

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

Complaint no. : 4633 of 2021
First date of hearing: 15.02.2022
Date of decision : 13.01.2023

1. Mr. Sandeep Agarwal
2. Mrs. Shilpa Agarwal
Both RR/o: - 47-B, Dada Nagar, Kanpur, Uttar Pradesh-
208022

Complainants

Versus

M/s Ramprashtha Promoters and Developers Private
Limited.

Regd. Office at: Plot No. 114, Sector-44, Gurugram-
122002

Respondent

CORAM:

Shri Vijay Kumar Goyal
Shri Sanjeev Kumar Arora

Member
Member

APPEARANCE:

Sh. Nilotpall Shyam (Advocate)
Ms. Gayatri Mansa and Shri Navneet Kumar (Advocates)

Complainants
Respondent

ORDER

1. The present complaint dated 03.12.2021 has been filed by the complainant/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is *inter alia* prescribed that the promoter shall be responsible for all



obligations, responsibilities and functions under the provision of the Act or the Rules and regulations made thereunder 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. N.	Particulars	Details
1.	Name of the project	"The Edge Tower", Sector 37D, Village Gadauli Kalan, Gurugram
2.	Project area	60.5112 acres
3.	Registered area	108894 sq. mt.
4.	Nature of the project	Group housing colony
5.	DTCP license no. and validity status	33 of 2008 dated 19.02.2008 valid upto 18.02.2025
6.	Name of licensee	Ramprastha Builders Pvt Ltd and 11 others
7.	Date of approval of building plans	12.04.2012 [As per information obtained by planning branch]
8.	Date of environment clearances	21.01.2010



		[As per information obtained by planning branch]	
9.	RERA Registered/ not registered	Registered vide no. 279 of 2017 dated 09.10.2017	
10.	RERA registration valid up to	31.12.2018	
11.	Extension applied on	17.06.2020	
12.	Extension certificate detail	Date	Validity
		<i>HARERA/GGM/REP/RC /279/2017/EXT/98/ 2019</i> In principal approval on 12.06.2019	30.12.2020
13.	Unit no.	B-1002, 10 th floor, tower/block- B (Page no. 29 of the complaint)	
14.	Unit area admeasuring	2390 sq. ft. (Page no. 29 of the complaint)	
15.	Date of execution of apartment buyer agreement	22.12.2010 (Page no. 25 of the complaint)	
16.	Possession clause	15. POSSESSION (a) Time of handing over the Possession Subject to terms of this clause and subject to the Allottee having complied with all the terms and condition of this	



		<p>Agreement and the Application, and not being in default under any of the provisions of this Agreement and compliance with all provisions, formalities, documentation etc., as prescribed by RAMPRASTHA. RAMPRASTHA proposed to hand over <i>the possession of the Apartment by 31/08/2012 the Allottee agrees and understands that RAMPRASTHA shall be entitled to a grace period of hundred and twenty days (120) days, for applying and obtaining the occupation certificate in respect of the Group Housing Complex.</i></p> <p>(Emphasis supplied) (Page no. 39 of the complaint)</p>
17.	Grace Period	<p>Not utilized</p> <p>The promoter has proposed to hand over the possession of the apartment by 31.08.2012 and further provided in agreement that promoter shall be entitled to a grace period of 120 days for applying and obtaining occupation certificate in respect of group housing complex. As a matter of fact, the promoter has not applied</p>



		for occupation certificate within the time limit prescribed by the promoter in the apartment buyer's agreement. As per the settled law, one cannot be allowed to take advantage of his own wrongs. Accordingly, this grace period of 120 days cannot be allowed to the promoter at this stage.
18.	Due date of possession	31.08.2012 [As per mentioned in the buyer's agreement]
19.	Total sale consideration	Rs.72,64,650/- (As per schedule of payment page no. 52 of the complaint)
20.	Amount paid by the complainants	Rs.65,10,180 /- (As per receipt information page no. 56 of the complaint)
21.	Occupation certificate /Completion certificate	Not received
22.	Offer of possession	Not offered
23.	Delay in handing over the possession till date of this order i.e., 13.01.2023	10 years 4 months and 13 days

B. Facts of the complaint

3. The complainants have made the following submissions: -

- I. That the complainants are respectable citizen of India. The respondent through its representative approached the complainants and represented that residential project name "**The Edge Towers**" would effectively serve their residential purpose and family and has best of the amenities.
- II. That the respondent claimed that it had obtained license from the Director General, Town & Country Planning, Haryana (DTCP) for development of the project land into group housing complex vide memo no. 33 of 2008 dated 19.02.2008 comprising of multi-storied residential apartments in accordance with law.
- III. That the complainants were allotted unit no. B-1002, admeasuring 2390 sq. ft. along with one parking in the said project located at Ramprastha City, Sector- 37 Gurugram, the total consideration for the said unit was fixed as Rs.72,64,650/-. Thereafter, both the parties entered into the buyer's agreement on 22.12.2010 for the sale of the said unit.
- IV. That as per buyer's agreement, the respondent agreed to sell/convey/transfer the said apartment unit no. B-1002, with the right to exclusive use of parking space for an amount of Rs.72,64,650/-, which includes basic sale price, car parking charges, external development charges and infrastructure development charges, plus applicable taxes. The complainants

have paid a sum of Rs.62,35,536/- towards the sale consideration in respect of the said unit.

- V. That as per clause 15(a) of the buyer's agreement, the possession date for the impugned unit was agreed to be 31.08.2012, with a grace period of 120 days for applying and obtaining the occupancy certificate. Further, clause 14 of said agreement also stipulates a penal interest @ 1.5% per month (18% per annum compounded monthly) for any delay in payment of installments made by the complainants. The agreement further stipulates under clause 17 that the respondent, if failed to deliver the possession of the impugned unit within 6 months from the date of intimation of possession (it may further extended to grace period of 120 days) and subject to the force majeure conditions would pay compensation @ Rs.5/- per sq. ft. of the super area per month for the entire period till the date of handing over the possession. In other words, the respondent would be liable for delay in possession after 10 months from the date of intimation of such possession as may be made depending upon its own sweet will. The said compensation clause is *ex facie* discriminatory in comparison to clause 14(a) of the agreement and amounts to unfair trade practices in view of catena of judgments of Hon'ble National Consumer Disputes Redressal Commission. Further, the said compensation clause is also in direct conflict with the Act,

2016 and rules made thereunder. Therefore, the clause 17 of agreement is *non est* in law in view of the fact that it is repugnant to the explicit statutory provision and to that extant clause 17 is severable from other clauses of agreement in accordance with clause 30 of the agreement. The complainants crave leave of authority to produce and rely upon relevant judgments at the time of oral hearing as may be required.

- VI. That the respondent company failed to handover the possession to the complainants on the agreed date (31.08.2012) or even after the elapse of the grace period of 120 days (31.12.2012) as provided under the buyer's agreement. The reason for the delay in handing over the possession despite payment of more than 90% of the total consideration is only best known to the respondent company as it has never bothered to intimate any rhymes and reasoning for the delay to the complainants. Therefore, the respondent company has breached the sanctity of the buyer's agreement. The respondent deliberately maintained silence and never bothered to abreast the complainants of the latest development of the project and any rhymes and reason for such a gross and inordinate delay. Henceforth, the respondent is liable to pay interest for delayed period of handing over the possession (i.e. from 31.08.2012) till the actual date of handing over the possession in accordance with section 18 of the Act of



2016. It is to be mentioned that the grace period of 120 days has been mentioned without any justification, therefore, the same cannot form part of legally binding date of possession.

- VII. That there is almost 11 years of unexplained and inordinate delay in handing over the possession by the respondent/promoter to the complainants and therefore a fit case wherein authority should order granting possession immediately along with the interest for unreasonable delay at the prescribed rate in view of the mandatory obligation as provided under section 18 of Act, 2016 as well as on account of the acrimony of respondent/promoter wherein it obliterated the trust reposed on it by complainants by handing over their hard earned money always on time and in accordance with the buyer's agreement. The respondent company did not perform the required reciprocity which goes to very root of any bilateral agreement.

C. Relief sought by the complainants:

4. The complainants have sought following relief(s):
- I. To direct respondent company to immediately deliver the possession of impugned unit to the complainant by revoking illegals demands and adjusting the amount due with the amount of interest payable to the complainants in accordance with prayer (b).

- II. To direct respondent company to pay interest at the prescribed rate for the delayed period of handing over the possession calculated from the date of delivery of possession as mentioned in the buyer's agreement from 31.08.2012 till the actual date of handing over of possession of the said unit.
5. On the date of hearing, the authority explained to the respondent/promoter about the contraventions as alleged to have been committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.
- D. Reply by the respondent.**
6. The respondent has contested the complaint on the following grounds: -
- i. That at the very outset, it is most respectfully submitted that the complaint filed by the complainants is not maintainable and this authority has no jurisdiction whatsoever to entertain the present complaint due to lack of cause of action.
 - ii. That the present complaint has been filed by the complainants before this authority for possession along with compensation against the investment made by them in one of the flat in the said project "Ramprastha City". In this behalf, it is most respectfully submitted that the authority is precluded from entertaining the present complaint due lack of jurisdiction of this authority.
 - iii. That the complainants have now filed a complaint in terms of the Haryana Real Estate (Regulation & Development) Amendment

Rules, 2019 under the amended Rule 28 in the amended 'Form CRA' and are seeking the relief of possession, interest, and compensation under section 18 of the Act. It is most respectfully submitted in this behalf that the power of the appropriate Government to make rules under Section 84 of the said Act is only for the purpose of carrying out the provisions of the said Act and not to dilute, nullify or supersede any provision of the said Act.

- iv. That without prejudice to the above, it is further submitted that the complainants are not "Consumers" within the meaning of the Consumer Protection Act, 2019 since their sole intention was to make investment in a futuristic project of the respondent only to reap profits at a later stage when there is increase in the value of flat at a future date which was not certain and fixed. Neither there was any agreement with respect to any date in existence of which any date or default on such date could have been reckoned due to delay in handover of possession.
- v. That the complainants having full knowledge of the uncertainties involved have out of their own will and accord have decided to invest in the present futuristic project. They have no intention of using the said flat for their personal residence or the residence of any of their family members. If the complainants had such intention they would not have invested in futuristic project. The sole purpose of the complainants was to make profit from sale of

the flat at a future date. Now since the real estate market is seeing downfall, the complainants cleverly resorted to the present exit strategy to conveniently exit from the project by arm twisting the respondent. It is submitted that the complainants having purely commercial motives made investment in a futuristic project and therefore, they cannot be said to be genuine buyers of the said apartment and therefore, the complaint being not maintainable must be dismissed in limine.

- vi. That the complainants have not intentionally filed their personal declarations with respect to the properties owned and/or bought/sold by them at the time of booking the impugned plot and/or during the intervening period till the date of filing of the complaint and hence an adverse inference ought to be drawn against the complainants.
- vii. That the complainants have approached the respondent office in 2010 and have communicated that the complainants interested in a project which is "not ready to move" and expressed their interest in a futuristic project. It is submitted that the complainants were not interested in any of the ready to move in/near completion projects. It is submitted that on the specific request of the complainants, the investment was accepted towards a futuristic project. Now, the complainants are trying to shift the burden on the respondent as the real estate market is facing rough weather.

- viii. That the complainants are an investor, who never had any intention to buy the apartment for their own personal use and have now filed the present complaint on false and frivolous grounds. This authority has no jurisdiction howsoever to entertain the present complaint as the complainants have not come to this authority with clean hands and have concealed the material fact that they have invested in the apartment for earning profits and the transaction therefore is relatable to commercial purpose. The complainants not being 'consumers' within the meaning of section 2(1)(d) of the Consumer Protection Act, 1986, the complaint itself is not maintainable under the Act, of 2016. This has been the consistent view of the National Consumer Disputes Redressal Commission.
- ix. Therefore, the complainants cannot be said to be genuine consumer by any standards; rather the complainants are mere investors in the futuristic project. An investor by any extended interpretation cannot mean to fall within the definition of a "Consumer" under the Consumer Protection Act, 2019.
- x. That the complainants have not approached this authority with clean hands and concealed the material fact that they are defaulters, having deliberately failed to make the timely payment of installments within the time prescribed, which resulted in delay payment charges/interest, as reflected in the statement of account.

Due the lackadaisical attitude of the complainants along with several other reasons beyond the control of the respondent as cited caused the present unpleasant situation. It is due to the default of the complainants, that the allotment could not have been carried out.

- xi. That further, even all through these years, the complainants have never raised any dispute regarding delay in possession or any other aspect. Furthermore, filing a complaint after all these years only hints at the malafide intentions of the complainant. Apparently, the complainants have been waiting eagerly all this while to raise dispute only to reap the benefits of the increase in value of property.
- xii. That the respondent had to bear with the losses and extra costs owing due delay of payment of installments on the part of the complainants for which they are solely liable. However, the respondent owing to its general nature of good business ethics has always endeavored to serve the buyers with utmost efforts and good intentions. The respondent constantly strived to provide utmost satisfaction to the buyers/allottees. However, now, despite of its efforts and endeavors to serve the buyers/allottees in the best manner possible, is now forced to face the wrath of unnecessary and unwarranted litigation due to the mischief of the complainants.

- xiii. That from the initial date of booking to the filing of the present complaint, the complainants have never raised any issues or objections. Had any valid issue been raised by complainants at an earlier date, the respondent would have, to its best, endeavored to solve such issues much earlier. However, now to the utter disappointment of the respondents, the complainants have filed the present complaint based on fabricated story woven out of threads of malice and fallacy.
- xiv. That further, the reasons for delay are solely attributable to the regulatory process for approval of layout which is within the purview of the Town and Country Planning Department. The complaint is liable to be rejected on the ground that the complainants had indirectly raised the question of approval of zoning plans which is beyond the control of the respondent and outside the purview of consumer courts and in further view of the fact the complainants had knowingly made an investment in a future potential project of the respondent. The reliefs claimed would require an adjudication of the reasons for delay in approval of the layout plans which is beyond the jurisdiction of this authority and hence the complaint is liable to be dismissed on this ground as well.
- xv. There is no averment in the complaint which can establish that any so-called delay in possession could be attributable to the

respondent as the finalization and approval of the layout plans has been held up for various reasons which have been and are beyond the control of the respondent including passing of an HT line over the layout, road deviations, depiction of villages etc. which have been elaborated in further detail herein below. The complainants while investing in a plot which was subject to zoning approvals were very well aware of the risk involved and had voluntarily accepted the same for their own personal gain. There is no averment with supporting document in the complaint which can establish that the respondent had acted in a manner which led to any so-called delay in handing over possession of the said flat. Hence the complaint is liable to be dismissed on this ground as well.

- xvi. The respondent/promoter was owner of vast tracts of undeveloped land in the revenue estate of Village Basai, Gadauli Kalan and falling within the boundaries of Sectors 37C and 37D Gurugram also known as Ramprastha City, Gurugram.
- xvii. That where the complainants approached the respondent company, it was made unequivocally clear to them that a specific plot cannot be earmarked out of large tracts of undeveloped and agriculture land; ii.) specific plot with preferred location can be demarcated only when the government releases the zoning plans applicable to the area villages Basai, Gadauli Kalan, Gurugram. It

was on this basic understanding that a preliminary allotment was nothing more than a payment towards a prospective undeveloped agriculture plot of the respondent.

- xviii. The below table shows the project name, its size, and the current status of the project. The respondent has been diligent in completing its entire project and shall be completing the remaining projects in phased manner. The respondent has completed major projects mentioned below and has been able to provide occupancy to the allottees.

S. No	Project Name	No. of Apartments	Status
1.	Atrium	336	OC received
2.	View	280	OC received
3.	Edge Tower I, J, K, L, M Tower H, N Tower-O (Nomenclature- P) (Tower A, B, C, D, E, F, G)	400 160 80 640	OC received OC received OC received OC to be applied
4.	EWS	534	OC received
5.	Skyz	684	OC to be applied
6.	Rise	322	OC to be applied

- xix. That the complainants are short-term speculative investor, their only intention was to make a quick profit from the resale of the land and having failed to resell the said apartment due to recession and setbacks in the real estate world have resorted to this litigation to grab profits in the form of interests. It is most strongly submitted herein that the complainants were never interested in the possession of the property for personal use but only had intent to resell the property and by this, they clearly fall within the meaning of speculative investors.
- xx. That thereafter Ministry of Finance, Government of India in the wake of COVID-19 pandemic has invoked *Force Majeure* and thereby extended the timelines for completion of real estate projects by 6 months period starting from February 2020.
- xxi. That the 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 signed by the complainants/allotment offered to him. It is a matter of record and rather a conceded position that no such agreement, as referred to under the provisions of said Act or said Rules, has been executed between both the parties. Rather, the agreement that has been referred to, for the purpose of getting the adjudication of the complaint, is the apartment buyer agreement dated 20.07.2011, executed much prior to coming into force of said Act or said rules.

The adjudication of the complaint for possession, refund, interest and compensation, as provided under Sections 12, 14, 18, and 19 of said Act, has to be in reference to the agreement for sale executed in terms of said Act and said rules and no other agreement. This submission of the respondent *inter alia*, finds support from reading of the provisions of the said Act and the said Rules. Thus, in view of the submissions made above, no relief can be granted to the complainants.

7. 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 these undisputed documents and submission made by the parties.
8. Through a perusal of the complaint shows that the complainants were allotted unit in the group housing colony namely "The Edge Tower" situated in sector- 37D, Gurugram but while filing written reply, the respondent on 15.02.2022, referred to allotment of a plot and that too with incorrect particulars.

E. Jurisdiction of the authority

The respondent has raised a preliminary submission/objection the authority has no jurisdiction to entertain the present complaint. The objection of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. 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

9. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram District, therefore this authority has complete territorial jurisdiction to deal with the present complaint.

E.II Subject matter jurisdiction

10. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

Section 11

.....

(4) The promoter shall-

(a) be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

11. 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.

F. Findings on the objections raised by the respondent.

F. I Objection regarding the complainants being investors.

12. The respondent has taken a stand that the complainants are the investors and not consumers. Therefore, they have not entitled to the protection of the Act and are not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority observes that the respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that the preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time the preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if the promoter contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the apartment buyer's agreement, it is revealed that the complainants are buyer and paid total



price of Rs.65,10,180/- to the promoter towards purchase of an apartment in its project. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

"2(d) "allottee" in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;"

In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment application for allotment, it is crystal clear that the complainants are allottees as the subject unit was allotted to them by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled as *M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr.* has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottees being investors are not entitled to protection of this Act also stands rejected.

F. II Objection regarding jurisdiction of authority w.r.t. booking application form executed prior to coming into force of the Act

13. 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 booking application form 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. Numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of *Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)* decided on 06.12.2017 which provides as under:

"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter...."

122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."

14. 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."

15. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective

departments/competent authorities and are not in contravention of any other Act, rules, statutes, instructions, directions issued thereunder and are not unreasonable or exorbitant in nature.

G. Findings on the relief sought by the complainants

G.I. To direct respondent company to immediately deliver the possession of impugned unit to the complainant by revoking illegals demands and adjusting the amount due with the amount of interest payable to the complainants in accordance with prayer (b).

G. II To direct respondent company to pay interest at the prescribed rate for the delayed period of handing over the possession calculated from the date of delivery of possession as mentioned in the buyer's agreement from 31.08.2012 till the actual date of handing over of possession of the said unit.

16. 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."

(Emphasis supplied)

17. Clause 15(a) of the apartment buyer agreement (in short, agreement) provides for handing over of possession and is reproduced below:

"15. POSSESSION

(a) Time of handing over the possession

Subject to terms of this clause and subject to the Allottee having complied with all the terms and condition of this Agreement and the Application, and not being in default under any of the provisions of this Agreement and compliance with all

*provisions, formalities, documentation etc., as prescribed by RAMPRASTHA. RAMPRASTHA proposed to hand over the possession of the Apartment by **31.08.2012** the Allottee agrees and understands that RAMPRASTHA shall be entitled to a grace period of hundred and twenty days (120) days, for applying and obtaining the occupation certificate in respect of the Group Housing Complex.”*

18. The authority has gone through the possession clause of the agreement and observes that this is a matter very rare in nature where builder has specifically mentioned the date of handing over possession rather than specifying period from some specific happening of an event such as signing of apartment buyer agreement, commencement of construction, approval of building plan etc. This is a welcome step, and the authority appreciates such firm commitment by the promoter regarding handing over of possession but subject to observations of the authority given below.
19. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and application, and the complainants not being in default under any provisions of these agreements and compliance with all provisions, formalities and documentation as prescribed by the promoter. 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 allottees in fulfilling 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 their right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

20. **Due date of handing over possession and admissibility of grace period:** The promoter has proposed to hand over the possession of the apartment by 31.08.2012 and further provided in agreement that promoter shall be entitled to a grace period of 120 days for applying and obtaining occupation certificate in respect of group housing complex. As a matter of fact, the promoter has not applied for occupation certificate within the time limit prescribed by the promoter in the apartment buyer's agreement. As per the settled law, one cannot be allowed to take advantage of his own wrongs. Accordingly, this grace period of 120 days cannot be allowed to the promoter at this stage.
21. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges at the rate 18% p.a. 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.

22. 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.
23. Taking the case from another angle, the complainants/allottees were entitled to the delayed possession charges/interest only at the rate of Rs.5/- per sq. ft. per month as per relevant clauses of the buyer's agreement for the period of such delay; whereas the promoter was entitled to interest @18% per annum compounded at the time of every succeeding Installment for the delayed payments. The functions of the authority are to safeguard the interest of the aggrieved person, may be the allottees or the promoter. The rights of the parties are to be balanced and must be equitable. The promoter cannot be allowed to take undue advantage of his dominate position and to exploit the needs

of the home buyers. This authority is duty bound to take into consideration the legislative intent i.e., to protect the interest of the consumers/allottees in the real estate sector. The clauses of the buyer's agreement entered into between the parties are one-sided, unfair and unreasonable with respect to the grant of interest for delayed possession. There are various other clauses in the buyer's agreement which give sweeping powers to the promoter to cancel the allotment and forfeit the amount paid. Thus, the terms and conditions of the buyer's agreement are ex-facie one-sided, unfair, and unreasonable, and the same shall constitute the unfair trade practice on the part of the promoter. These types of discriminatory terms and conditions of the buyer's agreement will not be final and binding.

24. 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., 13.01.2023 is **8.60%**. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **10.60%**.
25. The definition of term 'interest' as defined under section 2(z) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

"(z) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.

Explanation. —For the purpose of this clause—



- (i) *the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*
- (ii) *the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"*

26. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 10.60% by the respondent /promoter which is the same as is being granted to the complainants in case of delayed possession charges.

27. On consideration of the documents available on record and submissions made by both the parties regarding contravention of provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. The authority has observed that the apartment buyer agreement was executed on 22.12.2010 and the due date of possession was specifically mentioned in the apartment buyer agreement as 31.08.2012. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over possession is 31.08.2012. The respondent has failed to handover possession of the subject apartment till date of this order. Accordingly, it is the failure of the respondent/promoter to fulfil its obligations and responsibilities as per the agreement to hand over the possession within the stipulated period. Accordingly, the non-



compliance of the mandate contained in section 11(4)(a) read with proviso to section 18(1) of the Act on the part of the respondent is established. As such the allottees shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 31.08.2012 till the handing over of the possession, at prescribed rate i.e., 10.60 % p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules.


H. Directions of the authority

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

- i. The respondent is directed to pay interest at the prescribed rate of 10.60% p.a. for every month of delay from the due date of possession i.e., 31.08.2012 till the date of handing over possession of the said unit after obtaining the occupancy certificate from the concerned authority.
- ii. The arrears of such interest accrued from 31.08.2012 till the date of order by the authority 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 paid by the promoter to the allottees before 10th of the subsequent month as per rule 16(2) of the rules.



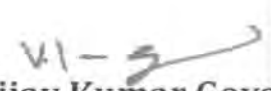
- iii. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
 - iv. The respondent shall not charge anything from the complainants which is not the part of the apartment buyer's agreement
 - v. The rate of interest chargeable from the allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 10.60% 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.
29. Complaint stands disposed of.
30. File be consigned to registry.


(Sanjeev Kumar Arora)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 13.01.2023


(Vijay Kumar Goyal)

Member