of Home Affairs, GOI vide notification dated March 24, 2020, bearing no. 40-3/2020-DM-I(A) recognised that India was threatened with the spread of Covid-19 epidemic and ordered a complete lockdown in the entire country for an initial period of 21 days which started from March 25, 2020. By virtue of various subsequent notifications, the Ministry of Home Affairs, GOI further extended the lockdown from time to time and till date the lockdown has not

been completely lifted. Various state governments, including the Government of Haryana have also enforced several strict measures to prevent the spread of Covid-19 pandemic including imposing curfew, lockdown, stopping all commercial and construction activities. Pursuant to issuance of advisory by the GOI vide office memorandum dated May 13, 2020, regarding extension of registrations of real estate projects under the provisions of the Real Estate (Regulation and Development) Act, 2016 due to 'force majeure', the Haryana Real Estate Regulatory Authority has also extended the registration and completion date by 6 months for all real estate projects whose registration or completion date expired and, or, was supposed to expire on or after March 25, 2020.

29. That in the past few years, the construction activities have also been hit by repeated bans by the courts/authorities to curb air pollution in NCR region. In recent past the Environmental Pollution (Prevention and Control) Authority for NCR ("EPCA") vide its notification bearing No. EPCA-R/2019/L-49 dated 25.10.2019 banned construction activity in NCR during night hours (6pm to 6am) from 26.10.2019 to 30.10.2019 which was later on converted into complete 24 hours ban from 01.11.2019 to 05.11.2019 by EPCA vide its notification No. EPCA-R/2019/L-53 dated 01.11.2019. The Hon'ble Supreme Court of India vide its order dated 04.11.2019 passed in Writ Petition No. 13029/1985 titled as ***"M.C. Mehta vs Union of India"*** completely banned all construction activities in NCR which restriction was

partly modified vide order dated 09.12.2019 and was completely lifted by the Hon'ble Supreme Court vide its order dated 14.02.2020. These bans forced the migrant labourers to return to their native states/villages creating an acute shortage of labourers in NCR region. Due to the said shortage, the construction activities could not resume at full throttle even after lifting of ban by the Hon'ble Supreme Court. Even before the normalcy in construction activity could resume, the world was hit by the 'Covid-19' pandemic. As such, it is submitted without prejudice to the submissions made hereinabove that in the event, this authority comes to the conclusion that the respondent is liable for interest/compensation for the period beyond 27.07.2017, the period consumed in the aforesaid force majeure events or the situations beyond control of respondent has to be excluded.

30. 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 based on these undisputed documents.

E. Jurisdiction of the authority

31. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint.

E. 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.

E. II Subject matter jurisdiction

31. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottees 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 promoter, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.*

32. So, in view of the provisions of the Act of 2016 quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

F. Findings on the objections raised by the respondent:

F. I Objection regarding maintainability of the complaint.

33. The respondent contended that the present complaint filed under section 31 of the Act is not maintainable as it has not violated any provision of the Act.

34. The authority, in the succeeding paras of the order, has observed that the respondent is in contravention of the section 11(4)(a) read with proviso to section 18(1) of the Act by not handing over possession by the due date as per the agreement. Therefore, the complaint is maintainable.

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

35. Another contention of the respondent is that in the present case, the flat buyer's agreement was executed much prior to the date when the Act came into force and as such section 18 of the Act cannot be made applicable to the present case.

36. 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. 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."*

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

> *"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the 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."*

38. 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.

F.III Objection regarding format of the compliant

39. The respondent has further raised contention that the present complaint has not been filed as per the format prescribed under the rules and is liable to be dismissed on this ground alone. There is a prescribed proforma for filing complaint before the authority under section 31 of the Act in form CRA. There are 9 different headings in this form (i) particulars of the complainants have been provided in the complaint (ii) particulars of the respondent- have been provided in the complaint (iii)is regarding jurisdiction of the authority- that has been also mentioned in para 14 of the complaint (iv) facts of the case have been given at page no. 5 to 8 (v)relief sought that has also been given at page 10 of complaint (vi)no interim order has been prayed for (vii) declaration regarding complaint not pending with any other court- has been mentioned in para 15 at page 8 of complaint (viii) particulars of the fees already given on the file (ix)list of enclosures that have already been available on the file. Signatures and verification part are also complete. Although, the complaint should have been strictly filed in proforma CRA but in this complaint all the necessary details as required under CRA have been furnished along with necessary enclosures. Reply has also been filed. At this stage, asking complainants to file complaint in form CRA strictly would serve no purpose and it would not vitiate the proceedings of the authority or can be said to be disturbing/violating any of the established principles of natural justice, rather getting into technicalities will delay justice in the matter. Therefore, the said plea of the respondent w.r.t rejection of complaint on this

ground is also rejected and the authority has decided to proceed with this complaint as such.

F.IV Objection of the respondent w.r.t reasons for the delay in handing over of possession.

40. The respondent submitted that there were various events or the situations beyond the control of the respondent and the same have to be excluded while computing delay in handing over possession and these are as follows.

a. ***The respondent submitted that non-grant of OC and other approvals including renewal of license by the DTCP Haryana is beyond the control of the respondent and the said approvals have not been granted so far despite the fact that the State Counsel assured to the hon'ble High Court of Punjab and Haryana to grant approvals/OC.***

41. As far as the aforesaid reason is concerned, the authority observes that the Hon'ble High Court of Punjab and Haryana vide its order dated 06.03.2020 in CWP-22750-2019 (O&M) has held as under:

> *"Learned State counsel, at the outset, submits that it has been decided to grant occupation certificate to the petitioner subject to fulfillment of other conditions/ formalities and rectification of any deficiency which are pointed out by the authority. He further submits that in case the petitioner makes a representation regarding exclusion of renewal fee and interest on EDC/IDC for the period from 25.07.2017 till date, same shall be considered by respondent no.2 as per law and fresh order shall be passed. Learned State counsel further assures that as soon as the representation is received, necessary steps shall be taken and the entire exercise shall be completed at the earliest, in any case, not later than two months.*
>
> *In view of the above, no further direction is necessary. Present petition is hereby disposed of."*

42. In view of aforesaid order of Hon'ble High Court of Punjab and Haryana, an office order of the DTCP, Haryana, Chandigarh dated 03.03.2021 has been issued. The para 4 of the said order states that "Government has accorded

approval to consider the period i.e., 01.11.2017 to 30.09.2020 as 'Zero Period' where the approvals were withheld by the department within the said period in view of the legal opinion and also gave relaxations as mentioned in para 3". Accordingly, the authority is of the considered view that this period should be excluded while calculating the delay on the part of the respondent to deliver the subject flat.

b. ***Unprecedented situation created by Covid-19 pandemic and lockdown for approx. 6 months starting from 25.03.2020.***

43. The Hon'ble Delhi High Court in case titled as M/s Halliburton Offshore Services Inc. V/S Vedanta Ltd. & Anr. bearing no. O.M.P (I) (Comm.) no. 88/ 2020 and I.As 3696-3697/2020 dated 29.05.2020 has observed that-

> *"69. The past non-performance of the Contractor cannot be condoned due to the COVID-19 lockdown in March 2020 in India. The Contractor was in breach since September 2019. Opportunities were given to the Contractor to cure the same repeatedly. Despite the same, the Contractor could not complete the Project. The outbreak of a pandemic cannot be used as an excuse for non- performance of a contract for which the deadlines were much before the outbreak itself."*

44. In the present complaint also, the respondent was liable to complete the construction of the project in question and handover the possession of the said unit by 11.11.2014. But the respondent is claiming benefit of lockdown which came into effect on 23.03.2020. Therefore, the authority is of the view that outbreak of a pandemic cannot be used as an excuse for non-performance of a contract for which the deadlines were much before the outbreak itself and for the said reason the said time period is not excluded while calculating the delay in handing over possession.

c. ***Order dated 25.10.2019, 01.11.2019 passed by Environmental Pollution (Prevention and Control) Authority (EPCA) banning construction activities in NCR region. Thereafter, order dated 04.11.2019 of hon'ble Supreme Court of India in Writ petition no. 13028/1985 completely banning construction activities in NCR region.***

45. The respondent in the reply has admitted that the construction of the phase of the project wherein the apartment of the complainants is situated has already been completed and the respondent has applied for grant of the occupancy certificate vide application dated 27.07.2017 to DTCP, Haryana. The respondent is trying to mislead the authority by making false or self-contradictory statement. On bare perusal of the reply filed by respondent, it becomes very clear that the construction of the said project was completed on 27.07.2017 as on this date the respondent has applied for grant of OC. Now, the respondent is claiming benefit out of lockdown period, orders dated 25.10.2019 and 01.11.2019 passed by EPCA and order dated 04.11.2019 passed by Hon'ble Supreme Court of India which are subsequent to the date when the respondent has already completed the construction. Therefore, this time period is not excluded while calculating the delay in handing over possession.

G. Findings regarding relief sought by the complainants.

46. **Relief sought by the complainants:**

i. Direct the respondent to quash the one-sided clause mentioned in the FBA.

ii. Direct the respondent to pay delay interest on the amount paid by the complainants amount to Rs. 17,22,218/- from May 2015 till actual handing over of possession at the rate of 24%.

G.I Direct the respondent to quash the one-sided clause mentioned in the FBA.

47. A buyer's agreement is a vital document, that defines rights and obligation of the parties. Thus, it is of utmost important that the agreement must be drafted fairly. Whereas only specific provisions are to be declared void on account of being arbitrary, unjust or unfair. In present case, the complainants have not mentioned any one-sided clause particularly except clause 9(c) and 5(b) of the agreement dealing with the rate of charging delay payment interest and delay in possession. The said relief has been dealt with relief no. 2, as the finding of the one will affect the finding of other.

G.II Direct the respondent to pay delay interest on the amount paid by the complainants amount to Rs. 17,22,218/- from May 2015 till actual handing over of possession at the rate of 24%.

48. In the present complaint, the complainants intend to continue with the project and are seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under:

> ***Section 18: - Return of amount and compensation***
>
> *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*

49. As per clause 9(a) of the flat buyer's agreement dated 11.11.2011 provides for handover of possession and is reproduced below:

> *As per clause 9(a): The Construction of the Flat is likely to be completed within a period of thirty six(36) months from the date of start of foundation of the particular tower in which the Flat is located with a grace period of six(6)*

months, on receipt of sanction of the building plans/revised building plans and approvals of all concerned authorities including the fire service department, civil aviation department, traffic department, pollution control department as may be required for commencing and carrying of the construction subject to force majeure restrains or restrictions from any courts/ authorities, non-availability of building materials or dispute with contractors/workforce etc. and circumstances beyond the control of company and subject to timely payments by the flat buyer(s). No claims by way of damages/compensation shall lie against the Company in case of delay in handing over the possession on account of any of such reasons and the period of construction shall be deemed to be correspondingly extended. The date of submitting application to the concerned authorities for the issue of completion/part completion/occupancy/part occupancy certificate of the Complex shall be treated as the date of completion of the flat for the purpose of this clause/agreement.

50. A flat buyer's agreement is a pivotal legal document which should ensure that the rights and liabilities of both builders/promoter and buyers/allottees are protected candidly. Flat buyer's agreement lays down the terms that govern the sale of different kinds of properties like residentials, commercials etc. between the buyer and builder. It is in the interest of both the parties to have a well-drafted 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 apartment, plot or building, as the case may be and the right of the buyers/allottees in case of delay in possession of the unit.

51. The authority has gone through the possession clause of the agreement and observes that the possession has been subjected to all kinds of terms and conditions of this agreement. The drafting of this clause and incorporation

of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single situation may make the possession clause irrelevant for the purpose of allottee and the committed date for handing over possession loses its meaning. If the said possession clause is read in entirety, the time period of handing over possession is only a tentative period for completion of the construction of the flat in question and the promoter is aiming to extend this time period indefinitely on one eventuality or the other. Moreover, the said clause is an inclusive clause wherein the numerous approvals and terms and conditions have been mentioned for commencement of construction and the said approvals are sole liability of the promoter for which allottees cannot be allowed to suffer. The promoter must have mentioned that completion of which approval forms a part of the last statutory approval, of which the due date of possession is subjected to. It is quite clear that the possession clause is drafted in such a manner that it creates confusion in the mind of a person of normal prudence who reads it. The authority is of the view that it is a wrong trend followed by the promoter from long ago and it is this unethical behaviour and dominant position that needs to be struck down. It is settled proposition of law that one cannot get the advantage of his own fault. The incorporation of such clause in the flat buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottees of their 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.

52. The respondent promoter has proposed to handover the possession of the subject apartment within a period of 36 months from the date of start of foundation of the particular tower in which the flat is located with a grace period of 6 months, on receipt of sanction of the building plans/revised plans and approvals of all concerned authorities including the fire service department, civil aviation department, traffic department, pollution control department as may be required for commencing and carrying of the construction subject to force majeure restrains or restrictions from any courts/ authorities, non-availability of building materials or dispute with contractors/workforce etc. and circumstances beyond the control of company and subject to timely payments by the flat buyer(s).

53. The respondent is claiming that the due date shall be computed from 01.05.2015 i.e., date of grant of Consent to Establish being last approval for commencement of construction. The authority observes that, the respondent has not kept the reasonable balance between his own rights and the rights of the complainants-allottees. The respondent has acted in a pre-determined, preordained, highly discriminatory and arbitrary manner. The unit in question was booked by the complainants and the flat buyer's agreement was executed between the respondent and the complainants on

11.11.2011. It is interesting to note as to how the respondent had collected hard earned money from the complainants without obtaining the necessary approval (Consent to Establish) required for commencing the construction. The respondent has obtained Consent to Establish from the concerned authority on 01.05.2015. The respondent is in win-win situation as on one hand, the respondent has not obtained necessary approvals for starting construction and the scheduled time of delivery of possession as per the possession clause which is completely dependent upon the start of foundation and on the other hand, a major part of the total consideration is collected prior to the start of the foundation. Further, the said possession clause can be said to be invariably one sided, unreasonable, and arbitrary. Moreover, the authority vide order dated 03.09.2021 has directed the respondent/ promoter to submit the date of start of foundation tower-wise on an affidavit. The respondent-promoter filed an affidavit on 23.09.2021 in compliance of the said order but failed to provide the date of start of foundation of particular tower in which the subject flat is located. This shows the mischievous and the irresponsible behaviour of the respondent promoter. The respondent-promoter has failed to comply with the orders of this authority. Therefore, the authority is of the considered view that as 'date of start of foundation of the subject tower in which the flat is located' cannot be ascertained in the present matter. So, the due date shall be computed from date of execution of the flat buyer's agreement i.e., 11.11.2011.

54. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the said flat within 36 months from the date of start of foundation of the particular tower in which the flat is located and has sought further extension of a period of 6 months, on receipt of sanction of the building plans/revised plans and approvals of all concerned authorities including the fire service department, civil aviation department, traffic department, pollution control department as may be required for commencing and carrying of the construction subject to force majeure restrains or restrictions from any courts/ authorities, non-availability of building materials or dispute with contractors/workforce etc. and circumstances beyond the control of company and subject to timely payments by the flat buyer(s). It may be stated that asking for the extension of time in completing the construction is not a statutory right nor has it been provided in the rules. This is a concept which has been evolved by the promoter themselves and now, it has become a very common practice to enter such a clause in the agreement executed between the promoter and the allottees. Now, turning to the facts of the present case, the respondent promoter has not completed the construction of the subject project in the promised time. The OC has been obtained from the competent authority on 23.07.2021 i.e., after a delay of more than 6 years for block A to I & block K to P. Moreover, OC for block J has not been obtained. Also, there is nothing on record to show that the concerned tower J is part of any of those blocks for which OC has been obtained. It is a well settled law that one cannot take benefit of his own wrong. In the light of the above-mentioned reasons, the grace period of 6 months is not allowed in the present case.

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

> ***Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]***
>
> *(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.:*
> *Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.*

56. 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.

57. 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., 21.07.2022 is @ 7.80%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.80%.

58. 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;"*

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

59. On consideration of the circumstances, the evidence and other record and submissions made by the parties, 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. It is pertinent to mention over here that as per the office order of the DTCP, Haryana, Chandigarh dated 03.03.2021, the para 4 of the said order has mentioned that "Government has accorded approval to consider the period i.e., 01.11.2017 to 30.09.2020 as 'Zero Period' where the approvals were withheld by the department within the said period in view of the legal opinion and also gave relaxations as mentioned in para 3". Accordingly, the

authority is of the considered view that this period should be excluded while calculating the delay on the part of the respondent to deliver the subject flat. It is a matter of fact that the date of start of foundation of the subject tower, where the flat in question is situated cannot be ascertained in this matter as the same is not provided by the respondent promoter even after the orders of this authority on 03.09.2021. Hence, the due date of possession is calculated from the date of execution of the flat buyer's agreement. By virtue of flat buyer's agreement executed between the parties on 11.11.2011, the possession of the booked unit was to be delivered within 36 months from the date of start of foundation of the particular tower in which the subject flat is located, which is not provided by the respondent-promoter even after the orders of this authority on 03.09.2021. Hence, the due date of possession is calculated from the date of date of execution of the flat buyer's agreement which comes out to be 11.11.2014 and a grace period of 6 months which is not allowed in the present case for the reasons quoted above.

60. 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. These 2 months' of reasonable time is being given to the complainants keeping in mind that even after intimation of possession practically he has to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking

possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e., 11.11.2014 till the date of handing over of the possession of the unit or up to two months from the date of valid offer of possession if possession is not taken by the complainants, whichever is earlier (excluding 'Zero period' w.e.f. 01.11.2017 till 30.09.2020) as per the provisions of section 19(10) of the Act.

61. Accordingly, non-compliance of the mandate contained in section 11(4) (a) read with proviso to section 18(1) of the Act on the part of the respondent is established. As such, the complainants are entitled to delayed possession charges at the prescribed rate of interest i.e., 9.80% p.a. for every month of delay on the amount paid by them to the respondent from the due date of possession i.e., 11.11.2014 till the date of handing over of the possession of the unit or up to two months from the valid offer of possession if possession is not taken by the complainants, whichever is earlier (excluding 'Zero period' w.e.f. 01.11.2017 till 30.09.2020) as per the provisions of section 18(1) of the Act read with rule 15 of the rules and section 19 (10) of the Act

H. Directions of the authority:

62. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligation cast upon the promoter as per the function entrusted to the authority under section 34(f) of the act of 2016:

i. The respondent shall pay interest at the prescribed rate i.e., 9.80% per annum for every month of delay on the amount paid by the complainants from due date of possession i.e., 11.11.2014 till actual handing over of possession or offer of possession plus two months, whichever is earlier (excluding 'Zero period' w.e.f. 01.11.2017 till 30.09.2020), as per section 18(1) of the Act of 2016 read with rule 15 of the rules.

ii. The respondent is directed to pay arrears of interest accrued within 90 days from the date of order.

iii. 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 respondent/promoter which is the same rate of interest which the promoter 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.

iv. The respondent shall not charge anything from the complainants which is not the part of buyer's agreement.

63. Complaint stands disposed of.

64. File be consigned to registry.

(Vijay Kumar Goyal)
Member

(Dr. KK Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 21.07.2022