

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

Complaint no. :	5965/2022
Date of filing complaint:	20.09.2022
First date of hearing:	18.01.2023
Date of decision :	03.01.2024

Sheoraj Singh and Jitender Singh Resident of: House no. 330, 2 nd Floor, Block D, Sushant Lok-2, Sector 56, Gurugram 122011.	Complainants
Versus	
M/s Shree Vardhman Infra Heights Pvt Ltd Regd. office: 302, 3 rd Floor, Indraprakash building, 21 barakhambha road, New Delhi-110001.	Respondent
CORAM:	
Shri Ashok Sangwan	Member
Shri Vijay Kumar Goyal	Member
APPEARANCE:	
Shri Sukhbir Yadav Advocate	Complainants
Shri Harshit Batra Advocate	Respondent

ORDER

1. The present complaint has been filed by the complainants/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that

the promoter shall be responsible for all obligations, responsibilities, and functions under the provisions 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, the date of proposed handing over of the possession, and the delay period, if any, have been detailed in the following tabular form:

Sr. No.	Particulars	Details
1.	Name of the project	"Shree Vardhman Victoria", village Badshapur, Sector-70, Gurugram
2.	Project area	10.9687 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no. and validity status	103 of 2010 dated 30.11.2010
5.	Name of licensee	Dial Softek Pvt. Ltd. and others
6.	RERA Registered/ not registered	Registered Registered vide no. 70 of 2017 dated 18.08.2017. Valid upto 31.12.2020
7.	Unit no.	404, Tower-E, 4 th floor (As on page 53 of complaint)
8.	Unit area	1950 sq.ft. (super-area)

	admeasuring	(As on page 53 of complaint)
9.	Date of endorsement (From original allottee to the complainants)	23.04.2015 (As on page 71 of complaint)
10.	Date of execution of Flat buyer agreement with original allottee.	20.03.2015 (As on page 50 of complaint)
11.	Date of commencement of construction work in tower in which apartment of complainants is situated.	07.05.2014 (As on page 87 of complaint)
12.	Possession clause	Clause 14(a) <i>The Construction of the Flat is likely to be completed within a period of forty (40) months of commencement of construction of the particular tower/block in which the Flat is located with a grace period of six(6) months, on receipt of sanction of the building plans/revised plans and all other approvals subject to force majeure including any restrains/restrictions from any authorities, non-availability of building materials or dispute with construction agency/workforce and circumstances beyond the control of Company and subject to timely payments by the Buyer(s) in the said Complex. No claims by way of damages/compensation shall be against the Company in case of delay in handing over the possession on account of said reasons. For the purposes of this Agreement, the date of application for issuance of occupancy/completion/part occupancy/completion certificate of the said Complex or the Flat shall be deemed to be the date of completion. The company on completion</i>

			<i>of construction shall issue a final call notice to the Buyer(s), who shall remit all dues within thirty (3) days thereof and take possession of the Flat after execution of Sale Deed. If possession is not taken by the Buyer(s) within thirty (30) days of offer of possession, the Buyer(s) shall be deemed to have taken possession for the purposes of this Agreement and for the purposes of payment of the maintenance charges, taxes, property tax or any other tax imposable upon the Flat.</i>
13.	Due date of possession	of	07.03.2018 (Calculated from the date of commencement of construction work of tower in which apartment of complainants is situated)
14.	Basic consideration	sale	Rs. 1,03,15,500/- (Page 54 of complaint)
15.	Amount paid by the complainants		Rs.1,01,97,174/- (Page 82 of reply)
16.	Offer possession	of	25.05.2023 (As on page 23 of reply)
17.	Occupation certificate		05.05.2023 (As on page 20 of reply)

B. Facts of the complaint:

- The said project of the respondent, "Shree Vardhman Victoria" bears the registration no. 70 of 2017 dated 18.08.2017. The respondent sent various communications through letters and a customer ledger to the erstwhile allottee towards the concerned unit as on 11.09.2014 asking for making payments of instalments towards the concerned unit. When it became financially difficult for Mr. Rohtash (Erstwhile allottee) to make timely payments of

instalment of the concerned unit, he expressed his desire to transfer the said unit in favour of his known contact, i.e. the complainants. Once Mr. Rohtash and the complainants came to a mutual understanding, an agreement to sell dated 16.03.2015 was executed between Mr. Rohtash and the complainants, whereby Mr. Rohtash sold/transferred the said unit in favour of the complainants at a total cost of Rs. 1,13,73,000/-.

4. It was noted in the said agreement to sell that the complainants had already paid an amount of Rs. 20,26,850/- and had further agreed to make a payment of Rs.32,54,400/- to the respondent on behalf of Mr. Rohtash who will get the unit transferred to the complainants by 15.04.2015. The said understanding was very much expressed to the respondent vide an "Application for change in right to purchase the property" which was issued to the respondent under the signatures of the erstwhile allottee, i.e. Mr. Rohtash and the signatures of the nominee/transferee(s), i.e., the complainants herein.
5. That while the process of transfer of the unit was underway, the respondent got a flat buyer's agreement dated 20.03.2015 executed in favour of the erstwhile allottee i.e. Mr. Rohtash, with an endorsement stating transfer of the said unit in favour of the complainants. The said agreement dated 20.03.2015 was executed for purchase of the unit bearing no. 404 in tower E having an approximate super area of 1950 Sq. Ft. at the base price of Rs. 1,03,15,500/-.
6. As per Cl. 14(a) of the said agreement, the flat was to be completed within 40 months from the date of commencement of

construction of the particular tower/block in which the flat is located. As per the knowledge of the complainants, the construction of tower E began on 07.05.2014. Therefore, the respondent was supposed to complete the concerned unit by 07.09.2017. Even if the 6 months grace period is taken into consideration, the concerned unit was supposed to be completed by 07.03.2018.

7. The complainants in order to arrange for funds of the flat got a house loan sanctioned from State Bank of India of Rs. 74,92,000/-.
8. The complainants even deposited the interest amount of Rs. 5,20,405/- towards the said flat to the respondent. The complainants thereafter vide cheque dated 11.04.2015 transferred an amount of Rs. 32,54,401/- towards the then balance amount payable to the respondent.
9. Thereafter, the erstwhile allottee, Mr. Rohtash issued a letter dated 11.04.2015 to the respondent for change in the right of the flat allotment/ownership. Vide the said letter, Mr. Rohtash further informed the respondent that a total sum of Rs. 53,81,251/- has already been transferred to the respondent and that the complainants' names be replaced with his name as nominees of the said flat.
10. The respondent thereafter provided the complainants with a customer ledger as on 13.06.2015 for the allotted flat containing charge wise transaction details under various head. As per the said ledger, only an amount of Rs. 2108/- stood balance as 'interest'.

11. The respondent issued a letter dated 25.06.2015 to the complainants containing a statement of account of the transactions concerning the said flat along with the construction updates in the form of photographs. As per the said statement of accounts, only an amount of Rs. 2,91,654/- had become due on basis of the fresh call of instalment which was payable by 16.07.2015.
12. The respondent thereafter issued a letter dated 08.07.2015 wherein the respondent assured that the possession of the flat will be provided to the complainants before time i.e. before completion of 40 months from 20.03.2015, which ended on 20.07.2018. The respondent further assured that construction progress will be provided at the beginning of every month to the complainants. Another such similar letter dated 23.07.2016 was shared by the respondent with the complainants.
13. Thereafter in January 2020, the respondent issued a letter dated 14.01.2020 stating that the project is undergoing finishing work and is almost complete. Vide the said letter, the respondent again gave false assurance that the tower E, i.e. the tower containing the flat of the complainants will be handed over by the end of December 2020. Since the said events happened before the imposition of nationwide lockdown due to covid-19 pandemic, the respondent in all reasonableness was late in handing over the possession of the concerned unit. In the said letter, the respondent did not mention about any further payments to be made by the complainants.

14. That the respondent vide letter dated 15.09.2021 communicated to the complainants that five towers (A, B, C, H, I) of their project 'Shree Vardhman Victoria' are completed whereas the remaining towers, i.e. D, E & F ("E" being the tower containing the complainant's flat) will be completed within 6-8 months. The respondent till date never mentioned about EEC and FFC charges to be paid by the complainants, vide the said letter the respondent again gave false timelines of handing over the possession of the concerned unit to the complainants.
15. That thereafter, despite the complainants making timely payments of all the dues as accrued from time to time, the respondent instead of making good for the losses faced by the complainants on account of delay in handing over the possession, sent a letter dated 01.03.2022 demanding an amount of Rs. 9,51,063.75/-. Out of the said amount demanded, an amount of Rs. 3,90,000/- was demanded towards EEC (External Electrification Charges) which was already a part of the IDC (Internal Development Charges) as already claimed by the respondent. These extra unlawful sums of money are being charged by the respondent only with the motive to siphon off money from the complainants and similar other allottees.
16. That, despite the complainants objecting to this unjustified demand of money towards EEC, the respondent thereafter sent another letter dated 19.04.2022 making another demand of additional amount of Rs. 5,61,063.33/- apart from the previous demand of Rs. Rs. 9,51,063.75/-, thereby making a total unjustified demand of Rs. 14,92,627.06/- towards the said unit.

17. That such an inordinate delay in delivery of possession to the allottee is an outright violation of rights of the allottees under the provisions of RERA Act as well as the agreement executed between the complainants and the respondent.

C. Relief sought by the complainants:

18. The complainants have sought the following relief(s):
- i. Direct the respondent to handover possession of the aforesaid unit in habitable condition and execute the conveyance deed in favour of complainants.
 - ii. Direct the respondent to pay interest on delayed possession at the rate determined by this Hon'ble Authority for every month of delay from due date of possession till actual handing over of possession.
 - iii. Direct the respondent to pay the balance amount to the complainants after setting-off the last demand including any future demands that may arise under the terms of flat buyer agreement.
 - iv. Restrain the respondent from raising any demands outside the terms of the flat buyer's agreement.

D. Reply by the respondent.

19. The project in question i.e., "Shree Vardhman Victoria" is being developed by the respondent in Sector-70, Gurugram, Haryana under a License issued by the Director Town and Country Planning Haryana under Haryana Development and Regulation of Urban Areas Act, 1975. It is clarified that the aforesaid License has been granted to M/s Santur Infrastructures Private Limited, a company having its registered office at E-6, Greater Kailash-I, New

Delhi in collaboration with the landowners with whom Santur has entered into a collaboration agreement qua development of the project in question. Subsequently, Santur entered into an agreement with the respondent whereby Santur assigned all its rights of the development, construction, marketing and sale of the built-up area in the project in question.

20. The first phase of the project consisting of residential towers - A, B, C, H, I and basement had been completed and ready to be occupied. An application for grant of occupation certificate ("OC") qua the said 1st phase was filed with the Director Town and Country planning Haryana on 23/02/2021. The Department of Town and Country Planning Haryana allowed the said application and on 13/07/2022 granted OC for the said phase vide its memo No. ZP-686/AD(RA)/2022/20077 dated 13/07/2022.
21. That the second phase of the project consisting of residential towers - D, E, F has also been completed and ready to be occupied. An application for grant of occupation certificate qua the said IInd Phase was filed with the Director Town and Country planning Haryana on 22/09/2022 and the Department of Town and Country Planning, Haryana allowed the said application and on 05/05/2023 granted the OC for the said phase vide its Memo No. ZP-686-Vol.-II/JD(RA)/2023/13044 dated 05/05/2023.
22. That consequent to grant of OC, the respondent started the process of delivering possession of the flats in those towers to their respective allottees. Many allottees have already taken possession of their respective flats.

23. That a flat buyer agreement dated 20/03/2015 was executed in respect of flat E-404 between Mr. Rohtash and respondent. The said agreement was further endorsed in the name of complainants on 23/04/2015 on the request of the complainants and the original allottee.
24. That the respondent vide its letter dated 25/05/2023 offered possession of the flat in question i.e., E-404 to the complainants calling upon them to clear the outstanding dues as mentioned in Appendixes A, B & C attached to the said letter and to take possession after getting the conveyance deed registered in his favor. However, the complainant did not respond to the said offer.
25. That the payment plan opted for payment of the agreed sale consideration and other charges was a construction linked payment plan. The respondent from time to time raised demands as per the agreed payment plan, however the complainant committed severe defaults and failed to make the payments as per the agreed payment plan, despite various call letters and reminders from the respondent.
26. The agreed total cost of the flat including BSP, additional charges and taxes is Rs. 1,28,70,209/- the detailed breakup is mentioned in the offer of possession sent to the complainant. The aforesaid amount does not include the maintenance related charges as detailed in appendix C of the offer of possession letter, the stamp duty and registration-related charges and the interest payable by the complainants on account of late payments and the same are separately payable by the complainants.

27. That the complainants have paid a total amount of Rs. 1,01,97,174/- out of which Rs.92,40,675.43 has been paid towards basic cost, PLC floor, covered car parking, Club membership and Rs. 9,56,498.57/- has been paid towards EDC & IDC, service tax, etc.
28. In the said agreement no definite or firm date for handing over possession to the allottee was given. However, clause 14 (a) provided a tentative period within which the project/flat was to be completed and application for OC was to be made to the competent authority was given. As the possession was to be handed over only after receipt of OC from DTCP Haryana and it was not possible to ascertain the period that DTCP, Haryana would take in granting the OC, therefore the period for handing over of possession was not given in the Agreement.
29. The tentative period i.e., 46 months for the completion as indicated in the flat buyer agreement was to commence from commencement of construction of the tower/block in which the flat was located on receipt of sanction of the building plans/all other approvals. The last approval required for commencement of construction being "Consent to Establish (CTE)" was granted to the project on 12/07/2014 by Haryana State Pollution Board. After receipt of CTE, the construction of tower in question started on or about 12/07/2014 with the laying of its foundation.
30. The said tentative/estimated period given in clause 14 (a) of the FBA was subject to conditions such as force majeure, restraint/restrictions from authorities, non-availability of building material or dispute with construction agency/work force and

circumstances beyond the control of the respondent company and timely payment of instalments by all the buyers in the said complex including the complainant.

31. Further, various other factors beyond control of respondent came into play including the following:

- i) The construction activity in Gurugram has also been hindered due to orders passed by Hon'ble NGT/State Govts. /EPCA from time to time putting a complete ban on the construction activities in an effort to curb air pollution. The Hon'ble National Green Tribunal, New Delhi (NGT) vide its order 09/11/2017 banned all construction activity in NCR and the said ban continued for almost 17 days hindering the construction for 40 days.
- ii) The district administration, Gurugram under the graded Response Action Plan to curb pollution banned all construction activity in Gurugram, Haryana vide from 01/11/2018 to 10/11/2018 which resulted in hindrance of almost 30 days in construction activity at site in compliance of direction issued by EPCAvide its notification No. EPCA-R/2018/L-91 dated 27/10/2018.
- iii) The Environmental Pollution (Prevention and Control) Authority for NCR ("EPCA") vide its notification bearing No. EPCA-R/2019/L-49 dated 25/10/2019 banned construction activity in NCR during night hours (06:00 PM to 06:00 AM) from 26/10/2019 to 30/10/2019 which was later on converted into complete 24 hours ban from

01/11/2019 to 05/11/2019 by EPCA vide its notification No. EPCA-R/2019/L-53 dated 01/11/2019.

- iv) The Hon'ble Supreme Court of India vide its order dated 04/11/2019 passed in Writ Petition No. 13029/1985 titled as "M.C. Mehta, vs. Union of India" completely banned all construction activities in NCR which restriction was partly modified vide order dated 09/12/2019 and was completely lifted by the Hon'ble Supreme Court vide its order dated 14/02/2020.
- v) The unprecedented situation created by the Covid-19 pandemic presented yet another force majeure event that brought to halt all activities related to the project including construction of remaining phase, processing of approval files etc. The Ministry of Home Affairs, GOI vide notification dated March 24, 2020 bearing no. 40-3/2020-DM-I(A) recognised that India was threatened with the spread of Covid-19 epidemic and ordered a complete lockdown in the entire country for an initial period of 21 (twenty) days which started from March 25, 2020. By virtue of various subsequent notifications, the Ministry of Home Affairs, GOI further extended the lockdown from time to time. Even before the country could recover from the 1st wave of Pandemic, the second wave of the same struck very badly in the March/April 2021 disrupting again all activities. Various state governments, including the Government of Haryana have also enforced several

strict measures to prevent the spread of Covid-19 pandemic including imposing curfew, lockdown, stopping all commercial, construction activity. The pandemic created acute shortage of labour and material. The nation witnessed a massive and unprecedented exodus of migrant labourers from metropolis to their native village. Due to the said shortage the construction activity could not resume at full throttle even after lifting of restrictions on construction sites.

It is submitted that all the above factors/force majeure events have resulted so far in wastage of almost 2 ½ years.

32. The complainants have sought reliefs under section 18 of the RERA Act, but the said section is not applicable in the facts of the present case and as such the complaint deserves to be dismissed. It is submitted that the operation of Section 18 is not retrospective in nature and the same cannot be applied to the transactions that were entered prior to the RERA Act came into force. In the present case also, the flat buyer agreement was executed much prior to the date when the RERA Act came into force and as such section 18 of the RERA Act cannot be made applicable to the present case.
33. That the FBA executed in the present case did not provide any definite date or time frame for handing over of possession of the apartment to the complainants and on this ground alone the refund and/or compensation and/or interest cannot be sought under section 18 of RERA Act. Even the Clause 14(a) of the FBA merely provided a tentative/estimated period for completion of

- construction of the flat and filing of application for occupancy certificate with the concerned Authority. After completion of construction the respondent was to make an application for grant of occupation certificate (OC) and after obtaining the OC, the possession of the flat was to be handed over.
34. That the tentative period given in clause 14(a) for completion of construction was subject to timely payments of the installments by the complainants. The said clause provided reciprocal promises to be performed by the parties and their order of performance is also specified therein. The respondent's promise to complete the construction within the period given in the said clause was dependent upon timely payment of the installments by the complainants. Since the complainants failed to make payment as per the agreed payment schedule the respondent was under no obligation to complete the construction within the given period. As such the complainants cannot be allowed to seek interest and/or compensation or to rescind the contract and seek a refund of the amount on the grounds that the construction was not completed within the given period.
35. That issue of grant of interest/compensation for the loss occasioned due to breaches committed by one party of the contract is squarely governed by the provisions of section 73 and 74 of the Contract Act, 1872 and no compensation can be granted de-hors the said sections on any ground whatsoever. A combined reading of the said sections makes it amply clear that if the compensation is provided in the contract itself, then the party complaining the breach is entitled to recover from the defaulting

party only a reasonable compensation not exceeding the compensation prescribed in the contract and that too upon proving the actual loss and injury due to such breach/default. On this ground compensation, if at all to be granted to the complainants, cannot exceed the compensation provided in the contract itself.

36. The complaint is bad for non-joinder of parties. The State Bank of India, who had been provided a loan to the complainants for purchase of the said flat in question, is also a stake holder and necessary party in the present case. The complainants have entered into a tripartite agreement dated 24/04/2015 with the said lender.

E. Jurisdiction of the authority:

37. The plea of the respondent regarding the rejection of the complaint on the grounds of jurisdiction stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.1 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 the entire Gurugram District for all purposes 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

Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per the 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 with the obligations cast upon the promoters, the allottees, and the real estate agents under this Act and the rules and regulations made thereunder.

38. So, given 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 complainants at a later stage.

F. Findings on the objections raised by the respondent:**F.1 Objections regarding force Majeure.**

39. The respondent-promoter has raised the contention that the construction of the tower in which the unit of the complainant is situated has been delayed due to force majeure circumstances such as orders passed by the district administration Gurugram, Hon'ble Supreme court, NGT, shortage of labor and construction material, Covid 19 etc. The pleas of the respondent advanced in this regard are devoid of merit. First of all, the possession of the unit was to be offered by 07.03.2018. The events alleged by the

respondent do not have any impact on the project being developed by the respondent. Moreover, the orders passed were for a very short period of time and thus, cannot be said to impact the respondent-builder leading to such a delay in the completion. Furthermore, the respondent should have foreseen such situations. Thus, the promoter respondent cannot be given any leniency on the basis of aforesaid reasons, and it is a well-settled principle that a person cannot take benefit of his own wrong.

F.II Objection of the respondent regarding due date of possession.

40. The respondent contends that there was no definite or firm date for handing over possession to the allottee and that the clause 14(a) of the agreement to sell only mentioned a tentative period for offer of possession. It stated that the possession was to be handed over only after obtained the occupation certificate from the DTCP. Furthermore, the time period given in the said clause was not the essence of the contract. On the other hand, the complainants contend that the clause 14(a) of the flat buyer's agreement dated 20.03.2015 is unequivocal in its interpretation. They contend that as per clause 14(a), the flat was to be delivered in 40 months from the date of construction of tower in which the flat was located. Therefore, the flat was to be delivered by 07.09.2017 or 07.03.2018 (Including grace period).
41. On perusal of the record brought before this Authority, and on examination of clause 14(a) of the said flat buyer's agreement, the Authority finds merit in the contention of the complainants. The clause 14(a) is reproduced below for ready reference.

"The Construction of the Flat is likely to be completed within a period of forty (40) months of commencement of construction of the particular tower/block in which the Flat is located with a grace period of six(6) months, on receipt of sanction of the building plans/revised plans and all other approvals subject to force majeure including any restrains/restrictions from any authorities, non-availability of building materials or dispute with construction agency/workforce and circumstances beyond the control of Company and subject to timely payments by the Buyer(s) in the said Complex. No claims by way of damages/compensation shall be against the Company in case of delay in handing over the possession on account of said reasons. For the purposes of this Agreement, the date of application for issuance of occupancy/completion/part occupancy/completion certificate of the said Complex or the Flat shall be deemed to be the date of completion. The company on completion of construction shall issue a final call notice to the Buyer(s), who shall remit all dues within thirty (3) days thereof and take possession of the Flat after execution of Sale Deed. If possession is not taken by the Buyer(s) within thirty (30) days of offer of possession, the Buyer(s) shall be deemed to have taken possession for the purposes of this Agreement and for the purposes of payment of the maintenance charges, taxes, property tax or any other tax imposable upon the Flat."

42. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement, and the complainants not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in

fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment time period 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.

43. As per the aforementioned clause, the construction of the flat was to be completed within 40 months of commencement of construction of the particular tower in which the flat is located with an additional grace period of 6 months. Since, the grace period is unqualified and unconditional, therefore the same is allowed. In view of above, the due date of possession come out to 07.03.2018.

F.III Objection of the respondent regarding non-joinder of parties.

44. The respondent contends that the state bank of India provided loan for the complainant's unit and had entered into a tri-partite agreement for the same and it not being a party to the instant complaint makes the instant complaint bad in law for non-joinder of parties and is therefore liable to be dismissed.
45. On perusal of the record brought before this Authority, it is of the view that the contention of the respondent has no merit. The bank is not a "necessary party" to the instant complaint, furthermore,

no liability is created on the said bank qua the reliefs sought in the said complaint. The relief sought by the complainants is handover of physical possession, payment of DPC, etc. The issues raised in the complaint has no bearing on the bank and therefore it is not a necessary party to the said complaint.

F.IV Objection of the respondent regarding compensation that can be allowed under section 73 and 74 of the Indian contract Act, 1872.

46. The respondent contends that as per the Indian contract act, the compensation that can be provided to the complainants due to breach of contract is governed by section 73 and 74 of the said Act and that the compensation provided for the said breach has to be reasonable and as per the terms of the contract signed between the parties.
47. On perusal of the record brought before this Authority, it is of the view that the Real estate (Regulation and Development) Act, 2016 differentiates between the claim for compensation for breach of contract and the right of delayed possession charge as per section 18 of the Act of 2016. Compensation and DPC are two separate remedies and while the former are to be filed before the Adjudicating officer, the latter has to be filed before the Authority. The Right of delayed possession charge is a statutory right and hence supersedes any contract entered between the parties. Therefore, the respondent's contention has no merit.

F.V Objection of the respondent regarding jurisdiction of the complaint w.r.t the apartment buyer's agreement executed before coming into force of the Act.

48. The respondent submitted that the complaint is neither maintainable nor tenable and is liable to be outrightly dismissed as the apartment buyer's agreement was executed between the parties before the enactment of the Act and the provision of the said Act cannot be applied retrospectively.
49. The authority is of the view that the provisions of the Act are quasi-retroactive to some extent in operation and would apply to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. The Act nowhere provides, nor can be so construed, that all previous agreements would be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of ***Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)*** decided on 06.12.2017 and which provides as under:

"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does

not contemplate rewriting of contract between the flat purchaser and the promoter...

122. *We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."*

50. Also, in appeal no. 173 of 2019 titled ***Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya***, in the order dated 17.12.2019 the Haryana Real Estate Appellate Tribunal has observed-

"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."

51. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement

subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of any other Act, rules and regulations made thereunder and are not unreasonable or exorbitant in nature. Hence, in the light of the above-mentioned reasons, the contention of the respondent w.r.t. jurisdiction stands rejected.

G. Findings on relief sought by the complainants.

G.I Direct the respondent to hand over possession of the aforesaid unit.

52. In the instant case, the flat buyer agreement was executed between the complainants and the respondent on 20.03.2015, and as per clause 14(a) of the said agreement, the possession was to be handed over within 40 months (Additional grace period of 6 months) from the date of commencement of construction of tower in which the flat is located. The said clause is reproduced below:

"The Construction of the Flat is likely to be completed within a period of forty (40) months of commencement of construction of the particular tower/block in which the Flat is located with a grace period of six(6) months, on receipt of sanction of the building plans/revised plans and all other approvals subject to force majeure including any restrains/restrictions from any authorities, non-availability of building materials or dispute with construction agency/workforce and circumstances beyond the control of Company and subject to timely payments by the Buyer(s) in the said Complex. No claims by way of damages/compensation shall be against the Company in case of delay in handing over the possession on account of said reasons. For the purposes of this Agreement, the date of application for issuance of

occupancy/completion/part occupancy/completion certificate of the said Complex or the Flat shall be deemed to be the date of completion. The company on completion of construction shall issue a final call notice to the Buyer(s), who shall remit all dues within thirty (3) days thereof and take possession of the Flat after execution of Sale Deed. If possession is not taken by the Buyer(s) within thirty (30) days of offer of possession, the Buyer(s) shall be deemed to have taken possession for the purposes of this Agreement and for the purposes of payment of the maintenance charges, taxes, property tax or any other tax imposable upon the Flat."

Therefore, the due date of possession comes out to be 07.03.2018. However, there has been a delay in completion of the said flat. The respondent obtained the occupation certificate on 05.05.2023 and thereafter issued an offer of possession on 25.05.2023. The complainants, however, did not take the possession due to dispute regarding payment of dues.

53. It is the view of this Authority that as per section 19(10) of Real estate (Regulation & Development) Act, 2016, the complainants were under an obligation to take physical possession within a period of two months of the issuance of occupation certificate for the said unit. The said section is reproduced hereunder:

"19(10) Every allottee shall take physical possession of the apartment, plot or building as the case may be, within a period of two months of the occupancy certificate issued for the said apartment, plot or building, as the case may be."

54. In view of the aforesaid reasoning, the complainant is bound to take possession of said flat.

G.II Direct the respondent to pay interest on delayed possession at the rate determined by this Hon'ble Authority for every

month of delay from due date of possession till actual handing over of possession.

G.III Direct the respondent to pay the balance amount to the complainants after setting-off the last demand including any future demands that may arise under the terms of flat buyer agreement.

55. The aforesaid reliefs being connected are dealt with together.

56. In the instant case, the complainant wishes to continue with the project and is seeking DPC as provided under the proviso to sec 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."

57. In the instant case, the possession of the aforesaid unit was to be delivered on 07.03.2018 as per clause 14(a) of the agreement dated 20.03.2015 but the same was not delivered. The relevant clause of the agreement signed between the parties is reproduced below:

"The Construction of the Flat is likely to be completed within a period of forty (40) months of commencement of construction of the particular tower/block in which the Flat is located with a grace period of six(6) months, on receipt of sanction of the building plans/revised plans and all other approvals subject to force majeure including any restrains/restrictions from any authorities, non-availability of building materials or dispute with construction agency/workforce and circumstances beyond the control of Company and

subject to timely payments by the Buyer(s) in the said Complex. No claims by way of damages/compensation shall be against the Company in case of delay in handing over the possession on account of said reasons. For the purposes of this Agreement, the date of application for issuance of occupancy/completion/part occupancy/completion certificate of the said Complex or the Flat shall be deemed to be the date of completion. The company on completion of construction shall issue a final call notice to the Buyer(s), who shall remit all dues within thirty (3) days thereof and take possession of the Flat after execution of Sale Deed. If possession is not taken by the Buyer(s) within thirty (30) days of offer of possession, the Buyer(s) shall be deemed to have taken possession for the purposes of this Agreement and for the purposes of payment of the maintenance charges, taxes, property tax or any other tax imposable upon the Flat."

58. **Admissibility of delay possession charges at prescribed rate of interest:** Proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

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

(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India's 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.

59. 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.
60. Consequently, as per the website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as of the date i.e., 03.01.2024 is 8.85%. Accordingly, the prescribed rate of interest will be the marginal cost of lending rate +2% i.e., 10.85%.
61. The definition of the 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 that 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;"*

62. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., **10.85%** by the respondent/ promoter which is the same as is being granted to it in case of delayed possession charges.
63. On consideration of the circumstances, the documents, submissions made by the parties, and based on the findings of the authority regarding contravention as per provisions of rule 28(2), the Authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of clause 14(a) of the agreement executed between the parties on 20.03.2015, the possession of the subject unit was to be delivered within 46 months from the date of commencement of construction of tower in which the flat is located. Therefore, the due date for handing over possession was 07.03.2018. Accordingly, it is the failure of the respondent/promoter to fulfil its obligations and responsibilities as per the agreement to hand over the possession within the stipulated period. The authority is of the considered view that there is a delay on the part of the respondent to offer possession of the allotted unit to the complainants as per the terms and conditions of the buyer's agreement dated 20.03.2015 executed between the parties.
64. Accordingly, it is the failure of the promoter to fulfil its obligations and responsibilities as per the agreement dated 20.03.2015 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 allottee shall be paid, by the promoter, interest for every month of a delay from the due date of possession i.e. 07.03.2018 till the date of the offer of possession i.e. 25.05.2023 plus 2 months at the prescribed rate i.e., 10.85 % p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules.

65. Further, it is brought to the notice of this Authority that a certain amount is yet to be paid by the complainants to the respondent. The complainants have prayed that the amount yet to be paid by them to the respondent be set-off against the amount payable by the respondent to them in lieu of the DPC. The Authority allows the said prayer, and the respondent shall issue a fresh statement of accounts to the complainants after adjusting the amount to be paid by complainants from the DPC payable by the respondent.

G.IV Restrain the respondent from raising any demands outside the terms of the flat buyer's agreement.

66. The complainants have prayed that no demands shall be raised outside of the terms of FBA. Though no specific pleadings, averments have been advanced by the complainants against particular demands, but in the interests of justice, equity, and good conscience, the said prayer is allowed and therefore the respondent shall not charge anything which is not part of the FBA.


H. Directions issued by the Authority:

67. Hence, the Authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance with obligations cast upon the promoter as per the

functions entrusted to the Authority under section 34(f) of the Act of 2016:

- I. The respondent is directed to pay delay possession charges (After setting off the amount payable by the complainants to the respondent) to the complainants against the paid-up amount at the prescribed rate of 10.85% p.a. for every month of a delay from the due date of possession i.e. 07.03.2018 till the date of offer of possession i.e. 25.05.2023 plus two months, as per section 18(1) of the Act of 2016 read with rule 15 of the rules.
- II. The respondent is directed to handover possession to the complainants and execute the conveyance deed.
- III. The rate of interest chargeable from the allottee by the promoter, in case of default, shall be charged at the prescribed rate i.e., 10.85% 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.
- IV. The respondent is directed to issue a fresh statement of accounts after adjusting/setting-off the amount payable by the complainants against the DPC payable by the respondent to the complainants.
- V. The respondent shall not charge anything from the complainants which is not part of the buyer's agreement.
- VI. A period of 90 days is given to the respondent to comply with the directions given in this order failing which legal consequences would follow.

68. Complaint stands disposed of.
69. File be consigned to the Registry.


Ashok Sangwan
Member


Vijay Kumar Goyal
Member

Haryana Real Estate Regulatory Authority, Gurugram

03.01.2024



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