BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	:	**2937 of 2020**
Date of filing complaint	:	**08.10.2020**
First date of hearing	:	**10.02.2021**
Date of decision	:	**12.04.2022**

1. 2.	Rajesh Khullar Poonam Khullar **R/O: -** A-51/B, 1st floor, Hauz khas, New Delhi-110016.	**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. Arpit Marwah	Advocate for the complainants
Sh. Venket Rao	Advocate for the respondent

ORDER

1. 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 promoters 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	'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.	603, 6th floor, tower- T23 (annexure R-5 on page no. 76 of reply)	

6.	Unit admeasuring	1998 sq. ft. (annexure R-5 on page no. 76 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 floor buyer's agreement	03.01.2013 (annexure R-5 on page no. 71 of reply)
9.	Total consideration	Rs. 1,32,06,331/- (annexure C-5 vide statement of account on page no. 90 of complaint)
10.	Total amount paid by the complainants	Rs. 1,27,04,601/- (annexure C-5 vide statement of account on page no. 90 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 sanctioning of building plan or execution of Floor Buyers Agreement, whichever is later" (Emphasis supplied)**
12.	Due date of delivery of possession	03.07.2016 (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 complainants believing the representations and fake claims made by the respondent with respect to their market reputation to be true & correct, booked unit No. T23-603, floor 6th in tower T23, admeasuring 1998 sq.ft in their project **"BPTP-Terra"** [hereinafter

referred to as the **"unit"**] for a total sale price consideration of Rs. 13,206,331/- inclusive of all the charges i.e. covered parking charge, club membership, corner & club park facing, development charges, fire fitting, power backup, IFMS & service tax.

4. That for the purpose of the purchase of the said unit, the complainants executed an allotment application form on 22.08.2012 with the respondent and paid a booking amount of Rs. 7,00,000/-. Further, on 07.12.2012 an allotment letter was issued by the respondent in favour of the complainants in which the aforesaid unit was allotment to them. Thereafter, in furtherance of the purchase of the unit the complainants executed flat buyer's agreement with the respondent on 03.01.2013.
5. That as per the **clause 1.6** of the flat buyer's agreement dated 03.01.2013, the respondent had assured the complainants to deliver the possession of the unit within 42 months from the date of the execution of the flat buyer's i.e., by 03.07.2016.
6. That further it was agreed in clause 6.1 of the flat buyer's agreement dated 03.01.2013 that in the event of delay in the delivery of possession on the part of the respondent, then the respondent will be liable to pay penalty @ Rs.5/- per square feet per month on super area.
7. That as per the flat buyer's agreement dated 03.01.2013; the complainants in discharge of their financial obligations towards the respondent has made timely payments to the tune of **Rs.12,704,601/-** till date inclusive of all the charges i.e. development charges, covered

parking charge, corner-club-park facing charges & club membership, which amounts to 95% of the total sale price consideration. It is most humbly submitted that all the payments made by the complainants were duly acknowledged by the respondent. Further, the complainants made all the payments to the respondent as & when demanded & there was no delay from the side of the complainants when it came to making the payment to the respondent. However, despite that the possession of the unit was delayed beyond reasonable time by the respondent.

8. That the complainants repeatedly asked for the possession of their unit from the respondent. However, the respondent avoided sharing the details of handing over of the unit with the complainants on one pretext or the other.

9. It is submitted that the respondent was supposed to deliver the unit by 02.01.2017 which includes the grace period but was not able to deliver the same till date which is almost a delay of 44 months as per the flat buyer's agreement.

10. That as per section 19 (6) of the real estate (regulation and development) act, 2016, the complainants have fulfilled their responsibility in regard to making the necessary payments in the manner and within the time specified in the flat buyer's agreement. Therefore, the complainants herein have not breached any of the terms of the agreement dated 03.01.2013.

11. That however to the utter dismay of the complainants, the respondent could not complete the said project & failed to deliver the possession of the unit by the due date as proposed in the flat buyer's agreement dated 03.01.2013 **i.e 03.01.2017 (including grace period of 180 days).** The respondent owing to his dishonest intentions even after taking timely payments against the unit purchased has failed to deliver the possession of the unit, thereby infringing the rights of the innocent complainants who has spent their hard-earned life savings in the purchase of the said unit.

12. That keeping in view the inability in developing the project in time and in the light of the half-hearted promises made by the respondent, the chances of getting physical possession of the apartment as per the agreement in near future seems bleak and that the same is evident of the irresponsible and desultory attitude and conduct of the respondent, consequently injuring the interest of the buyers including the complainants who has spent their entire hard earned savings in the purchase of the unit and now stands at a crossroad to nowhere.

13. That the complainants have even tried to contact the respondent time to time to know the status of the construction of the project but the respondent used to turn his ears deaf towards the pleas of the complainants, who used to run from pillar to post to get justice against the errant actions of the respondent. That the respondent unlawful actions of breaching the flat buyer agreement dated 03.01.2013, not

completing the construction of the project on time, delaying the delivery of the possession of the flat amounts not only to the defiance of law and order but also amounts to the prejudice to the rights of the complainants. hence the present complaint

C. Relief sought by the complainants.

14. The complainants have sought following relief:

(i) Pass an order for delayed penalty due to delay in handing over of the possession @ 18% per annum, from the due date of possession till the date of actual possession of the unit is not handed over to the complainants, in favour of the complainants and against the respondent;.

(ii) Pass an order directing the respondent to exclude development charges, covered parking charge, corner-club-park-facing charges & club membership charges from the final demand since the same has already been paid by the complainants.

(iii) Pass an order directing the respondent not to charge GST charges from the complainants at the time of raising final demand in lieu of judgment passed by Panchkula Authority in *"Madhu Sareen vs. BPTP Ltd."*

(iv) Pass an order directing the respondent to charge service tax on the complainants till 02.01.2017 i.e. the date of completion of the unit at the time of raising final demand.

(v) Pass an order restraining the respondent from charging electrification charges separately at the time of final demand.

(vi) Pass an order directing respondent for issuing offer of possession letter to the respondent after obtaining OC/CC and without asking any escalation charges and any others charges which were already paid by the complainants for the unit.

(vii) Pass an order for payment of penalty for delay as per the allotment agreement at the rate of Rs. 5/- per sq. feet per month for the period of delay in favour of the complainants and against the respondent.

D. Reply by the respondent.

15. It is submitted that the respondent had diligently applied for registration of the project in question i.e., "Terra" located at sector 37D, Gurugram including towers-T-20 to T-25 & EWS before this Hon'ble Authority and accordingly, registration certificate No. 299 of 2017 dated 13.10.2017 was issued by this Hon'ble Authority.

16. That the complainants 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 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 the fact that they have 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 complainants have made inordinate delays in making timely payments of installments.
- That the complainants have concealed from this hon'ble authority that at the stage of booking, the respondent offered a discount of the basic sale price amounting to Rs.104,895/- to the complainants. thus, the net BSP charged from them is less than the original amount of the unit
- That the complainants have further concealed that the respondent being a customer centric organization vide demand letters as well as 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 have shared photographs of the project in question. However, it is evident that the respondent has always acted bonafidely towards its customers including the complainants, and thus, have 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, they erroneously proceeded to file the present vexatious 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 is 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.

17. It is submitted that the relief(s) sought by the complainants are unjustified, baseless and beyond the scope/ambit of the agreement duly executed between the parties, which forms a basis for the subsisting relationship between the parties. The complainants entered into the said agreement with the respondent with open eyes and are bound by the same. That the relief(s) sought by the complainants travel way beyond the four walls of the agreement duly executed between the parties. The complainants while entering into the agreement have accepted and are bound by each and every clause of the said agreement.

18. That having agreed to the above, at the stage of entering into the agreement, and raising vague allegations and seeking baseless reliefs beyond the ambit of the agreement, the complainants are blowing hot and cold at the same time which is not permissible under law as the same is in violation of the 'doctrine of aprobate & reprobate". In this regard, the respondent reserves the right to refer to and rely upon decisions of the hon'ble supreme court at the time of arguments, if required.

19. That GST being indirect tax is payable by the end user / allottee as per GST regulations. That vide clause C (5) of the application form, later reiterated vide clause 1.33 read with clause 3.8 of the 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 and other tax incidence that may arise. Thus, 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.

20. That the project in question was launched by the respondent 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.

21. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the

complaint can be decided on the basis of those undisputed documents and submissions made by the parties

E. Observations of the authority

22. Since, common issues with regard to super area, cost escalation, STP charges, electrification charges, taxes viz GST &VAT, advance maintenance charges, car parking charges, holding charges, club membership charges, PLC, development location charges and utility connection charges, EDC/IDC charges, firefighting/power backup charges are involved in all these cases and others pending against the respondents in this project as well as in other projects developed by them. So, vide orders dated 06.07.2021and 17.08.2021 a committee headed by Sh. Manik Sonawane IAS (retired), Sh. Laxmi Kant Saini CA and Sh. R.K. Singh CTP (retired) was constituted and was asked to submit its report on the above-mentioned issues. The representatives of the allottees were also associated with the committee and 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. The complainant and other allottees did not file any objections. Though the respondent sought time to file the objections but, did not opt for the same despite time given in this regard. The executive summary of the committee

report and the recommendations so made in respect of the project in question i.e., 'Terra' are as under:

a) **Car Parking Charges:** The complainants requested that the car parking allotted to the allottees be also included in the conveyance deed being an integral part of the units.

Recommendation: After discussion, the committee finds no dispute on the issue and it was agreed upon that the car parking along with its cost shall be included in the conveyance deed to be executed with the allottees.

b) **Club membership charges:** The complainants contended that the club is not part of the common areas to be transferred to the RWA. It will be operated and managed by the respondent or third party on a commercial basis. Hence, they should not be forced to pay for this facility as CMC and requested that the club membership be made optional.

Recommendation:

i. After deliberation, it was agreed upon that club membership will be optional.

ii. Provided, if an allottee opts out to avail of this facility and later approaches the respondent for membership of the club, then he shall pay the club membership charges as may be decided by the respondent and shall not invoke the terms of FBAs that limits CMC to INR 1,00,000.00.

iii. In view of the consensus arrived, the club membership may be made optional. The respondent may be directed to refund the CMC if any request is received from the allottee in this regard with condition that he shall abide by the above proviso.

c) **EDC/IDC:** The contention of the complainant was limited to the extent that they have already paid the full and final amount of EDC/IDC as part of development charges prescribed in the FBAs. They requested the respondent may be restrained from making any further demands on this account in the future.

Recommendation: The committee observes that the concern of the complainants is genuine and recommends that the respondent be directed not to raise any undue and inappropriate demands in the future.

d) **Preferential location charges:** The contention of the complainant was limited to the extent that it may be ensured that the PLCs have been levied by the respondent as prescribed in the FBAs. They did not point out any specific case where the respondent has demanded PLCs beyond the scope of the FBAs.

Recommendation: In view of this, the Committee recommends that the respondent may be directed to submit an affidavit declaring that PLCs have been levied

strictly as prescribed in the FBAs executed with all the complainants in the projects Spacio , Park Generation and Terra.

e) **GST/VAT/Service Tax:** The GST came into force in the year 2017, therefore, it is a fresh tax. The possession of the flat was supposed to be delivered before the implantation of GST, therefore, the tax which has come into existence after the deemed date of delivery should not be levied being unjustified. The main questions which were arises for the consideration of the committee were:

i. Whether the respondent is justified in demanding GST, VAT, and service tax?

ii. If applicable, what is the rate of HVAT, GST, and Service Tax to be charged to customers?

Recommendation: After analysis of various factors as detailed in the committee report, the committee is view that the following taxation to be allowed:

i. Haryana Value Added Tax: The promoter is entitled to charge VAT from the allottee for the period up to 30.06.2017 as per the rate specified in the below table:

Period	Scheme	Effective Rate of Tax	Whether recoverable from Customer
Up to	Haryana Alternative	1.05 %	Yes

31.03.2014	Tax Compliance Scheme		
From 01.04.2014 to 30.06.2017	Normal Scheme	4.51%	Yes

ii. Service Tax: The service tax rate to be charged from the customer:

Service tax Rates/Date	Basic Rates of Service Tax	Education Cess	Secondary & Higher Education Cess	Swatch Bharat Cess	Krishi Kalyan	Total Tax Rate	Abatement %	Effective Tax Rate
01 July 2010 to 31st March 2012	10%	2%	1%			10.30%		10.30%
1st April 2012 to 31st May 2015	12%	2%	1%			12.36%	75%*/70 %	3.71%
1st June 2015 to 14th Nov 2015	14%					14%	75%*/70 %	4.20%
15th Nov 2015 to 31st May 2016	14%			0.5%		14.50%	75%*/70 %	4.35%
1st June 2016 to 30th June 2017	14%			'0.5%	'0.5%	15%	70%	4.50%

iii. Project Specific GST to be refunded:

Particulars	Terra

HVAT (after 31.03.2014) (A)	4.51%
Service Tax (B)	4.50%
Pre-GST Rate (C =A+B)	9.01%
GST Rate (D)	12.00%
Incremental Rate E= (D-C)	2.99%
Less: Anti-Profiteering benefit passed if any till March 2019 (F)	2.58%
Amount to be refunded Only if greater than (E-F) (G)	0.41%

G. 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.

G. 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.

G. 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 promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

H. Findings on the objections raised by the respondent.

H. I Objection regarding untimely payments done by the complainants.

23. The respondent has alleged that the complainants having breached the terms and conditions of the agreement and contract by defaulting in making timely payments. Further ,the above-mentioned contention is supported by the builder- buyer agreement executed between both the parties. Clause 7 provides that timely payments of the installments and other charges as stated in the schedule of payment is essence of the agreement.. 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..."*

24. 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 favour of the promoter 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 observes that despite complainants being in default in making timely payments, the respondent has 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 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(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 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.

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

25. 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)*** decided on 06.12.2017 wherein the Hon'ble Division Bench of Bombay High Court observed 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."

26. 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."*

27. 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.

I. Findings on the relief sought by the complainants.

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

(i) Pass an order for delayed penalty due to delay in handing over of the possession @ 18% per annum, from the due date of possession till the date of actual possession of the unit is not handed over to the complainants, in favour of the complainants and against the respondent;

(ii) Pass an order directing the respondent to exclude development charges, covered parking charge, corner-club-park-facing charges & club membership charges from the final demand since the same has already been paid by the complainants.

(iii) Pass an order directing the respondent not to charge GST charges from the complainants at the time of raising final demand in lieu of judgment passed by Panchkula Authority in *"Madhu Sareen vs. BPTP Ltd."*

(iv) Pass an order directing the respondent to charge service tax on the complainants till 02.01.2017 i.e. the date of completion of the unit at the time of raising final demand.

(v) Pass an order restraining the respondent from charging electrification charges separately at the time of final demand.

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

> ***"Section 18: - Return of amount and compensation***
>
> *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 floor 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 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.

31. **Admissibility of grace period:** The promoter has 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 floor buyer's agreement, whichever is later. In the

present complaint, the flat buyer's agreement was executed on 03.01.2013. So, the due date is calculated from the date of execution of flat buyer's agreement i.e., 03.07.2016. Further it was provided in the flat 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 42 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 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 wrongs. Accordingly, this grace period of 180 days cannot be allowed to the promoter at this stage.

32. **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 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.

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;"

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 them in case of delayed possession charges.

J.I. Development Charges

36. The complainants pleaded that they had made timely payments to the tune of Rs. 1.27,04,601/- inclusive of all the charges i.e. Development charges, covered parking charges, corner club park facing charges, club membership, which amounts to 95% of the total sale consideration. The said facts have been denied by the respondent in its reply The relevant clause from the agreement is reproduced as under:-

3. SALE CONDIDERATION; PAYMENT AND OTHER INCIDENTAL OBLIGATIONS.

b) Development Charges ("DC") @ Rs. 462/- per square feet calculated on Super Built Up Area

37. The development charges have been levied in terms of the provision of clause 1.11 of FBA which is reproduced below:

1.11 of FBA -"Development Charges" or "DC" shall mean the amount charged by the Seller/Confirming Party from the Purchaser(s) towards carrying out the developmental works inside or around the GH, including but not limited to the payment of the following:

a. (i) External Development Charges (EDC) and Infrastructure Development Charges (IDC) as conveyed and/or demanded by the HUDA, DTCP or the Government of Haryana and any increase thereof, retrospectively or prospectively,
(ii) Any interest paid and/or payable thereon to the concerned Authorities including any increase, retrospectively or prospectively,
b. (i) Infrastructure Augmentation Charge (IAC) as conveyed and/or demanded by the HUDA DTCP or the Government of Haryana including any increase thereof, retrospectively or prospectively. (Any interest paid and/or payable thereon to the concerned Authorities including any Increase, retrospectively or prospectively.

c. The cost of such other development works as may be undertaken by the Seller/Confirming Party within or around the GH that are not charged specifically elsewhere.
d. Cost incurred by the Seller/Confirming Party on the capital invested in making the payment of any of the Development Charges. Such cost shall be determined at the rate of (SBI PLR+ 5%) subject to upper ceiling of 18%"

38. The authority has gone through the report of the committee and observes that clause 3.1(b) of FBA prescribes development charges at the rate of Rs. 462/- per sq.ft. calculated on super built up area. The complainants have already paid the development charges in terms of the agreement. No additional demand shall be raised on the account of development charges, provided these are not enhanced by the competent authority in future.

J-II Car Parking Charges.

39. The complainants submitted that they had already paid 95% of the total sale consideration inclusive of car parking charges. The authority observes that the respondent company and the

complainants both are bound by the terms and conditions of the FBA. The car parking allotment charges have been levied in terms of the clause 3.1(d) of the duly executed FBA. As per this clause, the allottees are to pay charges at the following rates:

a) Open car parking @2,50,000/- per bay

b) Covered car parking @ Rs. 3,50,000/- per bay

40. After discussion, the committee found no dispute on the issue and it was agreed upon that the car parking along with its cost shall be included in the conveyance deed to be executed with the allottees

J-III Preferential Location Charges:

41. Both the respondent and the complainants are bound by the terms and conditions of the FBA. The term PLC has been defined under clause 1.31 and clause 3.1© prescribes the amount of PLC to be levied, which are reproduced below:

*1.31 "**Preferential Location Charges" or PLC**" shall mean the charges payable by the purchaser(s), calculated on super built up area, in case the unit allotted to the purchaser(s) has a locational advantage. There can be more than one PLC charges applicable to a unit"*

"clause 3.1© of FBA- Preferential Location Charge ('PLC') all units will attract one or more PLC, as applicable, due to their locational advantage, as per the table below. However, the total PLC for a unit shall not exceed 12% of BSP.

Preferential Location Charges on BSP

Corner – 7%

Corner+Club or park facing – 10%

Park Facing – 7%

Ground Floor- 5%

First floor- 4%

Second/Third Floor- 3%

42. This issue was also referred to the committee and who after due deliberations and hearing the affected parties, submitted a report to the authority wherein it was observed that the PLCs have been levied strictly in accordance with the provisions of the clauses referred to above. In view of this ,the committee recommends that the respondent may be directed to submit an affidavit declaring that PLCs have been levied strictly as prescribed in the FBAs executed with the complainants in the project "Terra".

J-IV Club Membership Charges

43. The term club membership charges have been defined under clause 1.4 and clause 3.2(a) prescribes the amount of club membership charges to be levied, which are reproduced below:

1.4 "Club Membership Charges" or "CMC" shall mean charges to be paid by the purchaser(s) to the seller or the maintenance service provider for membership of the club to be developed by the seller/confirming party. However, aforesaid charges do not include the usage charges for the club facilities, which shall always be payable extra by the purchaser(s).

3.2 in addition to the aforesaid cost of property, the purchaser(s) has undertaken and agreed to pay the following charges:-

a) club membership charges ("CMC") @ Rs. 2,00,000/- per unit.

44. The said issue was also referred to the committee and who after due deliberations and hearing the affected parties, submitted a report to the authority wherein it was observed as under:

> *"...After deliberation, it was agreed upon that club membership will be optional.*
> *Provided if an allottee opts out to avail this facility and later approaches the respondent for membership of the club, then he shall pay the club membership charges as may be decided by the respondent and shall not invoke the terms of FBAs that limits CMC to INR 1,00,000.00.*
> *In view of the consensus arrived, the club membership may be made optional. The respondent may be directed to refund the CMC if any request is received from the allottee in this regard with condition that he shall abide by the above proviso."*

45. It was also observed, while giving recommendations that in the cases of nominees of projects 'Spacio' and 'Park Generation' on issues concerning super area, car parking charges, development charges, cost escalation, advance maintenance, GST & VAT etc. may be implemented in case of the allottees/complainants of 'Terra' project also and the respondent may be directed to comply with the same while offering possession.

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

J-V GST/VAT/Service Tax

47. The allottees have also challenged the authority of the respondent-builder to raise demand by way of goods and services tax. Since this issue was also referred to the committee and who after due deliberations and hearing the affected parties, submitted a report to the authority wherein it was observed that in case of late delivery by the promoter, only the difference between post GST and pre-GST should be borne by the promoter. The promoter is entitled to charge from the allottee the applicable combined rate of VAT and service tax. The relevant extract of the report representing the amount to be refunded is as follows:

Particulars	Spacio	Park Generation	Astire Garden	Terra	Amstoria	Other Project

HVAT (after 31.03.2014) (A)	4.51%	4.51%	4.51%	4.51%	4.51%	4.51%
Service Tax (B)	4.50%	4.50%	4.50%	4.50%	4.50%	4.50%
Pre-GST Rate(C =A+B)	9.01%	9.01%	9.01%	9.01%	9.01%	9.01%
GST Rate (D)	12.00%	12.00%	12.00%	12.00%	12.00%	12.00%
Incremental Rate E= (D-C)	2.99%	2.99%	2.99%	2.99%	2.99%	2.99%
Less: Anti-Profiteering benefit passed if any till March 2019 (F)	2.63%	2.46%	0.00%	2.58%	0.00%	0.00%
Amount to be refund Only if greater than (E- F) (G)	**0.36%**	**0.53%**	**2.99%**	**0.41%**	**2.99%**	**2.99%**

48. The authority has also perused the judgement dated 04.09.2018 in complaint no. 49/2018, titled as *Parkash Chand Arohi Vs. M/s Pivotal Infrastructure Pvt. Ltd.* passed by the Haryana Real Estate Regulatory Authority, Panchkula wherein it has been observed that the possession of the flat in term of buyer's agreement was required to be delivered on 1.10.2013 and the incidence of GST came into operation thereafter on 01.07.2017. So, the complainants cannot be burdened to discharge a liability which had accrued solely

due to respondent's own fault in delivering timely possession of the flat. The relevant portion of the judgement is reproduced below:

> *"8. The complainant has then argued that the respondent's demand for GST/VAT charges is unjustified for two reason: (i) the GST liability has accrued because of respondent's own failure to handover the possession on time and (ii) the actual VAT rate is 1.05% instead of 4% being claimed by the respondent. The authority on this point will observe that the possession of the flat in term of buyer's agreement was required to be delivered on 1.10.2013 and the incidence of GST came into operation thereafter on 01.07.2017. So, the complainant cannot be burdened to discharge a liability which had accrued solely due to respondent's own fault in delivering timely possession of the flat. Regarding VAT, the Authority would advise that the respondent shall consult a service tax expert and will convey to the complainant the amount which he is liable to pay as per the actual rate of VAT fixed by the Government for the period extending upto the deemed date of offer of possession i.e., 10.10.2013."*

49. In appeal no. 21 of 2019 titled as *M/s Pivotal Infrastructure Pvt. Ltd. Vs. Prakash Chand Arohi,* Haryana Real Estate Appellate Tribunal, Chandigarh has upheld the *Parkash Chand Arohi Vs. M/s Pivotal Infrastructure Pvt. Ltd. (supra).* The relevant para is reproduced below:

> *"93. This fact is not disputed that the GST has become applicable w.e.f. 01.07.2017. As per the first Flat Buyer's Agreement dated 14.02.2011, the deemed date of possession comes to 13.08.2014 and as per the second agreement dated 29.03.2013 the deemed date of possession comes to 28.09.2016. So, taking the deemed date of possession of both the agreements, GST has not become applicable by that date. No doubt, in Clauses 4.12 and 5.1.2 the respondent/allottee has agreed to pay all the Government rates, tax on land, municipal*

property taxes and other taxes levied or leviable now or in future by Government, municipal authority or any other government authority. But this liability shall be confined only up to the deemed date of possession. The delay in delivery of possession is the default on the part of the appellant/promoter and the possession was offered on 08.12.2017 by that time the GST had become applicable. But it is settled principle of law that a person cannot take the benefit of his own wrong/default. ***So, the appellant/promoter was not entitled to charge GST from the respondent/allottee as the liability of GST had not become due up to the deemed date of possession of both the agreements.***"

50. In this present complaint, the due date of possession is prior to the date of coming into force of GST i.e. 01.07.2017. In view of the above, the authority is of the view that the respondent/promoter was not entitled to charge GST from the complainants/allottees as the liability of GST had not become due up to the due date of possession as per the flat buyer's agreement. The authority concurs with the findings of the committee on this issue and holds that the difference between post GST and pre-GST shall be borne by the promoter. The promoter is entitled to charge from the allottee the applicable combined rate of VAT and service tax as detailed in para 47 of this order.

J-VI Electrification Charges

51. In the present complaint, it was contended by the complainants that the respondent issued a letter dated 16.10.2012 (page no. 56 of reply) to them along with various

unjust and unreasonable demands under various heads i.e. electrification charges. On the other hand, the respondent submitted that such charges have been demanded by the allottees in terms of FBA.

52. The authority concurs with the recommendations made by the committee and holds that the term electrification charges, clubbed with STP charges, used in the statement of accounts-cum-invoice be deleted, and only STP charges be demanded from the allottee of Terra @ Rs.8.85 sq. ft. Further, the term ECC be clubbed with FFC+PBIC in the statement of accounts-cum-invoice attached with the letter of possession of the allottee of Terra and be charged @ Rs.100 per sq. ft. in terms of the provisions of 2.1 (f) at par with the allottee of Park Generation. The statement of accounts-cum-invoice shall be amended to that extent accordingly.

K. Directions of the authority

53. 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 to the complainants at the prescribed rate of 9.30% p.a. for every month of delay from the due date of possession i.e., 03.07.2016 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.

ii. The arrears of such interest accrued from 03.07.2016 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 before 10th of the subsequent month as per rule 16(2) of the rules..

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

iv. The respondent shall not charge anything from the complainants which is not the part of 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.

v. **GST charges**: The due date of possession of the subject unit is prior to the date of coming into force of GST i.e. 01.07.2017. The authority is of the view that the respondent/promoter was not entitled to charge GST from the complainants/allottees as the liability of GST had not become due up to the due date of possession as per the flat buyer's agreements as has been held

by Haryana Real Estate Appellate Tribunal, Chandigarh in appeal bearing no. 21 of 2019 titled as M/s Pivotal Infrastructure Pvt. Ltd. Vs. Prakash Chand Arohi. Also, the authority concurs with the findings of the committee on this issue and holds that the difference between post GST and pre-GST shall be borne by the promoter. The promoter is entitled to charge from the allottee the applicable combined rate of VAT and service tax as detailed in para 47 of this order.

vi. **STP charges, electrification, firefighting and power backup charges:** The authority in concurrence with the recommendations of committee decides that the term electrification charges, clubbed with STP charges, used in the statement of accounts-cum-invoice be deleted, and only STP charges be demanded from the allottees of Terra @ Rs.8.85 sq. ft. Further, the term ECC be clubbed with FFC+PBIC in the statement of accounts-cum-invoice attached with the letter of possession of the allottees of Terra be charged @ Rs.100 per sq. ft. in terms of the provisions of 2.1 (f) at par with the allottees of Park Generation. The statement of accounts-cum-invoice shall be amended to that extent accordingly.

vii. **Club membership charges:** The authority in concurrence with the recommendations of committee decides that the club membership charges (CMC) shall be optional. The respondent shall refund the CMC if any request is received from the allottee. Provided that if the allottees opt out to avail this facility and later approaches the respondent for membership of the club, then they shall pay the club membership charges as

may be decided by the respondent and shall not invoke the terms of flat buyer's agreement that limits CMC to Rs.1,00,000/-.

viii. **Preferential location charges:** In view of recommendations of the committee as detailed in para 41 of the order, the respondent is directed to submit an affidavit declaring that PLCs have been levied strictly as prescribed in the FBAs executed with the complainants.

54. Complaint stands disposed of.

55. File be consigned to registry.

(Vijay Kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 12.04.2022