

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

Complaint no. : 200 of 2023
Date of complaint : 27.01.2023
Date of order : 08.11.2023

Sutopa Banerjee,
R/o: - 8203/C-8, Vasant Kunj,
New Delhi- 110070.

Complainant

Versus

1. M/s Ramprashtha Promoters and Developers
Private Limited.
2. M/s Blue Bell Propotech Private Limited.
Both Having Office at: - C-10, C Block Market,
Vasant Vihar, New Delhi- 110057.
Also at: - Plot no. 114, Sector-44,
Gurugram, Haryana-122002.

Respondents

CORAM:
Ashok Sangwan

Member

APPEARANCE:
Rajiv Kumar Khare (Advocate)
Varun Katyal (Advocate) with Tarun Arora AR

Complainant
Respondent

ORDER

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

Rules and regulations made thereunder or to the allottees as per the agreement for sale executed *inter se*.

A. Unit and project related details

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

S. N.	Particulars	Details	
1.	Name of the project	"Skyz", Sector 37C, Village Gadauli Kalan, Gurugram	
2.	Project area	60.5112 acres	
3.	Registered area	102000 sq. mt.	
4.	Nature of the project	Group housing complex	
5.	DTCP license no. and validity status	33 of 2008 dated 19.02.2008 valid upto 18.02.2025	
6.	Name of licensee	Ramprastha Builders Pvt Ltd and 11 others	
7.	Date of approval of building plans	12.04.2012 [As per information obtained by planning branch]	
8.	Date of environment clearances	21.01.2010 [As per information obtained by planning branch]	
9.	RERA Registered/ not registered	Registered vide no. 320 of 2017 dated 17.10.2017	
10.	RERA registration valid up to	31.03.2019	
11.	Extension applied on	26.03.2019	
12.	Extension certificate no.	Date	Validity
		HARERA/GGM/REP/RC/320/2017/EXT/122/2019 In principal approval on 12.06.2019	30.03.2020
13.	Unit no.	703, 7 th floor, tower/block- B (Page no. 19 of the complaint)	
14.	Unit area admeasuring	1750 sq. ft. (Page no. 19 of the complaint)	



15.	Date of execution of apartment buyer agreement	10.12.2011 (Page no. 17 of the complaint)
16.	Possession clause	15. POSSESSION (a) Time of handing over the Possession Subject to terms of this clause and subject to the Allottee having complied with all the terms and condition of this Agreement and the Application, and not being in default under any of the provisions of this Agreement and compliance with all provisions, formalities, documentation etc., as prescribed by RAMPRASTHA. RAMPRASTHA proposed to hand over <i>the possession of the Apartment by 31.08.2014</i> the Allottee agrees and understands that <i>RAMPRASTHA shall be entitled to a grace period of hundred and twenty days (120) days, for applying and obtaining the occupation certificate in respect of the Group Housing Complex.</i> (Emphasis supplied) (Page no. 29 of the complaint)
19.	Due date of possession	31.08.2014 [As per possession clause mentioned in the buyer's agreement]
20.	Grace period	Not utilized
21.	Total sale consideration	Rs.69,18,700/- (page 19 of the complaint)
22.	Amount paid by the complainants	Rs.60,42,457/- (As per demand letter and payment receipts on page no.s 43, 45 and 46 of the complaint)
23.	Occupation certificate /Completion certificate	Not received

24.	Offer of possession	Not offered
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B. Facts of the complaint

3. The complainant has made the following submissions: -

- I. That the complainant was allotted an apartment bearing no. 703 on 7th floor, in Tower B, having super area of 1750 sq.ft. in project named "SKYZ", Sector 37 D, Gurgaon vide apartment buyer agreement dated 10.12.2011 for a sale consideration of Rs.69,18,700/- and she has paid an amount of Rs.60,42,457/- against the same in all as and when demanded by the respondent.
- II. That as per terms of the agreement, the unit was to be delivered on 31.08.2014. However, the complainant has not been given possession of the booked flat even after a delay of more than 8 years which is a violation of respondent's lawful contractual obligation towards the complainant.
- III. That the respondent has not been able to meet the terms and conditions of SWAMIH Loan in over two years and has only sought SWAMIH Loan to change the terms of delivery to an indefinite point of time in future.
- IV. That the respondent is in possession of the complainant's money and the apartment too and therefore it is misusing its dominant position to extract unlawful concessions from the complainant.
- V. That the respondent is liable to pay DPC at prescribed rate of interest to the complainant and hand over possession of the booked flat to the complainant as u/s 18(1) of the Act of 2016.

C. Relief sought by the complainant:

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



I. Direct the respondent to hand over the possession of the said unit and to pay interest on the paid-up amount at prescribed rate of interest.

D. Reply by the respondent.

5. No reply has been received from respondent no.2 with regard to the present complaint and also none has put in appearance on its behalf before the Authority. Therefore, the respondent no.2 is hereby proceeded ex-parte and the complaint will be decided as per documents available on record and submission made by the parties.
6. The respondent no.1 has contested the complaint on the following grounds: -
- i. That due the lackadaisical attitude of the complainant alongwith several other reasons beyond the control of the respondent caused the present unpleasant situation. Further, the complainant has never raised any dispute regarding delay in possession or any other aspect and now has raised the dispute only to reap the benefits of the increase in value of property. The entire intention of the complainant made it crystal clear that she is merely an investor who has invested in the present project only with the motive to reap the benefits of the escalated property rates at a later stage.
 - ii. That the complainant has concealed its own inactions and defaults since the very beginning. The complainant has deliberately concealed the material fact that she is at default due to non-payment of several installments within the time prescribed, which has also resulted into delay payment charges/interest.
 - iii. That the delay in delivering the possession of the apartment to the complainant has attributed solely because of the reasons beyond control of the respondent for which it cannot be held accountable.



- Further clause 15 (a) of the agreement shall not be read in isolation but have to be read in light of other clauses of the agreement as the stipulated date of delivery is not a strict and final date but merely a tentative date which is further subject to several factors involved.
- iv. That as per clause 17(a) of the agreement, the parties had agreed that in the eventuality of delay in handing over possession beyond the period stipulated in clause 15(a) of the agreement, the allottee will be compensated with Rs.5/- per sq. ft. per month of super area. This part of compensation was specifically consented to and was never objected at any earlier stage, not while signing the agreement or any time after that.
- v. That the project faced various road blocks and hindrances including approvals from different authorities, shortage of labour force in the NCR region, ban on the use of underground water for construction purposes, heavy shortage of supply of construction material were beyond the control of the respondent and which in turn lead to unforeseeable delay in the construction/completion of the project and hence handing over of the possession of the flat to the complainant. Therefore, the present complaint is not maintainable in its present form and ought to be dismissed with exemplary costs.
7. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submission made by the parties.

E. Jurisdiction of the authority

The respondent has raised a preliminary submission/objection the authority has no jurisdiction to entertain the present complaint. The objection of the respondent regarding rejection of complaint on ground



of jurisdiction stands rejected. 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

8. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram District, therefore this authority has complete territorial jurisdiction to deal with the present complaint.

E.II Subject matter jurisdiction

9. 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) The promoter shall-

(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.

10. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation



which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

F. Findings on the objections raised by the respondent.

F. I Objection regarding the complainant being investor.

11. The respondent has taken a stand that the complainant is an investor and not a consumer. Therefore, she is not entitled to the protection of the Act and is not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority observes that the respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that the preamble is an introduction of a statute and states main aims and objects of enacting a statute but at the same time the preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if the promoter contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the apartment buyer's agreement, it is revealed that the complainant is a buyer and paid total price of Rs.60,42,457/- to the promoter towards purchase of an apartment in its project. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

"2(d) "allottee" in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or



otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;"

In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment application for allotment, it is crystal clear that the complainant is an allottee as the subject unit was allotted to her by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled as *M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr.* has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottee being investor is not entitled to protection of this Act also stands rejected.

F.II Objections regarding force majeure.

12. The respondent/promoter has raised the contention that the construction of the tower in which the unit of the complainant is situated, has been delayed due to force majeure circumstances such as ban on construction by orders of Hon'ble High Court and other authorities, delay on part of govt. authorities in granting approvals and other formalities, shortage of labour force in the NCR region, ban on the use of underground water for construction purposes, heavy shortage of supply of construction material etc. However, all the pleas advanced in this regard are devoid of merit. First of all, the possession of the unit in question was to be offered by 31.08.2014. Moreover, time taken in governmental clearances cannot be attributed as reason for delay in project. Further, the events alleged by the respondent do not have any impact on the project being developed by the respondent. Furthermore,



some of the events mentioned above are of routine in nature happening annually and the promoter is required to take the same into consideration while launching the project. Thus, the promoter respondent cannot be given any leniency on based of aforesaid reasons and it is well settled principle that a person cannot take benefit of his own wrong.

G. Findings on the relief sought by the complainant.

G. I Direct the respondent to hand over the possession of the said unit and to pay interest on the paid-up amount at prescribed rate of interest.

13. 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."*

(Emphasis supplied)

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

"15. POSSESSION

(a) Time of handing over the possession

Subject to terms of this clause and subject to the Allottee having complied with all the terms and condition of this Agreement and the Application, and not being in default under any of the provisions of this Agreement and compliance with all provisions, formalities, documentation etc., as prescribed by RAMPRASTHA. RAMPRASTHA proposed to hand over the possession of the Apartment by 31.08.2014 the Allottee agrees and understands that RAMPRASTHA shall be entitled to a grace period of hundred and twenty days (120) days, for applying and obtaining the occupation certificate in respect of the Group Housing Complex."



15. The authority has gone through the possession clause of the agreement and observes that this is a matter very rare in nature where builder has specifically mentioned the date of handing over possession rather than specifying period from some specific happening of an event such as signing of apartment buyer agreement, commencement of construction, approval of building plan etc. This is a welcome step, and the authority appreciates such firm commitment by the promoter regarding handing over of possession but subject to observations of the authority given below.
16. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and application, and the complainant not being in default under any provisions of these agreements and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottees that even a single default by the allottees in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottees and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottees of their right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.



17. **Due date of handing over possession and admissibility of grace period:** The promoter has proposed to hand over the possession of the apartment by 31.08.2014 and further provided in agreement that promoter shall be entitled to a grace period of 120 days for applying and obtaining occupation certificate in respect of group housing complex. As a matter of fact, the promoter has not applied for occupation certificate within the time limit prescribed by the promoter in the apartment buyer's agreement. As per the settled law, one cannot be allowed to take advantage of his own wrongs. Accordingly, this grace period of 120 days cannot be allowed to the promoter at this stage.

18. **Admissibility of delay possession charges at prescribed rate of interest:** 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.

19. 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.



20. Taking the case from another angle, the complainant/allottee was entitled to the delayed possession charges/interest only at the rate of Rs.5/- per sq. ft. per month as per relevant clauses of the buyer's agreement for the period of such delay; whereas the promoter was entitled to interest @18% per annum compounded at the time of every succeeding installment for the delayed payments. The functions of the authority are to safeguard the interest of the aggrieved person, may be the allottees or the promoter. The rights of the parties are to be balanced and must be equitable. The promoter cannot be allowed to take undue advantage of his dominate position and to exploit the needs of the home buyers. This authority is duty bound to take into consideration the legislative intent i.e., to protect the interest of the consumers/allottees in the real estate sector. The clauses of the buyer's agreement entered into between the parties are one-sided, unfair and unreasonable with respect to the grant of interest for delayed possession. There are various other clauses in the buyer's agreement which give sweeping powers to the promoter to cancel the allotment and forfeit the amount paid. Thus, the terms and conditions of the buyer's agreement are ex-facie one-sided, unfair, and unreasonable, and the same shall constitute the unfair trade practice on the part of the promoter. These types of discriminatory terms and conditions of the buyer's agreement will not be final and binding.
21. 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., 08.11.2023 is **8.75%**. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **10.75%**.
22. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the



promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

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

Explanation. —For the purpose of this clause—

- (i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*
- (ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"*

23. 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.
24. On consideration of the documents available on record and submissions made by both the parties regarding contravention of provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. The authority has observed that the apartment buyer agreement was executed on 10.12.2011 and the due date of possession was specifically mentioned in the apartment buyer agreement as 31.08.2014. 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 31.08.2014. The respondent has failed to handover possession of the subject apartment till date of this order. 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. 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 is entitled to delay possession charges at the prescribed rate i.e., @10.75% p.a. w.e.f. 31.08.2014 till offer of possession plus 2 months after obtaining occupation certificate from the competent authority or actual handing over of possession, whichever is earlier, as per section 18(1) of the Act of 2016 read with rule 15 of the rules.

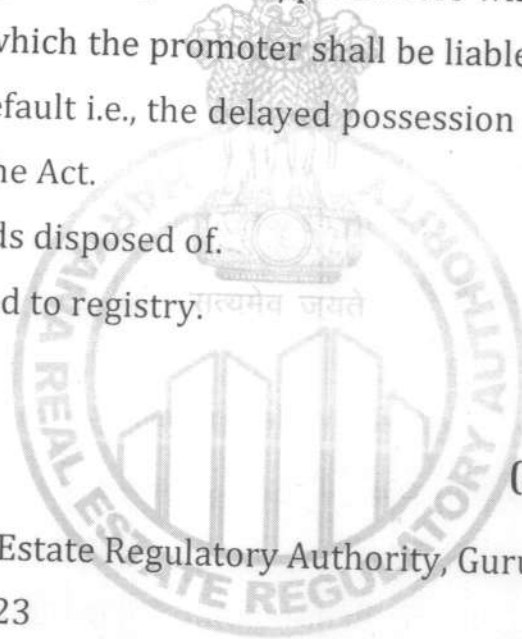
H. Directions of the authority

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

- i. The respondent-promoters are directed to hand over possession of the subject unit and pay interest to the complainant against the paid-up amount of Rs.60,42,457/- at the prescribed rate of 10.75% p.a. for every month of delay from the due date of possession i.e., 31.08.2014 till offer of possession plus 2 months after obtaining completion certificate/part completion certificate from the competent authority or actual handing over of possession, whichever is earlier, as per section 18(1) of the Act of 2016 read with rule 15 of the rules.
- ii. The arrears of such interest accrued from 31.08.2014 till the date of order by the authority shall be paid by the promoter to the allottee within a period of 90 days from date of this order and interest for every month of delay shall be paid by the promoter to the allottee before 10th of the subsequent month as per rule 16(2) of the rules.



- iii. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
 - iv. The respondent-promoters shall not charge anything from the complainant which is not the part of the apartment buyer's agreement.
 - v. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 10.75% by the respondent/promoters which is the same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.
26. Complaint stands disposed of.
27. File be consigned to registry.



(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 08.11.2023