BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 1928 of 2022
Date of filing complaint : 27.05.2022
Date of decision : 21.07.2023

1. 2.	Bhaskar Dutta Nilanjan Dutta **R/O:** - 208, Deerwood Chase, Nirvana Country, Sector-50, Gurgaon - 122018.	**Complainants**
	Versus	
1. 2.	M/s BPTP Limited M/s Country Promoters Private Limited **Regd. Office at:** - M-11, Middle Circle, Connaught Circus, New Delhi -110001	**Respondents**

CORAM:	
Shri Sanjeev Kumar Arora	**Member**
APPEARANCE:	
Sh. Shivankar	Advocate for the complainants
Sh. Harshit Batra	Advocate for the respondents

ORDER

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

Unit and project related details

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

S.N.	Particulars	Details	
1.	Name of the project	"Terra", Sector- 37-D, Gurugram	
2.	Nature of project	Group Housing Towers	
3	**RERA registered/not registered**	Registered 299 of 2017 dated 13.10.2017	
4.	**DTPC License no.**	83 of 2008 dated 05.04.2008	94 of 2011 dated 24.10.2011
	Validity status	04.04.2025	23.10.2019
	Name of licensee	SUPER BELTS PVT. LTD and 3 others	COUNTRYWIDE PROMOTERS PVT LTD and 6 others
	Licensed area	23.18 acres	19.74
5.	Unit no.	T-21-1502, Tower 21 [As per page no. 75 of reply]	
6.	Unit measuring	1691 sq. ft. [As per page no. 75 of reply]	
7.	Date of execution of Flat buyer's agreement	03.01.2013 (As per page no. 70 of reply)	
8	Date of building plan	21.09.2012	
9.	Possession clause	***5. Possession*** ***5.1 The Seller/Confirming Party proposes to offer possession of the Unit to the***	

		Purchaser(s) within e Commitment Period. *The Seller/Confirming Party shall be additionally entitled to a Grace Period of 180 days after the expiry of the said Commitment Period for making offer of possession of the said Unit.* ***1.6 "Commitment Period"*** *shall mean, subject to, Force Majeure circumstances; intervention of statutory authorities and Purchaser(s) having timely complied with all its obligations, formalities or documentation, as prescribed/requested by Seller/Confirming Party, under this Agreement and not being in default under any part of this Agreement, including but not limited to the timely payment of instalments of the sale consideration as per the payment plan opted, Development Charges (DC). Stamp duty and other charges, the Seller/Confirming Party shall offer the possession of the Unit to the* ***Purchaser(s) within a period of 42 months from the date of sanction of the building plan or execution of Flat Buyer's Agreement, whichever is later.***
10.	Due date of possession	03.07.2016 (Calculated from the date of execution of buyers agreement)
11.	Basic Sale Price	**Rs. 88,77,750/-** [as per page no. 76 of reply]
12.	Total amount paid by the complainant	Rs. 1,32,47,657/- (As alleged by the complainant)
13.	Occupation certificate dated	09.12.2021
14	Offer of possession	13.12.2021 (As per page no. 140 of reply)
15	Grace Period	Not Allowed

Facts of the complaint

3. That an allotment offer letter dated 07.12.2012 was issued to the complainants by respondents in respect of an apartment being developed by the respondents. Subsequent to the issue of the allotment letter, a flat buyer's agreement dated 03.01.2013 was executed by and between the complainants and the respondents for allotment of Flat - T 21-1502, floor no. 14 in T21 tower Terra admeasuring 1691 sq f or 157.098 square meter together with one parking spaces forming an indivisible part thereof ("Apartment") in the project "Terra" ("Project") located at Sector 37-D, Gurgaon, Haryana for a total sale consideration of approximately Rs. 1,10,84,084/-.

4. That for the purposes of purchasing the apartment, the complainants had opted for construction linked payment plan provided for in the flat buyer's agreement. As per the agreement, the total sale consideration for the flat was Rs. 1,10,84,084/-.

5. It is submitted that regular demands for payment of amounts as postulated under the buyer's agreement were made by the respondents vide various payment requests from time to time starting from 27.08.2012. These were linked to the construction schedule of the project. Such demands were met by the complainants, which was also duly acknowledged by the issuance of the statement of accounts by respondents to the complainants. As on 24.12.2016, for the total cost of Rs. 1,10,84,084/-, the respondents had called for Rs.1,04,47,600/- and the complainants had made corresponding payments of Rs. 1,04,78,130/-. Thus, as the end of 2016 the complainants had made excess payment of Rs. 30,529/- even though the commitment period had ended on 03.07.2016. It is submitted that these payments were made under duress and compulsion as

respondents had threatened and had indeed levied delayed interest and other penal charges from time to time, even though the project was nowhere close to completion.

6. Despite the fulfilment of their contractual obligations and adherence to the payment plan, the complainants were generally not apprised about the development status of the project by the respondents and often found themselves having to ask the respondent to provide them with updates. Being aggrieved by the severe and inordinate delay in delivery of possession of the apartment to the homebuyers, the complainants made several communications by the mode of telephone, email, etc. to respondents thereby raising the issue of such delay at several instances.

7. Thereafter, the notice of possession dated 13.12.2021 ("notice of possession") was issued to the complainants by BPTP informing them that the apartment was purportedly ready for possession and requesting the complainants to complete the formalities enumerated therein. The complainants were further asked to make the payment of the installment and/or outstanding dues amounting to Rs. 33,70,184/- . This amount also included Rs. 8,47,000/- for stamp duty charges, Rs.344,302/- as Goods and Services Tax, and Rs.49,311/- as value added tax. It further stated that BPTP would treat the 91st day from 13.12.2021 as the date on which the actual possession of the unit is deemed delivered and that the complainants would be liable to pay holding charges from the 91st day onwards at the rate of Rs. 5.0/- per sq. ft. per month of the super area besides maintenance charges. It should be noted as on the date of filing the petition, the flat is still not ready for possession.

8. That the complainants were shocked to learn that inspite of having paid Rs.1.09 crore, another substantial payment was demanded by the respondents as the price of the flat had been ostensibly increased to Rs. 1,43,17,475/-. This was apparently because the cost of the flat had undergone a revision from 2016 to 2021 unilaterally without any notice to the complainants. This was truly shocking as the price had been increased by Rs.33 lakhs in a matter of years.

9. That in December 2021 respondents also forced the complainants to sign a full and final letter dated 16.12.2021 to acknowledge the payments made by the complainants. By this letter the respondent demanded additional payment of Rs. 23 lakhs, which was also paid by the complainants under threat and coercion under the guise of levying further penal charges and interest. But the conditions precedent under the full and final letter were not abided to by the respondents in as much as no discount was offered or accounted in the statements of account. Further no signed copy of the full and final letter was shared with the complainants. This issue was raised by the complainants in their letter dated 23.03.2022 but a general response was received by the complainants asking them to come for a meeting.

10. That respondents then addressed letter dated 13.01.2022 wherein it requested the complainant to pay a purported outstanding balance of Rs. 2,46,185/- immediately, subject to being charged interest @ 10% p.a. for the period of delay. The complainants objected to this demand as nothing was due from them; even the purported increase of sale consideration to Rs. 1,43,17,475/- was disputed by them as they could not unilaterally increase the purchase price when they have violated the terms of the flat buyer's agreement in not handing over possession at the promised date. Further, though there was a delay of almost 06

six years in handing over possession of the apartment, and yet the respondents continued to demand amounts from them which are not even due, nor account for. This stood in contradiction to the full and final letter dated 16.12.2021.

11. That it is submitted that (i) the non-payment of the delay compensation is a breach of clause 6.1 of the flat buyers agreement, and (ii) the said computation of delay compensation (@ Rs 5 per square feet of the super built up area) is unfair, unreasonable and is not in accordance with Proviso to Section 18(1) of RERA read with Rule 15 of HRERA Rules and (iii) Various subheads like cost escalation, increase in BSP, VAT, GST had been imposed by the respondents universally in their notice for possession dated 13.12.2021.
12. That in view of the delay of more than 6.5 years in delivery of possession of the apartment and having already invested a large sum of money to the tune of Rs. 1,32,24,290/-, the complainants were dissatisfied with no delay compensation awarded by the respondents.

Relief sought by the complainants.

13. The complainants have sought following relief:
    a. Pass an order for delayed penalty due to delay in handing over of the possession @ 18% per annum, from the due date of possession till the date of actual possession of the unit is not handed over to the complainants, in favour of the complainants and against the respondents.
    b. Direct the respondent parties to pay refund the VAT amount Rs 49,311/- which has been paid by the complainants.
    c. Direct the respondent parties to refund the service tax amounting to Rs. 4,39,559/- which has been paid by the complainants.

d. Direct the respondents' parties to refund the GST amounting to Rs. 344,302/- which has been paid by the complainants.

e. Direct the respondents' parties to refund the increase in BSP from 2016 to 2021, difference amounting to Rs. 4,76,189/- which has already been paid by the complainants.

f. Direct the respondents' parties to refund the cost escalation of the Rs. 8,86,375/- which has been paid by the complainants.

g. Direct the respondent parties to refund the electrification & STP charges of Rs. 162,410/- which has been paid by the complainants.

h. Direct the respondents' parties to refund the firefighting & power backup of Rs. 213,698/- which has been paid by the complainants.

i. Direct the respondents' parties to refund the club membership charges of Rs. 208,400/- which has been already paid by the complainants.

j. Direct that respondents shall not charge anything from the complainants which is not part of the flat buyer's agreement, including the stamp duty charge amounting to Rs.847,000/-.

k. Direct the respondents to pay a sum of Rs.1,25,000/- towards litigation expenses to the complainants.

Reply by the respondents.

14. It is submitted that the respondents had diligently applied for registration of the project in question i.e., "Terra" located at sector 37D, Gurugram including towers-T-20 to T-25 & EWS before this Hon'ble Authority and accordingly, registration certificate no. 299 of 2017 dated 13.10.2017 was issued by this Hon'ble Authority.

15. That the construction of the unit of the complainants and tower where the same is located i.e., Tower T-21 has been completed by the

respondents in terms of the FBA. Subsequently, an application for the grant of occupation certificate ("OC") has been applied by the respondents to the Department of Town and Country Planning ("DTCP"), Haryana. Whereafter, on 09.12.2021, the respondents received the inprincipal approval from the office of Directorate of Town and Country Planning, Haryana, in respect of the Tower T20, T21, T24 & T25. Thereafter, the respondents issued the offer of possession letter dated 20.12.2021 in respect of the unit in question i.e., T21-1502 having final area admeasuring to 1,811 Sq. Ft.

16. That agreements that were executed prior to implementation of RERA Act and Rules shall be binding on the parties and cannot be reopened. Thus, both the parties being signatory to a duly documented flat buyer agreement (hereinafter referred to as the "FBA") dated 03.01.2013 executed by the complainants out of their free will and without any undue influence or coercion are bound by the terms and conditions so agreed between them.

17. That having agreed to the above, at the stage of entering into the agreement, and raising vague allegations and seeking baseless reliefs beyond the ambit of the agreement, the complainants are blowing hot and cold at the same time which is not permissible under law as the same is in violation of the 'doctrine of aprobate & reprobate". in this regard, the respondent reserves their right to refer to and rely upon decisions of the hon'ble supreme court at the time of arguments, if required.

18. It is submitted that as per clause-3 of the agreement titled as "sale Consideration and other conditions" specifically provided that in addition to basic sales price (BSP), various other cost components such as development charges (including EDC, IDC and EEDC),

preferential location charges (PLC), club membership charges (CMC), car parking charges, power back-up installation charges (PBIC), vat, service tax and any fresh incidence of tax (i.e. GST), electrification charges (EC), interest free maintenance security (IFMS), etc. shall also be payable by the complainants.

19. That the project in question was launched by the respondents in August' 2012. It is submitted that while the total number of flats sold in the project "Terra" is 401, for non- payment of dues, 78 bookings/ allotments have since been cancelled. Further, the number of customers of the Project "Terra" who are in default of making payments for more than 365 days are 125. Hence, there have been huge defaults in making payments of various instalments by large number of applicants in the project. It is well known fact that the projected timelines for possession are based on the cash flow. It was not in the contemplation of the respondents that the allottees would hugely default in making payments and hence, cause cash flow crunch in the project.
20. All other averments made in the complaint were denied in toto.
21. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submission made by the parties.
22. Since, common issues with regard to super area, cost escalation, STP charges, electrification charges, taxes viz GST and VAT etc, advance maintenance charges, car parking charges, holding charges, club membership charges, PLC, development location charges and utility connection charges, EDC/IDC charges, firefighting/power backup charges were involved in this cases and others of this project as well

as in other projects developed by the respondents, so vide orders dated 06.07.2021and 17.08.2021, a committee headed by Sh. Manik Sonawane IAS (retired), Sh. Laxmi Kant Saini CA and Sh. R.K. Singh CTP (retired) was constituted and was asked to submit its report on the above mentioned issues. The representatives of the allottees were also associated with the committee. A report was submitted and the same along with annexures was uploaded on the website of the authority.

Jurisdiction of the authority

23. 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.

24. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana, the jurisdiction of Haryana Real Estate Regulatory Authority, Gurugram shall be entire Gurugram district for all purposes. 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

25. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottees 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.

26. 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 promoters leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

Findings on the objections raised by the respondents.

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

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

28. Also, in appeal no. 173 of 2019 titled as ***Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya***, in order dated 17.12.2019 the Haryana Real Estate Appellate Tribunal has observed-

"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."

29. 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 allottees 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.

Findings on the relief sought by the complainants.

G. I Pass an order for delayed penalty due to delay in handing over of the possession @ 18% per annum, from the due date of possession till the date of actual possession of the unit is not handed over to the complainants, in favour of the complainants and against the respondents.

30. In the present complaint, the complainant states that the complainant has made full payment of the unit and the due date of possession has already expired in July 2016 and till now no offer of possession is made, rather, demanding Rs.10 Lakhs more before handing over of possession. The counsel for the respondent's states that the offer of possession was made on 13.12.2021, then a final and full discount letter was signed by the complainant on 16.12.2021 as per page no.162 of reply which clearly states that the matter has been finally settled and further stated that in lieu of that settlement, complainant made a payment of Rs.22,70,000/- on 22.12.2021. The counsel for the complainant states that the full and final discount letter has been signed by one party whereas the allotment is in the joint names of Bhaskar Dutta and Mr. Nilanjan Dutta. Counsel for the complainant further stated that on 22.12.2021 when the full and final settlement letter was signed may be by one allottee after discount then how the respondent raised further demand of Rs.2,46,184/- on 13.01.2022 as per annexur-1 page 108. The authority is of view that the discount letter will not be considered as settlement letter as it is signed by only one of the allottees and further, the respondent builder raised demand

even after the discount letter. So, the complainant is entitled for delay possession charges.

31. The complainants intend 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."*

32. Clause 5.1 read with clause 1.6 of the flat buyer's agreement provides the time period of handing over possession and the same is reproduced below:

> *"**Clause 5.1**- The Seller/Confirming Party proposes to offer possession of the unit to the Purchaser(s) within the Commitment period. The Seller/Confirming Party shall be additionally entitled to a Grace period of 180 days after the expiry of the said Commitment Period for making offer of possession of the said unit.*
>
> ***Clause 1.6** "FBA" "Commitment Period" shall mean, subject to Force Majeure circumstances; intervention of statutory authorities and Purchaser(s) having timely complied with all its obligations, formalities or documentation, as prescribed/requested by Seller/Confirming Party, under this Agreement and not being in default under any part of this Agreement, including but not limited to the timely payment of instalments of the sale consideration as per the payment plan opted, Development Charges (DC), stamp duty and other charges, the Seller/Confirming Party shall offer the possession of the Unit to the Purchaser(s) within a period of 42 months from the date of sanction of building plan or execution of Flat Buyers Agreement."*

33. At the inception it is relevant to comment on the pre-set possession clause of the buyer's agreement wherein the possession has been subjected to in numerous terms and conditions, force majeure circumstances and in numerous terms and conditions. The drafting of

this clause is not only vague but so heavily loaded in favour of the promoter that even a single default by the allottees in fulfilling obligations, formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottees and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottees of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottees are left with no option but to sign on the dotted lines.

34. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the apartment within a period of 42 months from the date of sanctioning of building plan or execution of buyer's agreement, whichever is later. In the present complaint, the date of building plan is 21.09.2012 and flat buyer's agreement was executed on 03.01.2013. So, the due date is calculated from the date of execution of flat buyer's agreement i.e. 03.07.2016 being later. Further it was provided in the flat buyer's agreement that promoter shall be entitled to a grace period of 180 days after the expiry of the said committed period for making offer of possession of the said unit. In other words, the respondent is claiming this grace period of 180 days for making offer of possession of the said unit. There is no material evidence on record that the respondent-promoter had completed the said project within this span of 42 months and had started the process of issuing offer of possession after obtaining the occupation certificate. As a matter of fact, the promoter has not obtained the occupation

certificate and offered the possession within the time limit prescribed by the promoter in the flat buyer's agreement till date. As per the settled law, one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 180 days cannot be allowed to the promoter at this stage.

35. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges at the prescribed rate of interest on amount already paid by them. 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.*

36. 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.

37. 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., 21.07.2023 is 8.75%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.75%.

38. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottees 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—*
> *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 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;"*

39. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 10.75% by the respondent/promoter which is the same as is being granted to the complainants in case of delayed possession charges.

G-II Direct the respondents parties to refund the club membership charges of Rs. 208,400/- which has been already paid by the complainants.

40. The term club membership charges have been defined under clause 1.4 and clause 3.2(a) prescribes the amount of club membership charges to be levied, which are reproduced below:

> *1.4 "Club Membership Charges" or "CMC" shall mean charges to be paid by the purchaser(s) to the seller or the maintenance service provider for membership of the club to be developed by the seller/confirming party. However, aforesaid charges do not include the usage charges for the*

club facilities, which shall always be payable extra by the purchaser(s).
3.2 in addition to the aforesaid cost of property, the purchaser(s) has undertaken and agreed to pay the following charges: -
a) club membership charges ("CMC") @ Rs. 2,00,000/- per unit.

41. The said issue was also referred to the committee and who after due deliberations and hearing the affected parties, submitted a report to the authority wherein it was observed as under:

> *"...After deliberation, it was agreed upon that club membership will be optional.*
> *Provided if an allottee opts out to avail this facility and later approaches the respondent for membership of the club, then he shall pay the club membership charges as may be decided by the respondent and shall not invoke the terms of FBAs that limits CMC to INR 1,00,000.00.*
> *In view of the consensus arrived, the club membership may be made optional. The respondent may be directed to refund the CMC if any request is received from the allottee in this regard with condition that he shall abide by the above proviso."*

42. The authority concurs with the recommendation made by the committee and holds that the club membership charges (CMC) shall be optional. The respondent shall refund the CMC if any request is received from the allottee. Provided that if an allottee opts out to avail this facility and later approaches the respondent for membership of the club, then he shall pay the club membership charges as may be decided by the respondent and shall not invoke the terms of flat buyer's agreement that limits CMC to Rs.1,00,000/-.

G-III Direct the respondent parties to pay refund the VAT amount Rs49,311/- which has been paid by the complainants.

G-IV Direct the respondent parties to refund the service tax amounting to Rs. 4,39,559/- which has been paid by the complainants.

G-V Direct the respondents' parties to refund the GST amounting to Rs. 344,302/- which has been paid by the complainants.

43. The allottees have also challenged the authority of the respondent builders to raised demand by way of goods and services tax. Since this issue was also referred to the committee and who after due deliberations and hearing the affected parties, submitted a report to the authority wherein it was observed 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 allottee the applicable combined rate of VAT and service tax. The relevant extract of the report representing the amount to be refunded is as follows:

Particulars	Spacio	Park Generation	Astire Garden	Terra	Amstoria	Other Project
HVAT (after 31.03.2014) (A)	4.51%	4.51%	4.51%	4.51%	4.51%	4.51%
Service Tax (B)	4.50%	4.50%	4.50%	4.50%	4.50%	4.50%
Pre-GST Rate(C =A+B)	9.01%	9.01%	9.01%	9.01%	9.01%	9.01%
GST Rate (D)	12.00%	12.00%	12.00%	12.00%	12.00%	12.00%
Incremental Rate E= (D-C)	2.99%	2.99%	2.99%	2.99%	2.99%	2.99%
Less: Anti-Profiteering benefit passed if any till March 2019 (F)	2.63%	2.46%	0.00%	2.58%	0.00%	0.00%

Amount to be refund Only if greater than (E- F) (G)	**0.36%**	**0.53%**	**2.99%**	**0.41%**	**2.99%**	**2.99%**

44. The authority has also perused the 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 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 complainants 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 relevant portion of the judgement is reproduced below:

> *"8. The complainant has then argued that the respondent's demand for GST/VAT charges is unjustified for two reason: (i) the GST liability has accrued because of respondent's own failure to handover the possession on time and (ii) the actual VAT rate is 1.05% instead of 4% being claimed by the respondent. The authority on this point will observe that 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. Regarding VAT, the Authority would advise that the respondent shall consult a service tax expert and will convey to the complainant the amount which he is liable to pay as per the actual rate of VAT fixed by the Government for the period extending upto the deemed date of offer of possession i.e., 10.10.2013."*

45. In appeal no. 21 of 2019 titled as ***M/s Pivotal Infrastructure Pvt. Ltd. Vs. Prakash Chand Arohi,*** Haryana Real Estate Appellate Tribunal, Chandigarh has upheld the ***Parkash Chand Arohi Vs. M/s Pivotal***

Infrastructure Pvt. Ltd. (supra). 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."***

46. In this present complaint, the due date of possession 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 were not entitled to charge GST from the complainants/allottees as the liability of GST had not become due up to the due date of possession as per the flat buyer's agreements. The authority concurs with the findings of the committee on this issue and holds that the difference between post GST and pre-GST shall be borne by the promoter. The promoter is entitled to charge from the allottee the applicable combined rate of VAT and service tax as detailed in para 43 of this order.

47. It is contended on behalf of complainant that the respondents raised an illegal and unjustified demand towards VAT to the tune of Rs. 49,311/-. It is pleaded that the liability to pay VAT is on the builder

and not on the allottee. But the version of respondents is otherwise and took a plea that while booking the unit as well as entering into flat buyer agreement, the allottee agreed to pay any tax/ charges including any fresh incident of tax even if applicable retrospectively.

48. The committee took up this issue while preparing report and after considering the submissions made on behalf of the allottees as well as the promoter, observed that the developer is entitled to charge VAT from the allottee for the period up to 31.03.2014 @ 1.05% (one percent VAT + 5 percent surcharge on VAT). However, for the period w.e.f. 01.04.2014 till 30.06.2017, the promoter shall charge any VAT from the allottees/prospective buyers at the rate of 4.51% as the promoter has not opted for composition scheme. The same is concluded in the table given below:

Period	Scheme	Effective Rate of Tax	Whether recoverable from Customer
Up to 31.03.2014	Haryana Alternative Tax Compliance Scheme	1.05 %	Yes
From 01.04.2014 to 30.06.2017	Normal Scheme	4.51%	Yes

49. The authority concurs with the recommendations of the committee and holds that promoter is entitled to charge VAT from the allottee for the period up to 31.03.2014 @ 1.05% (one percent VAT + 5 percent surcharge on VAT). However, for the period w.e.f. 01.04.2014 till 30.06.2017, the promoter shall charge any VAT from the allottees/prospective buyers at the rate of 4.51% as the promoter has not opted for composition scheme.

G-VI Direct the respondent parties to refund the electrification & STP charges of Rs. 162,410/- which has been paid by the complainants.

G-VII Direct the respondents' parties to refund the firefighting & power backup of Rs. 213,698/- which has been paid by the complainants.

50. In the present complaint, it was contended by the complainants that the respondent issued a letter dated 13.12.2021 to the complainants along with various unjust and unreasonable demands under various heads i.e., electrification charges. On the other hand, the respondent submitted that such charges have been demanded by the allottees in terms of FBA.

51. The authority concurs with the recommendation made by the committee and holds that the term electrification charges, clubbed with STP charges, used in the statement of accounts-cum-invoice be deleted, and only STP charges be demanded from the allottee of Terra @ Rs.8.85 sq. ft. Further, the term ECC (electric connection charges) be clubbed with FFC (firefighting charges) +PBIC (power backup charges) in the statement of accounts-cum-invoice attached with the letter of possession of the allottee of Terra and be charged @ Rs.100 per sq. ft. in terms of the provisions of 2.1 (f) at par with the allottee of Park Generation. The statement of accounts-cum-invoice shall be amended to that extent accordingly.

G. VIII Direct the respondents' parties to refund the cost escalation of the Rs. 8,86,375/- which has been paid by the complainants.

52. The complainants have pleaded that the respondents also imposed escalation cost Rs. 8,86,375/- after an increase in super area from

1691 to 1811 sq. ft. without increasing the carpet area. The authority has gone through the report of the committee and observes that as per the calculation of the estimated cost of construction for the years 2010-11 to 2013-14 and the actual expenditure of the years 2010 to 2014, the escalation cost comes down to 374.76 per sq. ft. from the demanded cost of Rs. 588 per sq. ft. No objections to the report have been raised by either of the party. Even the committee while recommending decrease in escalation charge has gone through booking form, builder buyer agreement and the issues raised by the promoter to justify increase in cost. The authority concurs with the findings of the committee and allows passing of benefit of decrease in escalation cost of the allotted units from Rs. 588/- per sq. ft to Rs. 374.76/- per sq. ft. to the allottees of the project.

H. Directions of the authority

53. 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):

a. The respondents are directed to pay interest at the prescribed rate of 10.75% p.a. for every month of delay from the due date of possession i.e., 03.07.2016 till offer of possession i.e., 13.12.2021 plus 2 months i.e., 13.02.2022.

b. The arrears of such interest accrued from 03.07.2016 till date of this order shall be paid by the promoter to the allottee within a period of 90 days from date of this order and interest for every month of delay shall be payable by the promoter to the allottee before 1oth of the subsequent month as per rule 16(2) of the rules.

c. 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.

d. The respondent is directed to handover the possession of the allotted unit to the complainant completes in all aspects as per specifications of buyer's agreement within 90 days from date of this order.

e. The respondent shall not charge anything from the complainants which is not the part of the agreement. However, 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.

f. **GST charges**: The authority is of the view that the respondent/promoter were not entitled to charge GST from the complainants/allottees as the liability of GST had not become due up to the due date of possession as per the flat buyer's agreements as has been held by Haryana Real Estate Appellate Tribunal, Chandigarh in appeal bearing no. 21 of 2019 titled as M/s Pivotal Infrastructure Pvt. Ltd. Vs. Prakash Chand Arohi. Also, the authority concurs with the findings of the committee on this issue and holds that the difference between post GST and pre-GST shall be borne by the promoter. The promoter is entitled to charge from the allottee the applicable combined rate of VAT and service tax as detailed in para 43 of this order.

g. **STP charges, electrification, firefighting and power backup charges:** The authority in concurrence with the recommendations of committee decides that the term electrification charges, clubbed with STP charges, used in the statement of accounts-cum-invoice be deleted, and only STP charges be demanded from the allottees of Terra @ Rs.8.85 sq. ft. Further, the term ECC be clubbed with FFC+PBIC in the statement of accounts-cum-invoice attached with the letter of possession of the allottees of Terra be charged @ Rs.100 per sq. ft. in terms of the provisions of 2.1 (f) at par with the allottees of Park Generation. The statement of accounts-cum-invoice shall be amended to that extent accordingly.

h. **Club membership charges:** The authority in concurrence with the recommendations of committee decides that the club membership charges (CMC) shall be optional. The respondent shall refund the CMC if any request is received from the allottee. Provided that if an allottee opts out to avail this facility and later approaches the respondent for membership of the club, then he shall pay the club membership charges as may be decided by the respondent and shall not invoke the terms of flat buyer's agreement that limits CMC to Rs.1,00,000/-.

i. **Cost escalation**: The authority is of the view that escalation cost can be charged only upto Rs. 374.76 per sq. ft. instead of Rs. 588 per sq. ft. as demanded by the developer.

j. **Increase in area**: The authority holds that the super area (saleable area) of the flat in this project has been increased and as found by the committee, the saleable area/specific area factor stands reduce from 1.30 to 1.2905. Accordingly, the super area of

the unit be revised and reduced by the respondents and shall pass on this benefit to the complainant/allottee(s) as per the recommendations of the committee.

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

54. Complaint stands disposed of.

55. File be consigned to registry.

(Sanjeev Kumar Arora)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 21.07.2023