

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

Order pronounced on: 04.08.2023

Name of the Builder		Shree Vardhman Build Prop Private Limited	
Project Name		Shree Vardhman Mantra	
S.n	Complaint No.	Complaint title	Attendance
1.	CR/ 1754/2022	Rajni Yadav V/s Shree Vardhman Build Prop Private Limited	Mr. Sunil Kumar Mr. Gaurav Rawat
2.	CR/1755/2022	Vijay Kumar Yadav V/s Shree Vardhman Build Prop Private Limited	Mr. Sunil Kumar Mr. Gaurav Rawat
CORAM:			
Shri Sanjeev Kumar Arora			Member

ORDER

1. This order shall dispose of all the 2 complaints titled as above filed before this authority under section 31 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred as "the Act") read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (hereinafter referred as "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 its obligations, responsibilities and functions to the allottees as per the agreement for sale executed inter se between parties.
2. The core issues emanating from them are similar in nature and the complainant(s) in the above referred matters are allottees of the project, namely, Shree Vardhman Mantra being developed by the same respondent/promoter i.e., Shree Vardhman Build Prop Private Limited. The terms and conditions of the builder buyer's agreements, fulcrum of the issues involved in all these cases



pertains to failure on the part of the promoter to deliver timely possession of the units in question, seeking award of delayed possession charges, and possession.

3. The details of the complaints, reply status, unit no., date of agreement, possession clause, due date of possession, offer of possession, total sale consideration, amount paid up, and reliefs sought are given in the table below:

Project: Shree Vardhman Mantra, Sector-67, Gurugram
Possession clause: Clause 9(a) The construction of the flat is likely to be completed within a period of thirty-six (36) months from the date of start of foundation of the particular tower in which the flat is located with a grace period of 6 months, on receipts of sanction of building plans/revised building plans and all approvals of all concerned authorities including the fire service deptt. Civil aviation deptt., pollution control deptt., as may be required for commencing and carrying on construction subject to force majeure, restraints or restrictions from any courts/authorities, non-availability of building materials, disputes with contractors/work force etc. and circumstances beyond the control of the company and subject to timely payments by the flat buyer(s).
Note: 1. Date of start of foundation of tower- Date of start of foundation of tower is available in the file i.e., 01.05.2012 at page 8 of reply so the due date of delivery of possession is calculated from the said date. 2. Grace period- The possession clause 9(a) of the BBA incorporates unqualified reason for grace period/extended period of 6 months but the same has not been allowed as the DTCP has already allowed <u>zero period for the said project from 01.11.2017 to 30.09.2020.</u> 3. Occupation certificate- Details of occupation certificate obtained has been detailed as follows
A. 23.07.2021
For- Block A, B, C, D, E, F, G, H, I, K, L, M, N, O and P



S. no	Complaint no./title/ date of filing complaint	Unit no. and area admeasuring	Date of execution of agreement	Due date of possession	Total sale consideration	Amount paid by the complainant
1	CR/1754/2022 Rajni Yadav V/s M/s Shree Vardhman Date of filling- 13.05.2022	D/801, Tower - D (Page 24 of complaint)	01.10.2011 [Page 21 of complaint]	01.05.2015 (Inadvertently mentioned as 01.11.2015 in the proceeding of the day of 04.08.2023)	Rs.16,00,000 /- - Basic sale price (Page 24 of complaint) Rs. 30,43,059/- (Page 62 of reply)	Rs. 20,10,300/- (Page 62 of reply and also as stated by complainant at page 13 of complaint)
2	CR/1755/2022 Vijay Kumar Yadav V/s M/s Shree Vardhman Date of filling- 13.05.2022	D/808, Tower - D (Page 22 of complaint)	01.10.2011 [Page 19 of complaint]	01.05.2015 (Inadvertently mentioned as 01.11.2015 in the proceeding of the day of 04.08.2023)	Rs.16,00,000 /- - Basic sale price (Page 22 of complaint) Rs. 30,41,470/- (Page 63 of reply)	Rs. 20,10,300/- (Page 63 of reply and also as stated by complainant at page 14 of complaint)

- The aforesaid complaints were filed by the complainants against the promoter on account of violation of the builder buyer's agreement executed between the parties *inter se* in respect of said unit for seeking award of delayed possession charges and compensation.
- It has been decided to treat the said complaints as an application for non-compliance of statutory obligations on the part of the promoter/respondent in

terms of section 34(f) of the Act which mandates the authority to ensure compliance of the obligations cast upon the promoters, the allottee(s) and the real estate agents under the Act, the rules and the regulations made thereunder.

6. The facts of all the complaints filed by the complainant(s)/allottee(s) are also similar. Out of the above-mentioned case, the particulars of lead case **CR 1754/2022 titled as Rajni Yadav Vs. Shree Vardhman Buildprop Private Limited** are being taken into consideration for determining the rights of the allottee(s) qua delay possession charges and possession.

A. Project and unit related details

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

CR/1754/2022 titled as Rajni Yadav Vs. M/s Shree Vardhman Buildprop Private Limited

S. No.	Heads	Information
1.	Name and location of the project	"Shree Vardhman Mantra", Village - Badshapur, Sector-67, Gurugram
2.	Project area	11.262 acres
3.	Nature of the project	Group housing colony - Affordable housing
4.	DTCP license no. and validity status	69 of 2010 dated 11.09.2010 valid upto 30.04.2022



5.	Name of the Licensee	Dharambir and 8 others
6.	RERA registered/ not registered and validity status	Registered Registered vide no. 50 of 2022 dated 13.06.2022 Valid upto 31.12.2024
7.	Unit no.	D/801, Tower - D (Page 24 of complaint)
8.	Unit admeasuring	520 sq. ft. (Page 24 of complaint)
9.	Date of flat buyer's agreement	01.10.2011 (Page 21 of complaint)
10.	Payment plan	Time linked payment plan (Page 41 of complaint)
11.	Total consideration	Rs. 16,00,000/- (Page 24 of the complaint) Rs. 30,43,059/- (Page 62 of reply)
12.	Total amount paid by the complainant	Rs. 20,10,300/- (Page 62 of the reply) Rs. 20,10,300/- (As stated by complainant at page 13 of complaint)
13.	Date of start of foundation of particular tower	01.05.2012 (Page 8 of the reply)
14.	Possession clause	9(a) <i>The construction of the flat is likely to be completed within a period of</i>

		<p><i>thirty-six (36) months from the date of start of foundation of the particular tower in which the flat is located with a grace period of 6 months, on receipts of sanction of building plans/revised building plans and all approvals of all concerned authorities including the fire service deptt. Civil aviation deptt., pollution control deptt., as may be required for commencing and carrying on construction subject to force majeure, restraints or restrictions from any courts/authorities, non-availability of building materials, disputes with contractors/work force etc. and circumstances beyond the control of the company and subject to timely payments by the flat buyer(s).</i></p> <p>(Emphasis supplied)</p>
15.	Due date of delivery of possession	01.05.2015 (Calculated from the date of foundation of tower)
16.	Occupation certificate	Obtained as on 23.07.2021 (Page 37 of reply)
17.	Offer of possession	25.10.2021 (As stated by counsel for respondent at bar vide proceeding dated 04.08.2023)
18.	Reminder notices	10.01.2022 (Page 46-49)

19.	Grace period utilization	Grace period is not allowed in the present complaint.
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B. Facts of the complaint

8. That the complainant is a law-abiding citizen and consumer who have been cheated by the malpractices adopted by the respondent, stated to be a builder and is allegedly carrying out real estate development.
9. That On 01st October 2011 an agreement was executed between the parties w.r.t. a unit in the project in question . She on account of residential Unit No. D-801, on a basic sale price 16,00,000/- paid total sum of Rs. 20,10,300/-.
10. The respondent agrees and promise to handover physical offer of possession of said unit within 36 months from the date of start of foundation of particular tower, however she does not know the exact date of start of foundation of particular .
11. Hence buyer agreement date was to be considered to offer of possession of said residential unit. Since the complainant has booked a residential low cost/affordable housing project since year 2011 but the respondent even failed to complete the construction of said unit and project in given time. The complainant has paid total sum of Rs. 20,10,300/- in lieu of total sale consideration i.e., 1,98,0175/- on timed linked payment plan. The respondent even made delay in construction of this unit and charged delay payment much higher rate of interest.

C. Relief sought by the complainant:

12. The complainant has sought following relief(s):
 - i. Direct the respondent to give possession of the apartment as soon as possible.

- ii. Direct the respondent to pay interest for every month of delay at prevailing rate of interest
13. On the date of hearing, the authority explained to the respondent/ promoter about the contraventions as alleged to have been committed in relation to section 11(4) (a) of the act to plead guilty or not to plead guilty.

D. Reply by the respondent

The respondent has contested the complaint on the following grounds.

14. That the complainant has sought reliefs under section 18 of the Act of 2016 but the said section is not applicable in the facts of the present case and as such, the complaint deserves to be dismissed. It is submitted that the operation of section 18 is not retrospective in nature and the same cannot be applied to the transactions entered prior to the RERA Act came into force. The parties while entering into the said transaction could not have possibly taken into account the provisions of the Act and as such cannot be burdened with the obligations created therein. In the present case also, the flat buyer agreement (hereinafter "FBA") was executed much prior to the date when the Act of 2016 came into force and as such, section 18 of the Act cannot be made applicable to the present case. Any other interpretation of the Act will not only be against the settled principles of law as to retrospective operation of law but will also lead to an anomalous situation and would render the very purpose of the Act nugatory. The expression "agreement to sell" occurring in section 18 (1)(a) of the Act covers within its folds only those agreements to sell that have been executed after the Act came into force and the FBA executed in the present case is not covered under the said expression and the same having been executed prior to the date the Act came into force.

15. That the complainant cannot be allowed to seek any relief which is in conflict with the said terms and conditions of the FBA. The complainant signed the agreement only after having read and understood the terms and conditions mentioned therein and without any duress, pressure or protest and as such, the terms thereof are fully binding upon her. The said agreement was executed much prior to RERA Act coming into force and the same has not been declared and cannot possibly be declared as void or not binding between the parties. The FBA executed in the present case did not provide any definite date or time frame for handing over of possession of the apartment to the complainant and on this ground alone, the refund and/or compensation and/or interest cannot be sought under RERA Act. Even clause 9 (a) of the FBA merely provides a tentative/estimated period for completion of construction of the flat and filing of application for occupancy certificate with the concerned authority. After completion of construction, the respondent was to make an application for grant of Occupation Certificate (OC) and after obtaining the OC, the possession of the flat was to be handed over. The residential group housing project in question has been developed by the respondent. The construction of the phase of the project wherein the apartment of the complainant is situated has already been completed and awaiting the grant of occupancy certificate from the Director General, Town and Country Planning (DTCP), Haryana. The occupancy certificate has already been applied by the licensee vide application dated 27.07.2017 to concerned authority. However, till date, no occupancy certificate has been granted despite follow up. The grant of such occupancy certificate is a condition precedent for occupation of the flats and habitation of the project.
16. That in fact, the office of the Director General, Town and Country Planning, Haryana is unnecessarily withholding grant of occupation certificate and other

requisite approvals for the project, despite having approved and obtained concurrence of the Government of Haryana. It is submitted that in terms of order dated 01.11.2017 passed by the Hon'ble Supreme Court of India in Civil Appeal No.8977/2014 titled as **Jai Narayan @ Jai Bhagwan & Ors. vs. State of Haryana & Ors.**, the CBI is conducting an inquiry in release of land from acquisition in Sector 58 to 63 and Sector 65 to 67 in Gurugram, Haryana. Due to pendency of the said inquiry, the office of the DTCP, Haryana has withheld, albeit illegally, grant of approvals and sanctions in the projects falling within the said sectors. Aggrieved by the situation created by the illegal and unreasonable stand of the DTCP, a CWP No. 22750 of 2019 titled as **DSS Infrastructure Private Limited Vs Government of Haryana** and others was filed by the licensee before the Hon'ble High Court of Punjab and Haryana for a direction to the office of DTCP to grant requisite approvals to the project in question. The said CWP has been disposed of vide order dated 06.03.2020 in view of the statement made by DTCP that it was ready to grant OC and other approvals. However, grant of approvals was pending despite continuous efforts being made by the licensee/respondent. In the meantime as the flats were ready, various allottees of the project in question approached the respondent with the request for handover of temporary possession of their respective flats to enable them to carry out the fit out/furnishing work in their flats. Considering the difficulties being faced by the allottees due to non-grant of occupancy certificate by the department in question, the respondent acceded to their request and handed over possession of their respective flats to them for the limited purpose of fit out.

17. That after various efforts and representations made by the respondent before the DTCP, the occupation certificate regarding the project in question was issued on 23.07.2021.

18. That in the FBA, no definite period for handing over possession of the apartment was given or agreed to. In the FBA, only a tentative period for completion of the construction of the flat in question and for submission of application for grant of occupancy certificate was given. Thus, the period indicated in clause 9(a) of FBA was the period within which the respondent was to complete the construction and was to apply for the grant of occupancy certificate to the concerned authority. It is clearly recorded in the said clause itself that the date of submitting an application for grant of occupancy certificate shall be treated as the date of completion of flat for the purpose of the said clause. Since the possession could be handed over to the complainant after grant of OC by DTCP Haryana and the time likely to be taken by DTCP in grant of OC was unknown to the parties, hence the period/date for handing over possession of the apartment was not agreed and not given in the FBA. The respondent completed the construction of the flat in question and applied for grant of occupancy certificate on 28.07.2017 and as such, the said date is to be taken as the date for completion of construction of the flat in question. It is submitted without prejudice; and in view of the said fact, the respondent cannot otherwise be held liable to pay any interest or compensation to the complainant for the period beyond 28.07.2017. As per the FBA, the tentative period given for completion of construction was to be counted from the date of receipt of sanction of the building plans/revised plans and all other approvals and commencement of construction on receipt of such approvals. The laying of raft/foundation of the tower in which the flat of the complainant is situated started from 01.05.2012.
19. It is submitted, without prejudice to the fact that the respondent completed the construction of the flat within the time indicated in the FBA, that even as per clause 9(a), the obligation of the respondent to complete the construction within

the time tentative time frame mentioned in said clause was subject to timely payments of all the installments by the complainant and other allottees of the project. As various allottees and even the complainant failed to make payments of the installments as per the agreed payment plan, he cannot be allowed to seek compensation or interest on the ground that the respondent failed to complete the construction within time given in the said clause. The obligation of the respondent to complete the construction within the time frame mentioned in FBA was subject to and dependent upon time payment of the installment by the complainant and other allottees. As such no allottee who has defaulted in making payment of the installments can seek refund, interest or compensation

27. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided based on these undisputed documents.

E. Jurisdiction of the authority

28. The respondent has raised preliminary objection regarding jurisdiction of authority to entertain the present complaint. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana the jurisdiction of 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 allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

The provision of assured returns is part of the builder buyer's agreement, as per clause 15 of the BBA dated..... Accordingly, the promoter is responsible for all obligations/responsibilities and functions including payment of assured returns as provided in Builder Buyer's Agreement.

Section 34-Functions of the Authority:

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

So, in view of the provisions of the Act of 2016 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 maintainability of the complaint.

29. The respondent contended that the present complaint filed under section 31 of the Act is not maintainable as it has not violated any provision of the Act.

30. The authority, in the succeeding paras of the order, has observed that the respondent is in contravention of the section 11(4)(a) read with proviso to section 18(1) of the Act by not handing over possession by the due date as per the agreement. Therefore, the complaint is maintainable.

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

31. Another contention of the respondent is that in the present case, the flat buyer's agreement was executed much prior to the date when the Act came into force and as such section 18 of the Act cannot be made applicable to the present case.

32. The authority is of the view that the Act nowhere provides nor can be so construed that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. The numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of **Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017) decided on 06.12.2017 and** 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."

33. Similarly, in appeal no. 173 of 2019 titled as **Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya**, vide order dated 17.12.2019, the Haryana Real Estate Appellate Tribunal observed as under:-

"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."

34. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no scope

left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of any other Act, rules, statutes, instructions, directions issued thereunder and are not unreasonable or exorbitant in nature.

F.III Objection of the respondent w.r.t reasons for the delay in handing over of possession.

35. The respondent submitted that the period consumed in the force majeure events or the situations beyond its control have to be excluded while computing delay in handing over possession.
- a. The respondents submitted that non-grant of OC and other approvals including renewal of license by the DTCP Haryana is beyond the control of the respondents and the said approvals have not been granted so far despite the fact that the State Counsel assured to the hon'ble High Court of Punjab and Haryana to grant approvals/OC.
36. As far as the aforesaid reason is concerned, the authority observes that the Hon'ble High Court of Punjab and Haryana vide its order dated 06.03.2020 in CWP-22750-2019 (O&M) has held as under:

"Learned State counsel, at the outset, submits that it has been decided to grant occupation certificate to the petitioner subject to fulfillment of other conditions/ formalities and rectification of any deficiency which are pointed out by the authority. He

further submits that in case the petitioner makes a representation regarding exclusion of renewal fee and interest on EDC/IDC for the period from 25.07.2017 till date, same shall be considered by respondent no.2 as per law and fresh order shall be passed. Learned State counsel further assures that as soon as the representation is received, necessary steps shall be taken and the entire exercise shall be completed at the earliest, in any case, not later than two months.

In view of the above, no further direction is necessary.

Present petition is hereby disposed of."

37. In view of aforesaid order of Hon'ble High Court of Punjab and Haryana, an office order of the DTCP, Haryana, Chandigarh dated 03.03.2021 has been issued. The para 4 of the said order states that "Government has accorded approval to consider the period i.e., 01.11.2017 to 30.09.2020 as 'Zero Period' where the approvals were withheld by the department within the said period in view of the legal opinion and also gave relaxations as mentioned in para 3". Accordingly, the authority is of the considered view that this period should be excluded while calculating the delay on the part of the respondent to deliver the subject flat.

b. Unprecedented situation created by Covid-19 pandemic and lockdown for approx. 6 months starting from 25.03.2020.

38. The Hon'ble Delhi High Court in case titled as M/s Halliburton Offshore Services Inc. V/S Vedanta Ltd. & Anr. bearing no. O.M.P (I) (Comm.) no. 88/2020 and I.As 3696-3697/2020 dated 29.05.2020 observed as under:-

"69. The past non-performance of the Contractor cannot be condoned due to the COVID-19 lockdown in March 2020 in India. The Contractor was in breach since September 2019. Opportunities were given to the Contractor to cure the same repeatedly. Despite the same, the Contractor could not complete the Project. The outbreak of a pandemic cannot be used as an excuse for non-performance of a contract for which the deadlines were much before the outbreak itself."

39. In the present complaint, the respondent was liable to complete the construction of the project in question and handover the possession of the said unit by 01.05.2015. It is claiming benefit of lockdown which came into effect on 23.03.2020. But, the authority is of the view that outbreak of a pandemic cannot be used as an excuse for non-performance of a contract for which the deadlines were much before the outbreak itself and for the said reason the said time period cannot be excluded while calculating the delay in handing over possession.
40. The respondent in the reply admitted that the construction of the phase of the project wherein the apartment of the complainant is situated has already been completed and it has applied for grant of the occupancy certificate vide application dated 28.07.2017 to DTCP, Haryana. The respondent is trying to mislead the authority by making false or self-contradictory statement. On bare perusal of the reply filed by respondent, it becomes very clear that the construction of the said project was completed on 28.07.2017 as on this date, it applied for grant of OC. Now,

the respondent is claiming benefit out of lockdown period, orders dated 25.10.2019 and 01.11.2019 passed by EPCA and order dated 04.11.2019 passed by hon'ble Supreme Court of India which are subsequent to the date when the respondent has already completed the construction. Therefore, this time period cannot be excluded while calculating the delay in handing over possession.

G. Findings on the relief sought by the complainant.

G.I Delay possession charges.

41. **Relief sought by the complainant:** Direct the respondent to pay the complainant delay penalty interest for every month of delay at the prevailing rate of interest from 01.05.2015 till actual date of issuance of offer of possession or date of receiving of OC, whichever is later.
42. In the present complaint, the complainant 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."

43. Clause 9(a) of the flat buyer's agreement provides for handing over possession and the same is reproduced below:

9.(a) The Construction of the Flat is likely to be completed within a period of thirty six(36) months from the date of start of foundation of the particular tower in which the Flat is located with a grace period of six(6) months, on receipt of sanction of the building plans/revised building plans and approvals of all concerned authorities including the fire service department, civil aviation department, traffic department, pollution control department as may be required for commencing and carrying of the construction subject to force majeure restrains or restrictions from any courts/ authorities, non-availability of building materials or dispute with contractors/workforce etc. and circumstances beyond the control of company and subject to timely payments by the flat buyer(s). No claims by way of damages/compensation shall lie against the Company in case of delay in handing over the possession on account of any of such reasons and the period of construction shall be deemed to be correspondingly extended. The date of submitting application to the concerned authorities for the issue of completion/part completion/occupancy/part occupancy certificate of the Complex shall be treated as the date of completion of the flat for the purpose of this clause/agreement.

44. A flat buyer's agreement is a pivotal legal document which should ensure that the rights and liabilities of both builder/promoter and buyers/allottees are protected candidly. Flat buyer's agreement lays down the terms that govern the sale of different kinds of properties like residential, commercials etc. between the buyer and builder. It is in the interest of both the parties to have a well-drafted agreement which would thereby protect the rights of both the builder and buyer in the unfortunate event of a dispute that may arise. It should be drafted in the simple and unambiguous language which may be understood by a common man with an ordinary educational background. It should contain a provision with

regard to stipulated time of delivery of possession of the apartment, plot or building, as the case may be and the right of the buyers/allottees in case of delay in possession of the unit.

45. The authority has gone through the possession clause of the agreement and observes that the possession has been subjected to all kinds of terms and conditions of this agreement. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single situation may make the possession clause irrelevant for the purpose of allottee and the committed date for handing over possession loses its meaning. If the said possession clause is read in entirety, the time period of handing over possession is only a tentative period for completion of the construction of the flat in question and the promoter is aiming to extend this time period indefinitely on one eventuality or the other. Moreover, the said clause is an inclusive clause wherein the numerous approvals and terms and conditions have been mentioned for commencement of construction and the said approvals are sole liability of the promoter for which allottees cannot be allowed to suffer. The promoter must have mentioned that completion of which approval forms a part of the last statutory approval, of which the due date of possession is subjected to. It is quite clear that the possession clause is drafted in such a manner that it creates confusion in the mind of a person of normal

prudence who reads it. The authority is of the view that it is a wrong trend followed by the promoter from long ago. It is this unethical behaviour and dominant position that needs to be struck down. It is settled proposition of law that one cannot get the advantage of his own fault. The incorporation of such clause in the flat buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottees of their right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

46. The respondent-promoter proposed to handover the possession of the subject apartment within a period of 36 months from the date of start of foundation of the particular tower in which the flat is located with a grace period of 6 months, on receipt of sanction of the building plans/revised plans and approvals of all concerned authorities including the fire service department, civil aviation department, traffic department, pollution control department as may be required for commencing and carrying of the construction subject to force majeure restrains or restrictions from any courts/ authorities, non-availability of building materials or dispute with contractors/workforce etc. and circumstances beyond the control of company and subject to timely payments by the flat buyer(s).

47. The respondent is claiming that the due date should be computed from 01.05.2012 i.e., date of start of foundation of subject tower. The authority observes that in the present case, the respondent has not kept the reasonable balance between his own rights and the rights of the complainant-allottee. The respondent has acted in a pre-determined, preordained, highly discriminatory and arbitrary manner. The flat buyer's agreement was executed between the respondent and the complainant on 01.10.2011. The respondent is in win-win situation as on the one hand, it has not obtained necessary approvals for starting construction and the scheduled time of delivery of possession as per the possession clause which is completely dependent upon the start of foundation and on the other hand, a major part of the total consideration is collected prior to the start of the foundation. Further, the said possession clause can be said to be invariably one sided, unreasonable, and arbitrary.
48. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the unit within 36 months from the date of start of foundation of the particular tower in which the flat is located. It has sought further extension of a period of 6 months, on receipt of sanction of the building plans/revised plans and approvals of all concerned authorities including the fire service department, civil aviation department, traffic department, pollution control department as may be required for commencing and carrying of the construction subject to force majeure

restrains or restrictions from any courts/ authorities, non-availability of building materials or dispute with contractors/workforce etc. and circumstances beyond the control of company and subject to timely payments by the flat buyer(s). It may be stated that asking for the extension of time in completing the construction is not a statutory right nor has it been provided in the rules. This is a concept which has been evolved by the promoter themselves and now it has become a very common practice to enter such a clause in the agreement executed between the promoter and the allottees. Now, turning to the facts of the present case, the respondent promoter has not completed the construction of the subject project in the promised time. The OC has been obtained from the competent authority on 23.07.2021 i.e., after a delay of more than 6 years. It is a well settled law that one cannot take benefit of his own wrong. In the light of the above-mentioned reasons, the grace period of 6 months is not allowed in the present case.

49. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges. The 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.

50. 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.
51. 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., 04.08.2023 is 8.75% p.a. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.75% p.a.
52. 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 allottees, in case of default. The relevant section is reproduced below:

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

Explanation. —For the purpose of this clause—

- (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;"*

53. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 10.75% p.a. by the respondent/promoter which is the same as is being granted to her in case of delay possession charges.
54. On consideration of the evidence and other record and submissions made by the parties, 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. Accordingly, the authority is of the considered view that the zero period should be excluded while calculating the delay on the part of the respondent to deliver the subject flat. It is a matter of fact that the date of start of foundation of the subject tower, where the flat in question is situated as mentioned in reply which is 01.05.2012. Hence, the due date of possession is calculated from the above - mentioned date. By virtue of flat buyer's agreement executed between the parties on 01.10.2011, the possession of the booked unit was to be delivered within 36 months from the date of start of foundation of the particular tower in which the subject flat is located and which has been

provided by the respondent-promoter. The grace period of 6 months is not allowed in the present case for the reasons quoted above.

55. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within two months from the date of receipt of occupation certificate. These two months of reasonable time is being 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., 01.05.2015 till the date of receipt of occupation certificate (i.e., 23.07.2021) plus two months (23.09.2021) (excluding 'Zero period' w.e.f. 01.11.2017 till 30.09.2020) as per the provisions of section 19(10) of the Act.
56. Accordingly, 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 complainant is entitled to delayed possession charges at the prescribed rate of interest i.e., 10.75% p.a. for every month of delay on the amount paid by her to the respondent from the due date of possession i.e., 01.05.2015 till the date of receipt of

occupation certificate (i.e., 23.07.2021) plus two months (23.09.2021)
(excluding 'Zero period' w.e.f. 01.11.2017 till 30.09.2020)

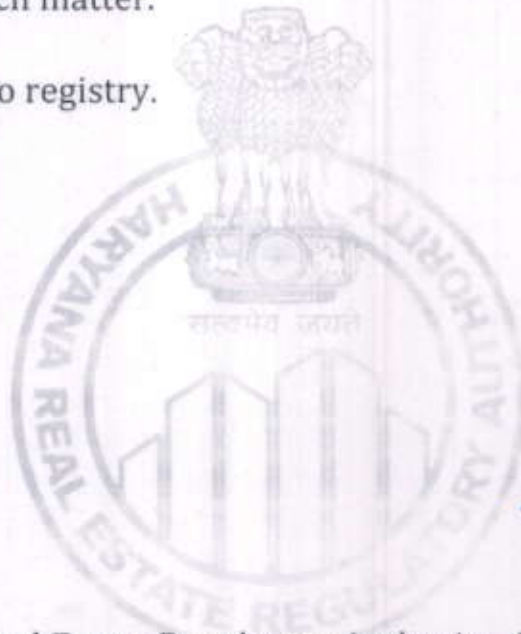
H. Directions of the authority


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

- I. The respondent is directed to pay delayed possession charges as per the proviso of section 18(1) of the Real Estate (Regulation and Development) Act, 2016 at the prescribed rate of interest i.e., 10.75% p.a. for every month of delay on the amount paid by the complainant to the respondent from the due date of possession which is 01.05.2015 till date of receipt of occupation certificate (i.e. 23.07.2021) plus 2 months(23.09.2021) (excluding 'Zero period' w.e.f. 01.11.2017 till 30.09.2020).
- II. The respondent is directed to handover the physical possession of the subject unit as OC has already been obtained.
- III. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
- IV. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 10.75% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

V. The respondent shall not charge anything from the complainant which is not the part of the agreement.

58. This decision shall mutatis mutandis apply to cases mentioned in para 3 of this order.
59. Complaint stands disposed of. True certified copies of this order be placed in the case file of each matter.
60. Files be consigned to registry.




Sanjeev Kumar Arofa
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 04.08.2023

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