BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**:**	**4738 of 2021**
Complaint filed on:		**30.11.2021**
Date of first hearing:		**27.01.2022**
Date of decision:		**26.10.2023**

1. Mr. Ashok Kumar Agarwal
2. Mrs. Usha Agarwal

Both RR/o:- B-503, Triveni Apartments, Plot No. 157/160, Sector -19, Kharghar, Raigarh, Maharashtra - 410210

Complainants

Versus

1. M/s. Identity Buildtech. Pvt. Ltd.
   Registered Office: 11, Indra Prakash, 21, Barakhamba Road, New Delhi-110001
2. M/s Ansal Housing Ltd.
   15 UGF, Indra Prakash, 21 Barakhamba Road, New Delhi-110001

Respondents

CORAM:

Shri Vijay Kumar Goyal — **Member**

APPEARANCE:

Shri K.K Kohli, Advocate	Complainants
None	Respondent no. 1
Shri Amandeep, Advocate	Respondent no. 2

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 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 to the allottee as per the agreement for sale executed inter-se them.

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, delay period, if any, have been detailed in the following tabular form:

S.No.	Particulars	Details
1.	Name of the project	"Ansal Highland Park", Sector-63A, Gurgaon
2.	Project area	11.7 acres
3.	Nature of the project	Residential
4.	DTPC License no. and validity	32 of 2012 dated 12.04.2012 valid upto 11.04.2020
5.	Name of licensee	Identity Buildtech & another
6.	RERA registration details	Registered Vide registration no. 16 of 2019 dated 01.04.2019 valid up to 30.11.2021
7.	Unit no.	EDNBG-1105 [page 63A of complaint]
8.	Unit area admeasuring	1940 sq. ft. [super area]
9.	Date of builder buyer agreement	16.04.2013 [page 62 of complaint]
10.	Possession clause	**31.** *The developer shall offer possession of the unit any time,* ***within a period of 48***

		months from the date of execution of the agreement or within 48 months from the date of obtaining all the required sanctions and approval necessary for commencement of construction, whichever is later *subject to timely payment of all dues by buyer and subject to force majeure circumstances as described in clause 32. Further, there shall be* ***a grace period of 6 months allowed to the developer over and above the period of 48 months*** *as above in offering the possession of the unit."* *(Emphasis supplied)* *[page 66A of complaint]*
11.	Date of commencement of construction as per customer ledger dated 15.07.2020	18.05.2013 [pg. 95 of complaint]
12.	Due date of possession	18.11.2017 **Note: Due date calculated from date of start of construction i.e., 18.05.2013.** (inadvertently mentioned as 16.10.2017 in the proceeding dated 26.10.2023)
13.	Grace period	**Grace period allowed being unconditional.**
14.	Basic sale consideration as per BBA dated 16.04.2013	₹ 93,80,928.20/- [pg. 63A of complaint]
15.	Total sale consideration as per customer ledger dated 15.07.2020	₹ 1,02,34,759/- [pg. 91 of complaint]
16.	Amount paid by the complainant as per customer ledger dated 15.07.2020	₹ 82,10,893/- [page 94 of complaint]

17.	Occupation certificate	Not yet obtained
18.	Offer of possession	Not offered

B. Facts of the complaint

3. The complainants have made the following submissions: -

I. That the present complaint is with reference to the residential group housing colony project namely "*Ansals Highland Park*" situated in Sector 103, Gurugram being developed and marketed by Ansal Housing Limited formerly known as Ansal Housing & Construction Ltd. which is owned by Ansal Housing Limited's wholly owned subsidiary Identity Buildtech Private Limited.

II. That the complainants booked a residential unit EDNBG-1105, 3BHK admeasuring 1940 Sq. ft. in "Ansals Highland Park" on 12.09.2012 by paying initial amount of Rs.7,00,000/-. The apartment buyers agreement was executed on 16.04.2013 for a total sale consideration of Rs.1,01,54,328/- and had paid a sum of Rs.82,09,893/- till 2017 against the demands raised by the respondent.

III. That as per clause 31 of the said apartment buyer's agreement dated 16.04.2013, respondents was promised that the possession of the apartment will be given to the buyer's within 48 months from the date of execution of ABA or from the date of obtaining all sanctions & approvals for commencement of construction extendable up to six additional months as the agreed grace period i.e. before the end of the year 2017.

IV. That in early 2017, when the construction of the said project should have been completed, the respondents without informing the complainants

discontinued all construction activity at the project site. Pertinently, by early 2017, the complainants had already paid a considerable amount of approx. 70% of the total consideration and hence this sudden discontinuation of construction activity at the project site is beyond understanding of the complainants.

V. That when the construction activity at the project site did not resumed for over months, the complainants and several other buyer/allottee(s) of the said project organized several meetings with the respondents and visited the said project and various departments including DTCP office/HRERA website to obtain information.

VI. That the respondents have also diverted the amount paid by the buyers of the said project to their other projects/businesses as investments/loans/ deposits etc. and/or payment of interest at a very high rates to group companies/investors and/or loan funding/mortgage of receivables from the project to fund the other projects of the respondent, which we are sure would be evident from the books of accounts of the respondents. Further, this information would have been provided at the time of booking the apartment or while the respondent was making regular demands of scheduled installment, either the complainants would have not booked the flat or would have asked for an undertaking that any funds paid by the complainants should not be distributed/diverted till completion of the aforesaid project to any other project.

VII. This clearly represents that despite the entire consideration amount along with miscellaneous and additional charges and expenses paid by them, they were subjected to unfair and clever dilatory tricks and tactics, false promises and assurances, biased agreements, ill trade practices and highly deficient

services causing immense loss to the complainants. The complainants even after paying huge amounts still received nothing in return but only loss of the time and money invested by him.

VIII. That despite the complainants mailing the respondents and following them continuously about the construction at the project site, the respondents have neither bothered to start the construction nor responded to the queries of the complainants till date and have now exceeded its possession date. The complainants have fairly booked the said unit in the year 2012 and till 2021 the complainants have no idea about the fate and future of the project while losing a major chunk of their lifelong savings. The complainants have prayed to this to grant the possession of the allotted unit of the complainant after obtaining the occupation certificate along with delayed possession charges at the prescribed rate of interest.

IX. That the respondents are guilty of deficiency in service within the purview of provisions of the Act, 2016 and the provisions of the Rules, 2017. The members of the complainant/association have suffered on account of deficiency in service by the respondent and as such the respondent are fully liable to cure the deficiency as per the provisions of the Act, 2016 and the provisions of the Rules, 2017.

C. Relief sought by the complainant

4. The complainant has sought following relief:

   i. Direct the respondent to adjust the amount to be paid by the complainant with DPC and handover the possession of the unit complete in all aspects as per the brochure.

   ii. To refrain the respondent to charge on account of increase in super area.

   iii. To refrain the respondent to charge GST.

iv. To refrain the respondent to charge HVAT.

v. Direct the respondent to withdraw the excess demand raised.

5. The authority issued a notice dated 06.12.2021 of the complaint to the respondents by speed post and also on the given email address. The delivery reports have been placed in the file. Despite service of notice, the respondent no. 1 has preferred neither to put in appearance nor file reply to the complaint within the stipulated period. In view of the same the matter was proceeded ex parte against the respondent no. 1 vide order dated 26.10.2023.

6. On the date of hearing, the authority explained to the respondent /promoter about the contraventions as alleged to have been committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent no. 2

7. The respondent no. 2 has contested the complaint on the following grounds:

a. That the respondent no. 2 is a developer and has built multiple residential and commercial buildings within Delhi/NCR with a well-established reputation earned over years of consistent customer satisfaction.

b. That the complainants had approached the respondents for booking a flat no. EDNBG-1105 in Ansal Highland Park, Gurugram. Upon the satisfaction of the complainant regarding inspection of the site, title, location plans, etc. an agreement to sell dated 16.04.2013 was signed between the parties.

c. That the current dispute cannot be governed by the Act, 2016 because of the fact that the apaprtment buyer agreement was signed between the complainant and the respondent in the year 2013. The regulations at the

concerned time period would regulate the project and not a subsequent legislation i.e., the Act, 2016.

d. The complaint specifically admits that the complainant has not paid the necessary dues or the full payment as agreed upon under the apartment buyer agreement. Therefore, the complainant cannot be allowed to take advantage of their own wrongdoing.

e. That the said complaint has been preferred by the complainant belatedly. The complainant filed the complaint in the year 2022 and the cause of action accrue on 16.04.2017. Therefore, the complaint stands barred by the limitation.

f. That the agreement which was signed in the year 2013 without coercion or any duress cannot be called in question today and the apartment buyer agreement provides for a penalty in the event of a delay in giving possession. As per the agreement clause 37 provides for Rs.5/ sq. ft. per month on super area for any delay in offering possession of the unit as mentioned in clause 31 of the agreement. Therefore, the complainant is entitled to invoke the said clause and is barred from approaching this authority in order to alter the penalty clause by virtue of this complaint more than 10 years it was agreed between the parties.

g. That the complaint itself discloses the said project does not have a RERA approval and is not registered. Therefore, the authority does not have the jurisdiction to decide the complaint.

h. That the delay has been caused by factors beyond the control of the respondent, including but not limited to the COVID-19 pandemic, which has contributed to the stalling of the project.

i. That the complaint lacks merit and is entirely false, frivolous, and devoid of any factual basis. Furthermore, the complainant has failed to disclose any valid cause of action against the respondent. Therefore, the present complaint is clearly not maintainable and should be dismissed.

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

E. Jurisdiction of the authority

9. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint.

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 complete territorial jurisdiction to deal with the present complaint.

E. II Subject matter jurisdiction

Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottees as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

> ***Section 11(4)(a)***
> *Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the*

conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

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 of 2016 quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside the 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 respondent:

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

11. The respondent submitted that the complaint is neither maintainable nor tenable and is liable to be out rightly dismissed as the buyer's agreement was executed between the parties prior to the enactment of the Act and the provision of the said Act cannot be applied retrospectively. The authority is of the view 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. The Act nowhere provides, nor can be so construed, that all previous agreements would 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 would be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. The numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of ***Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017) decided on 06.12.2017*** 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."*

12. 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."

13. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the 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. II Objection regarding maintainability of complaint.

14. The counsel for the respondent has raised an objection that the complaint is barred by limitation as the complainants have approached the respondent in the year 2012 to invest the projects of the respondent situated in Gurugram. The respondent further submitted that the complainants has admittedly filed the complaint in the year 2021 and the cause of action accrued on 12.09.2012 (vide application form).

15. On consideration of the documents available on record and submissions made by the party, the authority observes that the buyer's agreement w.r.t. the unit was executed with the allottee on 16.04.2013. As per clause 31 of the buyer's

agreement, the possession of the subject unit was to be offered with in a period of 48 months plus 6 months from date of obtaining all the required sanctioned and approvals necessary of commencement of construction, whichever is later. The authority calculated due date of possession from the date of commencement of construction i.e., 18.05.2013 being later which comes out to be 18.11.2017.

16. However, the said project of the allotted plot is an ongoing project, and the respondent/promoter has failed to apply and obtaining the CC/part CC till date. As per proviso to section 3 of Act of 2016, ongoing projects on the date of this Act i.e., 28.07.2017 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:*

17. 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.

18. Moreover, it is observed that despite passing a benchmark of due date on 18.11.2017, till date the respondent has failed to handover the possession of

the allotted unit to the complainants and thus, the cause of action is continuing till date and recurring in nature. The authority relied upon the section 22 of the Limitation Act, 1963, Continuing breaches and torts and the relevant portion are reproduce as under for ready reference: -

> ***22. Continuing breaches and torts-***
> *In the case of a continuing breach of contract or in the case of a continuing tort, a fresh period of limitation begins to run at every moment of the time during which the breach or the tort, as the case may be, continues.*

19. Keeping in view the aforesaid facts and legal position, the objection with regard to the complaint barred by limitation is hereby rejected.

F.III Objections regarding force majeure.

20. The respondents-promoter has raised the contention that the construction of the project, has been delayed due to force majeure circumstances such as orders passed by National Green Tribunal to stop construction, dispute with contractor, non-payment of instalment by allottees, GST, demonetization, shortage of labour, and Covid- 19. The plea of the respondent regarding various orders of the NGT and demonetisation and all the pleas advanced in this regard are devoid of merit. The orders passed by NGT banning construction in the NCR region was for a very short period of time and thus, cannot be said to impact the respondent-builder leading to such a delay in the completion. The plea regarding demonetisation is also devoid of merit. Further, any contract and dispute between contractor and the builder cannot be considered as a ground for delayed completion of project as the allottee was not a party to any

such contract. Also, there may be cases where allottees has not paid instalments regularly but all the allottees cannot be expected to suffer because of few allottees. 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.

F. IV Objection regarding delay in completion of construction of project due to outbreak of Covid-19.

21. The Hon'ble Delhi High Court in case titled as ***M/s Halliburton Offshore Services Inc. V/S Vedanta Ltd. & Anr. bearing no. O.M.P (1) (Comm.) no. 88/2020 and LAS 3696-3697/2020*** dated 29.05.2020 has observed as under:

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

22. In the present case also, the respondents were liable to complete the construction of the project and handover the possession of the said unit by 18.11.2017. It 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 cannot be excluded while calculating the delay in handing over possession.

G. Findings regarding relief sought by the complainants.

G. I Direct the respondent to adjust the amount to be paid by the complainant with DPC & hand over the possession of the unit complete in all respect as per the brochure.

23. In the present complaint, the complainants intend 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."*

24. Clause 31 of apartment buyer's agreement provides for handing over of possession and is reproduced below:

31.

> *The developer shall offer possession of the unit any time, **within a period of 48 months from the date of execution of the agreement or within 48 months from the date of obtaining all the required sanctions and approval necessary for commencement of construction, whichever is later** subject to timely payment of all dues by buyer and subject to force majeure circumstances as described in clause 32. Further, there shall be **a grace period of 6 months allowed to the developer over and above the period of 48 months** as above in offering the possession of the unit."*

25. 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 complainants 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 allottee that even a single default by the allottee 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 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.

26. **Due date of handing over possession and admissibility of grace period:** The promoter has proposed to hand over the possession of the apartment within a period of 48 months plus 6 months date of obtaining all the required sanctioned and approvals necessary of commencement of construction, whichever is later. The authority calculated due date of possession from the date of commencement of construction i.e., 18.05.2013 being later which comes out to be 18.11.2017. Since in the present matter the BBA incorporates unqualified reason for grace period/extended period in the possession clause. Accordingly, the authority allows this grace period of 6 months to the promoter at this stage.

27. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges 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.*

28. 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.

29. 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., 26.10.2023 is **8.75%.** Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **10.75%**.

30. 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;"*

31. 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 them in case of delayed possession charges.

32. 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 16.04.2013 and the possession of the subject unit was to be offered with in a period of 48 months plus 6 months from date of obtaining all the required sanctioned and approvals necessary of commencement of construction, whichever is later. The authority calculated due date of possession from the date of commencement of construction i.e., 18.05.2013 being later which comes out to be 18.05.2017. As far as grace period is concerned, the same is allowed for the reasons quoted above. Therefore, the

due date of handing over possession is 18.11.2017. The respondent has failed to handover possession of the subject unit 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. The authority is of the considered view that there is delay on the part of the respondent to offer of possession of the allotted unit to the complainant as per the terms and conditions of the agreement to sell dated 16.04.2013 executed between the parties. It is pertinent to mention over here that even after a passage of more than 5.11 years neither the construction is complete nor an offer of possession of the allotted unit has been made to the allottee by the builder. Further, the authority observes that there is no document on record from which it can be ascertained as to whether the respondent has applied for occupation certificate/part occupation certificate or what is the status of construction of the project. Hence, this project is to be treated as on-going project and the provisions of the Act shall be applicable equally to the builder as well as allottees.

33. 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. 18.11.2017 till actual handing over of possession or offer of possession plus two months, whichever is earlier, as per section 18(1) of the Act of 2016 read with rule 15 of the rules.

G. II To refrain the respondent to charge on account of increase in super area.

34. The authority has gone through the clause 1 of the apartment buyer's agreement and there is evidence on the record to show that the respondent had provisionally allotted super area of 1940 sq. ft. (180.23 sq. mtrs.) and also, by virtue of clause 4 of the said agreement dated 16.04.2013, the complainant had been made to understand and had agreed that the super area mentioned in the agreement was only a tentative area which was subject to the alteration till the time of construction of the complex.

"4

That however, in case of any major alteration/ modification ***resulting in more than 10% change in the area of the unit any time prior to or*** *upon the grant of completion/occupation certificate, the developer shall intimate to the Buyer in writing the changes thereof and the resultant change, if any, in the price of the unit to be paid by him/her and the Buyer agrees to inform the developer in writing his/her consent or objections to the changes within thirty (30) days from the date such notice failing which the Buyer shall be deemed to have accepted the changes. The Buyer agrees to pay the above-mentioned price for any increase in area up to 10% and prevailing market rate for any increase more than 10% in the area of the unit within 30 days of the receipt of information and demand by the developer. If the Buyer writes to the developer within thirty (30) days of intimation by the developer indicating his non-consent/objections to such alterations/modifications then the developer shall try and accommodate the Buyer at an alternate location and if the same is not possible for whatever reason, the developer shall offer refund with 6% p.a. simple interest."*

35. The authority is of the considered opinion that each and every minute detail must be apprised, schooled and provided to the allottee regarding the increase/decrease in the super area and he should never be kept in dark or made to remain oblivious about such an important fact i.e., the exact super area till the receipt of the offer of possession letter in respect of the unit. Accordingly, the amount of the unit shall vary due to any increase and decrease in the super area of the unit.

G. III. To refrain the respondent to charge GST.

36. The authority has decided this issue in the complaint bearing no. ***4031 of 2019 titled as Varun Gupta V/s Emaar MGF Land Ltd***. wherein the authority has held that for the projects where the due date of possession was prior to 01.07.2017 (date of coming into force of GST), the respondent/promoter is not entitled to charge any amount towards GST from the complainant/allottee as the liability of that charge had not become due up to the due date of possession as per the buyer's agreements.

37. In the present complaint, the possession of the subject unit was required to be delivered by 18.11.2017 and the incidence of GST came into operation thereafter on 01.07.2017. So, the respondent is entitled to charge GST from the complainants/allottees as the liability of GST had become due up to the due date of possession as per the said agreement but only upon the last payment i.e., on offer of possession because even if the delivery of the said unit was not delayed then also the complainants have paid the last demand on offer of possession after 01.07.2017.

G. IV Refrain the respondent to charge HVAT.

38. That the Govt. of Haryana, Excise and Taxation Department vide **notification no. S.O.89/H.A.6/2003/S.60/2014 dated 12.08.2014** provided a lump-sum scheme in respect of builders/developers which was further amended vide another **notification no. 23/H.A.6/2003/S.60/2015 dated 24.09.2015** according to which the builder/developer can opt for this scheme **w.e.f. 01.04.2014**. Under the above scheme, a developer had an option to pay lump sum tax in lieu of tax payable by him under the Act, by way of lump sum tax calculated at the compounded rate of 1% of entire aggregate amount specified

in the agreement or value specified for the purpose of stamp duty, whichever is higher, in respect of the said agreement.

39. The authority has decided this issue in the complaint bearing no. **4031 of 2019** titled as ***Varun Gupta V/s Emaar MGF Land Ltd***. wherein the authority has held that the promoter is entitled to charge VAT from the allottees for the period up to 31.03.2014 @ 1.05% (One percent VAT + 5 percent surcharge on VAT). However, the promoter cannot charge any VAT from the allottees /prospective buyers for the period 01.04.2014 to 30.06.2017 as the same was to be borne by the promoter-developer only. The respondent/promoter is bound to adjust the said amount, if charged from the allottee with the dues payable by him or refund the amount if no dues are payable by him.

G. V. Direct the respondent to withdraw the excess demands raised.

40. The complainants have not specified any demands in excess. So, the authority is unable to deliberate upon this relief. The respondent shall not charge anything from the complainant which is not part of the agreement to sell.

H. Directions of the authority:

41. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligation cast upon the promoter as per the function entrusted to the authority under section 34(f) of the act of 2016:

I. The respondent is directed to pay interest to the complainants against the paid-up amount at the prescribed rate of 10.75% p.a. for every month of delay from the due date of possession i.e., 18.11.2017 till actual handing over of possession or offer of possession plus two months,

whichever is earlier, as per section 18(1) of the Act of 2016 read with rule 15 of the rules.

II. The respondent shall not charge anything from the complainant(s) which is not the part of the flat buyer's agreement.

III. The complainant(s) are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period and after clearing all the outstanding dues, if any, the respondent shall handover the possession of the allotted unit.

IV. The arrears of such interest accrued from due date of possession i.e., 18.11.2017 till the date of order by the authority shall be paid by the promoter to the allottees 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 allottees before 10th of the subsequent month as per rule 16(2) of the rules.

V. The respondent is directed to offer the possession of the allotted unit within 30 days after obtaining occupation certificate from the competent authority. The complainants w.r.t. obligation conferred upon him under section 19(10) of Act of 2016, shall take the physical possession of the subject unit, within a period of two months of the occupancy certificate.

VI. The rate of interest chargeable from the allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 10.75% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottees, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

42. Complaint stands disposed of.

43. File be consigned to registry.

Dated: 26.10.2023

(Vijay Kumar Goyal)
Member
Haryana Real Estate
Regulatory Authority,
Gurugram