BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.:	3916 of 2019
First date of hearing:	18.11.2019
Date of decision:	14.09.2022

Ashish Dhar
R/o H No. C2644, Sushant Lok I, Gurugram — **Complainant**

Versus

1. M/s Anjali Promoters & Developers Pvt. Ltd.
   Office address: M-11, 1st Floor, middle circle, Connaught place, New delhi-110001
2. Anjali Chawla
   Address: 7, Amrita Shergil Marg, New Delhi
3. Kabul Chawla
   Address: 7, Amrita Shergil Marg, New Delhi — **Respondents**

CORAM:
Dr. K. K. Khandelwal — **Chairman**
Shri. Ashok Sangwan — **Member**
Shri Sanjeev Kumar Arora — **Member**

APPEARANCE:
Shri. Ganesh Kamath (Advocate) — Complainant
Shri. Venkat Rao (Advocate) & Pankaj Chandola (Advocate) — Respondents

ORDER

1. The present complaint dated 02.09.2019 has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is *inter alia* prescribed that the promoter shall be responsible for all

obligations, responsibilities and functions as provided under the provision of the Act or the rules and regulations made there under or to the allottee as per the agreement for sale executed *inter se*.

A. Unit and project related details

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

S. N.	Particulars	Details
1.	Name of the project	Centra One
2.	Project location	Sector 61, Gurugram
3.	Date of allotment	03.05.2010 [annexure P1, pg. 21 of complaint]
4.	Unit No.	GF-04, Ground floor [annexure P2, pg. 44 of complaint]
5.	Unit Area	838 sq. ft. [annexure P2, pg. 44 of complaint]
6.	Date of agreement for sale	09.10.2013 [annexure P2, pg. 42 of complaint]
7.	Possession clause	***Clause 2 Possession*** ***2.1*** *The possession of the said premises shall be endeavored* ***to be delivered to the intending purchaser by 31st December 2012****, however, subject to clause 9 herein and strict adherence to the terms and conditions of this agreement by the intending purchaser. The intending seller shall give notice of possession to the intending purchaser with regard to the date of handing over of possession, and in the event the intending purchaser fails to accept and take the possession of the said premises on such date specified in the notice to the intending purchaser shall be deemed to be custodian of the said premises from the date indicated in the notice of possession and the said premises shall*

		remain at the risk and cost of the intending purchaser. *2.2 The intending purchaser shall only be entitled to the possession of the said premises after making full payment of the consideration and other charges due and payable. Under no circumstances shall the possession of the said premises be given to the intending purchaser unless all the payments in full, along with interest due, if any, have been made by the intending purchaser to the intending seller. However, subject to full payment of consideration along with interest by the intending purchaser, if the intending seller fails to deliver the possession of the said premises to the intending purchaser by* ***June 2013****, however, subject to clause 9 herein and adherence to the terms and condition of this agreement by the intending Purchaser, then the intending seller shall be liable to pay penalty to the intending purchaser @ Rs.15/- per sq. ft. per month up till the date of handing over of said premise by giving appropriate notice to the intending purchaser in this regard. If the intending seller has applied to DTCP/any other competent authority for issuance of occupation and/or completion certificate by 30 April 2013 and the delay, if any, in making offer of possession by June 2013 is attributable to any delay on part of DTCP/ competent authority, then the Intending Seller shall not be required to pay any penalty under this clause.* *(Emphasis supplied)* *[annexure P2, pg 48 of complaint]*
8.	Due date of possession	30.06.2013 **[Note: Grace period included]**
9.	Total sale consideration as per statement of account annexed with offer of possession dated 12.12.2018	₹ 71,96,800/- [pg. 43 of reply]
10.	Amount paid by the complainant as per	₹ 50,44,477 /-

	statement of account annexed with offer of possession dated 12.12.2018	[pg. 43 of reply]
11.	Occupation certificate	09.10.2018 [annexure R3, pg. 39 of reply]
12.	Offer of possession	12.12.2018 [annexure R4, pg. 41 of reply]
13.	Assured return paid as per statement of account dated 06.04.2022 submitted by the respondent on hearing dated 14.09.2022	₹ 36,25,961/-

B. Facts of the complaint

3. The complainant has pleaded the following facts:

a. Anjali Promoters & Developers Pvt Ltd was incorporated in 2002under the Companies Act, 1956 and embarked upon residential and commercial real estate projects buying large parcels of land in Gurgaon and other major cities of India. It is pertinent to mention here that the managing director of the said company during booking of the complainant was Ms. Anjali Chawla, who along with her husband Kabul Chawla used to control and run day to day affairs of the company.

b. That on the basis of representations made by developer company which were widely circulated in newspapers and in other media, the complainant, acting under respondent's misrepresentations and being swayed by the published material as well as all the offers given from developer's office, was lured to purchase a ground floor unit measuring 838 sq. ft. for a total consideration of Rs. 5,028,000/- (Rupees fifty lacs & twenty-eight thousand only), to be situated at

Sector 61 Gurgaon in the scheme known as "Centra One" scheme floated by respondents under their banner.

c. That relying on such representation along with other representations/ commitments made by the respondents which were also quite widely circulated in newspapers and in other media (print or electronic), the complainant was lured to purchase the aforementioned unit. The respondent's staff even represented that being a developer of repute and ethical business, the respondents shall adequately compensate the complainant in case the project was delayed for any reason. It was further conveyed to the complainant that the respondent no. 1(developer) would proceed to obtain occupation certificate/completion certificate for the project from the concerned statutory authority on/before 31.12.2012 and accordingly the complainant purchased the unit.

d. That when the complainant visited developer's office, they met addressee no 2 and 3 and they were offered the unit on the ground floor bearing no GF-04. That the complainant was informed that the super area of the said unit would be 838 sq. ft. The complainant had asked the respondents about the calculation arrived at in calculating the super area. The complainant was informed that the respondent's office would satisfy his genuine query within a period of one month. That further, the addressee no 3 and 4 confirmed that the unit would be handed over on/before 31st December 2012. It was further conveyed that the addressee no.2 would proceed to obtain occupation certificate/completion certificate from the concerned statutory authority on/before 31st December 2012. Complainant was further assured that he would be getting a fixed assured return per month (from the date of booking) and the said

assured return would be continued till the time his premises gets leased at the minimum guaranteed rental. The addressee no 3 and 4 had confirmed that the said assured returns would not be delayed under any circumstances. The complainant booked the unit on 26.09.2009 and paid the amounts.

e. That after long follows ups and months of taking place of the transactions, an extremely one sided builder buyer's agreement ("BBA") for the apartment was handed over to the complainant for execution after the complainant having paid considerable sums per the attached annexure and there was precious little he could do to confront the respondents about the one sided BBA on which, the complainant had raised his concerns as regards several unconscionable and unreasonable provisions and clauses of the BBA that placed him in a considerably unfair and disadvantageous position vis-à-vis the dominant position of the respondents. However, instead of addressing his genuine concerns regarding the one-sided BBA, the complainant was laconically and brusquely brushed aside. It was further strange to note that the respondents had changed many terms and conditions which were earlier agreed upon by the respondents. It is pertinent to mention here that the amounts were taken on 26.09.2009 and the complainant was made to run from pillar to post for nearly 4 years for the BBA.

f. That the respondents at that relevant point of time had represented to the complainant that in case he refrained from executing the BBA with its existing provisions that were patently unconscionable and went against the interests of all buyers of the project and if he insisted that separate agreement be executed in respect of his unit, then in that event, an unnecessary controversy would be generated

amongst the other buyers of the project and therefore, the respondents expressed an inability to accommodate the concerns of the complainant as regards untenable provisions of the BBA and conveyed to him that he shall have to execute the already prepared BBA without any modifications and amendments. The respondents even intimidated, coerced and arm-twisted the complainant threatening that they would forfeit the entire amounts deposited by the complainant if he failed to sign such BBA.

g. That finally, without any bargaining power at his disposal and under threat of losing his hard-earned money through forfeiture of monies he had already paid as threatened by the respondents, the BBA dated 09.10.2013 which was completely one-sided was signed by the complainant. While the BBA contained coercive and penal consequences for various events all designed to cause a substantial wrongful loss to the complainant, at the same time, it had been repeatedly assured by the office of respondents that the stringent penal covenants contained in the BBA would not be brought into effect force against the complainant. As far as the complainant is concerned, he had to no option to but to trust the respondents based on the picture portrayed by them.

h. It is stated that after deposit of Rs. 50,44,477/- (Rupees fifty lacs forty four thousand four hundred and seventy seven only) in regard to said unit, the complainant kept on following the developer as well as its directors about the fate of the unit and about exact time when its possession would be handed over and also about the details as to when further documents would be executed by developer, but the respondents always avoided the issue and kept on delaying the matter on false and bogus pleas and excuses. Complainant was

further shocked, when after such a long-time respondents failed to pay him the pending assured returns. That it is further startling that respondents have admitted the liability of assured returns and promised to pay the same vide many verbal communications, but till date have not fulfilled the same.

i. To a glaring disregard, the respondents (especially respondent no 2 and 3) did not honour the commitments made to complainant in the said project and failed to give him the unit in the said project. respondents were duty bound to handover the possession of the unit to complainant in December 2012 as mentioned in the builder buyer agreement. It was thereafter revealed that the building plans were not approved by Department of Town & Country Planning-Chandigarh when respondents had taken the amounts from complainant. The same is in gross violation of the license conditions imposed upon developer/respondents. Thus, in 2009 when the complainant paid the booking about for allotment of the unit, no sale of any unit in the project could have been lawfully made by the respondents as they did not possess the necessary approvals that alone could legally empower respondents to sell units in the project. The booking of the unit made by respondents in favour of the present complainant is in utter violation of statutory provisions as well as the terms of license for the project. In fact, a specific prohibition had been imposed on respondents in the license itself in terms of which they were prohibited from even advertising for the sale of any shop/office/floor area in the said project prior to sanction and approval of the layout plans/building plans for the project which were still pending with DTCP when the said unit was

sold to the complainant and the booking amount collected from him in 2009.

j. That further, the developer unscrupulously issued the offer of possession letter in December 2018. The super area is unilaterally increased from 838 sq. foot to 965 sq. foot which has no nexus to actual area at site. Location is changed unilaterally. There are 2 big pillars in the property and there is no nexus to super area Vs actual area at site. Approx 18,80,000/- is demanded from complainant (on alleged increase of area) and approx. Rs 6,32,000/- is agreed to be paid back only for the last one year (that was stopped unilaterally). No response on 3 years assured returns (2009-2012) is made.

k. The respondent no. 1 has arbitrarily revised the super area of the unit without any rhyme or reason. Such revision in the area imposes hitherto unplanned and unforeseen additional financial demands upon the complainant in fact the respondent no. I has manipulated the area of the unit at its own whims and fancies and areas of the individual units have been arbitrarily and whimsically computed and the same has absolutely no nexus with the actual areas including but not limited to confined and open areas of the project and other common areas. The respondent no. 1 has further sold the car parking illegally to the present complainant as well as many other similarly placed innocent customers of the project. The respondent no. 1 was also selling/offering car parking separately during relevant times at varying prices.

l. That the complainant visited the office of the respondent no. 1 and tried his level best to meet the senior officials, but CRM (Customer Relation Managers) did not allow him to meet. The complainant demanded his pending assured return money with interest for not

fulfilling the promises as made in the BBA date 09.10.2013. However, the respondent didn't bother to pay heed to the genuine demands of the complainant and hence, this complainant to the Haryana Real Estate Regulatory Authority at Gurugram on the grounds which are raised in issues to decided.

C. Relief sought by the complainant:

4. The complainant has sought following reliefs:

   a. The respondent-promoter be ordered to handover the complainant's unit along with the interest towards delay in handover the unit.

   b. The respondent be ordered to collect payment only on carpet area.

   c. The respondent be ordered to clarify the area details allotted to the complainant.

   d. Respondents be directed to bear the cost of GST as the project got delayed solely due to them.

   e. That the respondent-promoter be ordered to make payment of assured return for a period of 22.10.2009 to 01.02.2012 along with interest till the date of actual payments back.

   f. That orders may be passed against the respondent in terms of section 59 of the Act, of 2016 for the failure on part of the respondent to register itself with the authority under the Act, of 2016.

5. On the date of hearing, the authority explained to the respondents/promoters about the contravention as alleged to have been committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent

6. The respondents have contested the complaint on the following grounds:

   a. That the complainant after conducting thorough due diligence and investigating the real estate market, approached the respondents through a broker namely, *"Kapur Estates"* for booking of the unit no.GF-04 in the project "Centra One" at Gurugram.

   b. That the respondents after receiving OC from the concerned authorities on 09.10.2018, duly served possession letter dated 12.12.2018 to the complainant. After issuance of OOP, the respondents have duly adjusted assured return amounting to Rs.6,32,193/- in complainant's account with regard to the unit in question.

   c. That the complainant has also concealed from this Hon'ble Authority that the respondents being a customer centric company has always addressed the concerns of the complainant and had requested the complainant time and again to visit the office of the respondents in order to amicably resolve the concerns of the complainant. However, notwithstanding the several efforts made by the respondents to attend to the queries of the complainant to their complete satisfaction, the complainant deliberately proceeded to file the present complaint before this hon'ble authority against the respondents.

   d. That the complainant has alleged that the respondents delayed the project and in terms of the SBA whereby the respondents had agreed to handover possession by 31.12.2012, there has been a huge delay, however it is clarified that the possession timelines as per clause 2.1

of the SBA were subject to clause 9 and strict adherence to the terms and conditions of the agreement.

e. In this context, it is further submitted that the respondents with a view to create a world class commercial space, engaged renowned architects Cervera and Pioz of Spain for the said project. The respondent also engaged renowned contactor M/s Ahluwalia Contracts (P) Ltd. for the said project. The respondents launched the project with a vision of creating an iconic building and hence engaged the best professionals in the field for the same who are well known for their timely commitment as well.

f. The respondents had conceived that the project would be deliverable by 31.12.2012 based on the assumed cash flows from the allottees of the project. However, it was not in the contemplation of the respondents that the allottees including the complainant herein would hugely default in making payments and hence, cause cash flow crunch in the project. The complainant was also aware that as per the SBA, timely payment of the installments was the essence of the contract, however demand raised vide offer of possession dated 12.12.2018 is outstanding till date.

g. The complainant, in view of the fact that the complainant has relied upon clause 2.1 of the SBA for the timelines, it is submitted that the said timelines for possession till 31.12.2012 were subject to compliance of all terms and conditions of the agreement, including but not limited to timely payment of all the dues. A further grace period of 6 months was also agreed to between the parties. As stated above, other allottees, including the complainant, defaulted in making timely payments of the various installments and despite the grant of numerous opportunities, failed to clear dues. Hence, the

timelines for possession stood diluted because of the acts/ defaults of the various allottees.

h. It is further submitted that the project 'Centra One' is a Greenfield project, located at Sector 61, Gurgaon. The majority of customers opted for construction linked payment plan after clearly understanding that and agreed upon to tender the payment as per the construction milestones. It is pertinent to mention here that, given the choice of payment plan and terms of the agreement, all the customers including the complainant specifically understood that a default in tendering timely payment by significant number of customers, would delay the construction activity. It is a matter of fact and record that the space/unit holders as a group have defaulted in making timely payment which has caused major set-back to the development work.

i. That in the 1st year (FY 07) demands amounting to Rs.20.84 Crores were raised by the respondent in accordance with the payment plans chosen by customers, and only Rs.15.83 Crores was paid by them. Over 43% customers defaulted in making timely payment in FY 2007, and percentage of defaulting customers swelled to 56%, 40% and 68% in the FY 09, 10 and 11 respectively.

j. It is submitted that the complainant has approached this hon'ble authority for redressal of his 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 decisions 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 amounts to fraud not only against the respondents but also against the court and in such situation, the complaint is liable to be dismissed at the threshold without any further adjudication.

7. Copies of all the documents have been filed and placed on record. The authenticity is not in dispute. Hence, the complaint can be decided on the basis of theses undisputed documents.

E. Jurisdiction of the authority

8. The authority observed 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. The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as per provisions of section 11(4)(a) of the Act leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

F. Findings on the objections raised by the respondent

F.I. Objection raised by the respondent regarding force majeure conditions.

11. The respondents have submitted the following contentions to be taken into note by the authority for granting grace period on account of force majeure:

a. That the complainant is the allottee of a shop bearing no. GF-04 in the commercial project of the respondent company, Centra One, situated in Gurugram, Haryana. The complainant in the present complaint is inter alia seeking interest on account of delay in handing over possession. The project, Centra One, is a business complex situated in Gurugram's sector 61, spread over an area of 3.675 acres. The said commercial complex has been developed by M/s Anjali Promoters Pvt. Ltd. in collaboration with M/s Saiexpo Overseas Pvt. Ltd. and M/s Countrywide Promoters Pvt. Ltd (collectively referred to as 'Company'). Subsequently, Department of Town and Country Planning, Haryana ("DTCP") has issued a license bearing no. 277 of 2007 to M/s Countrywide Promoters Pvt. Ltd. for developing a commercial complex on the said land.

b. That the timeline for possession as per the space buyer's agreement, was proposed to be by 31st December 2012 with a further grace period of 6 months. Thus, possession of the unit in question was proposed to be handed over by 30th June 2013. It is further submitted that the said timeline for possession was subject to force majeure and timely payment of installments by the complainant.

c. That it is pertinent to point out that both the parties as per the application form duly agreed that the respondent shall not be held responsible or liable for any failure or delay in performing any of its obligations or undertakings as provided for in the agreement, if such performance is prevented, delayed or hindered by delay on

part of or intervention of statutory authorities like DTCP or the local authorities or any other cause not within the reasonable control of the Respondent. In such cases, the period in question shall automatically stand extended for the period of disruption caused by such operation, occurrence or continuation of force majeure circumstance(s).

d. The possession timelines for the said project were subject to force majeure circumstances and timely payment of called installments by the allottees. "Force Majeure", a French term equivalent to "Vis majeure", in Latin, means "superior force". A force majeure clause is defined under the Black's Law Dictionary as 'A contractual provision allocating the risk if performance becomes impossible or impracticable, especially as a result of an event or effect that the parties could not have anticipated or controlled.

e. That delay, if any, in handing over of possession of the units of the said project is due to reasons beyond the control of the company. In this regard it is pertinent to point out that on 29.05.2008, the company applied for grant of approval of building plans from the DTCP.

f. That on 21.07.2008, in the meeting of the building plan approval committee, the committee members concurred with the report of Superintending Engineer (HQ), HUDA and STP, Gurgaon who had reported that the building plans were in order. The said members also took note of the report of the STP (E&V)'s observation on the building plans. The members stated that the said observations were "minor in nature" and hence approved the building plans subject to corrections.

g. That DTCP vide letter dated 30.07.2008 approved the building plans of the company subject to certain rectification of deficiencies. There were in total 3 deficiencies which were asked to be corrected by the company, namely, NOC from AAI to be submitted, covered area not correct and lastly fire safety measures were not provided.

h. That in compliance with the directions issued by DTCP vide office memo no. ZP-345/6351 dated 30.07.2008, the company submitted revised building plans on 27.08.2008 vide letter dated 25.08.2008. It is pertinent to point out that since there were no further objections conveyed to the company for the release of the building plans it was assumed that the building plans would be released automatically. Since no communication was received by the company for almost 5 months, the company on its own volition enquired the reasons for delay in release of the building plans by DTCP. To its astonishment, it came to the company's knowledge that the same was being withheld by DTCP on account of EDC dues. However, no formal communication qua the same was received by the company. Nonetheless, the company on 15.01.2009 and 16.01.2009 requested DTCP to release its building plans while submitting an undertaking to clear the EDC dues within a specified time period. It is pertinent to point out that there were no provisions in the Haryana Development and Regulation of Urban Areas Act, 1975 or the Haryana Development and Regulation of Urban Areas Rules, 1976 or any law prevalent at that time which permitted DTCP to withhold release of a building plan on account of dues towards EDC.

i. That DTCP on 27.02.2009 after a lapse of almost six months from the date of submission of the revised building plans, conveyed the

company to clear EDC/IDC dues while clearly overlooking the undertakings given by the company.

j. That it is stated that the company, on 03.08.2010 deposited full EDC/IDC with the department. It is pertinent to mention herein that in terms of the license granted and the conditional approval of the building plans, the company had started developing the project. That to its surprise, the company received a notice by DTCP dated 19.03.2013 directing the company to deposit composition charges of Rs.7,37,15,792/- on account of alleged unauthorized construction of over an area of 34238.64 sq. mtr. The said demand was questioned by the company officials in various meetings with DTCP officials. Various representations were made by the company on 04.09.2013, 22.10.2013, 11.11.2013, 02.12.2013, 14.03.2014, 15.04.2014, 07.07.2014, 13.11.2014, 09.02.2015, 07.04.2015. The company in its representation dated 05.06.2015 pointed out all the illegalities in the demand of composition charges of Rs.7.37 crores.

k. That instead of clarifying the issue, DTCP further issued a demand letter on 31.12.2015 directing the company to deposit Rs. 7.37 crores as composition charges, Rs. 54,72,889 as labour cess and Rs. 55,282 on account of administrative charges. That the company succumbed to the undue pressure and on 13.01.2016 deposited Rs. 7.37 crores with DTCP as composition charges and further requested for release of its building plans. The company on 13.01.2016 further deposited an amount of Rs.41,68,171/- towards the balance labour cess.

l. That even after clearing the dues of EDC/IDC and payment of composition charges, building plan was not released by DTCP, instead, the company was asked to apply for sanction of building

plan again as per the new format. The same was duly done by the company on 16.06.2017. Further, the company, on completion of construction applied for grant of occupation certificate on 29.07.2017. That the company on the very next day i.e., 25.10.2017 replied to the DTCP justifying the concern while submitting the building plan again for approval. In the meantime, the company also paid composition charges to the tune of Rs.43,63,127/- for regularization of construction of the project.

m. That, finally on 12.01.2018 the building plan was approved for the Centra One, post approval of the same, the company on 21.05.2018, in continuation to its application dated 31.07.2017, again requested DTCP for grant of occupation certificate for its project. It is stated that occupation certificate was duly granted by DTCP on 09.10.2018. Thus, even after having paid the entire EDC dues in the year 2010 the building plans for the project in question was not released by DTCP. It is reiterated that release/approval of building plan at that point in time was not linked with payment of EDC.

n. It is pertinent to mention that in 2013 the company received a surprise demand of Rs.7.37 crores for composition towards unauthorized construction without considering the fact that construction at the project site was carried out by the company on the basis of approval of building plan in the meeting of the building plan approval committee on 21.07.2008. Even after payment of the composition charges, the building plan was not released by DTCP instead, the company was asked to apply for sanction of building plan again as per the new format. The same was duly done by the company on 16.06.2017. However, it is after almost a lapse of 10 years from the date of first application that the building plan was

finally approved on 12.01.2018. Thus, the circumstances as mentioned hereinabove falls squarely into the definition and applicability of the concept of 'force majeure'.

o. That in addition to the above, the project also got delayed due to a complete ban on extraction of ground water for construction by the Central Ground Water Board. On 13.08.2011, the Central Ground Water Board declared the entire Gurgaon district as 'notified area' which in turn led to restriction on abstraction of ground water only for drinking / domestic use. Hence, the developer/company had to use only treated water for construction and/or to buy water for construction.

p. That the ***Hon'ble Supreme Court recently in Puri Constructions Pvt. Ltd. Vs. Dr. Viresh Arora (Civil Appeal No. 3072 of 2020)*** on 3rd September 2020 while allowing the appeal preferred by the Developer company against an order passed by the Ld. NCDRC directed the Ld. Commission to decide afresh on the matter in issue while taking into consideration the force majeure circumstances pleaded by the developer.

q. The Hon'ble Supreme Court conceded with the submissions made by the Developer Company that though the NCDRC noted that the developer pleaded force majeure on the ground that

(i) the construction of the flats could not proceed due to a stay granted by the National Green Tribunal on construction during the winter months; and

(ii) demonetization affected the real estate industry resulting in delays in completion, the submission has not been dealt with

r. The second submission which was urged on behalf of the developer was that in similar other cases, the NCDRC has condoned the delay

of the nature involved in the present case in handing over possession, having regard to the quantum of delay involved.

s. Thus, delay, if any, in handing over possession to allottees of Centra One has been due to reasons beyond control of the company and the same need to be taken into consideration by RERA in so awarding delay possession compensation while also giving the company an extension of 10 years so as to complete the project by 2018-19.

12. As far as this issue is concerned the authority the authority has already settled this issue in complaint bearing no. ***1567 of 2019*** titled as ***Shruti Chopra & anr. V/s Anjali Promoters & Developers Pvt. Ltd.*** wherein the authority is of the considered view that if there is lapse on the part of competent authority in granting the required sanctions within reasonable time and that the respondent was not at fault in fulfilling the conditions of obtaining required approvals then the respondent should approach the competent authority for getting this time period i.e., 31.12.2011 till 19.11.2018 be declared as "zero time period" for computing delay in completing the project. However, for the time being, the authority is not considering this time period as zero period and the respondent is liable for the delay in handing over possession as per provisions of the Act.

G. Findings on the relief sought by the complainant

G.I. DPC and possession.

13. In the present complaint, the complainant intends to continue with the project and is seeking delayed possession charges interest on the amount paid. Clause 2.1 & 2.2 of the buyer's agreement (in short, agreement) provides for handing over of possession and is reproduced below: -

"**2.1** *The possession of the said Premises shall be endeavored* ***to be delivered to the Intending Purchaser by 31st December 2012****, however, subject to clause 9 herein and strict adherence to the terms and conditions of this Agreement by the Intending Purchaser. The intending seller shall give notice of possession to the intending purchaser with regard to the date of handing over of possession, and in the event the intending purchaser fails to accept and take the possession of the said premises on such date specified in the notice to the intending purchaser shall be deemed to be custodian of the said premises from the date indicated in the notice of possession and the said premises shall remain at the risk and cost of the intending purchaser.*

2.2 *The intending purchaser shall only be entitled to the possession of the said premises after making full payment of the consideration and other charges due and payable. Under no circumstances shall the possession of the said premises be given to the intending purchaser unless all the payments in full, along with interest due, if any, have been made by the intending purchaser to the intending seller. However, subject to full payment of consideration along with interest by the intending purchaser, if the intending seller fails to deliver the possession of the said premises to the intending purchaser by* ***30th June 2013****, however, subject to clause 9 herein and adherence to the terms and condition of this agreement by the intending Purchaser, then the intending seller shall be liable to pay penalty to the intending purchaser @ Rs.15/- per sq. ft. per month up till the date of handing over of said premise by giving appropriate notice to the intending purchaser in this regard. If the intending seller has applied to DTCP/any other competent authority for issuance of occupation and/or completion certificate by 30th April 2013 and the delay, if any, in making offer of possession by 30th June 2013 is attributable to any delay on part of DTCP/ competent authority, then the Intending Seller shall not be required to pay any penalty under this clause."*

14. 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 complainant not being in default under any provisions of this agreement 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 favor of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities

and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the flat buyer agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee 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 allottee is left with no option but to sign on the dotted lines.

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

16. 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.

17. 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., **14.09.2022** is 8%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10%.

18. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

> *"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.*
> *Explanation. —For the purpose of this clause—*
> *(i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default.*
> *(ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"*

19. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., **10%** by the respondent/promoter which is the same as is being granted to the complainant in case of delayed possession charges.

20. On consideration of the documents available on record and submissions made regarding contravention of provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 2.1 of the buyer's agreement executed between the parties on 09.10.2013, the possession of the subject apartment was to be delivered by 30.06.2013. As far as grace period is

concerned, the same is allowed being unqualified. The respondents have offered the possession of the subject unit on 12.12.2018. Accordingly, it is the failure of the respondent/promoter to fulfil obligations and responsibilities as per the agreement to hand over the possession within the stipulated period.

21. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 09.10.2018. The respondent offered the possession of the unit in question to the complainant only on 12.12.2018. So, it can be said that the complainant came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the complainant should be given 2 months' time from the date of offer of possession. This 2 month of reasonable time is being given to the complainant keeping in mind that even after intimation of possession, practically one has to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit, but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e., 30.06.2013 till the expiry of 2 months from the date of offer of possession (12.12.2018) which comes out to be 12.02.2019.

22. 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 respondents is established. As such, the allottee shall be paid, by the promoters, interest for every month of delay from due date of possession i.e., 30.06.2013 till the date of offer of the possession of the

unit plus two months i.e., till 12.02.2019, at prescribed rate i.e., 10 % p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules

23. The respondents have already offered the possession of the subject unit on 12.12.2018 after the grant of OC. Therefore, the complainant is directed to take the possession of the subject unit after clearing the instalments due if, any within 15 days from the date of this order.

G. II. The respondent ordered to collect payment only on carpet area.

G.III. The respondent be ordered to clarify the area details allotted to the complainant.

24. The Director of Town and Country Planning had issued license bearing no. 107 of 2012 dated 15.10.2012 under the provisions of Haryana Development and Regulation of Urban Areas Act, 1975 in the favour of respondent on 15.10.2012. The license was issued prior to the date of commencement of Real Estate (Regulation and Development) Act, 2016. Moreover, the promoter has executed buyer's agreement with the allottees on 09.10.2013 i.e., prior to the coming into force of the Act. As per the buyer's agreement, the unit/flat has been sold on super area basis therefore, in the present case the promoter can sell super area in place of carpet area to the allottees. However, the position has changed after the Act has come into force.

25. Although, the agreements entered into prior to coming into force of the Act are treated as sacrosanct and the promoter is well within his right to charge on the basis of the super area but under this garb, allottees cannot be allowed to be cheated and they are to be informed as what is being charged from them in the name of super area.

G.IV. Refrain the respondents from raising the demand of GST.

26. The authority has decided this issue in the complaint bearing no. ***4031 of 2019*** titled as ***Varun Gupta V/s Emaar MGF Land Ltd.*** wherein the

authority has held that for the projects where the due date of possession was prior to 01.07.2017 (date of coming into force of GST), the respondent/promoter is not entitled to charge any amount towards GST from the complainant/allottee as the liability of that charge had not become due up to the due date of possession as per the buyer's agreements.

27. In the present complaint, the possession of the subject unit was required to be delivered by 30.06.2013 and the incidence of GST came into operation thereafter on 01.07.2017. No doubt as per clause 1.1 of the builder buyer's agreement, the complainant/allottee has agreed to pay all the Government charges, rates, tax or taxes of all and any kind by whatsoever name called whether levied now or in future, as the case may be, effective from the date of this agreement. The delay in delivery of possession is the default on the part of the respondent/promoters and the possession was offered on 12.12.2018 by that time the GST had become applicable. But it is settled principle of law that a person cannot take benefit of his own wrong/default. So, the respondent/promoter is not entitled to charge GST from the complainant/allottee as the liability of GST had not become due up to the due date of possession as per the agreements.

G.V. That the respondent-promoter be ordered to make payment of assured return for a period of 22.10.2009 to 01.02.2012 along with interest till the date of actual payments back.

28. The authority, after examining the record of the case meticulously, observed that there is no assured return clause in the BBA executed inter se parties. Nor there is any MOU or addendum to agreement on record from where the amount of assured return to be paid to the complainant by the respondent can be ascertained by the authority except from the letter dated 06.04.2022 where it is expressly mentioned

that the respondent company has paid ₹ 36,25,961/- with respect to assured return to the complainant. Since there is nothing on record for computation of the assured return therefore, authority denies granting the pending payments of assured return as it cannot be ascertained.

G.VI. That orders may be passed against the respondent in terms of section 59 of the Act, of 2016 for the failure on part of the respondent to register itself with the authority under the Act, of 2016.

29. As the project is registerable and has not been registered by the promoters, the authority has decided to take suo-moto cognizance for not getting the project registered and for that separate proceeding will be initiated against the respondent. A copy of this order be endorsed to registration branch for further action in the matter.

H. Directions of the authority

30. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligations casted upon the promoters as per the functions entrusted to the authority under section 34(f):

i. The respondent no. 2 is directed to pay interest at the prescribed rate of 10% p.a. for every month of delay from the due date of possession i.e., 30.06.2013 till the date of offer of the possession plus two months i.e., 12.02.2019 after adjusting the amount already paid by the respondent, if any.

ii. The arrears of such interest accrued from 30.06.2013 till 12.02.2019 shall be paid by the promoter to the allottee within a period of 90 days from date of this order.

iii. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.

iv. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 10% by the respondent/promoter which is the same rate of interest which the promoters shall be liable to pay the allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

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

31. Complaint stands disposed of.

32. File be consigned to registry.

Sanjeev Kumar Arora	Ashok Sangwan	Dr. K.K. Khandelwal
(Member)	**(Member)**	**(Chairman)**

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 14.09.2022