

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

Complaint no. :	4164 of 2020
First date of hearing:	28.01.2021
Date of decision:	03.10.2023

Sunny Singh Anand

R/o BG-7/116, Paschim Vihar, Delhi- 110063

Complainant

Versus

M/s Sana Realtors Pvt. Ltd.

Office address: H-69, Upper Ground Floor,
Outer Circle, Connaught Place, New Delhi-110001.

Respondent

CORAM:

Shri Vijay Kumar Goyal

Shri Ashok Sangwan

Member

Member

APPEARANCE:

Mr. Nivedita Chauhan (Advocate)

For the complainant

Mr. Gaurav Raghav (Advocate)

For the respondent

ORDER

1. The present complaint dated 10.12.2020 has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is *inter alia* prescribed that the promoter shall be responsible for all

obligations, responsibilities and functions as provided under the provision of the Act or the Rules and regulations made there under or to the allottee as per the agreement for sale executed *inter se*.

A. Project and unit related details

2. The particulars of the project, the amount of 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	Precision Soho Tower, Sector-67, Gurugram, Haryana.
2.	Nature of the project	Commercial complex
3.	DTPC license details	No.- 72 of 2009 dated 26.11.2009. Valid/renewed up to- 25.11.2019. Licensee- Sh. Hari Singh Licensed area- 2.456 acres
4.	Building plan approved on	25.07.2011
5.	RERA registered/ not registered	Not registered
6.	Unit no.	917, 9 th floor, tower A [Page 42 of complaint]
7.	Unit measuring	525 sq. ft. [Page 42 of complaint]
8.	Flat buyer agreement executed on	04.02.2011 [Page 40 of complaint]

9.	Possession clause as per flat buyer agreement	Clause 15. That the possession of the said premises is proposed to be delivered by the DEVELOPER to the ALLOTTEE(S) within Three years from the date of this Agreement....
10.	Due date of delivery of possession	04.02.2014
11.	Total consideration as per clause 1 of flat buyer agreement dated 04.02.2011	Rs. 24,70,125/- [Page 42 of complaint]
12.	Total amount paid by the complainant	Rs. 24,18,902/- [As per ledger dated 10.03.2014, page 70-71 of complaint]
13.	Occupation certificate	<ul style="list-style-type: none"> • 18.07.2017 [Tower A and C] [Page 116 of complaint] • 10.10.2019 [Tower B] [Page 118 of complaint]
14.	Letter for "Payment demand on Offer of possession"	18.09.2017 [Page 119 of complaint]

B. Facts of the complaint

3. The complainants have made the following submissions in the complaint:

- a. That the present complaint is being filed by the complainant before hon'ble authority under section 31 the Act r/w rules laid down thereunder r/w sections 11(4) (a), 12, 13, 14, 18 and 19 of the Act, against M/s Sana Realtors Pvt. Ltd. (hereinafter referred to as the respondent, which is a body corporate indulged in real estate

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business. The present complaint is being filed for non-compliance and violation of contractual obligation arising out of the flat buyer agreement executed between the complainant and the respondent and violation of the provisions of the Act.

- b. That the respondent was granted the license no. 72 of 2009 by the Town and Country Planning Department, Government of Haryana (hereinafter referred to as 'DTCP, Haryana') thereby granting permission to develop commercial colony in Sector 67, Village Badshapur, Gurugram, Haryana. That it is utmost pertinent to mention that clause 6 of the license no. 72 of 2009 makes it a mandate on the respondent not to give any *Advertisement for sale of Floor Area in Commercial Colony before the approval of Layout Plan/Building Plan*. However, the respondent not only widely advertised the project but also entered into flat buyer agreement with the complainant without the approval of the building plan.
- c. That the complainant on being allured by the project booked a unit/space by paying earnest money amounting to 20% of the entire sale consideration qua the unit along with car parking, External Development Charges, Infrastructure Development Charges and after such payment executed flat buyer agreement (Hereinafter referred to as the 'FBA') with the respondent. That as per clause 15 of the FBA, the respondent had undertaken to deliver the possession of the unit / space in the commercial colony within three years from the date of execution of FBA with the complainant.

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- d. That the respondent made the complainant enter into a FBA containing abusive, draconian, one-sided clauses, giving excessive arbitrary discretion at the hands of the respondent and the same if given effect to would render extremely detrimental to the interests of the complainant and would give undue freedom to the respondent to further harass the complainant and inflict further loss upon the complainant than what has already been suffered by them due to years of fraudulent conduct on the part of the respondent.
- e. That the 'Installment Schedule' under which the complainant was required to make payment in lieu of the booked unit/space in the project, was construction linked and according to which the complainant had paid more than 90 % of the entire consideration amount to the respondent in the year 2012 and that the respondent kept the complainant in dark about the status of construction of the project, the units of which as per clause 15 of the FBA, were required to be delivered by the respondent by the year 2013.
- f. That the respondent had promised to deliver the unit in the project by 04.02.2014 and that there was supposed to be three towers in the project (Tower A, B and C) and that the complainant was allotted a virtual unit no. 917 on the ninth floor but in which tower this unit lies was never communicated to the complainant by the respondent.
- g. That the respondent had collected External Development Charges (EDC)/Infrastructure Development Charges (IDC) from the

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complainant and others as similarly placed which were not only wrongfully and exorbitantly charged but the respondent fraudulently recused itself from depositing entire such amount in the accounts of the competent authority i.e., DTCP, Haryana thereby causing wrongful gain to itself by misappropriating the money so collected in the name of EDC/IDC from the complainant.

- h. That the respondent sent false and concocted emails dated 30.04.2015 and 04.05.2015 giving false information with the subject "Precision Soho Tower is nearing completion" whereas the respondent was supposed to deliver the possession of the unit of the complainant by 04.02.2014. That at this juncture, the complainant was ruthlessly charged the interest for late payment of instalment in the year 2010, 2011 and 2012 to the tune of more than Rs.80, 000/- and that the respondent has yet failed to give timely possession. That in lieu of the emails sent by the respondent, the complainant sent many emails to the respondent seeking queries as to when the possession of the unit would be delivered, status of construction and the interest amount to be paid by the respondent on account of failure of delivery of possession etc. And that the respondent failed reply to the same.
- i. That the respondent advertised that there would be 46 units on each floor of the project (as per the brochure and website), whereas it was later discovered that the exact number of units on each floor was only 34 in number and that it was further came to the knowledge of the complainant in the year 2017 that the respondent

on being caught for defrauding the complainant and others as similarly placed converted toilets into units and handed over the same to similarly placed customers as the complainant. Further it is pertinent to submit that the respondent had advertised in newspaper.

- j. That one Mr. Parveen Saluja discovered from the response dated 13.09.2017 received from the Public Information Officer of DTCP, Haryana upon filing an RTI Application dated 12.07.2017, that the respondent got approval of the building plan on 25.07.2011 and had applied for the occupation certificate on 21.05.2015 and the conditional occupation certificate was only granted on 18.07.2017 for Tower 'A' and 'C' in the project and further it is important to mention that the conditional occupation certificate for Tower 'B' in the project was only granted on 10.10.2019, whereas the respondent was obligated under the terms and conditions of the flat buyer agreements with the complainant to ready and deliver the final possession of the units along with necessary approvals/clearances from the concerned authority in the year 2013 which is an obligation of the promoter under section 11(4)(a) of the Act.
- k. That the respondent sent a false and concocted letter dated 18.09.2017 to the complainant with the subject 'Payment Demand at the time "AT THE TIME OF POSSESSION" Ref No.: - 'Commercial No. 917 in Precision SOHO Towers' giving a declaration that the construction work of the block is going on as per schedule. That at

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this juncture it is pertinent to mention that as per the payment schedule, the complainant was required to make payment till the year 2013 and that more than 90% of total consideration amount was already paid by the complainant by the year 2012 and that the remaining payment was due to be paid before the due date of delivery of possession of the unit being 04.02.2014 which the respondent failed to deliver as the property was far from completion in the said year.

- l. That the complainant paid interest/fines to the respondent as late payment fees in 2013 to the tune of over Rs. 50,000/- which was ruthlessly extracted from the complainant and the rest of the interest was waived off by the respondent on a condition that the complainant shall have to deposit the entire consideration amount and accordingly the complainant was compelled to deposit 100% payment in lieu of the unit in mid of 2013 with interest, for which the complainant was constrained to borrow money from family and friends.
- m. That section 13(1) of the Act, unambiguously states that '*A promoter shall not accept a sum more than ten percent of the cost of the apartment, plot, or building as the case may be, as an advance payment or an application fee, from a person without first entering into a written agreement for sale with such person and register the said agreement for sale, under any law for the time being in force*', whereas in the present case the respondent has accepted 20% of the entire sale consideration as an advance from the complainant

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herein before entering into a flat buyer agreement, thus, violating the provisions of the aforesaid section of the Act.

- n. That the respondent had advertised of providing high-tech modern facilities and amenities such as CCTV backed high-tech security, high-tech elevators, air-conditioned complex etc. and promised the complainant of these amenities at the time of executing FBA and while accepting earnest money payments from the complainant. Despite the lapse of more than 6 years not even an inch of sign of these amenities and facilities is to be seen from the current status of the project. That it is important to submit that it is a clear-cut case of cheating/fraud where a number of buyers including the complainant herein had been hoodwinked alluring them by showing dream units consisting of features of home cum office spaces while printing very glossy brochure as well as the advertisements put on its website and on YouTube. That the respondent has constructed only structure of the units by using inferior quality of raw materials and equipment and that no tangible development has taken place at the site, thus violating the obligation and responsibility imposed upon the respondent u/s 12 & 14 of the Act regarding veracity of the advertisements based on which the complainant herein had booked the unit in the said project.
- o. That the complainant herein has invested hard earned money to book a unit/space in the project having the status of a commercial colony, being developed by the respondent with the hope of starting

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businesses and providing employment in the unit purchased by them containing special features of 'Small Office Home Office' in return of which the complainant received great deal of disappointment, fraud, misrepresentation and wrongful loss at the behest of the deficiency of services and mal practices by the respondent, thus the intervention by this Hon'ble Authority is need of the hour.

C. Relief sought by the complainant:

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

- a. Direct the respondent to give immediate possession of the unit of the abovementioned complainant along with prescribed interest per month from the date promised for delivery of possession till the date of actual delivery of possession of unit in favour of the complainant herein in a habitable condition.
- b. Direct the respondent to provide with all the amenities and facilities as mentioned in its brochure/advertisements and cure structural defects within 30 days from the final adjudication of the present complaint.
- c. To restrain the respondent from raising any demand of final payment with interest and holding charges from the complainant.
- d. To restrain the respondent from raising any demand of maintenance before the actual delivery of possession and before the completion of one month after the actual delivery of possession of the unit.

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- e. Pass any other order which deems fit in the interest of justice, good conscience and equity.
5. On the date of hearing, the authority explained to the respondent/promoters about the contraventions as alleged to have been committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent.

6. The respondent by way of written reply made the following submissions:
 - a. That the respondent had way back on 18.05.2015 applied with the concerned authority i.e. DTCP for the grant of the occupation certificate and the concerned authority on 18.07.2017 prior to the commencement of the Rules had granted the respondent with the occupation certificate. It is pertinent to state the said Rules mentioned herein above were notified only on 28.07.2017 and therefore, cannot applied retrospectively to a project which stands completed before the Rules coming into force. The respondent had obtained the occupation certificate for its project despite which was an "ongoing project" even prior to the notification of the rules. Hon'ble Bombay High Court in the case of *Neelkamal Realtors Suburban Pvt. Ltd. v. Union of India* reported in *SCC Online Bom 9302*, wherein the collective reading of Rules 2(o) and 2(Zn) of the Rules have been interpreted and it was held that the rules of RERA are not applicable retrospectively.

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- b. That the specific agreements entered into between the respondent and the complainant are prior to coming into force of the Act and Haryana Rules, hence the provisions of the Act are not applicable to the present complaint.
- c. That the present complaint filed by the complainant is liable to be dismissed as the complainant has already filed an identical complaint before State Commission, for the same relief. The present complaint is hit by the principal of Res-Subjudice and further same relief can't be claimed from two distinct authorities. The matter before the State Commission is in advance stage.
- d. That the present complaint filed by the complainant is liable to be dismissed as the complainant has filed a false complaint and liable to be dismissed at threshold. The agreement between the developer and the customer is binding on the parties and the complainant who had preferred to make payments as per the construction linked plan, has failed to make the outstanding payments. For the sake of brevity the misconduct of the complaint is reflected herein below:

Total consideration Cost of the Unit (At the time of offer of possession) (In Rs)	Amount Paid by the Complainant (Rs)	Amount Outstanding
Rs. 25,82,625/-	Rs. 22,72,990 /- is excluding Service Tax and Including Timely Rebate Payment of Rs. 67,331/- On Account of failure to Complaint to Make the Balance Payments on Due Dates the said TRP was withdrawn	Rs. 3,33,327/- (After benefit of Timely Rebate Payment was included

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- e. That the complaint before the authority is beyond the limitation period and hence the present application is liable to be dismissed. The complainant was offered on 18.09.2017. The complaint of the complainant is only with malice and is nothing more than malicious prosecution. Referring to the provisions of Limitation Act, the maximum period as per Article 113 of the Limitation Act is three years and the same has already elapsed.
- f. That the present complaint filed by the complainant is not maintainable as the occupancy certificate is already issued on 18.07.2017 i.e. prior to the commencement of the rule and even the complainant is offered the possession of the commercial unit. Further the complainant was also intimated that the Sale Deed of the property in question is ready for execution but the complainant is deliberately not coming forward to take the possession and to get the conveyance deed executed.
- g. That the present complaint is not maintainable as the provision of section 19 (6) of the Act was not complied by the complainant, which says every allottee, who has entered into an agreement to take or sale the apartment, plot or building shall be responsible to pay the necessary payments at the time of offer of possession including registration charges, municipal taxes and other charges etc. But no necessary payments were made by the complainant after the completion of the project, hence the present complaint is not maintainable and is liable to be dismissed.

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- h. That as per the clauses 41 & 42 of the buyer agreement, the complainant shall be liable to pay as and when demanded by the respondent the stamp duty, registration charges and other legal and incidental charges for execution and registration of conveyance deed. It is also submitted that the complainant is also liable to pay any loss or damages suffered by respondent for non-payment or delay in payment, non-performance of the terms and conditions of the agreement. It is pertinent to mention here that clause 8 of the buyer agreement which incorporates that "the time of payment of installments as stated in Schedule of Payment and applicable stamp duty, registration, fee, maintenance and other charges payable under this Agreement as and when demanded is the essence of this Agreement", hence the present complaint is not maintainable and is liable to be dismissed.
- i. That the delay in the handing over the possession of the project was beyond the control of the respondent. It is submitted that clause 15 relied upon by the complainant also provide for the exemption if the delay, if any caused is beyond the control of the respondent, the same shall be excluded from the time period so calculated. It is not out of place to mention here that the respondent has been diligent in constructing the project and the delay, if any, is due to the authorities or government actions and the same is well documented.
- j. That initially there were high tension wires passing through the project land and the work got delayed as the agencies did not

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remove the same within time promised and since the work was involving risk of life, even the respondent could not take any risk and waited for the cables to be removed by the Electricity Department and the project was delayed for almost two years at the start. Initially, there was a 66 KV Electricity Line which was located in the land wherein the project was to be raised. Subsequently an application was moved with the HVPNL for shifting of the said Electricity Line. HVPNL subsequently demanded a sum of Rs. 46,21,000/- for shifting the said Electricity Line and lastly even after the deposit of the said amount HVPNL took about one and half years for shifting the said Electricity Line. It is pertinent to mention here that until the Electricity Line was shifted the construction on the plots was not possible and hence the construction was delayed for about two years. It is pertinent to note here that the diligence of the respondent to timely complete the project and live up to its reputation can be seen from the fact that the respondent had applied for the removal of high-tension wires in the year 2008 i.e., a year even before the license was granted to the respondent so that the time can be saved and project can be started on time. It is submitted that the contractor M/s Acme Techcon Private Limited was appointed on 08.07.2011 for development of the project and it started development on war scale footing.

- k. That in the year 2012, pursuant to the Punjab and Haryana High Court order, the DC had ordered all the developers in the area for not using ground water and the ongoing projects in the entire area

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seized to progress as water was an essential requirement for the construction activities and this problem was also beyond the control of the respondent, which further was duly noted by various media agencies and documented in the government department. Further, since the development process was taking lot of time and the contractor had to spend more money and time for the same amount of work, which in normal course would have been completed in almost a year, due to the said problems and delay in the work, the contractor working at the site of the respondent also refused to work in December, 2012 and the dispute was settled by the respondent by paying more to the earlier contractor and thereafter appointing a new contractor M/s Sensys Infra Projects Pvt. Ltd. in January, 2013 immediately to resume the work at the site without delay. Further, the project is complete since 2015 and the respondent has also applied for the occupancy certificate in May 2015. Lastly, in July 2017, occupancy certificate was issued, and the delay of two years was on account of the delay at the end of DTCP and as such the Respondent is not responsible for any delay.

1. That the development and construction has been diligently done by the respondent and the obligations which the respondent was to discharge have been onerously discharged without fail and the reasons for delay are stated herein for the kind consideration of this Hon'ble Authority. It is submitted that the respondent has complied with its part of the obligation and the conditions aforesaid were not in control of the respondent. The respondent could diligently do his



part, which has been done and requisite documents to prove its diligence are annexed herewith, therefore no illegality as being alleged can be attributed to the respondent in any manner whatsoever.

- m. That the present complaint filed by the complainant is liable to be dismissed as the complainant is having no locus standi and had made false allegations against the respondent without any substantial evidence, hence the present complaint is not maintainable and is liable to be dismissed with heavy cost. All other averments made in the complaint were denied in toto.
7. Copies of all 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 submissions made by parties.

E. Jurisdiction of the authority

8. 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

9. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by the 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

10. 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 promoter, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

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

F. Findings on the objections raised by the respondent

F.I Objections regarding that the respondent has made an application for grant of occupation certificate before coming into force of RERA

12. The respondent-promoter has raised the contention that the said project of the respondent is a pre-RERA project as the respondent has already applied for obtaining occupation certificate from the competent authority





in the year 2015 i.e., before the coming into force of the Act and the rules made thereunder. As per proviso to section 3 of Act of 2016, ongoing projects on the date of commencement of this Act i.e., 01.05.2017 and for which completion certificate has not been issued, the promoter shall make an application to the authority for registration of the said project within a period of three months from the date of commencement of this Act and the relevant part of the Act is reproduced hereunder: -

Provided that projects that are ongoing on the date of commencement of this Act and for which the completion certificate has not been issued, the promoter shall make an application to the Authority for registration of the said project within a period of three months from the date of commencement of this Act:

13. The legislation is very clear in this aspect that a project shall be regarded as an "ongoing project" until receipt of completion certificate. Since, no completion certificate has yet been obtained by the promoter-builder with regards to the concerned project, the plea advanced by it is hereby rejected.

F.II Findings qua force majeure conditions as pleaded by the respondent

14. While filing written reply, a specific plea was taken by the respondent that there was delay of about 2 years in completion of the project due to non-removal of cables of 66KV of the powerlines from the project land. Besides that, there were stay w.r.t. use of ground water for construction activities leading to escalation of cost and the contractor engaged earlier refusing to work at the previous rates and engaging a new one for further construction. Thirdly, after all its efforts, it was able to complete the construction of the project and applied for its occupation certificate in May 2015 but the same was issued only in the month of July 2017. Thus, all

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these factors were beyond the control of the respondent who complied with his obligations with due diligence. Thus, the time spent and detailed above be excluded while calculating the due date for completion of the project and offer of possession of the allotted unit. But all the pleas advanced in this regard are devoid of merit. No doubt, the respondent spent a considerable period in getting removed electric cables from the project land, a dispute with the contractor leading to escalation of project cost and non-issuance of occupancy certificate by the competent authority but no fault for the same can be found with the complainant who paid a substantial part of the sale consideration towards the allotted unit. Moreover, it was for the respondent to address all these issues and the complainant was not a party to either of the same transaction. Though there was a dispute of the respondent with the contractor, but it was for the former to settle the same and proceed with the construction of the project. There may be delay in issuances of occupation certificate of the project and the period obtained in this regard has been contended to be excluded and be treated as zero period. But again, the plea advanced in this regard is not tenable. It is for the competent authority to declare the period spent in obtaining occupation certificate as zero period and the authority cannot deliberate on that point.

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

15. 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 flat buyer agreement executed between the parties

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and no agreement for sale as referred to under the provisions of the Act or the said rules has been executed inter se parties.

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

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17. 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."

18. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of any other Act, rules, statutes, instructions, directions issued thereunder and are not unreasonable or exorbitant in nature.

F.IV Non-maintainability of complaint on the ground of matter being sub judice before State Commission

19. The respondent raised a plea that the present complaint is liable to be dismissed as the complainant has already filed an identical complaint before State Commission for the same relief. The present complaint is hit

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by the principal of res-sub judice and further same relief can't be claimed from two distinct authorities.

20. The complainant herein had filed a complaint bearing no. CC/1413/2016 before the State Commission in the year 2016 and the same was withdrawn by the complainant herein as is evident from the order dated 19.03.2023 placed on record by the complainant. Thus, the present complaint is not barred by the principal of res sub judice.

G. Findings on the relief sought by the complainant.

G.I Possession and delay possession charges

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

"Section 18: - Return of amount and compensation

18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building, —

.....

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."

22. Clause 15 of the flat buyer agreement (in short, agreement) provides for handing over of possession and is reproduced below:

"15. That the possession of the said premises is proposed to be delivered by the DEVELOPER to the ALLOTTEE(S) within Three years from the date of this Agreement..."

23. **Due date of handing over possession:** As per the aforesaid clause, the respondent had agreed to deliver the possession of the subject unit within 3 years from the date of the agreement. In the present complaint, the flat buyer agreement was executed on 04.02.2011 and the period of 3 years

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expires on 04.02.2014. Therefore, the due date of handing over possession comes out to be 04.02.2014. However, the respondent has failed to offer possession of the subject unit by the stipulated time period. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and regulations made thereunder or to the allottee as per agreement for sale under section 11(4)(a).

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

25. 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.

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26. 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., **03.10.2023** is @8.75%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.75%.
27. **Rate of interest to be paid by the complainant-allottee on the outstanding dues:** 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—

(i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default.

(ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"

28. Therefore, interest on the delay payments from the complainant 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 complainant in case of delayed possession charges.
29. On consideration of the documents available on record and submissions made by both the parties regarding contravention of provisions of the Act,

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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 15 of the said agreement executed between the parties on 04.02.2011, the possession of the subject apartment was to be delivered within 3 years from the date of execution of the buyer's agreement. Therefore, the due date of handing over possession comes out to be 04.02.2014. In the present complaint, the respondent has failed to handover possession of the subject unit within the stipulated time period. The occupation certificate was obtained on 18.07.2017 and the unit of the complainant falls in tower A as is evident from offer of possession dated 18.09.2017. Accordingly, it is the failure of the respondent/promoter to fulfil its obligations and responsibilities as per the agreement to hand over the possession within the stipulated period.

30. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with proviso to section 18(1) of the Act on the part of the respondent is established. As such the complainant-allottee shall be paid, by the respondent-promoter, interest for every month of delay from due date of possession i.e., 04.02.2014 till the receipt of occupation certificate (18.07.2017) plus 2 months i.e., 18.09.2017 at prescribed rate i.e., 10.75 % p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules. Further, 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 one month from date of this order.

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G.II Maintenance charges

31. As far as issue regarding advance maintenance charges is concerned, where the said agreements have been entered into before coming into force the Act, the matter is to be dealt with as per the provisions of the builder buyer's agreement.
32. The respondent right in demanding maintenance charges after the receipt of occupation certificate plus two months which would be applicable after 18.09.2017 that is the statutory period provided for taking possession of the subject unit by an allottee. However, the respondent shall not demand the maintenance charges for more than a period of one year from the allottee as has been decided by the authority in complaint bearing no. **4031 of 2019 titled as Varun Gupta V. Emaar MGF Land Ltd.**

G.III Holding charges

33. The complainant has also challenged the demand raised by the respondent builder in respect of holding charges on the ground that since the project is incomplete and the offer of possession is not lawful. On the contrary, the respondent submitted that all the demands have been strictly raised as per the terms of the flat buyer agreement.
34. The authority observes that this issue already stands settled by the Hon'ble Supreme Court vide judgment dated 14.12.2020 in civil appeal no. 3864-3889/202, whereby the Hon'ble Court had upheld the order dated 03.01.2020 passed by NCDRC, which lays in unequivocal terms that no holding charges are payable by the allottee to the developer. The relevant para of the committee report is reproduced as under:



"F. Holding Charges: The Committee observes that the issue already stands settled by the Hon'ble Supreme Court vide judgement dated 14.12.2020 in civil appeal no. 3864-3889/2020, hereby the Hon'ble Court had upheld the order dated 03.01.2020 passed by NCDRC, which lays in unequivocal terms that no holding charges are payable by the allottee to the developer. The Hon'ble Authority may kindly issue directions accordingly."

35. The respondent is not entitled to claim holding charges from the complainant at any point of time even after being part of the buyer's agreement as per law settled by Hon'ble Supreme Court in civil appeal nos. 3864-3889/2020 decided on 14.12.2020.

H. Directions of the authority

36. 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 respondent is directed to pay interest at the prescribed rate i.e., 10.75% p.a. for every month of delay from the due date of possession i.e., 04.02.2014 till the date of receipt of occupation certificate plus 2 months i.e., up to 18.09.2017.
- b. The respondent is directed to handover the physical possession of the unit to the complainant on payment of outstanding dues if any, after adjustment of delay possession charges.
- c. The arrears of such interest accrued from due date of possession till its admissibility as per direction (a) above shall be paid by the respondent to the complainant within a period of 90 days from the date of this order.
- d. The rate of interest chargeable from the allottees by the promoter, in

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case of default in making payment 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 allottees, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

- e. The respondent builder is directed to provide all the amenities and facilities as per buyer's agreement.
 - f. The respondent is not entitled to charge any amount against holding charges from the complainant/allottee at any point of time even after being part of the buyer's agreement as per law settled by Hon'ble Supreme Court in Civil appeal nos. 3864-3889/2020 decided on 14.12.2020.
37. The complaint stands disposed of.
38. File be consigned to registry.

(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Date: 03.10.2023


(Vijay Kumar Goyal)
Member