

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

Complaint no. : 1748 of 2021
First date of hearing: 23.04.2021
Date of decision : 21.07.2022

Sumitra Devi
R/o: 210, Sector -15, Gurugram, Haryana

Complainant

Versus

M/s Shree Vardhman Buildprop Pvt. Ltd.
Regd. office: 310-311, 3rd floor, Indra Prakash
Building, 21-Barakhamba Road, New Delhi-110001

Respondent

CORAM:
Dr. KK Khandelwal
Shri Vijay Kumar Goyal

**Chairman
Member**

APPEARANCE:
Sh. Varun Chugh
Shri Shalabh Singhal

Advocate for the complainant
Advocate for the respondent

ORDER

1. The present complaint dated 26.03.2021 has been filed by the complainant/allottee 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 complainant, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S. No.	Heads	Information
1.	Project name and location	"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	Registered 50 of 2022 dated 13.06.2022
5.	Unit no.	B-404 on 4 th floor, tower- B [As per page no. 5 of the complaint]
6.	Unit measuring	800 sq. ft. [As per page no. 05 of the complaint]
7.	Date of execution of flat buyer's agreement	November 2011 [As per page no. 5 of the complaint]
8.	Total consideration	Rs. 16,00,000/-

		[As per page no. 17 of reply] Rs. 20,50,237/- [As per page 55 of complaint]
9.	Total amount paid by the complainant	Rs. 17,16,862/- [As per page no. 55 of complaint]
10.	Date of environment clearance	22.02.2011 (As per details provided by respondent)
11.	Possession clause	9.(a) <i>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</i>

		<p>company and subject to timely payments by the flat buyer(s). Taken from another file of same project</p>
12.	Date of start of foundation of particular tower	Cannot be ascertained
13.	Due date of delivery of possession	<p>22.02.2014</p> <p>(Calculated from date of environment clearance i.e., 22.02.2011, as respondent stated through affidavit dated 23.09.2021 that date of start of foundation of the tower in question which is essential in calculating due date of possession is not readily available in company records related to the unit in question)</p> <p>*Note: The due date of possession has been advertently recorded wrong in the proceeding of the day dated 21.07.2022</p>
14.	Zero period	<p>2 years 10 months and 29 days</p> <p>(i.e., from 01.11.2017 to 30.09.2020 vide order of DTCP, Haryana Chandigarh dated 03.03.2021)</p>
15.	Occupation certificate	<p>23.07.2021</p> <p>(As per details provided by respondent)</p>
16.	Offer of possession	Not offered

17.	Grace period	Not allowed
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B. Facts of the complaint

3. That the apartment in question is located in the project namely "Shree Vardhman Mantra" situated at Sector-67, Gurugram, Haryana, was booked by the complainant in the year 2011.
4. The basic cost of the property is Rs 16,00,000/- only and out of which a sum of Rs 15,20,000/- has already been paid by the complainant. Since it was time linked payment plan, the remaining amount of Rs 80,000/- towards the last instalment, besides stamp duty and other charges were payable at the time of offer of possession of the property in question. That, in November 2011, a builder buyer's agreement was entered into with the respondent and by virtue of which it allotted the apartment bearing no.404, tower-b (fourth floor) admeasuring 800 sq ft, along-with car parking space in the project. The said buyer's agreement is original copy was retained by the respondent on the pretext of filling the complete details of the property purchased, besides getting it signed and stamped from the concerned personnel, authorized by it for the said purpose. The complainant was further assured by the respondent that the original buyer's agreement would be sent at her address via post within a period of one month, from the date of its execution.
5. It is also pertinent to mention that in clause no. 9(a), the respondent had categorically stated that the possession of the said floor would be handed over within 36 months from the date of start of laying of the foundation of particular tower, with a further grace period of another 6 months.

6. All efforts of complainant to get the copy of agreement went in vain. lastly, after consistently chasing the respondent for a number of years, the complainant was apprised that the original buyer's agreement has got misplaced by the respondent and a fresh buyer's agreement would be executed in lieu of the pervious one and hence on 07.01.2021, a fresh buyer's agreement was entered into between the complainant and the respondent.
7. That, the at the time of execution of the buyer's agreement dated 07.01.2021, the complainant realised that the entire scheme of not providing the original buyer's agreement executed in November, 2011, was a ploy and specifically designed to cheat and defeat the legitimate claim of the complainant, as in the previous buyer's agreement the factum/details pertaining to the start of the construction as well as the clauses related to compensation were mentioned which were not mentioned in the buyer's agreement dated 07.01.2021. It was deliberately done by the respondent to escape itself, from the liability of providing compensation to the complainant, on account of delay in handing over the possession of the apartment in question.
8. That, the respondent has breached the fundamental terms of the contract by inordinately delaying in delivery of the possession by **70 months**. it is pertinent to mention here that the possession of the property in question has still not been offered and the occupation certificate of the project in question is yet to come.
9. That, the complainant, without any default, had been timely paying the instalments towards the property, as per the payment schedule provided by the respondent towards the aforesaid apartment in the project and the balance payment is to be made at the time of offering of possession.

10. That, despite making the payment in accordance with payment schedule, the respondent has unlawfully demanded the balance payment of Rs 3, 33, 375/- towards last instalment, service tax, stamp duty and other charges which were otherwise payable at the time of offer of possession, deliberately ignoring the fact that the occupation certificate for the project is still awaited. In fact, the respondent has wrongfully imposed delay penalty/interest upon the complainant for non-payment of the above stated amount which is not due and payable to it and has levied an interest of Rs 1, 89, 540/- including taxes, which is recurrent and is continuously increasing on daily basis. Upon confrontation by the complainant via numerous emails, no reply was given by the respondent.

C. Relief sought by the complainant:

11. The complainant has sought following relief:

- i. Direct the Respondent to handover the possession of the property in question, after obtaining the occupation certificate of the project, in a time bound manner;
- ii. Direct the Respondent to pay interest @ 18% p.a. as payment, towards delay in handing over the property in question as per provisions of The Real Estate (Regulation and Development) Act, 2016 ("RERA") and Haryana Real Estate (Regulation and Development) Rules, 2017 ("HRERA");
- iii. Direct the Respondent to pay a sum of Rs.50,000/- to the Complainant towards the cost of the litigation;

12. 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:

13. That the complainant has 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 transactions 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 will not only be against the settled principles of law as to retrospective operation of laws 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.

14. That the complainant cannot be allowed to seek any relief which is in conflict with the said terms and conditions of the FBA. The complainant 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 complainant. 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.
15. 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 complainant and on this ground alone the refund and/or compensation and/or interest cannot be sought under RERA Act. Even clause 9 (a) of the FBA merely provides 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.
16. That the residential group housing project in question has been developed by the respondent.
17. That the construction of the phase of the project wherein the apartment of the complainant 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.

18. 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 Sector 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 were pending despite continuous efforts being made by the licensee/respondent.

19. 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 has handed over possession of their respective flats to them for the limited purpose of fit out.
20. 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.
21. 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 shall 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 complainant 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; that in view of the said fact, the respondent cannot otherwise be held liable to pay any interest or compensation to the complainant for the period beyond 27.07.2017.

22. 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.
23. 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 complainant and other allottees of the project. As various allottees and even the complainant failed to make payments of the installments as per the agreed payment plan, the complainant 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 complainant and other allottees.

24. 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 was 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 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.

25. 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 labour to return to their native states/villages creating an acute shortage, of labour in NCR region. Due to the said shortage the construction sector 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.

26. 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

27. 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

28. 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.

29. 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 complainant at a later stage.

F. Findings on the objections raised by the respondent:

F. I Objection regarding maintainability of the complaint.

30. 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.

31. 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.

32. 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.

33. 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."

34. 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."

35. 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 of the respondent w.r.t reasons for the delay in handing over of possession.

36. 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.*

37. 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."

38. 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.

39. 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."

40. 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 November 2014 and it 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.***
41. The respondent in the reply has admitted that the construction of the phase of the project wherein the apartment of the complainant is situated has already been completed and it 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 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 and 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 complainant.

42. Relief sought by the complainant:

- a) Direct the respondent to handover the possession of the property in question, after obtaining the occupation certificate of the project, in a time bound manner and direct the respondent to pay interest @ 18% p.a. as payment, towards delay in handing over the property in question.
- b) Direct the respondent to pay a sum of Rs.50,000/- to the complainant towards the cost of the litigation.

G.I Direct the respondent to pay delay interest on the amount paid by the complainant amount to Rs. 17,16,562/- at the rate of 24%.

43. In the present complaint, the complainant intends to continue with the project and is 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

44. As per clause 9(a) of the flat buyer's agreement dated (taken from other file of same project) 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.

45. 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.
46. 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.

47. 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).

48. The authority observes that in the present case, the respondent has not kept the reasonable balance between his own rights and the rights of the complainant-allottee. The respondent has acted in a pre-determined, preordained, highly discriminatory and arbitrary manner. After, the unit in question was booked by the complainant, she started making the payment from November 2011. Considering the facts given, BBA was executed in November 2011 but the copy of the same was not made available to the complainant and later on, she was told by respondent that it was misplaced, and new agreement is to be executed. It is interesting to note as to how the respondent had collected hard earned money from the complainant without obtaining the necessary approval (Consent to Establish) required for commencing the construction. The respondent is in win-win situation as on one hand, it 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 was 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 environment clearance i.e., 22.02.2011.

49. **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, 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.

50. **Admissibility of delay possession charges at prescribed rate of interest:**

The complainant is 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.

51. 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.

52. 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%.

53. 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 complainant 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 complainant in case of delayed possession charges.

54. 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 was 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 environment clearance. By virtue of flat buyer's agreement taken from other file of same project, 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 environment clearance which comes out to be 22.02.2014 and a grace period of 6 months which is not allowed in the present case for the reasons quoted above.

55. 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 complainant 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., 22.02.2014 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 complainant, 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.

56. 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 complainant is 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 the complainant to the respondent from the due date of possession i.e., 22.02.2014 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 complainant, 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:

57. 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 complainant from due date of possession i.e., 22.02.2014 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

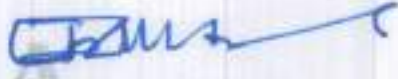
30.09.2020), as per section 18(1) of the Act of 2016 read with rule 15 of the rules.

- 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 allottee 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 complainant is also directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
- v. The respondent shall not charge anything from the complainant which is not the part of buyer's agreement.

58. Complaint stands disposed of.

59. File be consigned to registry.


(Vijay Kumar Goyal)
Member


(Dr. KK Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 21.07.2022