BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. :	**4911 of 2022**
Date of filing complaint:	**27.07.2022**
First date of hearing:	**07.09.2022**
Date of decision	**18.05.2023**

1. Sh. Prem Pradeep 2. Smt. Meena Pradeep R/O: 691-692, Ranka Heights Apartment, Domlur Layout, Bengaluru, Karnataka	**Complainants**
Versus	
M/s Experion developers Pvt Ltd Regd. Office: F-9, 1st Floor, Manish Plaza - I, Plot No. 7, MLU, Sector 10, Dwarka New Delhi 110075	**Respondent**

CORAM:	
Shri Vijay Kumar Goyal	**Member**
Shri Sanjeev Kumar Arora	**Member**
APPEARANCE:	
Sh. Dhruv Lamba (Advocate)	Complainants
Sh. Venket Rao (Advocate) Sh. Pankaj Chandola (Advocate) Sh. Ankita Saikia (Advocate)	Respondent

ORDER

1. The present complaint has been filed by the complainant/allottee under Section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the

provision of the Act or the rules and regulations made there under or to the allottees as per the agreement for sale executed inter se.

A. Unit and project related details

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

S.no.	Heads	Information
1.	Name of the project	Windchants Sector 112, Chauma, Gurugram
2.	Nature	Group hosuing
3.	DTCP License	21 of 2008 dated 08.02.2008 vald upto 07.02.2020 28 of 2012 dated 07.04.2012 valid upto 06.04.2025
4.	Licensee name	• Experion Developers
5.	Unit no.	WB -04/202 As per annexure 5 vide allotment letter on page 141 of the complaint)
6.	Unit area admeasuring	6325 sq. ft. Area increased by 6485 as per page no. 79 of buyer's agreement as per schedule iii of complaint (As per annexure 5 vide allotment letter on page 141 of the complaint)
7.	Date of allotment letter	31.07.2012 (As per annexure 2 on page 35 of the complaint in favor of the previous allottee namely Puneet sharma)
8.	Date of BBA	14.06.2013 (As per annexure 2 on page 68 of the

		complaint between the original allottee and respondent and endorsed in the favor of the complainant on 28.01.2013 on page 116 of reply)
9.	Payment plan	Construction linked
10.	Environment clearance	27.12.2012 (As per project details of the above mentioned project taken from the planning branch)
11.	Possession clause	10 Project completion period 10.1 Subject to Force Majeure, timely payment of the Total Sale Consideration and other provisions of this Agreement, based upon the Company's estimates as per present Project plans, the Company intends to hand over possession of the Apartment within a period of **42 (forty two months from the date of approval of the Building Plans or the date of receipt of the approval of the Ministry of Environment and forests, Government of India for the Project or execution of this Agreement, whichever is later** ("Commitment Period"). The Buyer further agrees that the Company shall additionally be entitled to a time of 180 (one hundred and eighty days ("Grace Period") after expiry of the Commitment Period for unforeseen and unplanned Project realities. However, in case of any default under this Agreement that is not rectified or remedied by the buyer within the period as may be stipulated, the Company shall not be bound by such Commitment Period.

12.	Due date of possession	14.06.2017 (Calculated from the date of bba i.e 14.06.2013 being later plus 180 days grace period)
13.	Total sale consideration	Rs. 4,23,00,737 (As alleged by the complainant)
14.	Amount paid by the complainant	Rs. 4,57,23,507/- (As alleged by the complainant)
15.	Occupation certificate /Completion certificate	23.07.2018 (As per annexure R -12 on page no. 134 of the reply) (For tower T-7 and t-8)
16.	Offer of possession	24.07.2018 (As per annexure r-4 On page no. 81 of REPLY)
17.	Reminder letter	31.03.2014,07.01.2015,10.02.2015, 28.04.2015,27.05.2015, 11.06.2016 ,19.06.2015,07.07.2015,16.07.2015 ,30.07.2015 , 01.08.2015

B. Facts of the complaint:

3. That That the complainant – allottees booked a unit namely in the project ""Windchants" situated at Sector - 112, Village Choma, Gurugram. On 14.06.2012, the respondent company issued an advertisement w.r.t launching of a Group Housing Project namely "Windchants" situated at Sector - 112, Village Choma, Gurugram and relying on the assurances and promises of the respondent, on 14.06.2012, the original allottes Mr. Puneet Sharma and Mrs. Anahat Sharma made an application for allotment of the unit in the said project and in lieu of the same paid an amount of Rs. 11,00,000/-.

4. That on 31.07.2012, a provisional allotment letter was issued by the respondent company in the name of the original allottees vide which a residential unit bearing no. WB-04/202, having a super area of 6325 sq. ft. was allotted against a total sale consideration of Rs. 4,23,00,737/-. The original allottees opted for a construction linked payment plan to make the payments.

5. That on 01.02.2013, the present complainants of the complaint Mr. Prem Pradeep and Mrs. Meena Pradeep had stepped into the shoes of the original allottees. On this date itself the endorsement w.r.t the same was done in the favour of the present complainants by the respondent. A buyer's agreement was executed between the parties on 14.06.2013. As per Schedule-III of the ABA, a unit bearing no. 202 on 2nd 1 floor in Tower/ Block WB-04 having a sale area of 6485 sq. ft. was agreed upon. As per Schedule-V of the buyer's agreement, the total sale consideration of the subject unit was Rs. 4,21,13,485/-excluding service tax.

6. That as per the clause 10.1 of the buyer's agreement, executed between the parties, the respondent company has proposed to handover the possession of the subject unit within a period of 42 months from the date of approval of building plans or the date of receipt of the approval of MoEF, Government of India for the project or execution of this agreement whichever is later. It is a matter of fact that the date of execution of the ABA is 14.06.2013 and therefore the due date of possession comes out to be 14.06.2017. Further, a grace period of 180 should not be allowed in the present case, as the respondent has failed to complete the construction of the subject unit and to deliver the possession of the same in promised time frame and it is a well settled law that "No one can take benefit out of his own wrong".

7. That on 24.07.2018, a notice of possession was sent by the respondent company to the present complainants along with final statement of account. It is pertinent to mention over here that the said statement of account consisted of certain illegal demands as ADHOC charges in the guise of Dual meter charges, piped connection charges, Geyser charges, PHE charges, FTTH charges, ECC charges etc. and GST charges to mention a few. The present complainants objected to the same but there was no positive response from the respondent w.r.t the same. In view of the same, the said offer of possession is not valid in the eyes of the law as it was accompanied with unlawful and illegal demands.

8. That the present complainants had made all the payments well on time as and when demanded by the respondent builder. It is a matter of fact that the complainants had made a payment of Rs.4,57,23,507/- towards the total sale consideration of the subject apartment. The respondent had wrongly charged the "ADHOC charges" under the head of dual meter charges (Rs. 16,800/-), PHE charges (Rs. 15,066/-), FTTH charges (Rs.45,044/-), piped connection charges (Rs.51,273/-), ECC charges (Rs.1,95,364/-) from the present complainants as the same were not part of "Schedule-V" as agreed upon between the parties at the time of execution of the ABA. Furthermore, the respondent has charged Rs. 7.28.654/- on 01.02.2013 as ADHOC charges from the complainants which are illegal and liable to be refunded. This Hon'ble Authority has ordered to refund the "ADHOC charges™ in the same project in Complaint no. 5577 of 2019 in its decision dated 22.12.2021.

9. That furthermore the respondent builder has wrongly charged Holding charges from the present complainants. However, as per the law settled by the Hon'ble Supreme Court in civil appeal no. 3864-3889/2020 dated 14.12.2020, the holding charges shall also not be charged by the respondent builder at any point of time even if they are part of the agreement. That as per the buyer's agreement, the respondent builder has charged the present complainants the sale consideration for an area of 6485 sq. ft. It is of grave importance to mention here that the area of the subject unit, the possession of which is offered to the present complainants is less than 3200 sq. ft. and no explanation and justification have been offered in this regard as to how the carpet area is just 50% of the charged sale area.

10. That the respondent had also wrongly charged GST from the complainants. It is a matter of fact that the due date of possession w.r.t the subject apartment comes out to be 14.12.2016 and the delay in the construction and handing over of possession has been caused by the respondent builder so the allottee should not bear the burden of the mistakes/ defaults of the respondent .That vide clause 4.8 of the said agreement, the respondents have to charge interest on delayed payment from the buyer @ 18 % P.A. on the delayed payment for the period of delay. However, if there is any delay in offer of possession i.e., delay on the part of the respondent, the company vide clause 13 of the said agreement is liable to pay a compensation of Rs. 7.50/- per sq. ft. of the sale area as the full and final settlement of any loss of whatsoever nature for every month of delay which is totally one-sided, illegal, arbitrary and unilateral as there is no parity between the two parties.

11. That the grievance of the complainants w.r.t the illegal demands of the respondent was not resolved even after long perusal of the same by the complainants. In view of the same a legal notice dated 08.03.2021 was sent to the respondent builder by the present complainants.

12. That on 14.03.2021, the respondent issued a public notice and also sent a letter to the complainants inviting objections to the revision of plans. It is at this critical juncture that the complainants came to know that the respondent has done illegal construction in violation of the sanctioned plans. That the complainants were shocked to find that the respondent has done several violations of very serious nature like the organised green area was encroached upon, reduction in no. of surface parking Reduction in ground coverage of towers, illegal construction of high-speed diesel and gas banks on children's playing area etc. which he sought to regularise through this process. The complainant immediately filed the objections.

13. That the respondent, in view of large no. of objections received from the allottees, again issued a public notice dt. 21.07.2021 withdrawing the earlier notice and informing that he has demolished the 20 EWS units. It is of grave importance to mention over here that the illegal 20 EWS units were only one of the several serious violations of the plans. The fact of the matter is that there are several other violations of very serious nature which are present on the site. The intention of the respondent was to post facto legalise the violations/ illegal constructions already done.

14. That due to the acts of the respondents and the deceitful intent as evident from the facts outlined above, the complainants have been unnecessarily

harassed mentally as well as financially, and therefore the opposite party is liable to compensate the complainants on account of the aforesaid unfair trade practice. That the complainants have been keen to take possession ever since the notice of possession was given but the respondent is deliberately withholding the possession of the subject apartment in order to extract the illegal sums from the complainants. The respondent builder was not settling the outstanding issue and was abusing his dominant position continuously till date.

15. That the respondent was liable to hand over the possession of a subject apartment on or before the due date of possession as per the clause 10.1 of the said agreement which comes out to be 14.12.2016. So, the respondent is liable to pay the delay possession charges from the due date of possession i.e., 14.12.2016 till actual handing over of possession. It is also prayed before this Hon'ble Authority that the amount charged in lieu of the illegal demands like ADHOC charges (totalling to approximately 11 lacs), Holding charges and the GST be refunded to the present complainants.

16. That the complainants have approached the respondent- builder for delayed possession charges and extra adhoc charges taken by the builder and leading to filing this complaint seeking delay possession charges.

C. Relief sought by the complainant :

17. The complainant have sought following relief(s):

    i. Direct the respondent to pay delay possession charges at prescribed rate of interest from the due date till actual handing over of the possession.

ii. Direct the respondent that the rate of interest chargeable from the present complainants by the promoter shall be equitable as per section 2(za) of the Act of 2016 .

iii. Direct the respondent to refund the wrongly charged amount of GST.

iv. Direct the respondent to refund all the wrongly charged "ADHOC Charges" totalling to approximately 11,00,000/-

v. Direct the respondent to not charge anything from the present complainants which is not part of the agreement.

vi. Direct the respondent to not to charge holding charges from the complainants.

vii. Direct the respondent to refund the amount charged in lieu of the increased area as the carpet area of the subject unit is 3200sq. ft.

D. Reply by respondent:

The respondent by way of written reply made following submissions

18. That the unit bearing No. WB/04/202 admeasuring tentatively 6485 sq. ft. sale area in the Project "Windchants" (hereinafter referred to as **"Project"**) was initially allotted to Mr. Puneet Sharma and Ms. Anahat Sharma (hereinafter referred to as the ***"Original Allottees"***) vide provisional allotment letter dated 31.07.2012. That the said unit was thereafter transferred to the complainants by way of endorsement from the original allottees, pursuant to which the apartment buyer agreement dated 14.06.2013 was executed with the complainants after carefully reading and understanding the terms and conditions contained therein.

19. That the respondent, being a responsible promoter/builder, completed the construction of this particular tower WB-04 of the project and applied for the occupation certificate with the competent authority on 16.01.2018. That the competent authority after duly following the procedure of law issued the occupancy certificate on 23.07.2018 to the respondent for this

particular phase, wherein the unit of the complainants is located. It is clarified that name of T-13 has been changed to WB-04 for marketing purpose.

20. That thereafter, pursuant to the provisions of RERA, 2016 and abiding by the terms and conditions of the buyer's agreement , the respondent sent the notice of possession letter dated 24.07.2018 to the complainants. That vide the said letter the respondent requested the complainants to take over the possession of the unit, as per the terms and conditions of the ABA and also execute conveyance deed thereof.

21. That the complainants utterly failed to take over the possession of the unit, after clearing all their dues. It is pertinent to mention that it has been more than 4 years that the respondent has offered the unit for possession but till date the complainants have not come forward to take the possession of the same, clear their dues and the respondent is left with no other option but to maintain the unit of the complainants till the handing over of possession to them.

22. That as per Section 17 of the RERA Act, 2016, it is the duty of the promoter to execute the conveyance deed and handover the physical possession to the allottee(s) within three months of obtaining of the occupation certificate. However, since the complainants have failed to come forward and take possession and thereby execute the conveyance deed, the respondent in turn has not been able to fulfil its obligations as per section 17.

23. That it was mutually agreed between the complainants and the respondent in the buyer's agreement , that after the issuance of occupancy certificate , the respondent shall offer the possession of the unit and after due completion of all the documentation work and payment of all due amounts

as per the apartment buyer agreement, the parties may proceed forward and execute a conveyance deed.

24. That as per Section 19(11) of the Real Estate (Regulation and Development) Act, 2016, it is an obligation upon the allottee(s) to execute the conveyance deed.That the complainants have considerably failed to take possession and duly execute the conveyance deed despite reminders being sent by the respondent via letter dated 29.01.2019, and 05.01.2021

25. That without prejudice and admitting anything as claimed in the complaint, it is humbly submitted that the buyer's agreement was executed between the complainants and the respondent on 14.06.2013. Therefore, the rights of the complainants over the unit only persisted from 14.06.2013 and therefore, the due date of handing over of possession is 42 months of date of execution of the ABA. Further, a grace period of 180 days after expiry of the due date is to be taken into consideration for unforeseen and unplanned project realities. Thus, the project was to be handed over by **13.06.2017** subject to force majeure and timely payment by the complainant.

26. That the respondent being a responsible developer and abiding by the terms and conditions recorded in the apartment buyer's agreement, has already paid an amount of **Rs.5,32,651/-** to the complainant as a compensation for delay in handing over of possession, which has been acknowledged by the complainants in the instant case. It is noteworthy that the said compensation was paid to the respondent on its own free will and reflects in the ledger as entry dated 24.07.2018.

27. That till 12.07.2022 i.e date of filing of the complaint, the complainant never raised any dispute regarding the delayed possession charges. That the complainant is raising the dispute at this juncture of time only to gain the illegitimate money from the respondent and as an after-thought.

28. That the complainants have been in blatant violation of Section 19(6) of the RERA Act, 2016 as they have failed to pay the due instalments on time against the sale consideration amounts payable towards the unit. It is pertinent to mention herein that the complainants have opted for construction linked plan and the respondent accordingly have raised their demands on achievement of relevant milestones. However, the complainants have failed to make timely payments. It is submitted that as per the ABA, so signed and acknowledged, the complainants were aware that the possession of the said unit was subject to timely payment of amount due by the respondents.

29. That despite being aware of the payment schedule and the fact that timely payment is essence for completion of the project, the complainants have failed to make the requisite payment of the instalment as and when demanded by the respondent in compliance with the payment schedule. And, upon not receiving the requisite instalment respondent had issued payment reminders, calling upon the respondents to make payment of balance outstanding.

30. That the complainants were aware of every term and condition of the buyer's agreement and willingly agreed to sign upon the same after being satisfied with each and every term and without any protest or demur. It is further submitted that as per the buyer's agreement so signed and acknowledged, the complainants were fully aware that the basic sale price of the unit was exclusive of various charges which were to be intimated to the complainants in future from time to time. The relevant clause 4.2 of the ABA is mentioned below for ready reference:

> *"4.2 The BSP of the apartment is exclusive of EDC and IDC and other statutory deposits and/or charges, including charges for connections and use of electricity, water, sewage, sanitation and other amenities,*

utilities and facilities or any other charges required to be paid by the Company to relevant authorities and shall be payable by the buyer at such rates as may then be applicable and in such proportion as the Sale Area of the Apartment bears to the total sale area of all the apartments in the project...."

31. That even clause 2 of the payment plan annexed as Schedule –VI to the ABA makes it abundantly clear that the BSP of the unit does not include charges for connection and use of electricity, water, sewage, sanitation etc. and therefore will be charged in addition.

32. That the various charges payable by the complainants have been duly raised as per the agreed terms of the buyer's agreement and pertain to charges related to electricity, water, sanitation, gas pipeline etc.

33. That the Government notified the Goods and Services Act 2017, as per which the GST was made mandatory to be charged. Accordingly, in the buyer's agreement it was clearly provided that the allottee will be responsible and liable to bear the '**present/future applicable taxes/levies/duties/cesses**' as may be imposed by the concerned authorities from time to time. The relevant clause is 4.3 of the ABA .

34. That on account of anti profiteering benefit under GST pursuant to Section 171 of Central Goods and Services Tax Act, 2017 the input tax credit was to be passed on to the recipients. Accordingly, vide letter dated 01.05.2019 the respondent informed the complainant that credit of GST benefit under section 171 of Central Goods and Services Tax Act, 2017 is being passed on and vide credit note dated 26.04.2019 an amount of **Rs.2,55,712**/- was credited to the

account of the complainants against the purchase of unit no. WB-04/202 in project Windchants and same was duly acknowledged by the complainants.

35. That the original sale area of the said unit, as per the buyer's agreement was **6485 sq.ft**. However, on completion of the project and final calculation of the area of the unit, the sale area was decreased to **6476 sq.ft. (reduction of 9 sq.ft.).** It is most humbly submitted that the permissible limit in variation of the sale area as per the buyer's agreement was 10%. However, the variation in the Sale Area of the unit of the complainants is merely 0.138%.

36. That the decrease in area was duly taken into consideration at the time of issuing notice of possession and therefore, the respondent at its own volition credited an amount of **Rs.51,750/-** to the account of the complainants for the said decreased area. This credited amount is clearly depicted in the ledger under the entry dated 28.09.2017.

37. That it was mutually agreed between the sale area of the unit was tentative and was subject to change and a maximum variation of 10% in the sale area of the unit was agreed to be acceptable to the complainants as per Clause 8.6 of the ABA.

38. That it was also agreed between the complainants and the respondent that actual sale area will be determined after the completion of construction work and after the issuance of occupation certificate. That after agreeing to the same the said understanding between the parties was recorded in Clause 3.1 of the apartment buyer agreement.

39. That further, clause 8 of the buyer's agreement clearly lays down mutually agreed terms and conditions with respect to change and variation in sale area of the unit for which the complainants have consented. For the purpose of this present complaint, the relevant clauses are clause 8.2 and clause 8.6. The respondent in order to prove the genuineness and justification for the decrease in total sale area of the unit got an independent architect to measure and certify the areas of the units on 30.01.2018 as per terms of clause 3.1 of the ABA. It is further submitted that on 23.09.2020 the respondent again appointed Knight Frank India Pvt. Ltd. to provide their report/opinion on the total Super Built-up Area of the project. This was done in order to clarify that the changes in total sale area was within the parameter as agreed in the apartment buyer agreement. Additionally, independent measurement and verification of the built-up area of the apartments and common areas of the project was also again done by D Idea Architects.

40. That the complainants were aware of every terms of the buyer's agreement and agreed to sign upon the same after being satisfied with each and every term and without any protest or demur. It is submitted that as per the buyer's agreement so signed and acknowledged the complainants knew that they will be liable for 'Maintenance Charges' on offer of possession and on account of delay in execution of the conveyance deed. The relevant clause is 11.3 and 12.2 of the buyer's agreement.

41. That without admitting or acknowledging in any manner the truth or legality of the allegations levelled by the complainants and without prejudice to the contentions of the respondent, it is submitted that project of the respondent got delayed due to force majeure situations beyond the

control of the respondent. That some of the force majeure situations faced by the respondent which affected or led to stoppage of the work for brief amount of time is being reiterated herein for the sake of clarity:

42. That the respondent since the inception of the project was committed towards the timely completion of the project. That due to some force majeure situations beyond the control of the respondent the project got slightly delayed. The respondent despite facing unforeseen force majeure situations completed the construction of the project and made an application for issuance of occupancy Certificate dated 16.01.2018 before the competent authority.

43. That the competent authority had granted the occupation certificate only on 23.07.2018. It is worthwhile to mention here that the competent authority has granted the Occupancy Certificate after a delay of approximately 7 months. It is also submitted that the delay was not due to any to any default of the respondent or due to submission of any incomplete applications. The respondent had submitted all necessary documents for obtaining the occupation certificate with the competent authority. That the delay on part of the competent authority in granting the occupancy certificate does not amount to delay on part of the respondent.

44. **NGT Order**: The Respondent stopped its development activities in compliance with the National Green Tribunal (NGT) order to stop construction in April 2015, November 2016 & November 2017 due to emission of dust. The NGT orders simply ordered to stop the construction activities as the pollution levels were unprecedented took time of a month

or so . It is submitted that stoppage of work for a week on the construction sites takes a month for re-mobilization of man and material on the site and start the work again. For this very, in recent times this Hon'ble Authority had extended the registration period of the projects by nine months for lockdown for 45 days due to COVID 19.

45. **Demonetization of Rs. 500 and Rs. 1000 currency notes:** The Real Estate Industry is dependent on un-skilled/semi-skilled unregulated seasonal casual labour for all its development activities. The Respondent awards its contracts to contractors who further hire daily labour depending on their need. On 8th November 2016, the Government of India demonetized the currency notes of Rs. 500 and Rs. 1000 with immediate effect resulting into an unprecedented chaos which cannot be wished away by putting blame on respondent. Suddenly there was crunch of funds for the material and labour. The labour preferred to return to their native villages. The whole scenario slowly moved towards normalcy but development was delayed by at least 4-5 months.

46. **GST Implications**: It is pertinent to apprise to the Ld. Authroity that the developmental work of the said project was slightly decelerated due to the reasons beyond the control of the respondent due to the impact of **Good and Services Act, 2017** [hereinafter referred to as 'GST'] which came into force after the effect of demonetization in last quarter of 2016 which stretches its adverse effect in various industrial, construction, business area even in 2019. The Respondent also had to undergo huge obstacle due to effect of demonetization and implementation of the GST.

47. **Jat Reservation Agitation:** The Jat Reservation agitation was a series of protests in February 2016 by Jat people of North India, especially those in the state of Haryana, which paralyzed the State including city of Gurgaon wherein the project of respondent are situated for 8-10 days. The protesters sought inclusion of their caste in the Other Backward Class (OBC) category, which would make them eligible for affirmative action benefits. Besides Haryana, the protests also spread to the neighbouring states, such as Uttar Pradesh, Rajasthan, and also the National Capital Region. The instant stoppage of work on the fear of riots and remobilization of work force took considerable time of 3-4 months.

48. **Delay by Contractor:** The respondent had awarded the works of Civil (Structure, Finishing), Mechanical, Electrical, HVAC and External Development Works, including Provisional Sum Items on Design and Build Basis for construction of the project in question to Larsen and Toubro Limited ("L&T") vide a work agreement dated 7.2.2013 ("Work Contract"). L&T is a well known construction company with vast expertise in executing large scale infrastructure projects. However, L&T delayed the work thereby delaying the construction milestones and sought several extensions in order to complete completion. The delays in this regard were beyond the control of the Respondent. The Respondent has made huge investments in the project through the funds infused by its parent company.

49. That the project was delayed due to force majeure situations beyond the control of the respondent. It is to be noted that the representatives of the respondent duly apprised the complainants in one of their visits to project site about the

difficulties being faced by the respondent in completing the construction of the project due to aforementioned force majeure situations.

50. That for the submissions made and objections raised in the preliminary submissions and also for the reason that the respondent has already compensated the complainants for delay in handing over of possession, despite delay not attributable to the respondent, the grievance of the complainant is not maintainable and hence may be dismissed.

51. Copies of all the relevant documents have been filed and placed on record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submission made by the parties.

E. Jurisdiction of the authority:

52. The Authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, 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

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

Section 11(4)(a)

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

Section 34-Functions of the Authority:

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

So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

F. Findings on the objections raised by the respondent:

F.I Objection regarding force majeure conditions:

53. The respondent-promoter raised the contention that the construction of the project was delayed due to force majeure conditions such as NGT Order , Delay by the contractor , , Demonetization , GST application , Jat Reservation Agitation but all the pleas advanced in this regard are devoid of merit. The subject unit was allotted to the complainants on 31.07.2012 and as per provisions of agreement, its possession was to be offered by 14.06.2017. The due date as per possession clause comes out to be 14.06.2017.

54. The events such as demonetization and various orders by NGT in view of weather condition of Delhi NCR region, were for a shorter duration of time and were not continuous whereas there is a delay of more than three years. Even after due date of handing over of possession. Whereas if it comes for GST , the GST was applicable from 01.07.2017 and jat reservation was for only one or two months . Thus, the promoter/respondent cannot be given any leniency on basis of aforesaid reasons and it is well settled principle that a person cannot take benefit of his own wrong.

G. Findings on the relief sought by the complainants:

G.I Direct the respondent to pay delay possession charges at prescribed rate of interest from the due date till actual handing over of the possession.

G.II Direct the respondent that the rate of interest chargeable from the present complainants by the promoter shall be equitable as per section 2(za) of the Act of 2016 .

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

> *"**Section 18: - Return of amount and compensation***
>
> *18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building, —*
>
> .....
>
> *Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."*

56. Clause 10 of the buyer's agreement 14.06.2013 provides for handing over of possession and is reproduced below:

10 Project completion period

10.1 Subject to Force Majeure, timely payment of the Total Sale Consideration and other provisions of this Agreement, based upon the Company's estimates as per present Project plans, the Company intends to hand over possession of the Apartment within a period of 42 (forty two months from the date of approval of the Building Plans or the date of receipt of the approval of the Ministry of Environment and forests, Government of India for the Project or execution of this Agreement, whichever is later ("Commitment Period"). The Buyer further agrees that the Company shall additionally be entitled to a time of 180 (one hundred and eighty days ("Grace Period") after expiry of the Commitment Period for unforeseen and unplanned Project realities.

57. The Authority has gone through the possession clause of the agreement and observes that the respondent-developer proposes to handover the possession of the allotted unit within a period of 42 months from the date of approval of building plans or the date of receipt of approval of environment clearance or execution of this agreement whichever is later . In the present case, the flat buyer's agreement inter-se parties was executed on 14.06.2013plus grace period of 180 days as such the due date of handing over of possession comes out to be 14.06..2017.

58. **Admissibility of grace period:** As per clause 10.1 of buyer's agreement dated 14.06.2013, the respondent-promoter proposed to handover the possession of the said unit within a period of period of 42 months from the date of approval of building plans or the date of receipt of approval of environment clearance or execution of this agreement whichever is later . Therefore, as per clause 10.1 of the buyer's agreement dated 14.06.2013, the due date of possession comes out to be 14.06.2017 by allowing grace period being unqualified and being allowed in earlier case no. 530 of 2018.

59. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant are seeking delay possession charges however, proviso to section 18 provides that where an allottee does not intend to

withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

> ***Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]***
>
> *(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.:*
>
> *Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.*

60. 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.

61. 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., 18.05.2023 is @ 8.70 %. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.70%.

62. 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;"*

63. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 10.70 % by the respondent/promoters which is the same as is being granted to them in case of delayed possession charges.

64. 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 10.01 of buyer's agreement executed between the parties on 14.06.2013, the possession of the subject apartment was to be delivered within a period of period of 42 months from the date of approval of building plans or the date of receipt of approval of environment clearance or execution of this agreement whichever is later. The due date of possession is calculated from the date of execution of buyer's agreement plus 180 days grace period which comes out to be 14.06.2017. The respondent has offered the possession of the allotted unit on 07.05.2019 after obtaining occupation certificate from competent Authority.

65. 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 has been obtained from the competent Authority on 23.07.2018 and it has also offered the possession of the allotted unit on 24.07.2018. Therefore, in the interest of natural justice, the complainant should be given 2 months' time

from the date of offer of possession. This 2 months' of reasonable time is to be given to the complainant keeping in mind that even after intimation of possession practically he 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. 14.06.2017 till offer of possession i.e 24.07.2018 .. The respondent-builder has already offered the possession of the allotted unit on 24.07.2018, thus delay possession charges shall be payable till offer of possession plus two months i.e. 24.09.2018.

66. Accordingly, it is the failure of the promoter to fulfil its obligations and responsibilities as per the buyer's agreement dated 14.06.2013 to hand over the possession within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with proviso to section 18(1) of the Act on the part of the respondent is established. As such, the allottee shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 14.06.2017 till offer of possession plus two months i.e. 24.09.2018; at the 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.

67. The respondent stated that a compensation/penalty on account of delay has already been credited to the account of complainant. The Authority observes that as per reply, an amount of Rs.5,32,651/-has been credited to the account of complainant as delay possession charges. Therefore, out of amount so assessed on account of delay possession charges, the respondent is entitled to deduct the amount already paid towards DPC.

G.III Direct the respondent to refund the wrongly charged amount of GST.

68. In the instant complainant, the respondent charged amount on pretext of GST from the complainants. However, it has been submitted by the respondent that it has already refunded an amount of Rs. 2,55,712/- to the complainants for which they charged on account of GST.

69. The Authority laid reliance on judgement dated 04.09.2018 in ***complaint no. 49/2018, titled as Parkash Chand Arohi Vs. M/s Pivotal Infrastructure Pvt. Ltd.*** passed by the Haryana Real Estate Regulatory Authority, Panchkula wherein it has been observed that where the possession of the flat in term of buyer's agreement was required to be delivered on 1.10.2013 and the incidence of GST came into operation thereafter on 01.07.2017. So, the complainant cannot be burdened to discharge a liability which had accrued solely due to respondent's own fault in delivering timely possession of the flat. The aforesaid order was upheld by Hon'ble Haryana Real Estate Appellate Tribunal, Chandigarh in ***appeal no. 21 of 2019***. The relevant para is reproduced below:

> *"93. This fact is not disputed that the GST has become applicable w.e.f. 01.07.2017. As per the first Flat Buyer's Agreement dated 14.02.2011, the deemed date of possession comes to 13.08.2014 and as per the second agreement dated 29.03.2013 the deemed date of possession comes to 28.09.2016. So, taking the deemed date of possession of both the agreements, GST has not become applicable by that date. No doubt, in Clauses 4.12 and 5.1.2 the respondent/allottee has agreed to pay all the Government rates, tax on land, municipal property taxes and other taxes levied or leviable now or in future by Government, municipal authority or any other government authority. But this liability shall be confined only up to the deemed date of possession. The delay in delivery of possession is the default on the part of the appellant/promoter and the possession was offered on 08.12.2017 by that time the GST had become applicable. But it is settled principle of law that a*

person cannot take the benefit of his own wrong/default. So, the appellant/promoter was not entitled to charge GST from the respondent/allottee as the liability of GST had not become due up to the deemed date of possession of both the agreements."

70. In the instant complainant, the due date of possession comes out to be 14.06.2017 which is prior to the date of coming into force of GST i.e. 01.07.2017. In view of the above, the Authority is of the view that the respondent/promoter 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 flat buyer's agreement. The Authority is of further view that in case of late delivery by the promoter only the difference between post GST and pre-GST should be borne by the promoter. The promoter is entitled to charge from the allottees the applicable combined rate of VAT and/or service tax. However, it further directs that the difference between post GST and pre-GST shall be borne by the promoter.

71. Moreover, the fact cannot be ignored that it has already refunded an amount equivalent to Rs. 2,55,712/- charged from the allottees on account of pre-GST, any further amount charged from the allottee part from the aforesaid quoted amount, the same shall also be refunded in view of the above finding of the Authority.

G.IV Direct the respondent to refund all the wrongly charged "ADHOC Charges" totalling to approximately 11,00,000/-

G.V Direct the respondent to not charge anything from the present complainants which is not part of the agreement.

72. As alleged by the complainants, an amount of Rs. 8,50,000/- has been raised on pretext of adhoc charges. Vide demand notice the respondent has been raised adhoc charges under various heads such as-

Dual meter charges of Rs. 15,000/-

Piped connection charges of Rs. 46,1811/-

Geyser Charges Rs. 75,055/-

PHE charges of Rs. Rs. 13,452/-

ECC charges Rs. 1,74,432/-

CBFC charges of Rs. 2,00,000/-

IFMSD Rs. 2,26,660/-

73. The respondent stated that such charges has been charged as per clause 4.2 of buyer's agreement dated 26.12.2012, the aforesaid charges are not part of BSP. The relevant clause of the buyer's agreement has been reproduced hereunder: -

The BSP of the Apartment is exclusive of EDC and IDC and other statutory deposits and/or charges, including charges for connections and use of electricity, water, sewerage, sanitation and other amenities, utilities and facilities or any other charges required to be paid by the Company to relevant authorities and shall be payable by the Buyer at such rates as may then be applicable and in such proportion as the Sale Area of the Apartment bears to the total sale area of all the apartments in the Project. If in case at any time in the future, such charges/rates are revised due to enhancement in government and statutory dues, or rates of taxes, cesses or charges under Applicable Laws are enhanced (including with

retrospective effect, if applicable), or if fresh notifications and/or amendments / modifications thereto are announced by any Government and/or Competent Authority, including but not limited to revision in the EDC/IDC/other statutory charges, increase in rates/amounts of any deposits/fees for the provision of electricity, water and sewerage facilities, additional fire. protection/mitigation systems, pollution control and effluent treatment plants, rain water harvesting systems or other outgoings of whatever nature, whether prospectively or retrospectively, and by whatever name called, the same shall also be payable by the Buyer in such proportion as the Sale Area of the Apartment bears to the total sale area of all the apartments in the Project. All such charges shall be payable by the Buyer on first demand of the Company/Maintenance Agency, whether before or after registration of the Conveyance Deed and irrespective of the Payment Plan. Delays in making such payments shall attract interest at rates as applicable for payments under the Payment Plan.

74. It is submitted on behalf of the complainant that the charges raised above by the promoter are not covered under any provision of ABA. Though the complainant is liable to pay basic sale price of the unit besides EDC, IDC & other statutory deposits but never agreed to pay amount under any head as demanded. The respondent is justified in demanding EDC & IDC as it is included in the total sale consideration as per clause 4.1 of the agreement on page no. 55 of the complaint but since these charges are payable on actual payment basis the respondent cannot charge a higher rate against EDC/IDC as actually paid to the concerned authority. Therefore, the respondent is directed to provided calculation of EDC & IDC . The

respondent builder is directed not to charge anything which is not a part of the buyer's agreement.

G.V Direct the respondent to not to charge holding charges from the complainants.

75. The developer shall not be entitled to any holding charges though it would be entitled to interest for the period the payment is delayed. Also, holding charges shall also not be charged by the promoter at any point of time even after being part of agreement as per law settled by the Hon'ble Supreme Court in civil appeal no. 3864-3889/2020 dated 14.12. 2020.However the reasonable maintenance charges are required to be paid altogether.

G.VI Direct the respondent to refund the amount charged in lieu of the increased area as the carpet area of the subject unit is 3200sq. ft.

76. As per the allotment letter dated 31.07.2012 the area allotted to the complainants were 6325 sq. ft. but as per the buyer's agreement dated 14.06.2013 area was increased by 6485 as per page no. 79 as per schedule iii of complaint. However, on completion of the project and final calculation of the area of the unit, the sale area was decreased to 6476 sq.ft.

77. That it was mutually agreed between the sale area of the unit was tentative and was subject to change and a maximum variation of 10% in the sale area of the unit was agreed to be acceptable to the complainants as per Clause 8.6 of the ABA. That the decrease in area was duly taken into consideration at the time of issuing notice of possession and therefore, the respondent at its own volition credited an amount of Rs.51,750/- to the account of the

complainants for the said decreased area. This credited amount is clearly depicted in the ledger under the entry dated 28.09.2017. Since the area has been ultimately decreased, the respondent is directed to return the amount for the area so decreased. Further, the respondent is entitled to adjust such amount, if any, already returned in this regard.

H. Directions of the Authority:

78. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016:

i. The respondent shall pay interest at the prescribed rate i.e., 10.70 % per annum for every month of delay on the amount paid by the complainant from due date of possession i.e., 14.06.2017 till the date of offer of possession (24.07.2018) plus two months i.e., 24.09.2018; as per proviso to section 18(1) of the Act read with rule 15 of the rules.

ii. Out of amount so assessed, the respondent is entitled to deduct the amount already paid towards DPC i.e., Rs.5,32,651/.

iii. The respondent shall not charge anything from the complainant which is not the part of the buyer's agreement.

iv. The respondent is directed to pay arrears of interest accrued, if any after adjustment in statement of account; within 90 days from the date of this order as per rule 16(2) of the rules.

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

further directed to handover the possession within next two weeks and the complainant is also directed to take the possession of the subject unit.

vi. The rate of interest chargeable from the allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 10.70 % by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottees, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

79. Complaint stands disposed of.

80. File be consigned to the registry.

(Sanjeev Kumar Arora)
Member

(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 18.05.2023