

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

Complaint no.:	4601 of 2020
Order reserved on:	15.12.2022
Date of pronouncement:	15.03.2023

Satpal Singh.

Office Address: Flat no. 002, Tower-20, Vipul Greens,
Sohna Road, Gurugram-122001

Complainant

Versus

M/s Anjali Promoters & Developers Pvt. Ltd.

Office address: 28, ECE House, 1st Floor, K.G. Marg, New
Delhi-110001

Respondent

CORAM:

Shri. Ashok Sangwan
Shri Sanjeev Kumar Arora

**Member
Member**

APPEARANCE:

Shri. Priyanka Agarwal (Advocate)
Shri. Harshit Batra (Advocate)

Complainant
Respondent

ORDER

1. The present complaint dated 16.12.2020 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.	Unit no.	05-502, 5 th floor. [pg. 36 of complaint]
4.	Change in unit as per offer of possession dated 29.11.2018	09-911, 9 th floor. [pg. 62 of complaint]
5.	Unit area	1000 sq. ft. [pg. 36 of complaint]
6.	Date of allotment letter	10.06.2008 [pg. 29 of complaint]
7.	Date of execution of buyer's agreement	11.03.2013 [page 34 of complaint]
8.	Possession clause	Clause 2 Possession <i>2.1 The possession of the said Premises shall be endeavored to be delivered to the intending Purchaser by 31st December 2011, 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</i>



		<p>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.</p> <p>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 2012, 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 @ rs15/- 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 2012 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.</p> <p><i>(Emphasis supplied)</i></p> <p>[pg. 40 and 41 of complaint]</p>
9.	Due date of possession	30.06.2012 [Note: Grace period included]
10.	Total sale consideration as per statement of account annexed with offer of possession dated 29.11.2018	₹ 76,10,015/- [pg. 65 of complaint]



11.	Amount paid by the complainant as per statement of account annexed with offer of possession dated 29.11.2018	₹ 68,01,001/- [pg. 65 of complaint]
12.	Occupation certificate	09.10.2018
13.	Offer of possession	29.11.2018 [pg. 62 of complaint]

B. Facts of the complaint

3. The complainant has pleaded the following facts:

- a. That the complainants are a law-abiding citizens and consumers who have been cheated by the malpractices adopted by the respondent is stated to be a builder and is allegedly carrying out real estate development, since many years, the complainants being interested in the project as it was a commercial project. The complainants desired their own commercial space.
- b. That the respondent company under the guise of being a reputed builder and developer has perfected a system through organized tools and techniques to cheat and defraud the unsuspecting, innocent and gullible public at large. The respondent advertised its projects extensively through advertisements. Complainants were allured by an enamoured advertisement of the respondent and believing the plain words of respondent in utter good faith the complainants were duped of their hard-earned monies which they saved from bonafide resources.
- c. That due to the malafide intentions of the respondent and non-delivery of the commercial unit, the complainants have accrued huge losses on account of the career plans of their children and themselves and the future of the complainants and their family are

rendered dark as the planning with which the complainants invested their hard-earned monies have resulted in sub-zero results and borne thorns instead of bearing fruits.

- d. That the previous allottee Mr Anubhav Agarwal approached to the respondent for booking of a commercial space admeasuring 1000 Sq ft. in Faridabad project and paid booking amount ₹ 1200000/- dated 18.12.2006.
- e. That the previous allottee paid the total amount ₹2100000/- through cheque no. 007328, 195607, and 195606 dated 03.01.2007, 04.04.2007 and 10.03.2007 before April 2007. After that respondent endorsed the payment receipt to the complainant. Unit no. is not mentioned in the payment receipt.
- f. Respondent abandoned the Faridabad commercial project and allotted the commercial space in Gurugram district, unit no. 05-502, area 1000 Sq. ft in project "CENTRA ONE", Sector-61, Gurugram, Haryana on dated 10.06.2008.
- g. That the respondent to dupe the complainant in their nefarious net even executed space buyer agreement signed between M/S Anjali Promoters & Developers Pvt Limited and Mr Satpal Singh dated 11.03.2013 after extract 100% consideration amount form complainant. Respondents create a false belief that the project shall be completed in time bound manner and in the garb of this agreement persistently raised demands due to which they were able to extract huge amount of money from the complainant.
- h. That the total cost of the said flat is ₹ 60,00,000 /- and sum of ₹ 68,01,001/- paid by the complainant in time bound manner. That the complainant had paid all the demanded instalments by



respondent on time and deposited ₹ 68,01,001/-. Before execution of SBA, builder extracted more than 100 % amount which is unilateral, arbitrary and illegal. That respondent in endeavour to extract money from allottees, devised a payment plan under which respondent linked 90 % amount for raising the super structure only. The total sale consideration to the timelines which is not depended or co-related to the development of the site at all. After taking the same respondent has not bothered to initiate any development of the project till 2018. That after taking 100 % amount before 2013, builder has taken 11 years for project development and offer of possession. So, project is extremely delayed.

- i. That respondent was liable to hand over the possession of a developed commercial unit before 31.12.2011 As per SBA clause no. 2.1 (*The possession of the said premises shall be endeavored to be delivered to the intending purchaser by 31st December 2011, however, subject to clause 9 herein and strict adherence to the term and conditions of the agreement by the intending purchaser*) is so far.
- j. That complainants visited project site many times and found that builder had not carried out development work except super structure completion, even during year 2007 to 2017 (10 year). Project was abandoned and development work was not carried out by the builder. That the complainants tried to approach the builder for knowing the reason for inordinate delay, but builder didn't reply. Respondent didn't disclose the date of possession but assured the complainants that delay penalty shall be paid at the time of offer of possession.



- k. That the complainants visited project after getting offer of possession. The unit is not in habitable condition even walls of unit, construction of fire emergency, and fitting of toilets and finishing of building still pending and project is not in habitable condition. That respondent was liable to hand over the possession of a said unit before 31.12.2011 so far from completion as per space buyer's agreement clause no 2.1 but builder offer the possession on dated 19.11.2018 but flat are not in habitable condition. Complainants were shocked when respondent sent offer of possession on dated 19.11.2018 and did not adjust any delay penalty for the delay in handing over the possession, which was committed by builder in earlier email.
- l. That the respondent has changed the unit without any consent of complainant. The unit earlier allotted was unit no. 05-502 than change to 09-911. New unit mention in the offer of possession letter. That the respondent charged the PLC of ₹ 3,01,500/- for unit however, unit doesn't meet the any criteria set by the builder for PLC therefore charges of PLC is unilateral illegal and arbitrary.
- m. From the above it is abundantly clear that the respondent sold the unit in 2007, extracted more than 10% before 2013 from innocent buyer by giving false millstone. This was done by executing illegal, unilateral, one-sided SBA Agreement. That as per section 19 (6) the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as the Act) complainants have fulfilled his responsibility in regard to making the necessary payments in the manner and within the time specified in the said agreement. Therefore, the



complainants herein are not in breach of any of its terms of the agreement.

- n. That keeping in view the complainants who have spent his entire hard-earned savings in order to buy this unit, stands at a crossroad to nowhere. The inconsistent and lethargic manner, in which the respondent conducted its business and their lack of commitment in completing the project on time, has caused the complainants great financial (Interest on money, Lease value, increase in taxes, opportunity loss etc.) and emotional loss.
- o. It is submitted that the cause of action to file the instant complaint has occurred within the jurisdiction of this Hon'ble Authority as the apartment which is the subject matter of this complaint is situated in Sector 61 Gurugram which is within the jurisdiction of this Hon'ble Authority.

C. Relief sought by the complainant:

4. The complainant has sought following reliefs:
 - a. Direct the respondent to pay interest for every month of delay at prescribed rate of interest from 31.12.2011 till handing over of physical possession.
 - b. Direct the respondent to complete the project and hand over the physical possession of the allotted unit.
 - c. Direct the respondent to quash one sided clause from space buyer agreement.
 - d. Pass an order for payment of GST amount levied upon complainant and taken the benefit of input credit by builder.
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 respondents.

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

- a. 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.
- b. That the complainant has misrepresented from this Hon'ble Authority that the complainant voluntarily and willingly approached the first allottee with an intent to seek booking/allotment of commercial space in the project developed by the respondent at Faridabad and accordingly, the first allottee and the complainant jointly approached the respondent for transfer of booking/allotment in the name of the complainant. Thereafter, the complainant requested for cancel/surrender of application for registration of commercial space in project at Faridabad, and further requested to transfer/adjust already deposited amount



towards new registration/booking by the complainant in the project developed by the respondent at Gurugram.

- c. That the complainant has concealed from this Hon'ble Authority that with the motive to encourage the complainant to make payment of the dues within the stipulated time, the respondent also gave additional incentive in the form of timely payment discount (TPD) to the complainant and in fact, till date, the complainant has availed TPD of ₹ 61,545/-.
- d. That the complainant has also concealed from this Hon'ble Authority that the complainant has been a chronic defaulter in making timely payments of the instalments raised as per the payment plan opted and agreed since the beginning of booking/allotment. In this regard, it is submitted that prior to entering into transaction with the respondent, the complainant vide *clause-11 of the SBA read along with clause-1.7 of the SBA*, agreed and accepted that timely payment of each instalment due and demanded was a material condition of the transaction and, if case there is any due from the complainant, he/she shall be liable to pay delayed interest thereon @18% p.a. from the due date till the date of payment along with such delayed payment. As explained in detail above, the respondent as a goodwill gesture has granted complete interest waiver amounting to ₹ 6,58,011/- towards unit in question till April' 2015.
- e. That the respondent after issuance of OOP letter dated 29.11.2018, as a goodwill gesture have granted a special credit amounting to ₹ 7,53,750/- towards unit in question.



- f. As contemplated in Section 13 of the Act, subsequent to the commencement of the Rules, a promoter has to enter into an agreement for sale with the allottees and get the same registered prior to receipt of more than 10 percent of the cost of the plot or building. Form of such agreement for sale has to be prescribed by the relevant state government and such agreement for sale shall specify amongst various other things, the particulars of development, specifications, charges, possession timeline, provisions of default etc.
- g. By a notification in the Gazette of India dated 19.04.2017, the Central Government, in terms of Section 1 (3) of the Act prescribed 01.05.2017 as the date on which the operative part of the Act became applicable. In terms of the Act, the Government of Haryana, under the provisions of Section 84 of the Act notified the **rules** on 28.07.2017.
- h. Rule 8 (1) clearly specifies that the form of the "agreement for sale" is prescribed in annexure A to the rules and in terms of section 13 of the Act the promoter is obligated to register the agreement for sale upon receipt of any amount in excess of 10 percent of the cost of the plot. Rule 8(2) provides that any documents such as allotment letter or any other document executed post registration of the project with the RERA between the promoter and the allottee, which are contrary to the form of the agreement for sale, Act or Rules, the contents of the form of the agreement for sale, Act or Rules shall prevail.
- i. It is very important to note that the rule 8 deals with documents executed by and between promoter and allottee after registration



of the project by the promoter, however with respect to the documents including agreement for sale/ flat buyers agreement/plot buyers agreement executed prior to the registration of the project which falls within the definition of "ongoing projects" explained herein below and where the promoter has already collected an amount in excess of 10 percent of the total price Rule 8 is not applicable.

- j. The parties had agreed under the space buyer agreement (SBA) to attempt at amicably settling the matter and if the matter is not settled amicably, to refer the matter for arbitration. Admittedly, the complainant has raised dispute but did not take any steps to invoke arbitration. Hence, is in breach of the agreement between the parties. The allegations made require proper adjudication by tendering evidence, cross examination etc. and therefore cannot be adjudicated in summary proceedings.
- k. It is submitted that there is no delay in issuing offer of possession as in terms of clause 14 of the application form, the respondent no. 1 was entitled to handover possession of the unit by 31st June 2012. It is submitted that despite fulfilling all the requisites with DTCP, Haryana the building plan was not sanctioned by the DTCP without giving any cogent reason for the same. The building plan was approved only on 12.01.2018.
- l. It is pertinent to point out that both the parties as per the application form duly agreed that the respondent no. 1 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).

- m. 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.
- n. **FORCE MAJEURE CONDITIONS:** That on 29.05.2008, the respondent no. 1 applied for grant of approval of building plans from DTCP, Haryana. 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 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.
- o. That DTCP vide letter dated 30.07.2008 approved the building plans of the respondent no. 1 subject to certain rectification of deficiencies. There were in total 3 deficiencies which were asked to



- be corrected by the respondent no. 1, namely, NOC from AAI to be submitted, covered area not correct and lastly fire safety measures were not provided.
- p. That in compliance with the directions issued by DTCP vide office memo no. ZP-345/6351 dated 30.07.2008, the respondent no. 1 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 respondent no. 1 for the release of the building plans it was assumed that the building plans would be released automatically.
- q. Since no communication was received by respondent no. 1 for almost 5 months, respondent no. 1 on its own volition enquired about the reasons for the delay in release of the building plans by DTCP. To its astonishment, it came to the respondent no. 1'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 respondent no. 1. Nonetheless, respondent no. 1 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.
- r. 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



- respondent no. 1 to clear EDC/IDC dues while clearly overlooking the undertakings given by the respondent no. 1. That it is stated that respondent no. 1, on 03.08.2010 deposited full EDC/IDC with the department.
- s. To its surprise, respondent no. 1 received a notice by DTCP dated 19.03.2013 directing the respondent no. 1 to deposit composition charges of ₹ 7,37,15,792/- on account of alleged unauthorized construction of over an area of 34238.64 sq. mtrs The said demand was questioned by the respondent no. 1 officials in various meetings with DTCP officials. Various representations were made by the respondent no. 1 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 respondent no. 1 in its representation dated 05.06.2015 pointed out all the illegalities in the demand of composition charges of rs 7.37 crores.
- t. That the respondent no. 1 succumbed to the undue pressure and on 13.01.2016 deposited ₹ 7.37 crores with DTCP as composition charges and further requested for release of its building plans. That the respondent no. 1 on 13.01.2016 further deposited an amount of ₹ 41,68,171/- towards the balance labour cess.
- u. Even after clearing the dues of EDC/IDC and payment of composition charges, the building plan was not released by DTCP, instead, the respondent no. 1 was asked to apply for sanction of building plan again as per the new format. The same was duly done by respondent no. 1 on 16.06.2017. Further, respondent no. 1, on completion of construction applied for grant of occupation certificate on 29.07.2017.



- v. That the respondent no. 1 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, respondent no. 1 also paid composition charges to the tune of ₹ 43,63,127/- for regularization of construction of the project. That, finally on 12.01.2018 the building plan was approved for centra one. Post approval of the same, the respondent no. 1 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.
- w. Even after payment of the composition charges, the building plan was not released by DTCP. Instead, respondent no. 1 was asked to apply for sanction of building plan again as per the new format. The same was duly done by respondent no. 1 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.
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 respondents.

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

11. The respondents in their reply have submitted the contentions regarding force majeure conditions for delay by the department for granting OC to be taken into note by the authority for granting grace period on account of force majeure:
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.

F.II. Objection regarding jurisdiction of authority w.r.t. retrospectivity of the Act.

13. Objection raised the respondent 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 flat buyer's agreement executed between the parties and no agreement for sale as referred to under the provisions of the Act or the said rules has been executed inter se parties. The authority is of the view that the Act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. 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 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 complainant.

G.I. Direct the respondent to pay interest for every month of delay at prescribed rate of interest from 31.12.2011 till handing over of physical possession.

G.II. Direct the respondent to complete the project and hand over the physical possession of the allotted unit.

16. 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 2011, 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 2012, 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 @ ₹ 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 2012 and the delay, if any,



in making offer of possession by 30th June 2012 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."

17. 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.
18. **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."

19. 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.
20. 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., **15.03.2023** is 8.70%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.70%.
21. 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;"



22. Therefore, interest on the delayed payments from the complainant shall be charged at the prescribed rate i.e., **10.70%** by the respondent/promoter which is the same as is being granted to the complainant in case of delayed possession charges.
23. 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 11.03.2013, the possession of the subject apartment was to be delivered by 30.06.2012. As far as grace period is concerned, the same is allowed being unqualified. The respondents have offered the possession of the subject unit on 29.11.2018. 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. Furthermore, the contention raised by the complainant regarding the unit not being habitable is rejected by the authority as the respondent has received the occupation certificate by the concerned authority on 09.10.2018 and thereafter the respondent offered the possession of the unit. Accordingly, the unit was complete as the DTCP, Haryana granted OC for the said project only after the respondent has complied with all the prerequisite required to obtain OC. As far as finishing works are concerned that is the duty of the respondent to handover the unit to the complainant complete in all respect as promised by the respondent in accordance with the terms of BBA executed between the parties.

26



24. 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 29.11.2018. 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., 30.06.2012 till the expiry of 2 months from the date of offer of possession (29.11.2018) which comes out to be 29.01.2019.
25. 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., 30.06.2012 till the date of offer of the possession of the unit plus two months i.e., till 29.01.2019, at prescribed rate i.e., 10.70 % p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules.



26. The respondents have already offered the possession of the subject unit on 29.11.2018 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.III. Direct the respondent to quash one sided clause from space buyer agreement.

27. The complainant has not mentioned one sided clause particularly in its complaint accordingly this relief stands infructuous.

G.IV. Pass an order for payment of GST amount levied upon complainant and taken the benefit of input credit by builder.

28. 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.
29. In the present complaint, the possession of the subject unit was required to be delivered by 30.06.2012 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 29.11.2018 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.

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. 1 is directed to pay interest at the prescribed rate of 10.70% p.a. for every month of delay from the due date of possession i.e., 30.06.2012 till the date of offer of the possession plus two months i.e., 29.01.2019 after adjustment of the amount of assured return paid to the complainant by the respondent.
- ii. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
- iii. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 10.70% 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.
- iv. 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.



HARERA
GURUGRAM

Complaint No. 4601 of 2020

32. File be consigned to registry.


Sanjeev Kumar Arora
(Member)


Ashok Sangwan
(Member)

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 15.03.2023