BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**1761 of 2022**
Date of filing complaint	**21.04.2022**
Date of decision	**18.07.2023**

	Avinash Kumar Lohia **R/o**: Care of Mr. Rupesh Agarwal C4 422 4th Floor Milan Vihar CGHS Plot No 72 IP Extension Patparganj Near Balco Market Delhi 110092	**Complainant**
	Versus	
	1. M/s BPTP Ltd. 2.M/s Countrywide Promoters Ltd. **Both R/o:** M-11, Middle Circle, Connaught Circus, New Delhi-110001	**Respondents**

CORAM:	
Shri Vijay Kumar Goyal	**Member**
APPEARANCE:	
Ms. Priyanka Aggarwal	Complainant
Sh. Harshit Batra	Respondents

ORDER

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

and regulations made there under or to the allottee as per the agreement for sale executed inter se.

A. Unit and project related details

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

S. No.	Heads	Description
1.	Name of the project	'Spacio', Sector 37D, Gurugram, Haryana
2.	Project area	43.588 acres
3.	DTCP license no.	83 of 2008 issued on 05.04.2008
	Validity of license	04.04.2025
	Name of the license holder of 83 of 2008	M/s Super Belts and 4 others
	Licensed area	23.814 acres
4.	RERA registration number	300 of 2017 dated 13.10.2017
	Validity of registration certificate	w.e.f. 13.10.2017 till 12.10.2020
5.	Date of execution of flat buyer's agreement	15.02.2011 (on page no. 30 of complaint)
7	Date of Booking	25.06.2010 (as per page no. 25 of complaint)
8.	Unit no.	K-301, 3rd floor, Tower-K (page no. 31 of complaint)

9.	Unit area admeasuring	1225 sq. ft. (on page no. 31 of complaint)
10.	Revised unit area	1303 sq. ft. (a on page no. 157 of reply)
11.	Total consideration	Rs 50,17,414/- on page no. 159 of reply)
12.	Total amount paid by the complainant	Rs. 36,28,014/- (page no. 159 of reply)
13.	Due date of delivery of possession as per clause 3.1 of the flat buyer's agreement i.e. within a period of **36 months from the date of booking/registration of flat** and the promoter has claimed **grace period of 180 days after the expiry of 36 months, for applying and obtaining the occupation certificate** in respect of the colony from the authority.	25.06.2013 **Note:** Grace period is not included
14.	Occupation certificate date	30.07.2020 (As er page no. 154 of reply)
15.	Offer of possession	01.08.2020 (page no. 157 of reply)

B. Facts of the complaint:

3. That the allottee approached to the respondents for booking of a flat admeasuring 1225 Sq ft in BPTP Spacio Sector- 37 D. Gurugram and

paid booking amount Rs. 100000/- through cheque/RTGS No.447377 and receipt No. 2010/1400005869 on dated 25.06.2010.

4. That the complainant was allotted the flat no. K-301, 3rd Floor, Tower-K admeasuring 1225 Sq ft in project "BPTP Spacio" Sector- 37 D. Gurugram.

5. That the total cost of the said flat is Rs. Rs 50,17,414/- including basic development charges. club. firefighting & power backup installation charge, 3rd Floor PLC, IFMS, car parking, VAT as per SOA dated 07.03.2019, out which the complainant paid a sum of Rs 36,28,015/- in time bound manner.

6. That respondents were liable to hand over the possession of a said unit before 25.06.2013 as per buyer's agreement clause no 3.1 but the respondent-builder offered the possession on dated 01.08.2020 but flat was not in habitable condition.

7. That the complainant sends legal notice on dated 16.08.2020 to the respondent for unilateral, one-sided charges but they did not pay any heed to the complainant.

8. That the respondent at the time of offer of possession forcibly imposed escalation cost Rs. 766164/-, electrification & STP Charges Rs. 104240/-, club membership charges Rs. 100000/- (Without construction of club house) and increased the super area of flat 1225 Sq. Ft to 1303 Sq Ft. But carpet area remains same. Due to increase in super area payable amount was increased and it was created extra burden on complainant

which has been objected by the complainant at the time of offer of possession.

9. That the respondent had illegal and unjustified demand towards VAT of Rs 26,092/- intimidation attempt to coerce and obtain an illegal and unfounded claim amount and the respondent also demanded 1 year advance maintenance charges, as per the Haryana Apartment Owners Act and the charges are to be paid monthly hence asking for the maintenance charges in advance for 12 months, without having given the possession and without the registration of the flat is absolutely illegal.

10. That respondent charges IFMS (Interest free maintenance security), this is security deposit and builder will get interest on amount paid but it is not passed to the complainant is illegal, arbitrary and unilateral.

11. That due to the malafide intentions of the respondent and non- delivery of the flat unit the complainant has accrued huge losses on account of the career plans of their family member and themselves and the future of the complainant and their family are rendered in dark as the planning with which the complainant invested her hard-earned monies have resulted in sub-zero results.

C. Relief sought by the complainant:

12. The complainant has sought following relief(s):

i. Direct the respondents to pay delay possession charges at the prescribed rate of interest.

ii. Direct the respondents to quash the escalation cost of Rs. 7,66,164/-

iii. Direct the respondents to quash the electrification & STP Charges.

iv. Direct the respondents to quash club membership charges Rs. 1,00,000/-.

v. Direct the respondents to quash one year maintenance charges

vi. Direct the respondents to quash VAT & GST Charges.

vii. Direct the respondents to quash the increase in super area of flat as carpet area remain same as previous.

D. Reply by respondents:

The respondents by way of written reply dated 30.09.2022 made the following submissions:

13. It is pertinent to mention herein that the complaint is liable to be dismissed on the sole ground that the complainant has indulged himself in ***"Forum Shopping"*** as the complainant initially on 06.02.2021 filed a consumer complaint bearing no. 13 of 2021 titled as *"Dr. Pankaj Goel & Ors. Vs. BPTP Ltd."* before the Hon'ble National Consumer Dispute Redressal Forum ("NCRDC"), wherein, the present complainant is litigating as 45th Member of the said group complaint and sought the similar relief before the NCDRC.

14. That the complainant has knocked the door of this Hon'ble Authority for redressal of their alleged grievances with unclean hands, i.e., by not disclosing material facts pertaining to the case at hand and also, by distorting and/or misrepresenting the actual factual situation with

regard to several aspects. It is further submitted that the Hon'ble Apex Court in plethora of cases has laid down strictly, that a party approaching the Court for any relief, must come with clean hands, without concealment and/or misrepresentation of material facts, as the same amounts to fraud not only against the respondents but also against the court and in such situation, the complaint is liable to be dismissed at the threshold without any further adjudication.

a) That the complainant has concealed from this hon'ble authority that despite being aware of the fact that the timely payment is an essence of the agreement. It is submitted that the complainant was in defaults in making timely payments as a result thereof, the respondent had to issue various reminder letters and since despite several reminders the complainant failed to pay the outstanding dues till date despite being aware of the fact that timely payment is the essence of the agreement between the parties

From the given premise, it is very well established that the complainant with malafide intention in order to shield her own case has approached this hon'ble authority with unclean hands by distorting, concealing and misrepresenting the relevant facts which are necessary for the proper adjudication and to meet the ends of justice. It is further submitted that the sole intention of the complainant is to unjustly enrich themselves at the expense of the respondent by filing this frivolous complaint which is nothing but gross abuse of the due process of law. it is further

submitted that in light of the fleet of precedents laid down by the hon'ble apex court, the present complaint warrants dismissal without any further adjudication

15. It further submitted that the detailed relief claimed by the complainant goes beyond the jurisdiction of this Hon'ble Authority under the Real Estate (Regulation and Development) Act, 2016 and therefore the present complaint **is not** maintainable qua the reliefs claimed by the complainant association.

16. It is further submitted 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 complainant is 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".

17. It is submitted that as per Clause-2 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), charges for installing sewerage treatment plant (STP), administrative charges, interest free maintenance security (IFMS), etc. shall also be payable by the complainant.

18. Thereafter the construction of the unit was going on in full swing and the respondents were confident to handover possession of the unit in question as per the terms of the agreement. However, it be noted that due to the sudden outbreak of the coronavirus (COVID 19), from past more than 2 years all the activities across the country including the constructions of the projects came to a halt. Initially, the Government of India announced the countrywide lockdown from 24.03.2020 till the further orders. Which was subsequently extended to 31.05.2020. Whereafter, the Government of India partially lifted the said lockdown subject to stringent conditions. This countrywide lockdown led to severe migrant problems whereby all the labour from Delhi, Mumbai and other metropolitans left for their hometown due to which not only the respondent but all the developers across the country witnessed the acute shortage of labour which in turn took considerable time to settle. Whereafter, despite the stringent conditions imposed by the Government of india the respondents endeavored its best to complete the project, however, to utter dismay of the respondent, our country yet again encountered the second wave of the Covid-19, wherein, the respective State Government(s) including the Government of Delhi and the Government of Haryana considering the surge in the Covid-19 cases imposed the State wise lockdown which again affected the construction of the project in question as well as of the unit of the complainants.

19. It is submitted that despite the aforesaid hardships and the force majeure encountered by the respondents including the covid – 19 under

whose labyrinth the entire world including the respondents were/ are caught up, the respondents have managed to mobilise the labour to the sites and the construction of the project and the tower where the unit of the complainant is located has been duly completed by the respondents. Whereafter, the respondent obtained the occupation certificate from the concerned government authorities on 30.07.2020. Post which the possession of the unit has been offered to the complainant on 01.08.2020. However, the complainants, being investor do not wish to take possession as the real estate market is down and there are no sales in secondary market, thus has initiated the present frivolous litigation.

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 record. Their authenticity is not in dispute. Hence, the complaint can be decided based on these undisputed documents and submission made by the parties.

E. Jurisdiction of the authority:

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

E. I Territorial jurisdiction

As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the

project in question is situated within the planning area of Gurugram district. Therefore, this authority has completed 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;*

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.

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

F. Findings on the objections raised by the respondents.

F. I Objection regarding untimely payments done by the complainant.

24. It is contended that the complainant has made defaults in making payments as a result thereof, the respondents had to issue reminder letters dated 04.07.2012, 14.12.2012, 10.05.2017 and 23.09.2017. The respondents have further submitted that the complainants have still not

cleared the dues. The counsel for the respondents pointed towards clause 11 of the buyer's agreement wherein it is stated that timely payment of instalment is the essence of the transaction, and the relevant clause is reproduced below:

> *"11. TIMELY PAYMENT ESSENCE OF CONTRACT. TERMINATION, CANCELLATION AND FORFEITURE"*
>
> *11.1 Timey Payments of all amounts as per this Agreement, payable by the Purchaser(s) shall be the essence of this Agreement if the Purchaser(s) neglects omits ignore or fails, for any reason whatsoever to pay to the Seller any of the instalments or other amounts and charges due and payable to the Purchaser(s) under the terms and conditions of this Agreement or by respective due dates there or the Purchaser(s) in any other way fails to perform, comply or observe any of the terms and conditions herein contained within the time stipulated or agreed to, the Seller / Confirming Party shall be entitled to cancel/terminate this Agreement forthwith and forfeit the booking amounts or amounts paid upto the Earnest Money and Non-Refundable Amount The Seller/Confirming Party is not under any obligation to send reminders for the payments to be made by the Purchaser(s), as per schedule of payments and for the payments to be made as per demand by the Seller/Confirming Party ..."*

25. At the outset, it is relevant to comment on the said clause of the agreement i.e., *"11. TIMELY PAYMENT ESSENCE OF CONTRACT. TERMINATION, CANCELLATION AND FORFEITURE"* wherein the payments to be made by the complainants have been subjected to all kinds of terms and conditions. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favor of the promoter and against the allottee that even a single default by the allottee in making timely payment as per the payment plan may result in termination of the said agreement and forfeiture of the earnest money. Moreover, the authority observes that despite complainants being in default in making timely payments, the respondents have not exercised discretion to terminate the buyer's

agreement. The attention of authority was also drawn towards clause 11.3 of the buyer's agreement whereby the complainants would be liable to pay the outstanding dues together with interest @ 18% p.a. compounded quarterly or such higher rate as may be mentioned in the notice for the period of delay in making payments. In fact, the respondents have charged delay payment interest as per clause 11.3 of the buyer's agreement and has not terminated the agreement in terms of clause 11.1 of the buyer's agreement. In other words, the respondents have already charged penal interest from the complainants on account of delay in making payments as per the payment schedule. However, after the enactment of the Act of 2016, the position has changed. Section 2(za) of the Act provides that the rate of interest chargeable from the allottees by the promoters, in case of default, shall be equal to the rate of interest which the promoter would be liable to pay the allottee, in case of default. Therefore, interest on the delay payments from the complainants would be charged at the prescribed rate i.e., 10.70% by the respondents which is the same as is being granted to the complainants in case of delay possession charges.

FII Objection regarding force majeure conditions:

26. The respondent-promoter has raised the contention that the construction of the project was delayed due to reasons beyond the control of the respondent such as COVID-19 outbreak, lockdown due to outbreak of such pandemic and shortage of labour on this account. The authority put reliance judgment of 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 which has observed that-

"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."

27. In the present complaint also, the respondent was liable to complete the construction of the project in question and handover the possession of the said unit by 25.06.2013. The respondent is claiming benefit of lockdown which came into effect on 23.03.2020 whereas the due date of handing over of possession was much prior to the event of outbreak of Covid-19 pandemic. Therefore, 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 is not excluded while calculating the delay in handing over possession.

G. Findings on the relief sought by the complainant.

Relief sought by the complainant: The complainant has sought following relief:

1) Direct the respondents to pay the delay possession charges along with prescribed rate of interest.

G.I Delay Possession Charge

28. The respondent took a plea that the complainant initially on 06.02.2021 filed a consumer complaint bearing no. 13 of 2021 titled as "Dr. Pankaj Goel & Ors. Vs. BPTP Ltd." before the Hon'ble National Consumer Dispute Redressal Forum ("NCRDC"), wherein, the present complainant is litigating as 45th Member of the said group complaint and sought the

similar relief before the NCDRC for similar relief. Oon the contrary, the complainant states that the complaint pending before NCDRC has been withdrawn and the Hon'ble NCDRC vide order dated 23.03.2023 has deleted the name of the complainant allottee from the array of parties.

29. Since, common issues with regard to super area, cost escalation, STP charges, electrification charges, taxes viz GST &VAT, 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 are involved against the respondents. So, vide orders dated 06.07.2021 and 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 and a report was submitted and the same along with annexures was uploaded on the website of the authority.

30. In the present complaint, the complainant intends to continue with the project and are 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."*

31. Clause 3.1 of the flat buyer's agreement provides the time period of handing over possession and the same is reproduced below:

(i) "clause 3.1 of the flat buyer's agreement i.e. within a period of **36 months from the date of booking/registration of flat** and the promoter has claimed **grace period of 180 days after the expiry of 36 months, for applying and obtaining the occupation certificate** in respect of the colony from the authority.."

32. At the inception, it is relevant to comment on the pre-set possession clause of the floor buyer's agreement wherein the possession has been subjected to numerous terms and conditions and force majeure circumstances. The drafting of this clause is not only vague but so heavily loaded in favour of the promoters that even a single default by the allottee 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 allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

33. **Admissibility of grace period: The** respondent took a plea on 18.07.2023, that due date may be taken by along 6 months grace period which comes out to be 25.12.2013. As per clause 3.1 of the buyer's agreement clearly states that the grace period of 6 months can be applying and obtaining the occupation certificate of the said project. Further the respondent states that Haryana Real Estate (regulation and development) Appellate Authority in appeal no. 122 of 2022 case title as Emaar MGF Land Ltd. V/s Laddi Paramjeet Singh and others wherein the grace period in similar condition has been allowed.

34. However, the promoter has proposed to hand over the possession of the unit within a period of 36 months from the date of booking/registration of flat, the flat booked on 25.06.2010. So, the due date is calculated from the date of booking of flat i.e., 25.06.2013. Further, it was provided in the buyer's agreement that promoter shall be entitled to a grace period of 180 days after the expiry of the said committed period for applying and obtaining occupation certificate. In other words, the respondents are claiming this grace period of 180 days for applying and obtaining occupation certificate of the said unit. There is no material evidence on record that the respondent-promoters had applied or obtained occupation certificate within this span of 36 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 him in the buyer's agreement. As per the settled law, one cannot be allowed to take advantage of his own wrongs. Accordingly, this grace period of 180 days cannot be allowed to the promoter.

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 the amount already paid by him. 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., 18.07.2023 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 respondents/promoters which is the same as is being granted to the complainants in case of delayed possession charges.

40. On consideration of the documents available on record and submissions made by both 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. By virtue of clause 3 of the agreement executed between the parties on 15.02.2011, the possession of the subject apartment was to be delivered within 36 months from the date of booking/registration of flat. For the reasons quoted above, the due date of possession is to be calculated from the date of booking i.e., 25.06.2010 and the said time period of 36 months has not been extended by any competent authority. Therefore, the due date of possession is calculated from the date of booking of flat and the said time period of 36 months expired on 25.06.2013. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over possession is 25.06.2013.

41. The respondent has obtained the occupation certificate on 30.07.2020. Copies of the same have been placed on record. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the complainant as per the terms and conditions of the buyer's agreement dated 15.02.2011 executed between the parties. It is the failure on part of the promoter to fulfil its obligations and responsibilities as per the buyer's agreement dated 15.02.2011 to hand over the possession within the stipulated period.

42. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 30.07.2020. The respondent offered the possession of the unit in question to the complainant only on 01.08.2020. So, it can be said that the complainant came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the complainant should be given 2 months' time from the date of offer of possession. This 2 month of reasonable time is being given to the complainant keeping in mind that even after intimation of possession practically 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., 25.06.2013 till the date of offer of possession (01.08.2020) plus two months i.e., 01.10.2020. The complainant is further directed to take possession of the allotted unit after clearing the dues, if any remains after adjustment of delay possession charges and other reliefs within a period of 2 months and failing which legal consequences as per the provisions of the Act will follow.

43. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainants are entitled to delay possession charges at rate of the prescribed interest @ 10.75% p.a. w.e.f. 25.06.2013 till the date of offer of possession (01.08.2020) plus two months i.e.,

01.10.2020; as per provisions of section 18(1) of the Act read with rule 15 of the Rules

G.II Increase in super area

44. It is contended that the respondents have increased the super area of the subject unit vide letter of offer of possession dated 01.08.2020 without giving any formal intimation to, or by taking any written consent from the allottee. The said fact has not been denied by the respondents in reply. The authority observes that the said increase in the area has been as per clause 5 of the buyer's agreement. The relevant clause from the agreement is reproduced as under: -

> ***"5. ALTERATIONS IN PLANS, DESIGN AND SPECIFICATION AND RESULTANT CHANGES IN AMOUNTS PAYABLE***
>
> *The seller/confirming party is in the process of developing residential blocks in the SPACIO in accordance with the approved layout plan for the Colony. However, if any changes, alterations, modifications in the tentative building plans and/or tentative drawings are necessitated during the construction of the units or as may be required by any statuary authority(s), or otherwise, the same will be effected suitably, to which the purchaser(s) shall raise no objection and hereby gives his unconditional consent..."*

45. On perusal of record, the super area of the unit was 1225 sq. ft. as per the flat buyer's agreement and it was increased by 78 sq. ft. vide letter of offer of possession, resulting in total super area of 1303 sq. ft. The said committee in this regard has made following recommendations while submitting report:

> "The above site report was discussed in the meeting of the Committee held on 08.09.2021 and after detailed deliberation, the Committee makes the following recommendations:
>
> (i). The *inclusion of area under pool balancing tank as common area is not justified. Hence, the area under pool balancing tank, measuring 432.48 sq.ft. (Park Generation) and 684.28 sq. ft. (Spacio) may be excluded from the category of common areas.*

(ii). *The area under feature wall elevation measuring 12054 sq. ft. (Park Generation) and 6665.04 sq. ft. (Park Spacio) may be excluded from the common areas being an architectural feature.*

(iii). *Consequent upon exclusion of the above mentioned components from the list of the common areas, the additional common areas will decrease from 45713.29 sq.ft. to 38363.97 sq. ft (Park Spacio) and from 26300 sq.ft. to 13813.48 sq. ft. (Park Generation).* ***Accordingly, saleable area/specific area factor (997049.14/772618.28) will reduce from 1.30 to 1.2905 (Park Spacio)*** *and from 1.2829 to 1.2613 (731573/580001.38, Park Generation). In the instant cases, the super area of the apartment measuring 1865 sq. ft. will reduce to 1851.50 sq.ft. (1434.7 x 1.2905) in park spacio and the super area of the apartment measuring 1521 sq.ft. will reduce to 1496.70 sq. ft. (1186.06x1.2613) in park Generation. Accordingly, the respondent company be directed to pass on this benefits to the remaining complainants/allottees.*

i. *The area under the remaining components of the common area mentioned in the Annexure-6(park generation) and Annexure-7 (park spacio) may be allowed to be included in the super area in terms of the enabling clause 2.4 of the agreements."*

46. In the instant case, the super area of the subject flat measuring 1865 sq. ft. would reduce to 1851.50 sq. ft. on the basis of aforesaid recommendations of the committee report. 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.

G.III Cost escalation

47. The complainant has pleaded that the respondents also imposed escalation cost Rs. 7,66,164/- after an increase in super area from 1225 to 1303 sq. Ft. without increasing the carpet area. The respondents in this regard took a plea that cost escalation was duly agreed by the complainant at the time of booking and the same was incorporated in the

FBA. The undertaking to pay the above-mentioned charges was comprehensively set out in the FBA. In this context following clause of the FBA is noteworthy:

> *"12.11The Purchaser(s) understands and agrees that the basic sale price is escalation free except a situation where the cost of steel, cement and other construction materials increase beyond 10%. It is further agreed and understood that the steel price of Rs. 27,500/- per ton and prices of other construction material has been taken as per index price as on 01.09.2009. the company is fully authorised to revise the cost of construction materials, based on market conditions. The revision, if any, shall be intimated to the purchaser(s) at the time of possession. the purchaser(s) agrees and undertakes to unconditionally accept the price revision and pay the escalated amount without any objection or challenge whatsoever."*

48. 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 promoters 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 374.76 per sq.ft. to the allottees of the project. The relevant recommendation of the committee is reproduced below:

> *"**Conclusion:***
> *In view of the above discussion, the committee is of the view that escalation cost of Rs. 374.76 per sq. feet is to be allowed instead of Rs. 588 demanded by the developer."*

49. The authority concurs with the recommendations of the committeeand holds that the 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.

G .IV VAT charges

50. It is contended on behalf of complainant that the respondents raised an illegal and unjustified demand towards VAT to the tune of Rs. 27,104/-. 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.

51. 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

52. 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.V Advance maintenance charges

53. The issue with respect to the advance maintenance charges 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:

> *"**D. Annual Maintenance Charges**: After deliberation, it was agreed upon that the respondent will recover maintenance charges quarterly, instead of annually."*

54. The authority is of the view that the respondents are right in demanding advance maintenance charges at the rates' prescribed in the builder buyer's agreement at the time of offer of possession. However, as agreed by the respondents before the said committee, the respondents shall recover maintenance charges quarterly instead of annually. The demand raised in this regard by the respondents is ordered to be modified accordingly.

G .VI GST

55. The allottees have also challenged the authority of the respondents' builders to raised demand by way of goods and services tax. It is pleaded by the complainant that while issuing offer of possession, the respondents had raised a demand of Rs.1,90,390/- under the head GST which is illegal and is not liable to repeat to be paid by him.

56. Though the version of respondents is otherwise, but 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 allottees 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%**

57. 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 complainant cannot be burdened to discharge a liability which had accrued solely due to respondent's own fault in delivering timely possession of the flat. The 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."*

58. 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.***"

59. 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 respondents/promoters were not entitled to charge GST from the complainant/allottee as the liability of GST had not become due up to the due date of possession as per the flat buyer's 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.

G.VII STP charges, electrification, firefighting and power backup charges

60. The respondent issued an offer of possession letter to the complainants along with various unjust and unreasonable demands under various heads i.e. cost escalation of Rs.7,66,164/-, electrification and STP charges of Rs.88,354/-. On the other hand, the respondent submitted that such charges have been demanded by the allottees in terms of the flat buyer's agreement.

61. The said issue was also referred to the committee and it was observed as under by the committee:

"***Recommendations:***

i. The Committee examined the contents of the FBAs executed with the allottees of Spacio and Park Generation and found that various charges to be paid by the allottees find mention at clause 2.1 (a to h). Neither, the electrification charges figures anywhere in this clause, nor it has been defined anywhere else in the FBAs. Rather, ECC+FFC+PBIC charges have been

mentioned at clause 2.1 (f). which are to be paid at INR 100 per sq. ft.

ii. The term electric connection charges (ECC) has been defined at clause 1.16 (Spacio) and Clause 1.19 (Park Generation), which is reproduced below:

> *"ECC" or electricity connection charge shall mean the charges for the installation of the electricity meter, arranging electricity connection (s) from Dakshin Haryana Bijli Vidyut Nigam, Haryana and other related charges and expenses. "*

iii. From the definition of ECC, it is clear that electrification charges are comprised in the electric connection charges and the same have been clubbed with FCC+PBIC and are to be charged @INR 100 per sq. ft. Therefore, the Committee concluded that the respondent has conveyed the electrification charges to the allottees of Spacio in an arbitrary manner and in violation of terms and conditions of the agreement. Accordingly, the Committee recommends:

A. 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 Spacio@ INR 8.85 sq. ft. similar to that of the allottees of Park Generation.

B. 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 Spacio and be charged @ INR 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."

62. 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 allottees of Spacio @ 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 Spacio and 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.

G.VIII Club membership charges

63. It was contended by the complainant that the respondent has charged a sum of Rs. 1,00,000/- of club membership charge in its letter for offer of possession despite the fact that the construction of the club has not been completed till date. Further, in plethora of judgements of various RERA Authorities; it has been held that the club membership charges cannot be imposed on the allottees till the time the club is not completed and becomes functional. On the other hand, respondent denied that the construction of club has not finished. The respondent has been raising demands as per its whims and fancies.

64. 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."*

65. 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/-

H. Directions of the authority

66. 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):

- The respondents are directed to pay interest at the prescribed rate of 10.75% p.a. for every month of delay on the amount paid by the complainant from the due date of possession i.e., 22.07.2016 till offer of possession i.e., 01.08.2020 plus 2 months 01.10.2020 to the complainant as per proviso to section 18(1) of the Act read with rule 15 of the rules.
- The arrears of such interest accrued from due date of possession till its admissibility as per direction (i) above shall be paid by the promoter to the allottees respectively within a period of 90 days from date of this order as per rule 16(2) of the rules.
- The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period against their unit to be paid by the respondents
- The rate of interest chargeable from the allottees by the promoters, in case of default shall be charged at the prescribed rate i.e., 10.75% by the respondent/promoters which is the same rate of interest which the promoters would be liable to pay the allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.
- **STP charges, electrification, firefighting and power backup charges**: The authority concurs with the recommendations of

committee regarding STP charges, electrification, firefighting and power backup charges etc. and to be charged as per the recommendation of the committee.

- **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 the allottees opt 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/-.
- **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.
- **Cost escalation:** The 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 as per the recommendation of the committee.
- **VAT Charges:** The 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.

- **GST charges**: 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 promoters are entitled to charge from the allottee the applicable combined rate of VAT and service tax as detailed mention in the committee report.

- **Advance maintenance charges**: The authority is of the view that the respondents are right in demanding advance maintenance charges at the rates' prescribed in the builder buyer's agreement at the time of offer of possession. However, as agreed by the respondents before the said committee, the respondents shall recover maintenance charges quarterly instead of annually.

- The respondents 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.

67. Complaint stands disposed of.

68. File be consigned to registry.

V.I-

(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 18.07.2023