BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.: **2073 of 2021**
Date of filing complaint: **16.04.2021**
First date of hearing: **06.07.2021**
Date of decision : **12.04.2022**

	Reeta agarwal **C/O:** -Ram Das Agarwal, Mansarover Vishnu Garden, Tonk Road, Jaipur, Rajasthan-302011.	**Complainant**
	Versus	
1. 2.	M/s BPTP Limited M/s Countrywide Promoters Pvt. Ltd. **Regd. Office at:** -M-11, Middle Circle, Connaught Circus, New Delhi -110001	**Respondents**

CORAM:	
Dr. K.K. Khandelwal	**Chairman**
Shri Vijay Kumar Goyal	**Member**
APPEARANCE:	
Ms. Aditi Mishra proxy counsel for Shri Harshit Batra	Advocate for the complainant
Sh. Venket Rao	Advocate for the respondents

ORDER

1. The present complaint has been filed by the complainant/allottee under section 31 of the Real Estate

(Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the rules and regulations made there under or to the allottees as per the agreement for sale executed inter se.

A. Unit and project related details

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

S.no.	Heads	Information	
1.	Project name and location	'Park Terra', Sector 37-D, Gurugram, Haryana.	
2.	Nature of the project	residential plotted colony (integrated township)	
3.	a) DTCP license no	83 of 2008 dated 05.04.2008	94 of 2011 dated 24.10.2011
	b) License valid up to	04.04.2025	23.10.2019
	c) Name of the licensee	super belts pvt. ltd and 4 others	countrywide promoters pvt. ltd. and 6 others
	d) area	23.18 acre	19.744 acre

4.	a) RERA registered/not registered	**Registered** **299 of 2017 dated 13.10.2017**
5.	Unit no.	703, 7th floor, tower- T23 (annexure R-7 on page no. 80 of reply)
6.	Unit admeasuring	1998sq. ft. (annexure R-7 on page no. 80 of reply)
7.	Date of building plan	21.09.2012 (vide projects details received from planning branch of the authority)
8.	Date of execution of the flat buyer's agreement	12.03.2013 (annexure R-7 on page no. 75 of reply)
9.	Total consideration	Rs. 1,26,83,451/- (annexure C-3 vide statement of account on page no. 53 of complaint)
10.	Total amount paid by the complainant	Rs. 1,15,20,375/- (annexure C-3 vide statement of account on page no. 53 of complaint)
11.	Possession clause	"**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 1.6** "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 42 months from the date of execution of Flat Buyers Agreement"** **(Emphasis supplied)**
12.	Due date of delivery of possession	12.09.2016 (Calculated from the date of execution of agreement as being later)
13.	Occupation certificate	Not obtained
14.	Offer of possession	Not offered
15.	Grace period utilization	Grace period is not allowed in the present complaint.

B. Facts of the complaint

3. That the complainant booked an apartment no. T-23-803, 8thfloor (the "**unit**") in the project "Terra" at sector 37D, Gurugram, Haryana (the "**Project**") and hence, is an allottee under Section 2(d) of the Real Estate (Regulation and Development) Act, 2016 (the "**Act**").

4. That thereafter, an allotment letter dated 07.12.2012 was executed between the parties followed by the execution of the builder-buyer agreement on 01.04.2013 (the "Agreement"). The malafide and unlawful activities of the respondents can be continued to be seen in the agreement as well. Clause 3.10 allows the change in the super built up area and "binds" the complainant to pay any additional changes without requiring the consent to such change. Clause 4.1 allows similar changes in building plans, position, numbering, etc. clause 4.1(c) allows the intimation of modification in the super built up area only if it is +/- 15% and not otherwise. That under no circumstance, the respondents can be allowed to demand or the complainant to make payments against unconsented changes, that may be made upon completion of the project. That the fundamental

principle of consent in a contractual relationship cannot be allowed to be violated and the respondents cannot be allowed to charge from the complainant what is not a part of the agreement.

5. That total cost of the unit has been calculated to be Rs. 1,32,06,331/- out of which, the complainant has paid an amount of Rs.1,15,20,375/- as is evident from the statement of accounts dated 01.03.2019, which is approximately 90% of the total cost of the unit. The complainant had also taken a loan of an amount of Rs.1,00,00,000/- from the HDFC Bank and had executed a tri-partite agreement on 13.08.2013.

6. That even after payment of a substantial amount, the delivery of possession of the Unit or even the completion of development works seems to be nowhere near. That as per clause 1.6 of the agreement the commitment period within which the obligations of the respondents were bound to be completed was 42 months from the date of sanction of the building plan or the execution of the agreement, whichever is later – subject to a grace period of 180 days (clause 1.18 and 5.1). That the calculation of the exact date cannot be made as the respondents have not disclosed the date of sanction of the building plan, if there is any. Thus, deeming from the

execution of the agreement, the due date of possession, after inclusion of the grace period turns out to be 15.08.2017.However, even after more than 4 years after the due date, the completion of the unit is nowhere.

7. That the complainant had, on multiple occasions, made several inquiries through emails, inter alia, the ones dated 15.11.2016, 22.11.2016, 24.11.2016, 25.11.2016, 25.04.2018 and 08.05.2018 against the unit, none of which had been addressed by the respondents. The respondents had not only violated their obligations under the Act, rules and regulations thereunder but has also failed to answer the complainant and provide details of the unit to which, the complainant is entitled to be privy to.

8. That moreover, ignoring the inquiries made by the complainant, the respondents continued to demand more payments towards the unit, the payment of which, in light of no construction is highly inequitable and completely unjustifiable; and was hence halted by the complainant until the true progress of the unit was disclosed, as is evident from the email dated 18.08.2018 to the respondents and the HDFC bank. The complainant had also asked the HDFC bank to stop the further payments to the respondents.

9. That even after the same, demands were continued to be made by the respondents and a final demand notice dated 21.08.2018 was also issued to the complainant. Even after the same, the complainant attempted to communicate with the respondents; however, the respondents paid no heed to the complainant.

10. That the obligation of the complainant to make the remaining payment arises upon the due completion of the development and construction of the unit, however, the respondents without reaching the same had time and again made wrongful and unlawful demands from the complainant. That the complainant had no obligation to make the payment of any such wrongful and unlawful demand and is only required to pay as per the payment plan attached application form and not upon whims and fancies of the respondents. That paying absolutely no heed to the requests and inquiries of the complainant, keeping him in the dark, and unjustifiably, unilaterally, wrongfully, unlawfully, and unreasonably making demands from the complainant, the respondents had put him through grave misery and trauma. Upon noncompliance of such unjustifiable, unreasonable demands, the respondents wrongfully and unilaterally cancelled the

unit on 10.12.2019. That this act of the respondents is in grave violation of Section 11(5) of the Act.

11. That it is submitted that just and equity has to be maintained between the promoters and the allottee. The transactions in the real estate sector cannot be carried out without the same or would lead to a grave violation and hindrance to the completion of the objectives of the implementation of the Act in the first place and which under no circumstance can be allowed.

12. The complainant had also send a legal notice dated 07.07.2020 to the respondents to recall the termination notice and refund the amount paid along with interest.

13. That after having paid a substantial amount, investment of not just monies but more than 8 years of aspiration of owning a house, cancellation of the Unit would gravely affect the complainant, both financially and mentally. That moreover, it has to be noted that termination letter dated 10.12.2019 has not be given effect to by the respondents, as they have not refunded any amount. The mere issuance of a termination letter cannot be considered as an effective cancellation unless, the same has been carried out by the

cancelling party, which, has not been done in the present case by the respondents being the cancelling party.

C. Relief sought by the complainant.

14. The complainant has sought following relief:

(i) Direct the respondents to provide the complainant with prescribed rate of interest on delay in handing over of possession of the allotted unit on the amount paid by the complainant from the due date of possession as per the FBA till the actual date of possession of the allotted unit and to set aside the unilateral termination letter dated 10.12.2019 as the same is against the provision of the Act of 2016 and no refund is initiated by the respondents and there is no acceptance of the cancellation by the complainant.

(ii) Direct the respondents to not charge any amount on account of escalation charges for the unit from the complainant as asked by the respondents through telephonic conversation with the complainant.

D. Reply by the respondents.

15. The complainant booked a unit in the project namely "Terra" situated at Sector 37-D, Gurugram and opted subvention payment plan. The respondents vide its allotment letter dated 07.12.2012 allotted unit No. T23-803 (tentatively admeasuring 1,998 sq. ft.) to the complainant. The flat

buyer's agreement ("FBA") was executed between the respondents and the complainant on 01.04.2013.

16. That the complainant approached this Hon'ble Authority for redressal of the alleged grievances with unclean hands, i.e. by not disclosing material facts pertaining to the case in 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 respondents 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 complainant has concealed the fact that he has committed defaults in making timely payments of various installments within the stipulated time despite having clearly agreeing that timely payments is the essence and it is pertinent to point out that till date, the complainant has made inordinate delays in making timely payments of installments. The complainant defaulted in the payment of the installments on various occasions and the respondents were constrained to

issue reminder letters dated 19.12.2012, 22.01.2013, 22.02.2013, 26.07.2013, 26.08.2013, 07.03.2018, 08.05.2018 and 04.07.2018. The complainant continued to make defaults and respondents again issued reminder letters

- In 2018, the respondents issued demand letter upon reaching the milestone "on casting of top floor roof slab" payable by 03.09.2018. The complainant again failed to make the payment within stipulated time and the respondents issued reminder letters dated 21.08.2018. On failure to clear demand a last and final opportunity letter dated 13.03.2019 was issued. Despite receipt of reminder letters and last and final opportunity letter, the complainant failed to clear the demands and hence respondents were constrained to issue termination Letter dated 10.12.2019 vide which the booking/allotment of the complainant stood cancelled due to non-payment of dues. This act of not making payments is in breach of the agreement which also affects the cash flow projections and hence, impacts the projected timelines for possession. Hence, the proposed timelines for possession got diluted due to the defaults

committed by various allottees including the complainant in making timely payments.

- The complainant at the stage of booking availed BSP discount of Rs. 1,04,895/-
- That the complainant has further concealed that the respondents being a customer centric organization vide demand letters as well as numerous emails has kept updated and informed the complainant about the milestone achieved and progress in the developmental aspects of the project. The respondents vide emails have shared photographs of the project in question. However, it is evident that the respondents have always acted bonafidely towards its customers including the complainant, and thus, have always maintained a transparency in reference to the project. In addition to updating the complainant, the respondents 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 respondents to attend to the queries of the complainant to his complete satisfaction, the complainant erroneously proceeded to file the present vexatious complaint before this Hon'ble Authority against the respondents..

From the above, it is very well established, that the complainant has 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 complainant is to unjustly enrich himself at the expense of the respondents by filing this frivolous complaint which is nothing but gross abuse of the due process of law.

17. That the proposed timelines for possession being within 42 months from the date of sanction of building plans or execution of FBA, whichever is later, along with 180 days of grace period was subject to force majeure circumstances, timely payments and other factors. The building plan was sanctioned on 21.09.2012 and the FBA was executed on 12.03.2013.That the remedy in case of delay in offering possession of the unit was also agreed to between the parties. It is pertinent to point out that the said understanding had been achieved between the parties at the stage of entering into the transaction.

18. The parties had, vide clause 5.1 of the FBA [clause G (1) of the application form, duly agreed that subject to force majeure and compliance by the complainant of all the terms and conditions of the FBA, the respondents proposes to hand over possession of the flat to the complainant within 42 months from the date of sanction of the building plans or

execution of the FBA, whichever is later along with a further grace period of 180 days.

19. That vide Clause G.2 of the application form, which was later reiterated vide Clause 6.1 of the FBA, it was duly agreed between the parties that subject to the conditions mentioned therein, in case the respondents fails to hand over possession within 42 months from the date of sanctioning of the building plans or execution of FBA, whichever is later along with 180 days of grace period, the respondents shall be liable to pay to the complainant compensation calculated @ Rs.5/- per sq. ft. for every month of delay. The parties had agreed the penalty in case of delay in offering possession prior to entering into the transaction. Prior to entering into the transaction, the parties had further agreed vide clause G.2 of the Application Form that in case the complainant fails or defaults in making timely payment of any of the installments, then the complainant would not be eligible for delay compensation and the said understanding was also reiterated in clause 6.1 of the FBA. Thus, the understanding between the parties regarding compensation for delay in offering of possession had been agreed and accepted prior to entering into the transaction.

20. The proposed timelines for possession have been diluted due to serious payment defaults in making payment of installments by various allottees of the project Terra including the complainant.

21. That the project in question was launched by the respondents in August 2012. It is submitted that while the total number of flats sold in the project "Terra" are 401, for non-payment of dues, 78 bookings/ allotments have since been cancelled. Further, the number of customers of the project "Terra" who are in default of making payments for more than 365 days are 125.

E. Jurisdiction of the authority

The respondents have 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.*

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 complainant at a later stage.

F. Findings on the objections raised by the respondents.

F. I Objection regarding untimely payments done by the complainant.

22. The respondents have contended that the complainant has made defaults in making payments as a result thereof, the respondent had to issue reminder letters dated 19.12.2012, 26.07.2013, 07.03.2018, 08.05.2018 and13.03.2019. The respondents have further submitted that the complainant has still not cleared the dues. The counsel for the respondents 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..."*

23. 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 complainant has 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 promoters and against the allottee that even a single default by the allottee 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 observed that despite complainant being in default in making timely payments, the respondents have not exercised 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 complainant 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 respondents have 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 respondents have already charged penalized interest from the complainant 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(za) of the Act provides that the rate of interest chargeable from the allottees by the promoters, in case of default, shall be equal to the rate of interest which the promoters would be liable to pay the allottee, in case of default. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 9.30% by the respondents which is the same as is being granted to the complainant 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.

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

25. 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."

26. 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 complainant.

Relief sought by the complainant: The complainant hassought following relief:

- Direct the respondents to provide the complainant with prescribed rate of interest on delay in handing over of possession of the allotted unit on the amount paid by the complainant from the due date of possession as per the FBA till the actual date of possession of the allotted unit and to set aside the unilateral termination letter dated 10.12.2019 as the same is against the provision of the Act of 2016 and no refund is initiated by the respondents and there is no acceptance of the cancellation by the complainant.

(ii) Direct the respondents to not charge any amount on account of escalation charges for the unit from the complainant.

27. In the present complaint, the respondents have contended that the complainant has made defaults in making timely payments as a result thereof, the respondent had to issue reminder letters dated 03.01.2013, 04.02.2013, 25.11.2013, 26.12.2013, 07.03.2018, 08.05.2018, 04.07.2018 and 21.08.2018. Further, the respondent issued a last and final opportunity letter to clear dues on 13.03.2019 in pursuance of the demand letters as mentioned above but complainant failed to make the remaining payments. No doubt, a number of reminders for due payments were issued by the respondents to the complainant but cancellation of subject unit was issued only on 10.12.2019. There is nothing on the record to show that respondents-builder took action against the allotee as per the provisions of 7.1 of FBA dated 12.03.2013. It is provided in that provision that in case the allottee fails to make timely payment, then the respondents at sole discretion may terminate the agreement forthwith and forfeit the amount of earnest money and non-refundable amounts and other amounts of such nature. But that was not

done despite default in making payments as per the version of respondents, leading to issuance a number of reminders detailed above. Admittedly , the allottee has paid more than 90% of total sale consideration to the respondents. So, they were liable to return the remaining amount after deducting 10% as earnest money. But that was not done. Thus, the termination of allotted unit is not sustainable in the eye of law and the same is hereby ordered to be set aside. The allottee is directed to clear the outstanding dues at an equitable rate of interest as per section 2(za) of the Act of 2016 and take possession of the unit after being offered by the respondent. The respondent is directed to revoke the termination letter dated 10.12.2019 after receiving outstanding dues and the complainant shall further take possession of the allotted unit within 2 months from the date on which the possession is offered by the respondent.

28. 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***
>
> *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."

29. Clause 5.1 read with clause 1.6 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 1.6 "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 42 months from the date of sanction of building plan or execution of Flat Buyers Agreement."

30. At the inception, it is relevant to comment on the pre-set possession clause of the flat buyer's agreement wherein the possession has been subjected to innumerous terms and conditions, force majeure circumstances and innumerous 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 promoters 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 promoters are 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 builders have 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.

31. **Admissibility of grace period:** The promoters have proposed to hand over the possession of the apartment within a period of 42 months from the date of sanctioning of building plan or execution of flat buyer's agreement, whichever is later. In the present complaint, the flat buyer's agreement was executed on 12.03.2013. So, the due date is calculated from the date of execution of flat buyer's agreement i.e.12.09.2016. Further, it was provided in the flat buyer's agreement that promoters 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 respondents are 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 respondents-promoter had completed the said project within this span of 42 months and had started the process of issuing offer of possession after obtaining the occupation certificate. As a matter of fact, the promoters have not obtained the occupation certificate and offered the possession within the time limit prescribed by the promoter in the flat buyer's agreement 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 promoters at this stage.

32. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges at the prescribed rate of interest on amount already paid by her. However, proviso to section 18 provides that where an allottees 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.

33. 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.

34. 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., 12.04.2022 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

35. 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;"

36. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 9.30% by the respondents/promoters which is the same as is being granted to the complainant in case of delayed possession charges.

G.I. Cost escalation

37. The complainant pleaded that escalation cost was asked by the respondents through telephonic conversation. The authority is of the view that there have been no details regarding escalation cost charges. However, the authority vide orders dated 06.07.2021 and 17.08.2021 constituted a committee headed by Sh. Manik Sonawane IAS (retired), Sh. R.K. Singh CTP (retired) and Sh. Laxmi Kant Saini CA and was asked to submit its report with regard to super area, cost escalation, STP charges, electrification charges, taxes viz GST and VAT etc. advance maintenance charges, car parking charges, holding charges, club membership charges, PLC, development location charges and utility connection charges, EDC/IDC charges, fire fighting/power backup charges involved in some of the cases and others pending against the

respondent in this project as well as in other projects developed by the respondents. The representatives of the allottees were also associated with the committee. A report was submitted and the same along with annexures was uploaded on the website of the authority. Both the parties were directed to file objections to that report if any. Though the respondents sought time to file the objections but did not opt for the same despite time given in this regard. The recommendations of the committee with regard to cost escalation are reproduced as under for a ready reference.

Cost escalation: The committee considers the estimated cost of construction as certified by the chartered accountant and thereafter applies various indexation and demands a cost escalation of Rs. 588 per sq. ft.

Recommendation: After analysis of various factors as detailed in the committee report, the committee is of the view that an escalation cost of Rs. 374.76 per sq. feet is to be allowed instead of Rs. 588 demanded by the developer.

38. The authority has gone through the report of the committee and observes that as per the calculation of the estimated cost of construction for the years 2010-11 to 2013-14 and the actual expenditure of the years 2010 to 2014, the escalation

cost comes down to 374.76 per sq. ft. from the demanded cost of Rs. 588 per sq. ft. No objections to the report have been raised by either of the party. Even the committee while recommending decrease in escalation charge has gone through booking form, builder buyer agreement and the issues raised by the promoter to justify increase in cost. The authority concurs with the findings of the committee and allows passing of benefit of decrease in escalation cost of the allotted units from Rs. 588 per sq. ft to 374.76 per sq. ft. to the allottees of the project.

39. The authority concurs with the recommendations of the committee and holds that the escalation cost is to be charged only upto Rs. 374.76 per sq. ft. instead of Rs. 588 per sq. ft. as demanded by the developers.

H. Directions of the authority

40. 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 respondents are directed to revoke the termination of the allotted unit issued vide letter dated 10.12.2020 after receiving outstanding dues and the complainant shall further take possession of the unit within 2 months

from the date on which the possession is offered by the respondents.

ii. The respondents are directed to pay interest to the complainant at the prescribed rate of 9.30% p.a. for every month of delay from the due date of possession i.e., 12.09.2016 till offer of possession of the subject unit 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.

iii. The arrears of such interest accrued from 12.09.2016 till date of this order shall be paid by the promoter to the allottee within a period of 90 days from date of this order and interest for every month of delay shall be payable by the promoters to the allottee before 1oth of the subsequent month as per rule 16(2) of the rules..

iv. The rate of interest chargeable from the allottee by the promoters, in case of default shall be charged at the prescribed rate i.e., 9.30% by the respondents/promoters which is the same rate of interest which the promoters shall be liable to pay the allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

v. **Cost escalation:** The authority is of the view that escalation cost can be charged only up to Rs. 374.76 per

sq. ft. instead of Rs. 588 per sq. ft. as demanded by the respondent developers.

vi. The respondents are directed to revoke the termination letter dated 10.12.2019 after receiving outstanding dues and the complainant shall further take possession of the allotted unit within 2 months from the date on which the possession is offered by the respondents.

vii. The respondents shall not charge anything from the complainant 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.

41. Complaint stands disposed of.

42. File be consigned to registry.

(Vijay Kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 12.04.2022