

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

Complaint no. :	1734/2021
Date of filing complaint:	02.04.2021
Date of decision:	07.11.2023

Shweta Gupta R/O: 26, Amaltas Marg Dlf Phase I Sikanderpur Ghosi 68 Dlf Qe	Complainant
Versus	
Experion Developers Private Limited R/O: F-9, First Floor, Manish Plaza-I, Plot No. 7 Mlu, Sector 10, Dwarka, New Delhi-110075	Respondent

CORAM:	
Shri Ashok Sangwan	Member
APPEARANCE:	
Sh. K.K Kohli (Advocate)	Complainant
Ms. Savita Vashisht AR	Respondent

ORDER

1. The present 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 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 complainants, date of proposed handing over the possession and delay period, if any, have been detailed in the following tabular form:

S.No.	Heads	Information
1.	Name of the project	Wind chants , Phase 3 , Sector 112, Chauma, Gurugram
2.	DTCP License	21 of 2008 dated 08.02.2008 valid up to 07.02.2020 28 of 2012 dated 07.04.2012 valid up to 06.04.2025
3.	Licensee name	Experion Developers
4.	Unit no.	5052 on 5 th floor tower WT -05 As per annexure 5 vide allotment letter on page 141 of the complaint)
5.	Unit area admeasuring	4650 sq. ft. (As per annexure 5 vide allotment letter on page 141 of the complaint)
6.	Revised unit measuring	4848 sq. ft. (As per annexure R-8 vide letter dated 27.04.2017 on page 123 of reply)
7.	Increased area	4.26% (198 sq. ft.)
8.	Date of allotment letter	31.07.2012 (As per annexure 5 on page 141 of the complaint in favor of the previous allottee namely M/s Network realty pvt. ltd.)
9.	Date of builder buyer agreement	26.12.2012 (As per annexure 2 on page 68 of the complaint between the original

		allottee and respondent and endorsed in the favor of the complainant on 28.01.2013 on page 116 of reply)
10.	Payment plan	Construction linked (As per annexure 2 vide schedule VI on page no. 104 of complainant)
11.	Building plan approved on	07.06.2012 (As per annexure 2 vide BBA on page no. 69 of the complainant)
12.	Environment clearance	27.12.2012 (As per project details of the above mentioned project taken fro the planning branch)
13.	Agreement to sell	11.01.2013 (As per annexure 3 on page no. 105 of the complaint between the original allottee and the complainant)
14.	Possession clause	10 Project completion period 10.1 Subject to Force Majeure, timely payment of the Total Sale Consideration and other provisions of this Agreement, based upon the Company's estimates as per present Project plans, the Company intends to hand over possession of the Apartment within a period of 42 (forty two months from the date of approval of the Building Plans or the date of receipt of the approval of the Ministry of Environment and forests, Government of India for the Project or execution of this Agreement, whichever is later ("Commitment Period") . The Buyer further agrees that the Company shall additionally be entitled to a time of 180 (one hundred and eighty days ("Grace Period") after expiry of the Commitment Period

		<p>for unforeseen and unplanned Project realities.</p> <p>However, in case of any default under this Agreement that is not rectified or remedied by the buyer within the period as may be stipulated, the Company shall not be bound by such Commitment Period.</p>
15.	Due date of possession	<p>24.12.2016</p> <p>(Calculated from the date of environment clearance i.e 27.12.2012 being later and grace period of 180 days being allowed)</p> <p>(Inadvertently mentioned in the proceeding of the day dated 05.09.2023 as 27.06.2016)</p>
16.	Total sale consideration	<p>Rs. 3,00,56,116/- (for 4650 sq. ft.)</p> <p>(As per annexure 2 vide schedule V of BBA on page no. 103 of complaint)</p> <p>(As per on page 38 of complaint)</p>
17.	Amount paid by the complainant	<p>Rs. 3,01,00,137/-</p> <p>(As per annexure 4 vide cancellation letter on page 146 of the complaint)</p>
18.	Occupation certificate /Completion certificate	<p>24.12.2018</p> <p>(As per annexure R -12 on page no. 134 of the reply)</p> <p>(For tower T-7 and T8)</p>
19.	Offer of possession	<p>27.12.2018</p> <p>(As per annexure R-13 On page no. 137 of reply)</p>
20.	Reminder letter	<p>12.02.2019, 04.03.2019 04.04.2019 - reminders</p>

		09.05.2019 – final notice (As per annexure R – 16, 17,19 on page 167 -173 and 178 -179 of reply)
21.	Cancellation letter	21.01.2021 (As per annexure R page 181 of reply)

B. Facts of the complaint:

3. That in year 2012, the respondent company issued an advertisement announcing a group housing colony project called 'Windchants' situated at Sector-112, Gurugram, Haryana. The original allottee M/s. Network Realty Private Limited entered into an agreement dated 26.12.2012 with the respondent and paid an initial amount of Rs. 11, 00,000/- vide cheque no: 005306 dated 15.06.2012 with respect to booking application dated 09.07.2012 for one unit and opted for construction linked payment plan.
4. That the original allottee M/s. Network Realty Private Limited made a payment of Rs.18, 00,180/- vide cheque no: 005310 dated 16.07.2012 which was acknowledged by the respondent vide receipt dated 18.07.2012. The original allottee was informed through a letter by respondent that they were allotted one unit being WT-05/0502 in the above said project. The original allottee M/s. Network Realty Private Limited made a payment of Rs.22, 66,215/- vide a cheque no: 572686 dated 11.01.2013 which was acknowledged by the respondent vide receipt.
5. That the original allottee executed an agreement to sell with the complainant for an agreed amount of Rs.29, 00,180. The complainant received a payment request letter from the

respondent to make payment of next instalments. The complainant made a payment of Rs.22, 57,002/- on account of starting of basement roof slab vide Cheque No: 493345 dated 10.07.2014 and the same was paid vide cheque no: 493349 dated 15.12.2014.

6. That the complainant received a payment request letter from the respondent to make payment of next instalments. The complainant made a payment of Rs.22, 57,002/- on account of starting of 1st and 4th Floor Roof slab vide cheque no: 493351 dated 18.03.2015. The complainant received a letter from respondent regarding the revision in external development charges. The complainant made a payment of Rs. 18,38,729/- and Rs. 8,809/- vide cheque no:493353 and 493354 dated 04.06.2015 on account of starting of 7th floor roof slab and 10th Floor roof slab which was acknowledged by a copy of receipt of payment.
7. That the complainant received a letter from respondent regarding installation of geysers and provision of piped gas on 04.06.2015. The complainant received a payment request letter from the respondent to make payment of next instalments and Rs.13, 24,187/- was paid by the complainant on account of starting of 10th and 13th Floor Roof slab vide Cheque No: 493357 dated 31.07.2015 which was acknowledged by a receipt of payment dated 31.07.2015.
8. That the complainant received a payment request letter from the respondent to make payment of next instalments and Rs.22,57,002/- was paid by the complainant on account of starting of 13th and 16th Floor Roof slab vide Cheque No:265082 dated 04.09.2015. The complainant received a payment request letter

- from the respondent to make payment of next instalments and Rs.15, 67,301/- was paid by the complainant on account of starting of 16th and 20th Floor Roof slab vide Cheque No: 265083 dated 05.10.2015 and Rs.15, 67,350/- on account of starting of 20th and 24th Floor Roof slab vide Cheque No: 184380 dated 17.11.2015.
9. That the complainant received a payment request letter from the respondent to make payment of next instalments and the following payments were made by the complainant of Rs.15,69,628/- was paid by the complainant on account of starting of 24th and Top Floor Roof slab vide Cheque No:029070 dated 07.01.2016 , Rs.13,21,588/- on account of starting of Electrical and Plumbing works and Top Floor Roof slab vide Cheque No:493360 dated 16.03.2016 and Rs.15,69,628/- on account of starting of Electrical and Plumbing works and Flooring and Finishes vide Cheque No:493361 dated 15.04.2016 , Rs.15,69,628/- on account of starting of Internal Flooring and Finishes and completion of door and windows vide Cheque No:029071 dated 16.05.2016.
10. That the complainant received a payment request letter from the respondent to make payment of next instalments and Rs.52,095/- was paid by the complainant on account of starting of basement roof slab vide Cheque No:184382 dated 27.06.2017. The complainant received a Tax Invoice/ demand note from the respondent to make payment regarding alteration in sale area. The complainant made a payment of Rs.14, 19,412/- on account of area alteration and completion of door and windows vide Cheque No: 493371 dated 06.03.2018.

11. That the complainant received a tax Invoice/ demand note from the respondent to make payment of next instalments. The complainant received notice of possession dated 27.12.2018 wherein there are some set of documents in which several demand notes is enclosed.
12. That there are subsequent possession notice reminders dated 12.02.2019, 04.03.2019, 04.04.2019, and one final notice on 09.05.2019 stating to remit the due amount of Rs.12,30,478/- .As per the demands raised by the respondent, based on the payment plan, the complainant and original allottee together paid a sum of Rs. 2, 97, 81,577.00/- towards the said unit against total demands of Rs. 3, 00, 05,684.00/- raised by the respondent from 2012 till 2019.
13. That offering possession by the respondent on payment of charges which the flat buyer is not contractually bound to pay, cannot be considered to be a valid offer of possession. HVAT was never, as per the Act, payable by the complainant and hence the offer of possession is not a valid offer of possession. The respondent is insisting advance monthly maintenance charges for a period of 12 months which was never a part of the buyer's agreement and hence this demand is illegal and therefore for this reason as well the letter of possession is an invalid offer.
14. That the respondent asking for interest free maintenance security as the maintenance security is also illegal and amounts to unjust enrichment depriving the complainant of a huge loss of interest on a sum of Rs. 1, 69,680.00/- which condition was never a part of the buyer agreement and hence for this reason as well the intimation of possession is not a valid offer of possession. That the respondent

has cancelled the allotment of apartment of the complainant citing reasons of outstanding dues and breach of contractual obligations as per builder buyer agreement.

15. That as per clause 10. 1 of buyers agreement, which was signed on 26.12.2012 details of which are attached, the possession of the said unit was supposed to be delivered within 42 from the date of approval of the Building Plans by the DTCP i.e., 07.04.2012 plus a grace period of 180 days, making the due date of delivery i.e., 07.04.2016. However, the possession is offered after a delay of almost three years as per the letter of offer of possession dated 27.12.2018.
16. That the respondent knowing well that HVAT is not payable by the Allottee has included the HVAT element in the IOP letter; as the HVAT came into existence much before the flat was sold to the allottee and hence to any stretch of imagination, it cannot be believed, that if the VAT is payable by the allottee, the respondent would not have included the same in the cost on the flats sold in 2012. It is therefore requested that the respondent may kindly withdraw this demand of Rs 52,095.00/- towards HVAT from your offer of possession.
17. That the respondent in the offer of possession dated 27.12.2018 has demanded GST of Rs. 2, 18,366.00/-. The GST Act came into force in the year 2017 and therefore, it is a fresh tax. The possession of the Unit was supposed to be delivered by 07.04.2016, therefore, the tax which has come into existence after the deemed date of delivery should not be levied as it is unjustified. That as per the buyer's agreement, the IFMS of Rs. 1, 69,680/- was payable on

the Offer of Possession. No offer of possession has been made in the letter dated 27.12.2018 which is the nature of a notice/final demand Letter informing the allottees. The respondent has stated at annexure 1 of offer of possession that, 12 months of advance maintenance charges @ Rs. 3.5 per Sq. Ft Plus GST @ 18% for 12 months amounting to Rs. 3, 98,157.00 has to be paid by the complainant.

18. That it has been held by the Hon'ble NCDRC, New Delhi in many cases that offering of possession, conditional on the payment of charges which the flat buyer is not contractually bound to pay, cannot be considered to be a valid offer of possession. In the present case the following charges of Rs. 10,06,046/- levied are not a part of the agreement, and hence are not payable:

- a. Dual meter Charges- Rs. 16,800/-
- b. Piped Connection Charges- Rs. 51,723/-
- c. Geyser Charges- Rs. 69,735/-
- d. Community Building Furnishing Charges- Rs. 2,24,000/-
- e. ECC Charges- Rs. 1, 95,364/-
- f. FTTH Charges- Rs. 35,201/-
- g. PHE Charges- Rs. 15,066/-
- h. Common Area Maintenance Charges- Rs. 3, 98,157/-

19. There is no second thought to the fact that the complainant has paid Rs. 3,01,99,713,00 which exceeds the total consideration that was

agreed upon in the Buyer agreement. It is an undisputed fact that our complainant has made more than 100% payment as per his contractual obligation.

20. That as the respondent has failed to offer possession by the due date to the complainant, which is in violation of obligation of the company under Section 11(4) (a) of the RERA Act, thus the respondent is liable to pay interest at the rate prescribed which shall be the State Bank of India, Highest Marginal Cost of Lending Rate Plus 2%, which comes to 10.05 %, on the amount paid by the Complainant for every month of delay from the due date of delivery of possession as per Section 18(1) of the proviso of the Act read with rule 15 of the Haryana Real Estate (Regulation & Development) Rules 2017.

21. That the complainant has filed an application on 29.11.2022 for additional reliefs in the prayer stating that the respondent charged administrative charges from the complainant amounting to Rs. 5,22,474/- and the same was paid to the respondent vide receipt no. EXWCREC / 00974/12-13 dated 28.01.2013. Therefore the complainant requested to refund the same amount.

C. Relief sought by the complainant:

22. The complainants have sought the following relief(s):

- i. Direct the respondent - builder to handover the possession and to pay delay possession charges to the complainant.
- ii. Direct the respondent to execute the conveyance deed.
- iii. Direct the respondent to not to cancel the unit.

iv. Direct the respondent to not to charge anything which has not been agreed between the parties like asking for fixed deposit of Hvat , Gst , Maintenance charges etc.

v. Direct the respondent to not to ask for advance monthly maintenance charges for a period of 12 months.

vi. Direct the respondent to not to ask for interest free maintenance security.

vii. Direct the respondent to not to ask for any charges which is not part of the buyer's agreement.

D. Reply by respondent:

The answering respondent by way of written reply made the following submissions

23. That the respondent is developer of a residential group housing colony, namely "Windchants", situated at Sector 112, Gurugram, Haryana. M/s. Network Realty Private Limited is a private limited company and inter-alia engaged in business of real estate and its related activities. That M/s. Network Realty, vide its application dated 15.06.2012, applied for allotment of a residential unit in the said project. That thereafter, vide an allotment letter dated 31.07.2012 provisionally allotted a residential unit, admeasuring 4,650 sq. ft., bearing no. WT - 05/0502 in the said Project to M/s. Network Realty.

24. That the respondent also provided details of the cost of the said unit along with its payment schedule, and further M/s. Network Realty opted for the construction linked plan for making the payment. That the said allotment to M/s. Network Realty was subject to

terms of the allotment letter and the application form dated 15.06.2012. That as per the payment schedule, M/s. Network Reality paid Rs.11,00,000/- and Rs.18,00,180/- to the respondent at the time of booking etc.

25. That thereafter a buyer agreement dated 26.12.2012 was duly executed between M/s. Network Reality and the respondent for purchase of the said unit. In terms of the said agreement, M/s. Network Reality agreed to purchase the said unit for total sale consideration of Rs. 3,00,56,116/-, which was including Basic Sale Price (BSP) of Rs. 2,63,65,274/-, Car Parking Usage Charges (CPUC) of Rs. 12,37,080/-, External Development Charges (EDC) of Rs. 15,57,948/-, Infrastructure Development Charges (IDC) of Rs. 1,24,636/-, Community Building Furnishing Charges (CBFC) of Rs. 1,06,180/-, Community Building Security Deposit (CBSD) of Rs. 1,00,000/- and Interest Free Maintenance Security Deposit (IFMSD) of Rs. 4,65,000/-. Pertinent to mention that taxes, cess, duties, VAT and service tax and other charges were not included in the said sale consideration, and were agreed to be paid by M/s. Network Reality upon their demands by the Respondent and/or the competent authority.
26. That as per the said agreement M/s. Network Reality agreed to make payment of the above-mentioned amount as per the stages of construction, and further it was agreed that the actual sale area of the said unit would be determined upon final measurement of the said unit, and accordingly the BSP and other charges, might be changed. It was further agreed that in case, M/s. Network Reality defaulted in making the payment of the above-mentioned amounts or any part thereof beyond 60 days, then the respondent had right ✓

to cancel the said allotment or in case, the respondent did not cancel the said allotment, then the respondent would charge 18% interest per annum on the defaulted amount. It was further agreed that the respondent would hand over possession of the said unit to M/s. Network Realty within 42 months and grace period of 180 days from the date of approval of building plans or approval from the Ministry of Environment and Forests, or execution of this agreement, whichever was later.

27. That in the month of January, 2013, M/s. Network Realty transferred the said unit to the complainant herein, and admittedly, the complainant herein executed an undertaking-cum-indemnity dated 07.01.2013, whereby acknowledging that the complainant had read and understood the terms of the allotment letter as well as the buyer agreement, and agreed to comply the same. That based upon various documents, submitted by the complainant and M/s. Network Realty, the respondent transferred the said unit in favor of the complainant vide its letters dated 28.01.2013.
28. That the respondent, vide its letter dated 01.06.2015, informed the complainant that external development charges stood revised downwards to Rs. 224.00 per sq. ft., and the amount due against the same would be credited to the complainant's account. The respondent, vide its letter dated 04.06.2015, informed the complainant that the respondent, after feedback from the customers and the recommendations of the design and architect team, would be installing geysers and provision for piped gas, and as the same were not part of standard specifications, the respondent charged an amount of Rs. 62,263/- towards geysers and Rs. 46,181/- towards the gas pipeline from the complainant. ✓

The respondent, vide its letter dated 27.04.2017, informed the complainant that the area of the said unit had been increased by 198 sq. ft. and hence the revised sale area of the said unit was 4848 sq. ft.

29. That the respondent, vide its letter dated 22.06.2017, informed the complainant that as per provisions of Haryana Value Added Tax, 2003, the advances, received against the purchase of the said Unit was liable for Value Added Tax, however due to uncertainty around the levy of the VAT, the Respondent did charge VAT from the complainant. It was further informed to the complainant that Government of Haryana introduced amnesty scheme for the contractors, whereby the liability of VAT was reduced to 1.05%, and hence the respondent paid an amount of Rs. 52,621/- to the concerned Authority towards discharge of VAT liability of the complainant. That hence, the respondent demanded the said amount from the complainant, and the complainant duly paid the said amount to the respondent on 27.06.2017 without any protest/reservation.
30. That the respondent, vide its letter dated 21.07.2017, informed the complainant about levying of GST on the project w.e.f. July 01, 2017. The respondent, vide its demand notice dated 27.09.2017, duly informed the complainant about the increase in area of the said unit by 198 sq. ft. and hence demanded an amount of Rs. 12,19,680/- towards the difference in BSP along with applicable GST.
31. That the occupancy certificate qua the said project, in which the said unit is situated, has been granted by the concerned Authority vide its letter dated 24.12.018, and thereafter the respondent

started offering the possession of the unit in the said project to the customers. The respondent, vide its letter dated 27.12.2018, informed the complainant that the occupation certificate qua the said unit had been received by the respondent, and hence the respondent offered the possession of the said unit to the complainant. That the respondent also provided final statement of account, and demanded Rs. 26,30,330/- towards total sale consideration, Rs. 3,98,157/- towards maintenance charges and Rs. 14,11,200/- towards stamp duty, registration charges and legal fees from the complainant, and requested the complainant to make the payment of the said amounts and complete documentation on or before 28.01.2019. In pursuance to the notice of possession dated 27.12.2018, the complainant paid Rs. 14,03,200/- towards stamp duty in favour of SBI, Stamp Duty vide cheque bearing no. 493374 dated 25.01.2019. The complainant also paid the registration charges and legal fee of Rs. 8,000/- to Mr. Nihal Singh Dhariwal vide cheque bearing no. 493375 dated 25.01.2019.

32. That further the complainant also executed a Maintenance Agreement qua the said unit between the parties to the present complaint, M/s. Mainage Facility Management Private Limited and M/s. CBRE South Asia Private Limited. That the complainant also paid the amount of Rs. 3,98,157/- towards maintenance charges to M/s. Mainage Facility Management Private Limited vide cheque bearing no. 493373 dated 25.01.2019.

33. That admittedly, the complainant defaulted in making payment of Rs. 26,61,203/- towards the sale consideration and completing the formalities of documentation, and hence the respondent was constrained to issue a possession reminder - 1 dated 12.02.2019 to ✓

the complainant. That thereafter, the complainant paid only Rs.14,10,746/- against the demand of Rs. 26,61,203/- vide cheque bearing no. 493378 dated 19.02.2019, however the complainant did not complete the formalities of documentation qua the said unit. The complainant was not coming forward to make the remaining payment of Rs. 12,50,453/- towards the sale consideration and completing the formalities of documentation, the respondent was constrained to issue possession reminder - 2 dated 04.03.2019 and possession reminder - 3 dated 04.04.2019 to the complainant, however, the complainant neither paid the said amount nor came forward to complete the formalities of documentation qua the said unit.

34. That the respondent, vide its letter dated 01.05.2019, informed the complainant about the credit of GST benefit under anti-profiteering under Section 171 of CGST Act and accordingly, the respondent gave input tax credit of Rs. 76,247/- to the complainant qua the said unit. That there is no violation of Section 171 of the CSGT Act as alleged as the respondent has given the input tax credit of Rs. 76,247/- to the complainant and duly informed about the same vide its letter dated 01.05.2019, and which fact has been concealed by the complainant in the subject complaint.

35. That thereafter, the respondent vide its final notice dated 09.05.2019, informed the complainant that despite various reminders, the respondent had not received the due amount and further the respondent was ready and willing to handover the possession of the said unit to the complainant, and hence the respondent requested the complainant to make payment of the due amount, complete the formalities for execution of necessary

documents and handing over the possession of the said unit. It was also specifically informed to the complainant that in case, the complainant did not do the needful, the respondent would be constrained to cancel the said allotment.

36. That despite receipt of all the reminders and final notice dated 09.05.2019, the complainant neither came forward to make payment of the due amount nor completed the formalities of execution of necessary documents and handing over of the possession of the said unit. The respondent issued a cancellation letter dated 21.01.2021, whereby the allotment qua the said unit was cancelled and an amount of Rs. 51,82,584/- was forfeited in accordance of the terms and conditions of the agreement.
37. That the respondent has even paid delay in compensation charges, amounting to Rs. 7, 75,680/- to the complainant as per the buyer agreement between the parties, thus adhering to both letter and spirit of the same. That the said amount has been duly adjusted at the time of raising final invoice to the complainant and is evident in the final statement of account entry dated 27.12.2018.
38. All other averments made in the complaint were denied in toto.
39. Copies of all the relevant documents have been filed and placed on record. Their authenticity is not in dispute. Hence, the complaint can be denied on the basis of these undisputed documents and submissions made by the parties.

E. Jurisdiction of the authority:

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

E. I Territorial jurisdiction

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

E. II Subject matter jurisdiction

41. 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.

42. 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.
43. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgements passed by the Hon'ble Apex Court in *Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. 2020-2021 (1) RCR (c) 357* and reiterated in case of *M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020* decided on **12.05.2022** wherein it has been laid down as under:

"86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is that although the Act indicates the distinct expressions like 'refund', 'interest', 'penalty' and 'compensation', a conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest thereon, it is the regulatory authority which has the power to examine and determine the outcome of a complaint. At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of Section 71 read with Section 72 of the Act. If the adjudication under Sections 12, 14, 18 and 19 other than compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and

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functions of the adjudicating officer under Section 71 and that would be against the mandate of the Act 2016."

44. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the cases mentioned above, the authority has the jurisdiction to entertain a complaint seeking refund of the amount and interest on the refund amount.

F. Findings on the relief sought by the complainant:

F.1 Direct the respondent - builder to handover the possession and to pay delay possession charges to the complainant.

45. In the present case in hand, the complainant is a subsequent allottee. The said unit was transferred in the favour of the complainant on 07.01.2013 i.e., before the due date of handing over of the possession (24.12.2016) of the allotted unit. As decided in complainant no. 4037 of 2019 titled as *Varun Gupta Vs. Emaar MGF Land Limited*, the authority is of the considered view that in cases where the subsequent allottee had stepped into the shoes of original allottee before the due date of handing over of possession, the delayed possession charges shall be granted w.e.f. due date of handing over possession.

46. In the present case the occupation certificate was obtained on 24.12.2018 and the respondent offered the possession of the unit on 27.12.2018 which was accompanied by certain invalid demands like Geyser Charges, Community Building Furnishing Charges, ECC Charges etc. which were unjustified as they were not according to the builder buyer agreement and the complainant did not pay the amount. In this peculiar case it is observed that the complainant has already paid an amount of Rs. 3,01,00,137/- which is more than

the total sale consideration of Rs. 3,00,56,116/-. There has been a delay of two years as the due date is 24.12.2016 and the possession was offered on 27.12.2018 by the respondent. If at that time the respondent had adjusted the delayed possession charges then, as per provisions of the Act the delayed possession charges would amount to more than the dues which were demanded by the respondent. The respondent cancelled the unit as the complainant did not pay the amount as demanded by the respondent on 21.01.2021. The Authority is of the view that the offer of possession was accompanied by certain invalid demands which are not part of the buyer agreement and the cancellation done by the respondent is bad in law.

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

"Section 18: - Return of amount and compensation

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

.....

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

48. Clause 10.1 of the buyer's agreement 26.12.2012 provides for handing over of possession and is reproduced below:

"Clause 11.2

Subject to Force Majeure, timely payment of the Total Sale Consideration and other provisions of this Agreement, based upon the Company's estimates as per present Project plans, the Company intends to hand over possession of the Apartment within a period of 42 (forty two months from the date of

approval of the Building Plans or the date of receipt of the approval of the Ministry of Environment and forests, Government of India for the Project or execution of this Agreement, whichever is later ("Commitment Period"). The Buyer further agrees that the Company shall additionally be entitled to a time of 180 (one hundred and eighty days ("Grace Period") after expiry of the Commitment Period for unforeseen and unplanned Project realities.

However, in case of any default under this Agreement that is not rectified or remedied by the buyer within the period as may be stipulated, the Company shall not be bound by such Commitment Period.

49. The Authority has gone through the possession clause of the agreement and observes that the respondent-developer proposed to handover the possession of the allotted unit within a period of forty two months from the date of approval of the Building Plans or the date of receipt of the approval of the Ministry of Environment and forests, Government of India for the Project or execution of this Agreement, whichever is later and grace period of 180 days. In the present case, the due date of handing over of possession is calculated from the date of environment clearance being later. The buyer's agreement inter-se parties was executed on 26.12.2012; as such the due date of handing over of possession without considering grace period comes out to be 27.06.2016.
50. **Admissibility of grace period:** As per clause 10.1 of buyer's agreement dated 26.12.2012, the respondent-promoter proposed to handover the possession of the said unit within a period of forty two months and one hundred and eighty days grace period. The Authority is of view that the said grace period of one hundred and eighty days shall be allowed to the respondent being unqualified and being allowed in earlier case no. 530 of 2018. Therefore, as per

clause 10.1 of the buyer's agreement dated 26.12.2012, the due date of possession comes out to be 24.12.2016.

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

52. 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.
53. 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., 07.11.2023 is @ 8.75 %. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.75%.

54. 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;"*

55. Therefore, interest on the delay payments from the complainants 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.
56. On consideration of the documents available on record and submissions made 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. By virtue of clause 10.1 of buyer's agreement executed between the parties on 26.12.2012, the possession of the subject apartment was to be delivered within a period of forty two months from the date of approval of the building plans or the date of receipt of the approval of the ministry of environment and forests, Government of India for the project or

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execution of this agreement, whichever is later and grace period of 180 days. The due date of possession is calculated from the date of environment clearance i.e.; 27.12.2012, which comes out to be 24.12.2016. The respondent has offered the possession of the allotted unit on 27.12.2018 after obtaining occupation certificate from competent Authority on 24.12.2018.

57. The Authority observes that as per reply, an amount of Rs.7,75,680/-has been credited to the account of complainant as delay possession charges. Only a meagre amount of Rs. 7,75,680/- is adjusted whereas there has been a delay of two years as the due date is 24.12.2016 and the possession was offered on 27.12.2018 by the respondent. If at that time the respondent had adjusted the delayed possession charges then, the delayed possession charges would amount to more than the dues which were demanded by the respondent. Out of amount so assessed on account of delay possession charges the respondent is entitled to deduct the amount already paid towards DPC.
58. Accordingly, it is the failure of the promoter to fulfil its obligations and responsibilities as per the buyer's agreement dated 26.12.2012 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 allottees shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 24.12.2016 till offer of possession i.e 27.12.2018 plus two months i.e 27.02.2019 at the prescribed rate i.e., 10.75 % p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules. ✓

59. In this case , as per the submissions of the respondent at bar on 05.09.2023 , the balance amount after cancellation and deductions ,i.e., Rs. 2,49,17,553/- have been refunded to the complainant vide RTGS transfer dated 21.12.2021. Since the cancellation is invalid, the respondent is directed to issue a revised account statement after adjustment of delayed possession charges from the due date 24.12.2016 till offer of possession i.e 27.12.2018 plus two months i.e 27.02.2019 . The complainant is hereby directed to payback the amount of Rs. 2,49,17,553/- with equitable interest at the prescribed rate i.e 10.75% for the period for which the amount as remained with the complainant within 30 days from the date of this order . The relevant section of the Act of 2016 is mentioned below:-

Section 2 (za)

"Interest" means the rate of interest payable by the promoter or the allottee , as the case may be

Explanation-for the purpose of this clause-

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.

F.II Direct the respondent to execute the conveyance deed.

60. The complainant is seeking relief of the execution of conveyance deed. Clause 3.3 of the apartment buyer agreement (in short, agreement) provides for conveyance deed and is reproduced below:

3.3

The transaction contemplated hereby relates to the sale, transfer and conveyance of the Apartment, i.e. an immovable property. Hence, notwithstanding anything contained in this Agreement, the ownership

title to the Apartment shall be transferred into the name of the Buyer through execution of a conveyance deed in the format to be provided by the Company and on full payment of the then applicable charges for stamp duty, registration and incidental legal costs and expenses by the Buyer and to be duly registered with the jurisdictional Sub-Registrar of Assurances, Gurgaon, Haryana ("Conveyance Deed") along with such other related documents as specified in this Agreement or as may then be required for such purposes. The Buyer agrees and undertakes to be present before such Sub Registrar of Assurances, Gurgaon, Haryana at the date and time as may be specified by the Company for registration of the Conveyance Deed.

61. The authority has gone through the conveyance clause of the agreement and observes that the conveyance has been subjected to all kinds of terms and conditions of the buyers' agreement and the complainant(s) not being in default under any provisions of the agreement and compliance with all provisions, formalities and documentation as prescribed by the promoter.
62. Section 17 (1) and proviso of the Real Estate Regulation and Development Act, 2016 is reproduced below:

"Section 17: - Transfer of Title

17(1). The promoter shall execute a registered conveyance deed in favour of the allottee along with the undivided proportionate title in the common areas to the association of the allottees or the competent authority, as the case may be, and hand over the physical possession of the plot, apartment of building, as the case may be, to the allottees and the common areas to the association of the allottees or the competent authority, as the case may be, in a real estate project, and the other title documents pertaining thereto within specified period as per sanctioned plans as provided under the local laws: Provided that, in the absence of any local law, conveyance deed in favour of the allottee or the association of the allottees or the competent authority, as the case may be, under this section shall be carried out by the promoter within three months from date of issue of occupancy certificate.

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63. The authority is of view that promoter is under an obligation to get conveyance deed executed in favour of the complainant(s) as per the section 17(1) of the Act, 2016. Since the possession was offered on 27.12.2018 after obtaining occupation certificate on 24.12.2018, the respondent is directed to get the conveyance deed of the allotted unit executed within a period of 3 months from the date of this order as per section 17(1) of the Act of 2016.

F.III Direct the respondent to not to cancel the unit.

64. The cancellation done by the respondent is invalid as already observed in para no. 46. Therefore, no further direction is required.

F.IV Direct the respondent to not to charge anything which has not been agreed between the parties like asking for fixed deposit of Hvat , Gst , Maintenance charges etc.

65. **Hvat** - In the notice for possession letter dated 27.12.2018 the respondent has charged Rs. 526/- for hvat charges . The promoter is entitled to charge VAT from the allottee for the period up to 31.03.2014 @ 1.05% (one percent VAT + 5 percent surcharge on VAT) under the amnesty scheme. The promoter shall not charge any VAT from the allottees/prospective buyers during the period 01.04.2014 to 30.06.2017 since the same was to be borne by the promoter-developer only. Moreover, if the respondent company has opted for composition levy, then also the incidence of such taxes shall be borne by the respondent only. If for this period any VAT has been charged the same is refundable in case of availing amnesty scheme availed by the promoter.

66. **GST** – The Authority laid reliance on 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 where 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 aforesaid order was upheld by Hon'ble Haryana Real Estate Appellate Tribunal, Chandigarh in *appeal no. 21 of 2019*. 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 leviabale 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."

67. In the instant complainant, the due date of possession comes out to be 24.12.2016 which is prior to the date of coming into force of GST ✓

i.e. 01.07.2017. In view of the above, the Authority is of the view that the respondent/promoter is 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 agreement. The Authority is of further view that in case of late delivery by the promoter only the difference between post GST and pre-GST should be borne by the promoter. The promoter is entitled to charge from the allottees the applicable combined rate of VAT and/or service tax. However, it further directs that the difference between post GST and pre-GST shall be borne by the promoter.

68. That the respondent, vide its letter dated 01.05.2019, informed the complainant about the credit of GST benefit under anti-profiteering under Section 171 of CGST Act and accordingly, the respondent gave input tax credit of Rs. 76,247/- to the complainant qua the said unit. Therefore, credit is required to be given in terms of above directions.

F.V Direct the respondent to not to ask for advance monthly maintenance charges for a period of 12 months.

69. **Maintenance Charges** - The Act mandates under section 11 (4) (d) that the developer will be responsible for providing and maintaining the essential services, on reasonable charges, till the taking over of the maintenance of the project by the association of the allottees. Clause 15.5, 15.6 & 15.7 of the buyer agreement provides the clause for maintenance charges.
70. In the present case, the respondent has demanded charge towards maintenance of Rs. 3,98,157/- through demand cum notice of possession letter dated 08.12.2017 on page no. 138 of the

reply. The complainant allottee is required to pay the maintenance charges to the respondent in terms of obligation of complainant allottee under section 19(6) of the Act of 2016 and the same is reproduced below :

19(6) Rights and duties of allottees

Every allottee , who has entered into an agreement or sale to take an apartment , plot or building as the case may be , under section 13 , shall be responsible to make necessary payments in the manner and within the time as specified in the said agreement for sale and shall pay at the proper time and place , the share of the registration charges , municipal taxes , water and electricity charges , maintenance charges , ground rent , and other charges , if any.

71. However, the respondent shall not demand the advance maintenance charges for more than one (1) year from the allottee even in those cases wherein no specific clause has been prescribed in the agreement or where the AMC has been demanded for more than one (1) year.

F.VI Direct the respondent to not to ask for interest free maintenance security.

F.VII Direct the respondent to not to ask for any charges which is not part of the buyer's agreement.

72. Both the relief being interconnected are being taken up together. In the notice for possession letter dated 27.12.2018 the respondent has charged Rs. 26,61,199 /- wherein the adhoc charges such as Dual Meter charges , phe charges , geyser charges , ifmsd charges etc. are also added . Interest Free Maintenance Security (IFMS): It is held that the promoter may be allowed to collect a reasonable

amount from the allottees under the head "IFMS". However, the authority directs that the promoter must always keep the amount collected under this head in a separate bank account and shall maintain that account regularly in a very transparent manner. If any allottee of the project requires the promoter to give the details regarding the availability of IFMS amount and the interest accrued thereon, the promoter must provide details to the allottee. It is further clarified that out of this IFMS/IBMS, no amount can be spent by the promoter for the expenditure it is liable to incur to discharge its liability and obligations as per the provisions of section 14 of the Act.

73. The respondent shall not charge anything from the complainant which is not the part of the buyer's agreement.

G. Directions of the Authority:

74. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016:

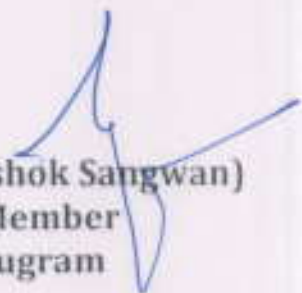
- a. The cancellation done by the respondent is invalid and hence hereby the respondent is directed to restore the unit and issue a revised account statement after adjustment of delayed possession charges.
- b. The respondent shall pay interest at the prescribed rate i.e. 10.75% per annum for every month of delay on the amount paid by the complainants from the due date of possession i.e.;

24.12.2016 till offer of possession i.e 27.12.2018 plus two months i.e 27.02.2019 as per proviso to section 18(1) of the Act read with rule 15 of the rules.

- c. The complainant is hereby directed to payback the amount of Rs. 2,49,17,553/- with interest at the prescribed rate i.e 10.75% from the date of its refund to the account of allottee till its transfer back to the respondent .
- d. The respondent shall not charge anything from the complainants which is not the part of the buyer's agreement.
- e. 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 allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.
- f. The respondent shall handover the possession of the allotted unit complete in all aspects as per specifications of buyer's agreement within 90 days.
- g. Out of amount so assessed, the respondent is entitled to deduct the amount already paid towards DPC i.e. Rs.7,75,680/-

75. Complaint stands disposed of.

76. File be consigned to the registry.



(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 07.11.2023



HARERA
GURUGRAM