

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

Complaint no. : 5004 of 2020
Date of filing complaint : 13.01.2021
First date of hearing : 24.02.2021
Date of decision : 24.03.2022

1. Dharmendra Sharma 2. Ambika Sharma R/O: - A102, Sujjan Vihar, Sector 43, Gurugram-122009.	Complainants
Versus	
M/s BPTP Limited Regd. Office at: - M-11, Middle Circle, Connaught Circus, New Delhi -110001	Respondent

CORAM:

Dr. K.K. Khandelwal	Chairman
Shri Vijay Kumar Goyal	Member

APPEARANCE:

Sh. Rishab Jain	Advocate for the complainants
Sh. Venket Rao	Advocate for the respondent

ORDER

- The present complaint has been filed by the complainants/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act)

read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the rules and regulations made there under or to the allottees as per the agreement for sale executed inter se.

A. Unit and project related details

2. The particulars of unit details, sale consideration, the amount paid by the 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	'Pedestal', Sector 70-A, Gurugram, Haryana.
2.	Project area	102.2 Acres
3.	Nature of the project	residential plotted colony (integrated township)
	a) DTCP license no.	15 of 2011 dated 07.03.2011
	b) License valid up to	06.03.2024
	c) Name of the licensee	M/s Impartial Builders Developers Pvt. Ltd. and 7 others.
4.	a) RERA registered/not registered	Not Registered
5.	Unit no.	C-76-FF, 1 st floor (annexure R-5 on page no. 94 of reply)



6.	Unit admeasuring	1430 sq. ft. (annexure R-5 on page no. 94 of reply)
7.	Date of execution of the floor buyer's agreement	16.11.2013 (annexure R-5 on page no. 86 of reply)
8.	Total consideration	Rs. 1,42,18,393.82/- (annexure R-17 vide statement of account on page no. 154 of reply)
9.	Total amount paid by the complainants	Rs. 98,60,773.10/- (annexure R-17 vide statement of account on page no. 154 of reply)
10.	Possession clause	<p>Clause 5.1- The Seller/Confirming Party proposes to offer possession of the unit to the Purchaser(s) within the Commitment period. The Seller/Confirming Party shall be additionally entitled to a Grace period of 180 days after the expiry of the said Commitment Period for making offer of possession of the said unit.</p> <p>Clause 1.4 "FBA" "Commitment Period" shall mean, subject to Force Majeure circumstances; intervention of statutory authorities and Purchaser(s) having timely complied with all its obligations, formalities or documentation, as prescribed/requested by Seller/Confirming Party, under this Agreement and not being in default under any part of this Agreement,</p>

		including but not limited to the timely payment of instalments of the sale consideration as per the payment plan opted, Development Charges (DC), stamp duty and other charges, the Seller/Confirming Party shall offer the possession of the Unit to the Purchaser(s) within a period of 36 months from the date of execution of Floor Buyers Agreement" (Emphasis supplied)
11.	Due date of delivery of possession	16.11.2016 (Calculated from the date of execution of agreement as being later)
12.	Occupation certificate	16.10.2020 (annexure R-16 on page no. 151 of reply)
13.	Offer of possession	07.11.2020 (annexure R-17 on page no. 152 of reply)
14.	Grace period utilization	Grace period is not allowed in the present complaint.

B. Facts of the complaint

- The complainants were approached by the sales representatives of the Company, who made tall claims about the Project, Pedestal, Sector 70A, Gurugram, a part of integrated township in Sector 70 and 70A, Gurugram as the world class project. The complainants were invited to the sales office and were lavishly entertained and promises were

made to them that the possession of the flat would be handed over by 16th of May, 2017 including that of parking, horticulture, club and other common areas. The complainants were impressed by their oral statements and representations and ultimately lured to pay Rs.9,00,000/- as booking amount of the said flat on 25 August, 2013.

4. The FBA for the unit No. C-76-FF, 3 bedroom flat with servant quarter, measuring 1430 square foot, executed on 16 November, 2013 between the complainants and the Respondent. The date of possession as per the agreement was 16 May, 2017, calculated 36 months from the date of execution of the agreement, plus grace period of 180 days.
5. The complainants and developer respondent took a loan of Rs.89,12,576/- from the housing development finance corporation (HDFC) and paid in advance to the developer respondent, wherein in return, the developer respondent agreed to pay equated monthly instalment for the loan to the HDFC till the developer respondent hands over the possession of the Unit to the complainants, purchased by the complainants. The tripartite agreement amongst the complainants, the developer respondent and the HDFC was signed on 16 November, 2013.
6. The complainants had paid, as and when demanded by the respondent, a total of Rs.98,60,773/-, out of total



consideration of Rs.1,03,63,687/- till 3 January, 2020 for the floor. But even after collecting more than 95% (ninety five per centum) amount of the floor. The respondent has failed to timely deliver the possession of the floor.

7. That it was unfair, illegal, unlawful, unethical for the respondent when he had taken the amount from the complainants without the particular stage of construction being achieved, as the completion of the Floor has been delayed by more than 3 years and 7 months which has ultimately resulted in the difficulties for the complainants and many such buyers.
8. The complainants have approached the respondent and pleaded for delivery of possession of their flat as per the floor buyer's agreement on various occasions. The respondent did not submit any justified reply to their letters, emails, personal visits, telephone calls, seeking information about the status of the project and delivery of possession of their flat.
9. The respondent has not paid the equated monthly instalment (EMI) to the HDFC on various occasions despite making a commitment that the respondent would pay equated monthly instalments to the HDFC till the respondent hands over the possession of the unit to the complainants. On



numerous times, the complainants were forced to pay the EMI to the HDFC, contrary to the agreement signed between the parties. The respondent has not paid some of the EMI to the HDFC till date, despite making a commitment that the respondent would pay the EMI till the possession is handed over to the complainants.

10. All of a sudden on 7 November, 2020, the respondent issued the offer for possession wherein the respondent has raised unjustified, illegitimate, illegal and unlawful demands for the flat, which includes; charges for unjustified increase in area - 135 square feet -from 1430 square feet to 1565 square feet at Rs.9,05,985/-, development charges - Rs.4,86,773, interest charges-Rs.5,93,948/.,utility connection charges-Rs.25,000/-, cost escalation charges Rs.2,58,225/-, electrification and STP charges-Rs.1,63,151/-, power backup installation charges-Rs.1,50,000/-, value added tax Rs.48,3551, service tax - Rs.2,27,037/-, goods and services tax - Rs.9,61,772/-. All the aforesaid charges and other such charges have accrued due to the lapses and failures of the respondent, whereas the complainants have timely complied with all the demands raised by the respondent. The respondent instead of adjusting delay possession charges in the final demand letter (offer for possession dated 7 November, 2020) has tried to



hoodwink the complainants through frivolous and vexatious demands.

11. The respondent has tried to cover the period of delay within the meaning of force majeure but the failure of respondent shall not be covered within the narratives of force majeure as it includes only inevitable situations which cause hindrance, whereas at present the project has been delayed due to the failures of the respondent, and not due to any circumstances beyond control.
12. That, further, the respondent fraudulently, unlawfully and illegally increased the super area of the flat and also demanded huge cost escalation of the flat without providing any justified explanations of such charges. The respondent increased the super area of the Unit, 135 square feet from 1430 square feet to 1565 square feet illegally, unlawfully and on papers only, demanding an extra amount of Rs.9,05,985/- from the complainants. Whereas in actuality, there is no increase of super area of the Unit. The respondent superstitiously and with mala-fide intention increased the super area of the flat as it had neither informed nor sought permission from the complainants.
13. That, the complainants approached the respondent and pleaded to revoke/cancel/withdraw the amounts imposed



by the respondent illegally, unlawfully and fraudulently, such as amount of extra 135 square feet - from 1430 square feet to 1565 square feet at Rs.9,05,985/-, development charges - Rs.4,86,773, interest charges Rs.5,93,948), utility connection charges-Rs.25,000/-, cost escalation charges-Rs.2,58,225/-, electrification and STP charges Rs.1,63,151/-, power backup installation charges-Rs.1,50,000/-, value added tax - Rs.48,355/, service tax - Rs.2,27,037/-, goods and services tax - Rs.9,61,772/-. The respondent did not submit any justified response to his requisitions and personal visits seeking information.

14. That the respondent has in an unfair manner siphoned of funds meant for project and utilised same for its own benefit for no cost. The respondent being builder, promoter, colonizer and developer, whenever in need of funds from bankers or investors ordinarily has to pay a heavy interest per annum. However in the present scenario, the respondent utilised funds collected from the complainants and other buyers for its own good in other projects, being developed by the respondent.
15. The complainants have lost confidence and in fact have got no trust left in the respondent, as the respondent has deliberately and wilfully indulged in undue enrichment, by

cheating the complainants beside being guilty of indulging in unfair trade practices and deficiency in services in not offering the legitimate, rightful, lawful and legal possession of the flat in time and then remaining non-responsive to the requisitions of the complainants.

C. Relief sought by the complainants.

16. The complainants have sought following relief:

- (i) Direct the respondent to pay interest for every month of delay in offering the possession of the allotted unit since 16.05.2017 to the complainants , on the amount taken from the complainants for the sale consideration for the allotted unit along with additional charges , at the prescribed rate as per the act of 2016 and handover rightful, legal and lawful possession of the allotted unit to the complainants.
- (ii) Direct the respondent to revoke/cancel/withdraw the amounts imposed by the respondent illegally, unlawfully and fraudulently such as amount of (a) increased area, (b) cost escalation, (c) electrification & STP charges , (d) power backup installation charges, (e) VAT, service tax, GST, (f) development charges , (g) interest (h) utility connection charges, etc being charged on the allotted unit of the complainants.
- (iii) Direct the respondent to pay and clear equated monthly instalments to HDFC, till the legal and

rightful possession of the allotted unit is handed over to the complainants.

- (iv) Direct the respondent to cancel/revoke/withdraw maintenance and holding charges until the legitimate , rightful and lawful possession of the allotted unit is handed over to the complainants.

D. Reply by the respondent.

17. That respondent, on 07.03.2011, obtained License No. 15 of 2011 for approximately 102 acres of land falling in sectors 70- 70A, Gurgaon, Manesar Urban Complex, Gurgaon. The said license was taken for development of Integrated township consisting of plots, villas, floors, shopping centers on community center, schools etc. Over the portion of the said land, respondent was in the process of developing certain plots under the name and style of one project/floor 'Pedestal', situated in sector 70A, wherein the complainants applied for, and were allotted the unit. It is submitted that the complainants conducted thorough due diligence and made investment in the property in question after being fully satisfied.
18. That after obtaining various approvals, inter alia, for sectors 70-70A 'Colony' and after completing most of the internal development works, respondent vide various letters and representations requested DGTCP to approve building plans. In the interregnum, respondent carried out internal development works in and around Sectors 70-70A. For the

purpose of developing sector roads, acquisition proceedings were initiated by Government of Haryana. It is not out of place to mention that respondent represented to the Government of Haryana to expedite the acquisition proceedings, however, the said proceedings were abysmally delayed which in turn delayed development of sector roads and services that are to be laid along with it i.e., master sewer lines, master storm water drains, master water lines and master electricity lines. Resultantly, it adversely affected the internal development works and construction work within the colony which was to be carried out by respondent.

19. That the complainants approached this Hon'ble Authority for redressal of their alleged grievances with unclean hands, i.e. by not disclosing material facts pertaining to the case at hand and also, by distorting and/or misrepresenting the actual factual situation with regard to several aspects. It is further submitted that the Hon'ble Apex Court in plethora of cases has laid down strictly, that a party approaching the court for any relief, must come with clean hands, without concealment and/or misrepresentation of material facts, as the same tantamount to fraud not only against the respondent but also against the court and in such situation, the complaint is liable to be dismissed at the threshold without any further adjudication.
- That the complainants have concealed from this Hon'ble Authority that via offer of possession dated 07.11.2020,

the respondent has, provided compensation amounting to Rs. 10,79,004.10/- to the complainants.

- That the complainants have concealed from this Hon'ble Authority that the respondent vide e-mail dated 29.12.2015, as a gesture of goodwill and as special consideration extended the subvention scheme till the date of offer of possession and also informed the complainants that respondent will bear the interest portion of per-EMI for this extended time.
- That the complainants have further concealed from this Hon'ble Authority that the respondent being a customer centric organization vide numerous emails has kept updated and informed the complainants about the milestone achieved and progress in the developmental aspects of the project. The respondent vide emails has shared photographs of the project in question. It is evident to say that the respondent has always acted bonafidely towards its customers including the complainants, and thus, has always maintained a transparency in reference to the project. In addition to updating the complainants, the respondent on numerous occasions, on each and every issue/s and/or query's upraised in respect of the unit in question has always provided steady and efficient assistance. However, notwithstanding the several efforts made by the respondent to attend to the queries of the complainants to their complete satisfaction, the

complainants erroneously proceeded to file the present vexations complaint before this Hon'ble Authority against the respondent.

From the above, it is very well established, that the complainants have approached this Hon'ble Authority with unclean hands by distorting/ concealing/ misrepresenting the relevant facts pertaining to the case at hand. It is further submitted that the sole intention of the complainants are to unjustly enrich themselves at the expense of the respondent by filing this frivolous complaint which is nothing but gross abuse of the due process of law.

20. That as per clause-3 of the agreement titled as "Sale Consideration and other conditions" specifically provided that in addition to basic sales price (BSP), various other cost components such as development charges (including EDC, IDC and EEDC), preferential location charges (PLC), club membership charges (CMC), car parking charges, power back-up installation charges (PBIC), VAT, service tax and any fresh incidence of tax (i.e. GST), electrification charges (EC), charges for installing sewerage treatment plant (STP), administrative charges, interest free maintenance security (IFMS), etc. shall also be payable by the complainants.
21. That in duly executed FBA, it was specifically agreed to between the parties that the complainants are liable to pay statutory dues including but not limited to service tax, VAT or any fresh or enhanced incidence of tax even if they are retrospective in effect, as may be levied on the

project/colony, Unit or the Land. (That the Government of Haryana vide Notification No.19/ST 1/H.A.6/2003/S.59A/2016 dated 12.09.2016 launched amnesty scheme for developers Haryana alternative tax compliance scheme for contractors, 2016 (hereinafter referred to as 'Amnesty Scheme'). The scheme provides for a tax rate of 1% and sub-charge of Five Per 5%, effective of tax comes to 1.05% of the entire aggregate amount received/receivable (total sale consideration) during the year for the period prior to 31.03.2014. The VAT payable under the VAT amnesty scheme is in lieu of tax, interest, penalty, charged or chargeable, under the provisions of the Act. In accordance with the same, it is stated that for the said unit, the respondent has received an amount of Rs. 46,05,190.53/ till 31.03.2014, therefore the respondent vide letter dated 10.11.2016 raised demand towards VAT for a sum of Rs. 48,355/ i.e., 1.05% of the received amount which is completely within the purview of the amnesty scheme.

22. That HVAT, GST etc. being indirect tax is payable by the end user / allottees as per applicable laws. GST which has been levied by the Government from 01.07.2017 is applicable and payable by each customer. Even otherwise, indirect taxes such as GST, HVAT etc. are pass through charges which are collected by the respondent and passed on to the government.
23. That it is submitted that the demand qua VAT has been paid without any protest and demur and accordingly the receipt

for the same was also issued by the respondent. It is further submitted that the said charges has been agreed by the complainants right from the beginning and despite being agreed charges, the complainants are now at such belated stage is raising contentions against the said charges with a view to gain at the expenses of the respondent.

E. Jurisdiction of the authority

The respondent has raised an objection regarding jurisdiction of authority to entertain the present complaint. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana, the jurisdiction of Haryana Real Estate Regulatory Authority, Gurugram shall be entire Gurugram district for all purposes. 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

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

So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoters 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. 1 Objection regarding untimely payments done by the complainants.

24. The respondent has contended that the complainants have made defaults in making payments as a result thereof, the respondent had to issue reminder letters dated 28.11.2013 and 06.12.2013. The respondent has further submitted that the complainants have still not cleared the dues. The counsel for the respondent stressed upon clause 7.1 of the buyer's agreement wherein it is stated that timely payment of instalment is the essence of the transaction, and the relevant clause is reproduced below:

***"7. TIMELY PAYMENT ESSENCE OF CONTRACT.
TERMINATION, CANCELLATION AND FORFEITURE"***

7.1 The timely payment of each instalment of the Total Sale Consideration i.e., COP and other charges as stated herein is the essence of this transaction/Agreement. In case the Purchaser(s) neglects, omits, ignores, defaults, delays or fails, for any reason whatsoever, to pay in time any of the instalments or other amounts and charges due and payable by the Purchaser(s) as per the payment schedule opted or if the Purchaser(s) in any other way fails to perform, comply or observe any of the terms and conditions on his/her part under this Agreement or commits any breach of the undertakings and covenants contained herein, the Seller/Confirming Party may at its sole discretion be entitled to terminate this Agreement forthwith and forfeit the amount of Earnest Money and Non-Refundable Amounts and other amounts of such nature..."

25. At the outset, it is relevant to comment on the said clause of the agreement i.e., ***"7. TIMELY PAYMENT ESSENCE OF CONTRACT. TERMINATION, CANCELLATION AND FORFEITURE"*** wherein the payments to be made by the complainants have been subjected to all kinds of terms and conditions. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favor of the promoter and against the allottee that even a single default by the allottees in making timely payment as per the payment plan may result in termination of the said agreement and forfeiture of the earnest money. Moreover, the authority has observed that despite complainants being in default in making timely payments, the respondent has not exercised his discretion to terminate the buyer's agreement. The attention of authority

was also drawn towards clause 7.2 of the flat buyer's agreement whereby the complainants would be liable to pay the outstanding dues together with interest @ 18% p.a. compounded quarterly or such higher rate as may be mentioned in the notice for the period of delay in making payments. In fact, the respondent has charged delay payment interest as per clause 7.2 of the buyer's agreement and has not terminated the agreement in terms of clause 7.1 of the buyer's agreement. In other words, the respondent has already charged penalized interest from the complainants on account of delay in making payments as per the payment schedule. However, after the enactment of the Act of 2016, the position has changed. Section 2(zd) of the Act provides that the rate of interest chargeable from the allottees by the promoter, in case of default, shall be equal to the rate of interest which the promoter would be liable to pay the allottees, in case of default. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 9.30% by the respondent which is the same as is being granted to the complainants in case of delay possession charges.

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

26. Another contention of the respondent is that authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the apartment buyer's agreement executed between the parties and no

agreement for sale as referred to under the provisions of the Act or the said rules has been executed inter se parties. The authority is of the view that the act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. The numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of **Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)** 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."

27. 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."

28. 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 allottees to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of any other Act, rules,

statutes, instructions, directions issued thereunder and are not unreasonable or exorbitant in nature.

G. Findings on the relief sought by the complainants.

Relief sought by the complainants: The complainants have sought following relief:

- (i) Direct the respondent to handover the legitimate , rightful, legal and lawful possession of the flat to the complainants, after completing the construction of the flat and common area amenities and facilities and pay interest for every month of delay in offering the possession of the flat since 16 may,2017 (this period includes the grace period of 180 days) to the complainants , on the amount taken from the complainants for the sale consideration for the flat along with additional charges, at the prescribed rate as per the Act, 2016 till the respondent hands over the possession of the flats to the complainants. .

29. In the present complaint, the complainants 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

18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building,

—

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."

30. Clause 5.1 read with clause 1.4 of the flat buyer's agreement provides the time period of handing over possession and the same is reproduced below:

"Clause 5.1- The Seller/Confirming Party proposes to offer possession of the unit to the Purchaser(s) within the Commitment period. The Seller/Confirming Party shall be additionally entitled to a Grace period of 180 days after the expiry of the said Commitment Period for making offer of possession of the said unit.

Clause 1.4 "FBA" "Commitment Period" shall mean, subject to Force Majeure circumstances; intervention of statutory authorities and Purchaser(s) having timely complied with all its obligations, formalities or documentation, as prescribed/requested by Seller/Confirming Party, under this Agreement and not being in default under any part of this Agreement, including but not limited to the timely payment of instalments of the sale consideration as per the payment plan opted, Development Charges (DC), stamp duty and other charges, the Seller/Confirming Party shall offer the possession of the Unit to the Purchaser(s) within a period of 36 months from the execution of Flat Buyers Agreement."

31. At the inception it is relevant to comment on the pre-set possession clause of the floor buyer's agreement wherein the possession has been subjected to Innumerable terms and conditions, force majeure circumstances and innumerable terms and conditions. The drafting of this clause is not only vague but so heavily loaded in favour of the promoter that even a single default by the allottees in fulfilling obligations, formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the



purpose of allottees and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottees of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottees are left with no option but to sign on the dotted lines.

32. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the apartment within a period of 36 months from the date of execution of floor buyer's agreement, whichever is later. In the present complaint, the floor buyer's agreement was executed on 16.11.2013. So, the due date is calculated from the date of execution of floor buyer's agreement i.e. 16.11.2016. Further it was provided in the floor buyer's agreement that promoter shall be entitled to a grace period of 180 days after the expiry of the said committed period for making offer of possession of the said unit. In other words, the respondent is claiming this grace period of 180 days for making offer of possession of the said unit. There is no material evidence on record that the respondent-promoter had completed the said project within this span of 36 months and had started the process of issuing offer of possession after obtaining the occupation certificate. As a matter of fact, the promoter has not offered the possession within the time limit prescribed by the promoter

in the floor buyer's agreement nor has the promoter offered the possession till date. As per the settled law, one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 180 days cannot be allowed to the promoter at this stage.

- 33. Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges at the prescribed rate of interest on amount already paid by them. However, proviso to section 18 provides that where an allottees does not intend to withdraw from the project, they 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.

- 34.** 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.

35. 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., 24.03.2022 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.
36. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottees by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottees, 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— 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 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;"

37. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same as is

being granted to the complainants in case of delayed possession charges.

Other reliefs:-

- (ii) Direct the respondent to revoke/cancel/withdraw the amounts imposed by the respondent illegally, unlawfully and fraudulently such as amount of (a) increased area, (b) cost escalation, (c) electrification & STP charges, (d) power backup installation charges, (e) VAT, service tax, GST, (f) development charges, (g) interest (h) utility connection charges, etc being charged on the allotted unit of the complainants.
- (iii) Direct the respondent to pay and clear equated monthly instalments to HDFC, till the legal and rightful possession of the allotted unit is handed over to the complainants.

The above mentioned relief (ii) to (iii) sought by the complainant was not pressed by the complainant counsel during the arguments in the passage of hearing and also made an application in this regard. The authority is of the view that the complainant counsel does not intended to pursue the above-mentioned relief sought.

- (iv) Direct the respondent to cancel/revoke/withdraw maintenance and holding charges until the legitimate, rightful and lawful possession of the allotted unit is handed over to the complainants.
38. The holding charges shall not be charged by the promoter at any point of time even after being part of agreement as per law settled by Hon'ble Supreme Court in civil appeal no. 3864-3889/2020. Whereas as far as the maintenance charges are

concerned, the respondent can demand maintenance charges at the rates prescribed in the builder buyer's agreement at the time of offer of possession. However, the respondent shall not demand the maintenance charges for more than one year from the allottees even in those cases wherein no specific clause has been prescribed in the agreement or where the maintenance charges has been demanded for more than a year.

(v) Direct the respondent to pay legal expenses of Rs. 1,00,000/- incurred by the complainants.

39. The complainant is claiming compensation in the above-mentioned relief. For claiming compensation under sections 12, 14, 18 and section 19 of the Act, the complainants may file a separate complaint before Adjudicating Officer under section 31 read with section 71 of the Act and rule 29 of the rules

40. On consideration of the documents available on record and submissions made by both the parties regarding contravention of provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 5.1 read with clause 1.4 of the flat buyer's agreement executed between the parties on 16.11.2013, the possession of the subject apartment was to be delivered within stipulated time i.e., by 16.11.2016. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over possession is 16.11.2016. The respondent has failed to handover possession of the subject apartment till date of this

order. Accordingly, it is the failure of the respondent to fulfil obligations and responsibilities as per the flat buyer's agreement to hand over the possession within the stipulated period.

41. Section 19(10) of the Act obligates the allottees 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, they have 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., 16.11.2016 till offer of possession of the subject flat after obtaining occupation certificate from the competent authority plus two months or handing over of possession whichever is earlier as per the provisions of section 19(10) of the Act.
42. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with proviso to section 18(1) of the Act on the part of the respondent is established. As such, the allottees shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 16.11.2016 till offer of possession of the subject flat after obtaining occupation certificate from the competent authority plus two

months or handing over of possession whichever is earlier as per the provisions of section 19(10) of the Act.

H. Directions of the authority

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

- i. The respondent is directed to pay interest at the prescribed rate of 9.30% p.a. for every month of delay from the due date of possession i.e., 16.11.2016 till offer of possession of the subject floor after obtaining occupation certificate from the competent authority plus two months i.e. 07.11.2020 plus two months i.e. 07.01.2021 or handing over of possession whichever is earlier as per the provisions of section 19 (10) of the Act.
- ii. The arrears of such interest accrued from 16.11.2016 till date of this order shall be paid by the promoter to the allottees within a period of 90 days from date of this order and interest for every month of delay shall be payable by the promoter to the allottees.
- iii. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period and takeover the possession.
- iv. The rate of interest chargeable from the allottees by the promoter, in case of default shall be charged at the

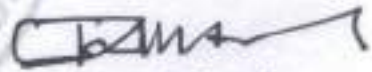
prescribed rate i.e., 9.30% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottees, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

- v. The respondent shall not charge anything from the complainants which is not the part of the agreement. However, holding charges shall also not be charged by the promoter at any point of time even after being part of agreement as per law settled by the Hon'ble Supreme Court in civil appeal no. 3864-3889/2020 dated 14.12.2020.

44. Complaint stands disposed of.

45. File be consigned to registry.


(Vijay Kumar Goyal)
Member


(Dr. K.K. Khandelwal)
Chairman

HARERA
Haryana Real Estate Regulatory Authority, Gurugram
Dated: 24.03.2022