

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

| | |
|---------------------------------|---------------------|
| Complaint no. | 3048 of 2020 |
| Date of filing complaint | 16.10.2020 |
| Date of decision | 09.08.2023 |

| | |
|--|--------------------|
| Mahesh Koshi R/o: A1-8, First Floor, South City II, Sector-49, Sohna Road, Gurgaon-122001 | Complainant |
| Versus | |
| M/s BPTP Ltd. R/o: M-11, Middle Circle, Connaught Circus, New Delhi-110001 | Respondent |

| | |
|------------------------------|--------------------|
| CORAM: | |
| Shri Ashok Sangwan | Member |
| APPEARANCE: | |
| Ms. Priyanka Aggarwal | Complainant |
| Sh. Harshit Batra | Respondent |

ORDER

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

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

A. Unit and project related details

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

| Sr. No. | Particulars | Details |
|---------|--|--|
| 1. | Name of the project | 'Astaire Gardens', Sector 70A, Gurugram, Haryana. |
| 2. | Unit no. | C-183-GF (Annexure R-7 on page no. 84 of the reply) |
| 3. | Unit admeasuring | 2512 sq. ft. (Annexure R-7 on page no. 84 of the reply) |
| 4. | Date of sanction of building plan | 15.05.2013 (vide documents submitted by the respondent to BPTP Committee) |
| 5. | Date of execution of floor buyer's agreement | 31.01.2012 (annexure R-7 on page no. 76 of the reply) |
| 6. | Possession clause | " Clause 5.1- Subject to Force Majeure, as defined in Clause 14 and further subject to the Purchaser(s) |

having complied with all its obligations under the terms and conditions of this Agreement and the Purchaser(s) not being in default under any part of this Agreement including but not limited to the timely payment of each and every installment of the total sale consideration including DC, Stamp duty and other charges and also subject to the Purchaser(s) having complied with all formalities or documentation as prescribed by the Seller/Confirming Party, **the Seller/Confirming Party proposes to hand over the physical possession of the said unit to the Purchaser(s) within a period of 36 months from the date of sanctioning of the building plan or execution of Floor Buyers Agreement, whichever is later ("Commitment Period")**. The Purchaser(s) further agrees and understands that the Seller/Confirming Party shall additionally be entitled to a period of 180 days ("Grace Period") after the expiry of the said

| | | |
|-----|--------------------------------------|--|
| | | Commitment Period to allow for filing and pursuing the Occupancy Certificate etc. from DTCP under the Act in respect of the entire colony. (Emphasis supplied) |
| 7. | Due date of delivery of possession | 15.05.2016 (Calculated from the date of sanction of building plan being later) |
| 8. | Total sale consideration | Rs. 1,17,70,206.25/- (Annexure R-17 on page no. 139 of reply) |
| 9. | Total amount paid by the complainant | Rs. 94,10,247.30/- (Annexure R-17 on page no. 139 of reply) |
| 10. | Occupation certificate | 19.09.2017 (Annexure R-17 on page no. 135 of reply) |
| 11. | Offer of possession | 26.09.2017 (Annexure R-17 on page no. 137 of reply) |
| 12. | Grace period utilization | In the present case, the promoter is seeking a grace period of 180 days for finishing work and filing and pursuing the occupancy certificate etc. from DTCP. As a matter of fact, from the perusal of occupation |

| | | |
|--|--|---|
| | | <p>certificate dated 19.09.2017, the promoter did not apply for the OC within the stipulated time. The clause clearly implies that the grace period is asked for filing and pursuing occupation certificate, therefore as the promoter applied for the occupation certificate much later than the statutory period of 180 days, he does not fulfil the criteria for grant of the grace period. Therefore, the grace period is not allowed, and the due date of possession comes out to be 15.05.2016.</p> |
|--|--|---|

B. Facts of the complaint:

3. That in the year 2011, the complainant was searching for a suitable flat/accommodations as per their standard and budget. The original allottees while searching for a home visited the office of the respondent company. The agents of the respondent company told the original allottees about the moonshine reputation of the company and the agents of the respondent company made huge presentations about their project namely Astaire gardens at sector 70A, Gurugram and also assured that they have delivered several projects in the national capital region. The respondent handed over one brochure to the original allottees which portrayed the project

like heaven and tried to hold the original allottee interest in every possible way and incited the original allottees for payments.

4. That the complainant was subjected to unethical trade practice as well as subject of harassment in the name and guise of a biased, arbitrary and one-sided floor buyer's agreement. The respondent not only failed to adhere to the terms and conditions of the FBA dated 31.01.2012 but also illegally extracted money from the original allottees by making false promises and statements.
5. That in 2012, the complainant who was caught in the web of false promises by the agents of the respondents filed an application form for one flat/unit and opted for construction linked payment plan.
6. That the respondent issued a provisional allotment letter dated 12.07.2011 allotting a flat bearing unit no. C-183-GF measuring super built up area of 2512 sq. ft in the aforesaid project of the developer for a basic sale consideration at the rate of Rs.3,838/- per sq. ft.
7. That the respondent sent one detailed FBA to the original allottees and requested for signing the agreement which was signed on 31.01.2012 and returned to the builder, wherein as per the clause 2.2 and 2.3 of floor buyer's agreement, the total sale value of the unit (total consideration) payable by the allottees that are the original allottees to the company i.e. the respondent includes the basic sale price (Basic Sale Price / BSP) of Rs 9,641,935/-, development charges of Rs. 367,000/-, club membership charges of

Rs. 2,00,000/-, interest free maintenance charges (IFMS) @ Rs. 50 sq. foot and power backup installation charges of Rs 20,000/- per KVA.

8. That as per the demands raised by the respondent, based on the payment plan, the complainant paid a sum of Rs. 1,17,70,206/- towards the said plot against total net cost of Rs 94,10,247/-.
9. It is very unfortunate that the complainant had become helpless and had to run from pillar to post for the possession of their flat though they had made payment of the agreed amount/consideration as per the construction linked plan attached to the floor buyer's agreement.
10. That it is quite clear that the respondent is involved in unethical/unfair practices so as to extract money from the complainant despite the fact that the project has not been completed and the respondent was capriciously involved in demanding money illegally from the complainants.
11. That the respondent sent a letter cum invoice no. INV1920/H001922 dated 18.09.2019 for offer of possession for unit no. E-58-SF with demand of Rs. 2,892,958/- wherein a demand for the basic sale price of Rs. 9,448,175/-, EDC/IDC charges of Rs. 367,000/-, club membership charges of Rs. 200,000/-, cost escalation charges of Rs 834,436/-, STP and electrification charges of Rs 161,224/-, VAT of Rs. 95,239/- and GST of Rs. 307,250/- were also raised.

C. Relief sought by the complainant:

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

- i. Direct the respondent to pay delay possession charges at the prescribed rate of interest.
- ii. Direct the respondent to provide all amenities, as assured in the brochure and as promised at the time of booking of the flat, as soon as possible, as elaborated in para-M.
- iii. Direct the respondent to refund the money collected towards the club membership charges to the complainants with interest as the construction of the club is yet to be started as mentioned in para-N.
- iv. Direct the respondent to ensure no further demand is raised on the complainant till the time the entire interest due to the complainant has been adjusted against additional demand, if any payable by the complainant to the respondent.
- v. Direct the respondent to refund the amount collected towards the escalation charges which is not payable as elaborated in para-O.
- vi. Direct the respondent to take the opinion of HVAT Tax experts and communicate to the complainant along with detailed justification thereof and direct order the respondent to take the opinion of GST experts about the quantum of the GST payable in the given circumstances by the complainant up to the deemed date of offering the possession of the apartments.

- vii. Direct the respondent to refund the amount collected towards STP charges of Rs. 161,224/- when the FBA did not carry any such condition.

D. Reply by respondent:

The respondent by way of written reply dated 05.01.2021 made the following submissions:

13. It is submitted that the respondent upon completely of construction with regard to the project and upon receipt of occupation certificate dated 19.09.2017 from the concerned departments, has issued offer of possession letter on 26.09.2017. In terms of the said offer of possession the complainant was requested to complete documentary formalities/ pay all previous dues. It is further stated that the complainant on adequate examination and analysis of the contents of the offer of possession letter dated 26.09.2017 and, being satisfied on account of investigation conducted with regard to allotted unit and, all other related aspects, the complainant without hesitation have taken physical possession of the allotted unit on 10.01.2018 without any demur or protest.
14. It is submitted that the complainants have approached this Hon'ble Authority for redressal of his alleged grievances with unclean hands, i.e., by not disclosing material facts pertaining to the case at hand and also, by distorting and/or misrepresenting the actual factual situation with regard to several aspects. It is further submitted that the Hon'ble Apex Court in plethora of cases has laid down strictly, that a party approaching the court for any relief, must

come with clean hands, without concealment and/or misrepresentation of material facts, as the same amounts to fraud not only against the respondent but also against the court and in such situation, the complaint is liable to be dismissed at the threshold without any further adjudication.:

- That the complainant has concealed from this hon'ble authority that they have approached the respondent from the secondary market through original allottee. As the complainant is subsequent purchasers of the unit in question and thus are not entitled for any relief as sought by the complainant in the reply. It is a well settled law that one who purchases the property from original allottee and or from the open market, was very well aware regarding the status of construction/ possession and thus is not entitled for any delay compensation or any other relief from Hon'ble Authority.
- The respondent being a customer centric organization and as a goodwill gesture provided a special discount of Rs. 326,560/- apart from the compensation of Rs. 401,920/- already offered to the complainant at the time of offering possession. A settlement has already been arrived at prior of filing of the said complaint. However, the complainant erroneously proceeded to file the present vexatious complaint before this hon'ble authority to gain at the expense

of the respondent, even though settlement has already been arrived at between the parties.

From the above, it is very well established, that the complainant has approached this Hon'ble Authority with unclean hands by distorting/ concealing/ misrepresenting the relevant facts pertaining to the case at hand. It is further submitted that the sole intention of the complainant is to unjustly enrich himself at the expense of the respondent by filing this frivolous complaint which is nothing but gross abuse of the due process of law. It is further submitted that in light of the law laid down by the Hon'ble Apex Court, the present complaint warrants dismissal without any further adjudication.

15. That as per clause 2 of the duly executed FBA tilted as 'Consideration and other Conditions' specifically documented and provided that in addition to the Basic Sale Price (BSP), various other cost components such as development charges (DC, inclusive of EDC/IDC/EEDC), preferential location charges (PLC), club membership charges (CMC), car parking charges, power back-up installation charges (PBIC), VAT, service tax and any fresh incidence of Tax (i.e., GST), electrification charges (EC), charges for installing sewerage treatment plant (STP), administrative charges, interest free maintenance security (IFMS) etc. shall also be payable by the complainant. It was also clarified at time of the endorsement that while most of the charges as stated above were quantified and

accordingly, at the stage of offering possession of the respective units, the said charges were quantified and demanded from the original allottee.

16. All other averments made in the complaint were denied in toto.
17. Copies of all the relevant documents have been filed and placed on record. Their authenticity is not in dispute. Hence, the complaint can be decided based on these undisputed documents and submission made by the parties.

E. Finding regarding jurisdiction of the authority:

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

Territorial jurisdiction

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

E. II Subject matter jurisdiction

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

Section 11(4)(a)

Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

21. 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 relief sought by the complainant.

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

- i. Direct the respondent to pay delay possession charges at the prescribed rate of interest.
- ii. Direct the respondent to provide all amenities, as assured in the brochure and as promised at the time of booking of the flat, as soon as possible, as elaborated in para-M.
- iii. Direct the respondent to refund the money collected towards the club membership charges to the complainant with interest as the construction of the club is yet to be started as mentioned in para-N.
- iv. Direct the respondent to ensure no further demand is raised on the complainant till the time the entire interest due to the

complainant has been adjusted against additional demand, if any payable by the complainant to the respondent.

- v. Direct the respondent to refund the amount collected towards the escalation charges which is not payable as elaborated in para-0.
- vi. Direct the respondent to take the opinion of HVAT Tax experts and communicate to the complainant along with detailed justification thereof and direct order the respondent to take the opinion of GST experts about the quantum of the GST payable in the given circumstances by the complainant up to the deemed date of offering the possession of the apartments.
- vii. Direct the respondent to refund the amount collected towards STP charges of Rs. 161,224/- when the FBA did not carry any such condition.

G.I Delay Possession Charge

22. The complainant intends to continue with the project and are seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under.

"Section 18: - Return of amount and compensation
18(1). If the promoter fails to complete or is unable to
give possession of an apartment, plot, or building, —

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

23. Clause 5 of the floor buyer's agreement provides the time period of handing over possession and the same is reproduced below:

- (i) *"Clause 5.1- Subject to Force Majeure, as defined in Clause 14 and further subject to the Purchaser(s) having complied with all its obligations under the terms and conditions of this Agreement and the Purchaser(s) not being in default under any part of this Agreement including but not limited to the timely payment of each and every instalment of the total sale consideration including DC, Stamp duty and other charges and also subject to the Purchaser(s) having complied with all formalities or documentation as prescribed by the Seller/Confirming Party, the Seller/Confirming Party proposes to hand over the physical possession of the said unit to the Purchaser(s) within a period of 36 months from the date of sanctioning of the building plan or execution of Floor Buyers Agreement, whichever is later ("Commitment Period"). The Purchaser(s) further agrees and understands that the Seller/Confirming Party shall additionally be entitled to a period of 180 days ("Grace Period") after the expiry of the said Commitment Period to allow for filing and pursuing the Occupancy Certificate etc. from DTCP under the Act in respect of the entire colony..."*

24. At the inception, it is relevant to comment on the pre-set possession clause of the floor buyer's agreement wherein the possession has been subjected to numerous terms and conditions and force majeure circumstances. The drafting of this clause is not only vague but so heavily loaded in favour of the promoters that even a single default by the allottee in fulfilling obligations, formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottees and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous

clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

25. Admissibility of grace period: The promoter has proposed to hand over the possession of the unit within a period of 36 months from the date of sanction of the building plan or execution of floor buyer's agreement, whichever is later. The buyer's agreement was executed on 31.01.2012 and date of sanctioning of building plan is 15.05.2013. So, the due date is calculated from the date of sanctioning of building plan i.e., 15.05.2013 which comes out to be 15.05.2016 being later. Further, it was provided in the floor buyer's agreement that promoter shall be entitled to a grace period of 180 days after the expiry of the said committed period for making offer of possession of the said unit. In other words, the respondent is claiming this grace period of 180 days for filing and pursuing of occupation certificate. There is no material evidence on record that the respondent-promoters had completed the said project within this span of 36 months and had started the process of issuing of the occupation certificate. As a matter of fact, the promoter neither obtained the occupation certificate nor offered the possession within the time limit prescribed by him in the floor buyer's agreement. As per the settled law, one cannot be allowed to take advantage of his own wrongs. Accordingly, this grace period of 180 days cannot be allowed to the promoter.

26. Admissibility of delay possession charges at prescribed rate of interest: The complainant is seeking delay possession charges at the prescribed rate of interest on the amount already paid by him. However, proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the

promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]

(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%:-

Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.

27. 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.
28. 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., 09.08.2023 is 8.75%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.75%.
29. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottees by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottees, in case of default. The relevant section is reproduced below:

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

Explanation. — For the purpose of this clause—

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

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

30. 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.
31. On consideration of the documents available on record and submissions made by both the parties, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 5 of the agreement, the possession of the subject apartment was to be delivered within 36 months from the date of execution of agreement or sanctioning of building plan whichever is later. For the reasons quoted above, the due date of possession is to be calculated from the date of sanctioning of building plan i.e., 15.05.2013 and the said time period of 36 months has not been extended by any competent authority. Therefore, the due date of possession is calculated from the date of sanctioning of building plan and the said time period of 36 months expired on 15.05.2016. As far as grace period is concerned, the same is disallowed for the reasons quoted above.
32. The respondent has obtained the occupation certificate on 16.09.2019. Copies of the same have been placed on record. The authority is of the considered view that there is delay on the part of

the respondent to offer physical possession of the allotted unit to the complainant as per the terms and conditions of the buyer's agreement dated 31.01.2012 executed between the parties. It is the failure on part of the promoter to fulfil its obligations and responsibilities as per the buyer's agreement dated 31.01.2012 to hand over the possession within the stipulated period.

33. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 19.09.2017. The respondent offered the possession of the unit in question to the complainant only on 26.09.2017. So, it can be said that the complainant came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the complainant should be given 2 months' time from the date of offer of possession. This 2 month of reasonable time is being given to the complainant keeping in mind that even after intimation of possession practically he has to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e., 15.05.2016 (calculated from the date of sanctioning of building plan) till the date of offer of possession (26.09.2017) plus two months i.e., 26.11.2017. The complainant is further directed to take possession of the allotted unit after clearing all the dues within a period of 2

months and failing which legal consequences as per the provisions of the Act will follow.

34. 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 complainant is entitled to delay possession charges at rate of the prescribed interest @ 10.75% p.a. w.e.f. 15.05.2016 till the date of offer of possession (26.09.2017) plus two months i.e., 26.11.2017; as per provisions of section 18(1) of the Act read with rule 15 of the Rules

G.II: Other Reliefs:

35. Since, common issues with regard to super area, cost escalation, STP charges, electrification charges, taxes viz GST & VAT, advance maintenance charges, car parking charges, holding charges, club membership charges, PLC, development location charges and utility connection charges, EDC/IDC charges, firefighting/power backup charges were involved in all similar cases and others pending against the respondent in this project as well as in other projects developed by them, vide orders dated 06.07.2021 and 17.08.2021 a committee headed by Sh. Manik Sonawane IAS (retired), Sh. Laxmi Kant Saini CA and Sh. R.K. Singh CTP (retired) was constituted and was asked to submit its report on the above-mentioned issues. The representatives of the allottees were also associated with the committee and a report was submitted and the same along with annexures was uploaded on the website of the authority.

G.II (a) Direct the respondent to refund the amount collected towards the escalation charges which is not payable as elaborated in para 0

36. The complainant has pleaded that the respondent also imposed escalation cost Rs. 834,436/-. The respondent in this regard took a plea that cost escalation was duly agreed by the complainant at the time of booking and the same was incorporated in the FBA. The authority has gone through the report of the committee and observes that the cost escalation should be allowed up to the deemed date of possession i.e., 36 months from the date of sanctioning of the building plan or execution of the Floor Buyers Agreement, whichever is later i.e., 03.05.2013, or up to the actual date of the offer of possession i.e., 2016. As most of the complainant paid a major part of the sale consideration and there was no default on the part of the complainant in making payment to the promoter. The project has been delayed by over 1 years for no fault on the part of the complainant. It is, therefore, fair, and just that the cost escalation, should be calculated only from the date of sanctioning of the building plan or execution of the floor buyer's agreement, whichever is later i.e., 03.05.2013 up to the deemed date of delivery of possession i.e., 03.05.2016, or up to the grace period i.e., 03.11.2016. No escalation in cost can be allowed after 03.05.2016 because no justifiable reason has been cited or explanation offered by the respondent for such inordinate delay in offering the possession to the complainant. The authority concurs with the findings of the committee and allows escalation cost of Rs. 233.32/- per sq. feet is to be allowed instead of Rs. 332.18/- demanded by the developer.

G.II (b) Direct the respondent to take the opinion of HVAT Tax experts and communicate to the complainant along with detailed justification thereof and direct order the respondent to take the opinion of GST experts about the quantum of the GST

payable in the given circumstances by the complainant up to the deemed date of offering the possession of the apartment.

37. The allottees have also challenged the authority of the respondent builder to raise demand by way of goods and services tax. It is pleaded by the complainant that while issuing offer of possession, the respondent had raised a demand of Rs. 2,69,530/- under the head GST which is illegal and is not liable to repeat to be paid by him.
38. Though the version of respondent is otherwise, but this issue was also referred to the committee and who after due deliberations and hearing the affected parties, submitted a report to the authority wherein it was observed that in case of late delivery by the promoter, only the difference between post GST and pre-GST should be borne by the promoter. The promoter is entitled to charge from the allottee the applicable combined rate of VAT and service tax. The relevant extract of the report representing the amount to be refunded is as follows:

| Particulars | Spacio | Park Generation | Astire Garden | Terra | Amstoria | Other Project |
|-----------------------------|--------|-----------------|---------------|--------|----------|---------------|
| HVAT (after 31.03.2014) (A) | 4.51% | 4.51% | 4.51% | 4.51% | 4.51% | 4.51% |
| Service Tax (B) | 4.50% | 4.50% | 4.50% | 4.50% | 4.50% | 4.50% |
| Pre-GST Rate (C = A+B) | 9.01% | 9.01% | 9.01% | 9.01% | 9.01% | 9.01% |
| GST Rate (D) | 12.00% | 12.00% | 12.00% | 12.00% | 12.00% | 12.00% |
| Incremental Rate E= (D-C) | 2.99% | 2.99% | 2.99% | 2.99% | 2.99% | 2.99% |

| | | | | | | |
|--|-------|-------|-------|-------|-------|-------|
| Less: Anti-Profitteering benefit passed if any till March 2019 (F) | 2.63% | 2.46% | 0.00% | 2.58% | 0.00% | 0.00% |
| Amount to be refund Only if greater than (E- F) (G) | 0.36% | 0.53% | 2.99% | 0.41% | 2.99% | 2.99% |
| (E-F) (G) | | | | | | |

39. The authority has also perused the judgement dated 04.09.2018 in complaint no. 49/2018, titled as *Parkash Chand Arohi Vs. M/s Pivotal Infrastructure Pvt. Ltd.* passed by the Haryana Real Estate Regulatory Authority, Panchkula wherein it has been observed that the possession of the flat in term of buyer's agreement was required to be delivered on 1.10.2013 and the incidence of GST came into operation thereafter on 01.07.2017. So, the complainant cannot be burdened to discharge a liability which had accrued solely due to respondent's own fault in delivering timely possession of the flat. The relevant portion of the judgement is reproduced below:

"8. The complainant has then argued that the respondent's demand for GST/VAT charges is unjustified for two reason: (i) the GST liability has accrued because of respondent's own failure to handover the possession on time and (ii) the actual VAT rate is 1.05% instead of 4% being claimed by the respondent. The authority on this point will observe that the possession of the flat in term of buyer's agreement was required to be delivered on 1.10.2013 and the incidence of GST came into operation thereafter on 01.07.2017. So, the complainant cannot be burdened to discharge a liability which had accrued solely due to respondent's own fault in delivering timely possession of the flat. Regarding VAT, the Authority would advise that the respondent shall consult a service tax expert and will convey to the complainant the amount which he is liable to pay as per the actual rate of VAT fixed

by the Government for the period extending upto the deemed date of offer of possession i.e., 10.10.2013."

40. In appeal no. 21 of 2019 titled as M/s Pivotal Infrastructure Pvt. Ltd. Vs. Prakash Chand Arohi, Haryana Real Estate Appellate Tribunal, Chandigarh has upheld the Prakash Chand Arohi Vs. M/s Pivotal Infrastructure Pvt. Ltd. (supra). The relevant para is reproduced below:

*"93. This fact is not disputed that the GST has become applicable w.e.f. 01.07.2017. As per the first Flat Buyer's Agreement dated 14.02.2011, the deemed date of possession comes to 13.08.2014 and as per the second agreement dated 29.03.2013 the deemed date of possession comes to 28.09.2016. So, taking the deemed date of possession of both the agreements, GST has not become applicable by that date. No doubt, in Clauses 4.12 and 5.1.2 the respondent/allottee has agreed to pay all the Government rates, tax on land, municipal property taxes and other taxes levied or leviable now or in future by Government, municipal authority or any other government authority. But this liability shall be confined only up to the deemed date of possession. The delay in delivery of possession is the default on the part of the appellant/promoter and the possession was offered on 08.12.2017 by that time the GST had become applicable. But it is settled principle of law that a person cannot take the benefit of his own wrong/default. **So, the appellant/promoter was not entitled to charge GST from the respondent/allottee as the liability of GST had not become due up to the deemed date of possession of both the agreements.**"*

41. In the present complaint, the due date of possession was prior to the date of coming into force of GST i.e. 01.07.2017. In view of the above, the authority is of the view that the respondent/promoter is not entitled to charge GST from the complainant/allottees as the liability of GST had not become due up to the due date of possession as per the flat buyer's agreements. The authority concurs with the findings of the committee on this issue and holds that the difference between post GST and pre-GST shall be borne by the promoter. The promoter is entitled to charge from the allottees the applicable combined rate of VAT and service tax as detailed in para 38 of this order.

42. It is contended on behalf of complainant that the respondent raised an illegal and unjustified demand towards VAT to the tune of Rs. 95,239/-. It is pleaded that the liability to pay VAT is on the builder and not on the allottee. But the version of respondent is otherwise and took a plea that while booking the unit as well as entering into flat buyer agreement, the allottees agreed to pay any tax/ charges including any fresh incident of tax even if applicable retrospectively.
43. The committee took up this issue while preparing report and after considering the submissions made on behalf of the allottees as well as the promoter, observed that the developer is entitled to charge VAT from the allottees for the period up to 31.03.2014 @ 1.05% (one percent VAT + 5 percent surcharge on VAT). However, for the period w.e.f. 01.04.2014 till 30.06.2017, the promoter shall charge any VAT from the allottees/prospective buyers at the rate of 4.51% as the promoter has not opted for composition scheme. The same is concluded in the table given below:

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

44. The authority concurs with the recommendations of the committee and holds that promoter is entitled to charge VAT from the allottee for the period up to 31.03.2014 @ 1.05% (one percent VAT + 5 percent surcharge on VAT). However, for the period w.e.f.

01.04.2014 till 30.06.2017, the promoter shall charge any VAT from the allottees/prospective buyers at the rate of 4.51% as the promoter has not opted for composition scheme.

G.II (c) Direct the respondent to refund the money collected towards the club membership charges to the complainant with interest as the construction of the club is yet to be started as mentioned in para-N.

45. It was contended by the complainant that the respondent has charged a sum of Rs. 2,00,000/- of club membership charge in its letter for offer of possession despite the fact that the construction of the club has not been completed till date. Further, in plethora of judgements of various RERA Authorities; it has been held that the club membership charges cannot be imposed on the allottees till the time the club is not completed and becomes functional. On the other hand, respondent denied that the construction of club has not finished. The respondent has been raising demands as per its whims and fancies.
46. The said issue was also referred to the committee and who after due deliberations and hearing the affected parties, submitted a report to the authority wherein it was observed as under:

"...After deliberation, it was agreed upon that club membership will be optional.

Provided if an allottee opts out to avail this facility and later approaches the respondent for membership of the club, then he shall pay the club membership charges as may be decided by the respondent and shall not invoke the terms of FBAs that limits CMC to INR 1,00,000.00.

In view of the consensus arrived, the club membership may be made optional. The respondent may be directed to refund the CMC if any request is received from the allottee in this regard with condition that he shall abide by the above proviso."

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

G.II (d) Direct the respondent to refund the amount collected towards STP charges of Rs. 161,224/- when the FBA did not carry any such condition

48. It was contended by the complainant, on 26.09.2017, the respondents issued an offer of possession letter to the complainant along with various unjust and unreasonable demands electrification and STP charges of Rs. 161,224/-. On the other hand, the respondent submitted that such charges have been demanded by the allottees in terms of the flat buyer's agreement.

49. The authority concurs with the recommendation made by the committee and holds that the existing population of the colony is around 1500 persons, which is about 10% of the total population of the colony. The present discharge is around 170 KLD and the respondent company has set up two STPs, each 100 KLD capacity to treat the present sewage load. It has been taking NOC from HSPCB regularly. Hence, the technical reason given by the respondent company to install a single STP of 1330 KLD once the 30% of the total load is achieved for establishing a full capacity STP (1330 KLD) appears genuine. However, the respondent may be directed to keep upgrading the existing STPs in commensurate with the increasing

sewage load till the desired level of sewage load is achieved for establishing the main STP for the entire colony.

G. Directions of the authority

50. 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):

1. (a) **Delay Possession Charge:** The respondent is directed to pay interest at the prescribed rate of 10.75% p.a. for every month of delay from the due date of possession i.e., 15.05.2016 till offer of possession i.e., 26.09.2017 till plus two months i.e., 26.11.2017 to the complainant(s) as per section 19(10) of the Act.

(b) The arrears of such interest accrued from due date of possession till its admissibility as per direction (i) above shall be paid by the promoter to the allottees respectively within a period of 90 days from date of this order as per rule 16(2) of the rules.

(c) The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period against their unit to be paid by the respondent.

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

(e) The respondent is also directed not to charge anything which is not part of buyer's agreement.

- II. **Club membership charges:** The authority in concurrence with the recommendations of committee decides that the club membership charges (CMC) shall be optional. The respondent shall refund the CMC if any request is received from the allottee. Provided that if the allottees opt out to avail this facility and later approaches the respondent for membership of the club, then he shall pay the club membership charges as may be decided by the respondent and shall not invoke the terms of flat buyer's agreement that limits CMC to Rs.1,00,000/-.
- III. **GST charges:** The due date of possession of the subject unit is prior to the date of coming into force of GST i.e. 01.07.2017. The authority is of the view that the respondent/promoter was not entitled to charge GST from the complainant/allottee as the liability of GST had not become due up to the due date of possession as per the flat buyer's agreements as has been held by Haryana Real Estate Appellate Tribunal, Chandigarh in appeal bearing no. 21 of 2019 titled as M/s Pivotal Infrastructure Pvt. Ltd. Vs. Prakash Chand Arohi. Also, the authority concurs with the findings of the committee on this issue and holds that the difference between post GST and pre-GST shall be borne by the promoter. The promoters are entitled to charge from the allottee the applicable combined rate of VAT and service tax as detailed mention in the committee report.
- IV. The respondent shall not charge anything from the complainant which is not the part of the agreement. However, holding charges shall also not be charged by the promoter at any point of time even after being part of agreement as per law settled by the

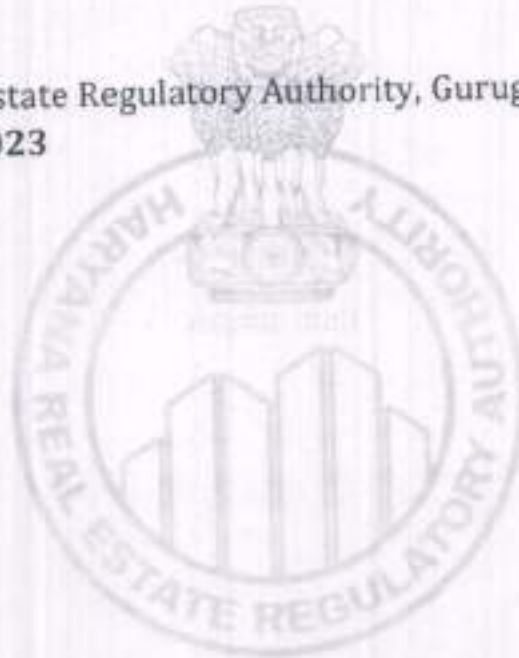
Hon'ble Supreme Court in civil appeal no. 3864-3889/2020
dated 14.12.2020.

51. Complaint stands disposed of.

52. File be consigned to registry.


(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 09.08.2023



HARERA
GURUGRAM