BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 3725 of 2021
Date of complaint : 14.09.2021
Order pronounced on: 14.05.2024

Shirish Shorewala
R/o: 18/14, Anand Villas, Civil Lines, Delhi. — Complainant

Versus

M/s Vatika Limited.
Registered office: Tower-A, Vatika City Centre, 5th Floor, near Kherki Daula Toll Plaza, Sector-83, Gurugram, Haryana-122004. — Respondent

CORAM:

Shri Arun Kumar — **Chairman**
Shri Vijay Kumar Goyal — **Member**
Shri Ashok Sangwan — **Member**

APPEARANCE:

Ms. Ritu Bhalla (Advocate) — Complainant
Shri Harshit Batra (Advocate) — Respondent

ORDER

1. The present complaint has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act,2016) 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 thereunder or to the allottee as per the agreement for sale executed *inter se*.

A. Unit and project related details

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

S.No.	Particulars	Details
1.	Name of the project	"Gurgaon-City Homes", Sector 83, Gurugram
2.	Project type	Residential Housing Colony
3.	Welcome letter	20.08.2008 [Page 54 of complaint]
4.	Booking made by the complainant towards independent floor and the booking amount was acknowledged by the respondent vide letter dated	28.07.2008
5.	Allotment letter in respect of apartment no. B7-803	08.11.2010 [Page 58 of complaint]
6.	Unit no.	803, 8th floor, B7 admeasuring 1325.2 sq. ft. (super area) (Page 71 of complaint) **Increase in super area as per intimation of possession dated 10.10.2015:** 2315 sq. ft. (Increased by 989.8 sq. ft./ by 57.23%) (Page 115 of complaint)
7.	Date of execution of buyer's agreement	22.07.2011 (Page 68 of complaint)

8.	Possession clause	***10.1 Schedule for Possession of the said Apartment*** *The Company based on its present plans and estimates and subject to all just exceptions, contemplates to complete construction of the said Building/ said apartment* ***within a period of three years from the date of execution of this agreement*** *unless there shall be delay or there shall be failure due to reasons mentioned in Clauses (11.1), (11.2), (11.3) and Clause (39) or due to failure of Allottee(s) to pay in time the price of the said Apartment along with all other charges and dues in accordance with the schedule of payments given in Annexure III or as per the demands raised by the Company from time to time or any failure on the part of the Allottee(s) to abide by any of the terms or conditions of this Agreement.* [Page 78 of complaint]
9.	Due date of possession	22.07.2014 (Calculated as three years from date of execution of plot buyer's agreement)
10.	Total sale consideration	Rs.38,02,795/- (As per apartment buyer agreement dated 22.07.2011, page 71 of complaint)
11.	Paid up amount	Rs.33,10,956/- (As per SOA dated 09.10.2015 on page 121 of complaint)
12.	Offer of possession	10.10.2015 (Page 115 of complaint) **Note: This offer of possession is not valid as the same was made prior to receipt of OC**
13.	Occupancy Certificate	Not obtained for Tower-B-7 (OC dated 30.08.2016, Page 46 of reply)

14.	Emails by the complainant w.r.t increase in area of the unit	29.10.2015 (Page 124-127 of the complaint)
15.	Reminder/ Demand Letter	03.08.2011, 04.11.2015, 04.02.2016, (Page 107, 128, 137 of complaint)
16.	Notice for termination	15.05.2021 (Page 151 of complaint)
17.	Cancelation letter dated	24.06.2021 [Not placed on record]
18.	Legal notice by the complainant to respondent to handover possession or to refund paid-up amount with interest	09.08.2021 [Page 156 of complaint]

B. Facts of the complaint:

3. The complainant has made the following submissions: -

I. That on the assurances given by the respondents as well as their agents, the complainant was much influenced with the assurance conveyed by the respondents through their wide publicity and the complainant booked an independent floor in the said project "Vatika India Next" being developed & constructed by the respondent no. 1. Complainant and his two friends namely Mrs. Kavita Khanna and her husband and Mrs. Neeta Monga booked their individual floors together, before booking their flats, the complainant alongwith his friends met with the officials of the respondent and told that they want to purchase their independent floors on the same floor or if it's in a low-rise, then they want their floors in same tower/plot.

II. The officials of the respondent no. 1 told the complainant and his friends that there are two 3 BHK flats and one 2 BHK flat available on the same floor. On 28.07.2008, the complainant and his friends gave their consent and

booked three flats/ units in the above said project. The complainant booked his flat of 2 BHK at the rate of Rs.2443/- per sq. ft. and at the time of booking /registration officials of the respondents duly assured the complainant that the respondent would deliver the physical possession of the above mentioned flat within 36 months i.e. three years and after that the complainant have paid an amount of Rs.5,00,000/- against priority No. 2BR/148 for 2 BHK Flat/Floor vide cheque bearing no. 81447 dated 28.07.2008.

III. That thereafter, the complainant and his friends approached the officials of the respondent and requested to execute buyer's agreement but the officials of the respondent linger on the matter on one pretext or the other till 2010 and instead the respondent demanded the next installment of the above mentioned flat/unit/priority number, on this the complainant and his friends requested to their officials to issue the allotment letter of their flats/units, then they will pay the installments.

IV. That in the month of July, 2010, the respondent called the complainant and his friends and offer a new unit bearing nos. B7-801, 802 (3BHK) and 803 (2 BHK) in "City Homes" situated at Sector-83, Gurugram, Haryana with an increased area of the flat/unit without any prior consent or permission of the complainant and his friends. Complainant objected on the same but the officials of the respondent forced the complainant to accept the same stating that the plan has changed. Complainant and his friends left with no other option, gave their consent and agreed for the same. After repeated requests of the complainant and his friends, the respondent executed a apartment buyer agreement dated 22.07.2011 in respect of the flat bearing No. B7-803 of the complainant with increasing area from 1180 Sq. Ft. to 1325 Sq. Ft.

V. That the complainant paid the installment as and when demanded by the respondents till the year, 2015. The complainant paid a total sum of Rs. 33,10,954/- to the respondent in respect of the above said unit/floor. That at the time of booking of the flat, the total sale consideration of the said flat/unit was Rs.32,19,000/- and after re-allotment, the respondent increased this amount to Rs.38,02,795/- i.e. total sale consideration of the new flat/unit by increasing the area of the flat/unit.

VI. That in the middle of October, 2015, the complainant and his friends received a letter dated 10.10.2015 from the respondent and the complainant shocked to see that the respondent have again increased the area of the flat of the complainant from 1325 sq. ft. to 2315 sq. ft. without any prior notice, intimation or consent of the complainant and his friends. On this, the complainant alongwith his friends, visited the office of the respondent on dated 19.11.2015 and asked about the same, and officials of the respondent told the complainant that due to change in FSI, the particular flat no. 803 has been changed into duplex and for which they were supposed to provide them floor plan along all other details and also offered the complainant for an alternate flat/unit on first floor, which the complainant denied as the complainant and his friends want to take the flat/unit on the same floor. Complainant and his friends booked their flats/units on the same condition and the officials of the respondent agreed for the same.

VII. That after this, the complainant sent emails regarding the mistake in writing the area of the flat of the complainant i.e. 2315 Sq. Ft. instead of 1325 Sq. Ft. and also sent emails regarding resolving the issues but not satisfactory reply was received from the respondent and further complainant and his friends denied to accept their flat/unit in different way, then the officials of the

respondents assured the complainant and his friends to resolve the matter within a short span of time.

VIII. That the complainant and his friends continuously enquired the officials of the respondent in order to clear the plan but the officials of the respondent delayed the matter on one pretext or the other, complainant sent several e-mails to the respondent and thereafter, complainant and his friends visited the respondent's office to discuss their issues on which respondent seeked some time to resolve the concerns of complainant and his friends followed by an email dated 12.12.2015 promising to resolve the matter. However, on 18.02.2016, the respondent sent a demand letter on which complainant and his friends visited the respondent's office with cheques to clear the due amount but the respondent seeked more time to resolve the issue of allotting the unit/flat of complainant on same floor/tower, as complainant and his friends had booked their flats/units on this condition.

IX. That after sufficient wait of respondent to resolve the matter, the complainant and his friends sent a letter to the respondent to clear the status of their flats/ units. Instead of resolving the issue, respondents again sent a demand notice to complainant and his friends, demanding the amount illegally and unlawfully. On which, complainant and his friends again visited to the office of the respondent to clear the status of the flat no. B7-803, and asked the respondents if respondent is are ready to give the possession of the flat no. 803 on the same rate i.e. Rs.2443/- per sq. ft. as mentioned in the Buyer Agreement, and to waive off interests thereupon, the complainant and his friends are ready to take the possession immediately by clearing the entire dues but no fruitful came out.

X. That on 15.05.2021, respondents sent a termination notice to the complainant and his friends through e-mails stating that if the dues of the complainant would not be cleared then the respondent would terminate the flats/ units of the complainant and his friends while they were/are still ready to take the same on the rates as agreed by the respondent at the time of booking and after waiving off the interest. The complainant and his friends visited the office of the respondents in order for the redressal of their grievance but the requests of the complainant and his friends fell on the deaf ears and the officials of the respondents flatly refused to do so.

XI. That the respondents intentionally and wilfully wanted to usurp the hard earned money of the complainant and his friends in an unlawful and illegal manner. Due to their above said acts and conducts the complainant has to suffer a huge economic loss, mental pain, agony. The respondents knowingly, intentionally with ulterior motives and malafide intentions did not handover the physical possession of the flat/unit to the complainant which is categorical, default and deficiency in service on the part of respondent.

XII. That after termination notice of the unit/flat of the complainant and his friends, visited the office of the respondents many times and asked about the reason of termination of their units/flats even after receiving more than 90% amount from the complainant and his friends, but the officials of the respondent linger on the matter on one pretext or the other and finally in the month of July, 2021, the officials of the respondent refused to withdraw their termination notice and to restore the booking of the complainant and his friends and to listen the legal and genuine request and demanded the interest amount which are illegally charged by the respondent. The terms

and conditions of the buyer's agreement are one sided as the respondent have not fulfilled the terms and conditions of the agreement at any point of time.

XIII. The complainant and his friends again and again visited the office of the respondent and requested them to give the total demand of the flats booked by them after waive of the interest as this amount of interest was due to delay in clearing the issues on the respondent's side only.

XIV. That after receiving a sum of Rs.33,10,954/- from the complainant, the respondent illegally charged the amount in respect of interest on the due amount but the respondent are not clearing the issues raised by the complainant and his friends regarding increasing of area of the flat and the amount which was raised by making delayed interest on the balanced amount of the complainant and his friends. It is further mention herein that the friends of the complainant have not paid the balance amount of their units only because of the issue of the complainant's flat, as they booked three units/flats together and the same is fully in notice and knowledge of the officials of the respondent.

XV. That the respondent had offered the flat of the complainant on the same rate after so many requests of the complainant and his friends but have illegally charged the interest upon the dues of the flats of the complainant's friends which was not delayed by the them but delayed by the respondent themselves in handing over the actual physical possession of the flat which is due from 2011 to till date and not resolving the issues. In this way, the respondent wants to recover the amount for the increasing area of the complainant's flat from his friends in the way of interest on dues of their units.

XVI. That the complainant and his friends have already paid more than 80% amount of the total sale consideration of their flats/units but the respondent using the same on their personal uses and enjoying the same.

XVII. That complainant is always willing and ready to pay the remaining cost of the flat but the respondents refused to accept the same from the complainant as they does not want to deliver the flats/units to the complainant and his friends, intentionally and unlawfully.

C. Relief sought by the complainant:

4. That pursuant to the amendment of relief application dated 23.02.2022, the following reliefs were sought by the complainant:

i. To set aside the cancellation letter dated 15.05.2021.

ii. To handover the actual physical possession of the flat bearing unit no. B7-803, admeasuring 2315 sq. ft. on 8th floor in the project "City Homes" of the respondents situated at Sector-83, Gurugram, Haryana.

iii. To pay interest at applicable rate on account of delay in offering possession on amount of Rs.33,10,956/- paid by the complainant from the date of payment till actual physical handover of flat/unit.

iv. To execute the conveyance deed/sale deed in favour of the complainant in respect of the said unit/flat.

v. To pay compensation to the tune of Rs.20,00,000/- and litigation charges to the tune of Rs.1,00,000/-.

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

D. Reply by the respondent:

5. The respondent contested the complaint on the following grounds: -

i. That the complainant herein, learned about the project launched by the respondent titled as 'City Homes -**Vatika India Next**' *(herein referred to as **'Project'**)* situated at Sector 83, Gurgaon and approached the respondent repeatedly to know the details of the said project. The complainant further inquired about the specification and veracity of the project and was satisfied with every proposal deemed necessary for the development of the project.

ii. That complainant after having keen interest in the project constructed by the respondent, vide booking application dated 28.07.2008, booked a residential unit bearing no. B7-803 *(herein referred to **'Unit'**)* admeasuring to 2315 sq. ft., situated at sector-83 was allotted to the complainant.

iii. That on 21.09.2011 apartment buyer agreement *(herein referred to as **'Agreement'**)* was executed between the complainant and the respondent, wherein, a unit bearing no. B7-803 was allotted to the complainant in the said project for a total sale consideration of Rs.66,87,800/-. That as per the agreement the construction of the apartment was estimated to be completed within 36 months in read with clause(s) 11.1, 11.2, 11.3 & 38, the same was subject to the midway hindrances which were beyond the control of the respondent.

iv. That complainant was aware of terms and conditions under the aforesaid agreement and post being satisfied with each and every term agreed to sign upon the same with free will and consent without any demur. Also, the complainant knew that in case the project is delayed due to any event/reason beyond the control then the respondent shall be entitled for extension of time period in handing over the possession. Further, the complainant was obligated to make instalments according to the agreement and the respondent was not required to issue notices for

payments. Despite being aware of respondent's construction challenges, the complainant, having paid only partial amount.

v. That the respondent is committed to complete the development of the project and deliver the unit of the allottee as per the terms and conditions mentioned under the agreement. That the developmental work of the said project was slightly delayed due to the reasons which were beyond the control of the respondent company.

vi. That on 10.10.2015 complainant was offered letter of offer of possession in compliance with the agreement which specifically reflects that the completion of the contractual obligation was fulfilled by the respondent. However, the complainant failed to accept the offer within the prescribed period as mentioned period under the agreement and moreover, the same was intimated in the contours of the letter for offer of possession.

6. All other averments made in the complaint were denied in toto.

7. Copies of all the relevant documents have been filed and placed on record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of those undisputed documents and oral as well as written submissions made by the parties.

E. Jurisdiction of the authority

8. 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

9. 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

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

> ***Section 11....*** *(4) 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.*

11. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

F. Findings on the relief sought by the complainant.

F.I To set aside the cancellation letter dated 15.05.2021.

F.II To handover the actual physical possession of the flat bearing unit no. B7-803, admeasuring 2315 sq. ft. on 8th floor in the project "City Homes" of the respondents situated at Sector-83, Gurugram, Haryana.

12. The above mentioned relief no. F.I & F.II as sought by the complainant is being taken together as the findings in one relief, as it will definitely affect the result of the other reliefs and these reliefs are interconnected.

13. The complainant states that the complainant had booked the unit in the project "Gurgaon City Homes" and apartment buyer's agreement was executed on 22.07.2011 and due date of delivery was 22.07.2014. He further submitted that as per the original agreement the area of 1325 sq. ft. which was unilaterally increased to 2315 sq. ft. later on. Complainant had paid a sum of Rs.33,10,956/- against total sale consideration of Rs.38,02,795/-. Further, respondent raised a demand of Rs.41,63,854/- for increased area.

14. On the contrary, the counsel for the respondent states that intimation of offer of possession was made on 10.10.2015 however the occupation certificate was obtained on 30.08.2016 and further states that it was well informed in the offer of possession that the area of the property has been increased to 2315 sq. ft. The respondent submitted that the complainant had agreed to take possession of all the three flats i.e. unit no. 801, unit no. 802 and unit no. 803 in tower B-7 in the said project together and agreed on the demand of Rs.13,51,065/- for unit no. 803. However, after repeated reminders the complainant did not pay the said amount and intimation of cancellation was made on 15.05.2021 and finally the unit was terminated on 24.06.2021 and third-party rights has also been created by the respondent on 27.12.2022.

15. However, the counsel for complainant stated that the respondent/builder illegally terminated the subject unit and created third party rights. As per orders of the authority dated 02.02.2022, the respondent was restrained from creating third party rights of the said unit. On the contrary, the respondent states that vide the said order authority adjourned the matter on 08.04.2022 and during the course of proceeding dated 08.04.2022, the authority did not pass any direction to continue the restraining order passed vide order dated 02.02.2022. Thereafter, in none of the subsequent hearings, the authority

passed any order to continue the interim order passed vide hearing dated 02.02.2022.

16. Before coming to the facts of the case, it is necessary to clarify the validity of offer of possession. After valid and lawful offer of possession, the liability of promoter for delayed offer of possession comes to an end. On the other hand, if the possession is not valid and lawful, the liability of promoter continues till valid offer is made and allottee remains entitled to receive interest for the delay caused in actual handing over of valid possession. The authority is of considered view that a valid offer of possession must have following components:

    i. Possession must be offered after obtaining occupation certificate;
    ii. The subject unit should be in a habitable condition;
    iii. The possession should not be accompanied by unreasonable additional demands.

17. As per lause 10.1 of the buyer's agreement provides the time period of handing over possession and the same is reproduced below:

> *"The Company based on its present plans and estimates and subject to all just exceptions, contemplates to complete construction of the said Building/ said apartment* ***within a period of three years from the date of execution of this Agreement*** *unless there shall be delay or there shall be failure due to reasons mentioned in Clauses (11.1), (11.2), (11.3) and Clause (39) or due to failure of Allottee(s) to pay in time the price of the said Apartment along with all other charges and dues in accordance with the schedule of payments given in Annexure III or as per the demands raised by the Company from time to time or any failure on the part of the Allottee(s) to abide by any of the terms or conditions of this Agreement..."*
>
> ***(Emphasis Supplied)***

18. The authority has gone through the possession clause of the agreement. At the outset, it is relevant to comment on the pre-set possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and the complainant not being in default under any provision of this agreement and in compliance with all provisions,

formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions is 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 date for handing over possession loses its meaning.

19. The buyer's agreement is a pivotal legal document which should ensure that the rights and liabilities of both builder/promoter and buyer/allottee are protected candidly. The flat/unit agreement lays down the terms that govern the sale of different kinds of properties like residentials, commercials etc. between the builder and the buyer. It is in the interest of both the parties to have a well-drafted buyer's agreement which would thereby protect the rights of both the builder and buyer in the unfortunate event of a dispute that may arise. It should be drafted in the simple and unambiguous language which may be understood by a common man with an ordinary educational background. It should contain a provision with regard to stipulated time of delivery of possession of the unit, plot or building, as the case may be and the right of the buyer/allottee in case of delay in possession of the unit.

20. It is observed that the respondent offered the possession of the subject unit on 01.08.2015 without obtaining occupation certificate. It is important to note that till date no occupation certificate has been received of the subject unit in Tower-7. Hence, at the outset the said offer of possession failed to fulfil the first and foremost criteria of the valid offer of possession. Hence, the same cannot be regarded as a valid offer of possession. It is important to note that respondent/builder has not obtained occupation certificate yet.

21. Further, the complainant has taken a plea that at the time of offer of possession the area was increased to 2315 sq. ft. and further raised demand of Rs. 41,63,854/-. The respondent in its defence submitted that increase in super area was duly agreed by the complainant at the time of booking/agreement and the same was incorporated in the buyer agreement. Relevant clauses no. 1.4 of the agreement is reproduced hereunder:

> *It is made clear by the Company and the Allottee agrees that the sale price of the said Apartment shall be calculated on the basis of its super area (as per the definition of super area given in Annexure-II and that the super area stated in this Agreement is tentative and is subject to change till the construction of the said Building is complete. The final super area of the said Apartment shall be confirmed by the Company only after the construction of the said Building is complete and occupation certificate is granted by the competent authority (ies). The total price payable for the said Apartment shall be recalculated upon confirmation by the Company of the final super area of the said Apartment and any increase or reduction in the super area of the said Apartment shall be payable or refundable, as the case may be, without any interest, at the same rate per square ft as agreed in clause (1.2) of this Agreement. If there shall be an increase in super area, the Allottee agrees and undertakes to pay for the increase in super area immediately on demand by the Company and if there shall be a reduction in the super area, then the refundable amount due to the Allotte shall be adjusted by the Company from the final installment as set forth in the Schedule of Payments in Annexure-III. The definition of super area, Apartment area, the tentative percentage of Apartment area to super area as on the date of execution of this Agreement (the percentage of apartment area to super area shall be subject to change till the construction of the said Building is complete-however such change is likely in occur only due to compliance with any building/safety norms) are clearly described by the Company in Annexure-II which forms part of this Agreement and is hereby accepted by the Allottee. The Alliottee confirms that he/ she has read, understood and agrees to this definition and that he/ she has no objection to the same and the Allottee has assured the Company that after having agreed to the definition of super area given in Annexere-II as the basis for the purchase and payment of price of the said Apartment, he/ she shall not raise any dispute or make any claims etc at a later date in this regard.*

22. Considering the above-mentioned facts, the authority observes that the respondent has increased the super area of the flat from 1325 sq. ft. to 2315 sq. ft. as per intimation of possession dated 10.10.2015 with increase in area of

990 sq.ft. i.e. 57% without any justification or prior intimation to the complainant.

23. That in ***NCDRC consumer case no. 285 of 2018 titled as Pawan Gupta Vs Experion*** Developers ***Private Limited***, it was held that the respondent is not entitled to change any amount on account of increase in area. The relevant part of the order has been reproduced hereunder: -

> *The complaints have been filed mainly for two reasons. The first is that the opposite party has demanded extra money for excess area and second is the delay in handing over the possession. In respect of excess area, the complainant has made a point that without any basis the opposite party sent the demand for excess area and the certificate of the architect was sent to the complainant, which of a later date. The justification given by the party that on the basis of the internal report of the architect the demand was made for excess area is not acceptable because no such report or any other document has been filed by the opposite party to prove the excess area. Once the original plan is approved by the competent authority, the areas of residential unit as well as of the common spaces and common buildings are specified and super area cannot change until there is change in either the area of the flat or in the area of any of the common buildings or the total area of the project (plot area) is changed. The real test for excess area would be that the opposite party should provide a comparison of the areas of the original approved common spaces and the flats with finally approved common spaces/buildings and the flats. This has not been done. In fact, this is a common practice adopted by majority of builders/developers which is basically an unfair trade practice. This has become a means to extract extra money from the allottees at the time when allottee cannot leave the project as his substantial amount is locked in the project and he is about to take possession. There is no prevailing system when the competent authority which approves the plan issues some kind of certificate in respect of the extra super area at the final stage. There is no harm in communicating and charging for the extra area at the final stage but for the sake of transparency the must share the actual reason for increase in the super area based on the comparison of the originally approved buildings and finally approved buildings. Basically, the idea is that the opposite party allottee must know the change in the finally approved lay-out and areas of common spaces and the originally approved lay-out and areas. In my view, until this is done, the opposite party is not entitled to payment of any excess area. Though the Real Estate Regulation Act (RERA) 2016 has made it compulsory for the builders/developers to indicate the carpet area of the flat, however the, problem of super area is not yet fully solved and further reforms are required.*
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> ***(Emphasis Supplied)***

24. The Authority observe that the increase in a super area was intimated to the complainant at the time of offer of possession and not before. Further, no justification and intimation was made to the complainant in respect of increase in area. The respondent cannot charge any amount from the complainant merely on account of increase in the super area without providing proper justification and specific details regarding the increase in the super area/carpet area.

25. Now the question arises, whether the act of respondent wherein creating third party rights against the subject unit is valid or not. The complainant stated that as per orders of the authority dated- 02.02.2022, the respondent was specifically directed to not to create third party rights against the subject unit and further adjourned the matter for 08.04.2022. He further emphasised that thereafter, in none of the subsequent hearings, the authority passed any order to quash the interim order passed vide hearing dated 02.02.2022. The respondent on other hand took a plea that it was nowhere specified that till what period the stay is to be continued and further relied on judgment **of hon'ble Supreme Court in the matter of *Asian Resurfacing of road agency Pvt. Ltd. vs. Central Bureau of Investigation-Miscellaneous – Miscellaneous Application no. 1577 of 2020 Order dated 15.10.2020,*** Wherein stating that where no period of stay has been specified, it shall automatically get expired after six months. The relevant para of the order is reproduced below:

> *"... In cases where stay is granted in future, the same will end on expiry of six months from the date of such order unless similar extension is granted by a speaking order. The speaking order must show that the case was of such exceptional nature that continuing the stay was more important than having the trial finalised. The trial court where order of stay of civil or criminal proceedings is produced, may fix a date not beyond six months of the order of stay so that on expiry of the period of stay, proceedings can commence unless order of extension of stay is produced."*

26. However, the plea of the respondent is devoid of merits as the Authority observes that the aforesaid judgment quoted by the respondent has been overruled by judgment of Supreme Court titled as ***High Court Bar Association, Allahabad Vs. State of U.O. & Ors.(Criminal Appeal No. 3589 of 2023 dated 29.02.2024)***. The relevant para reproduced below:

> *"...Sometimes, in quest of justice we end up doing injustice. Asian Resurfacing is a clear example of the same. Such a situation created ought to be avoided in the normal course or if at all it arises be remedied at the earliest. In doing so, we have to adopt a practical and a more pragmatic approach rather than a technical one which may create more problems burdening the courts with superfluous or useless work. It is well said that useless work drives out the useful work. Accordingly, it is expedient in the interest of justice to provide that a reasoned stay order once granted in any civil or criminal proceedings, if not specified to be time bound, would remain in operation till the decision of the main matter or until and unless an application is moved for its vacation and a speaking order is passed adhering to the principles of natural justice either extending, modifying varying or vacating the same".*

27. The Authority observes that the subject unit was terminated on 24.06.2021, thereafter complaint before the authority was filed on 14.09.2021. Relevant part of order dated 02.02.2022 has been reproduced hereunder-

> *"The counsel for the complainant made a submission under section 36 of the Act, 2016 and on being satisfied with the conditions given under section 36 of the Act, the Authority hereby restrained the promoter to cancel the unit and to create third part rights."*

28. Upon perusal of proceeding dated 02.02.2022, it is observed that directions has been given to the respondent to maintain the status quo of the subject matter by not creating third party rights. It is relevant to remind the respondent herein that the allotted unit and its cancellation is the main subject matter of this complaint around which the whole dispute subsists. The Authority has stayed the transfer of the subject unit by creating third party rights and nowhere specified that whether such stay should be till next date of hearing or for any other specific period, which makes it very clear in itself that the stay has been

imposed till disposal of the complaint. Respondent is trying to take advantage of the situation by adding his own interpretation to the proceedings dated 02.02.2022, in such a manner that would definitely jeopardize the purpose of the whole proceeding. Furthermore, the respondent builder also increased the super area to 2315 sq.ft. without providing proper justification and specific details. Thus, the authority is of considered view that such cancellation made by the respondent and further creation of third party rights is not valid in the eyes of law.

F.III To pay the delayed possession charges at prescribed rate of interest on amount of Rs.33,10,956/- paid by the complainant from the date of payment till actual physical handover of flat/unit.

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

> *"Section 18: - Return of amount and compensation*
> *18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building, —*
> .....
> *Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."*

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

31. 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.

32. 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., 14.05.2025 is 8.85%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.85%.

33. 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;"

34. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 10.85% w.e.f. due date of possession i.e.

22.07.2014 till the offer of possession plus 2 months or handing over of possession, whichever is earlier by the respondents/promoters which is the same as is being granted to them in case of delayed possession charges.

35. On consideration of the circumstances, all the documents and submissions made by the parties, the authority is satisfied that the respondent is in contravention of the provisions of the Act. The intimation offer of possession made by the complainant was not valid as it was made on 10.10.2015 however the occupancy certificate of the unit in question is not obtained yet. Therefore, till date no valid offer of possession is made by the respondent. As such complainants are entitled to delay possession at prescribed rate of interest i.e., 10.85% p.a. from the due date of possession i.e.22.07.2017 till the valid offer of possession plus 2 months or handing over of possession, whichever is earlier.

F.IV Direct the respondent to execute the conveyance deed of the unit in question in favour of the complainant.

32. As per section 11(4)(f) and section 17(1) of the Act of 2016, the promoter is under obligation to get the conveyance deed executed in favour of the complainant. Whereas as per section 19(11) of the Act of 2016, the allottee is also obligated to participate towards registration of the conveyance deed of the unit in question. The respondent is directed to get the conveyance deed executed per the terms of Section 17 of the Act of 2016.

F.V Compensation and Litigation

33. The complainant is also seeking relief w.r.t. compensation and litigation charges. Hon'ble Supreme Court of India in civil appeal nos. 6745-6749 of 2021 titled as M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of Up & Ors. (supra), has held that an allottee is entitled to claim compensation & litigation charges under sections 12,14,18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation

& litigation expense shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation & legal expenses.

G. Directions of the authority

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

i. The cancellation letter dated 24.06.2021 is hereby set aside and the respondent is directed to allot an alternative unit of similar size and the same price which is similarly situated in favour of the complainant within a period of 60 days from the date of this order.

ii. The respondent is directed to pay interest at the prescribed rate i.e., 10.85% per annum for every month of delay on the amount paid by the complainants from due date of possession i.e., 22.07.2014 till the date of valid offer of possession of possession of the alternative unit, as per proviso to section 18(1) of the Act read with rule 15 of the rules.

iii. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order and interest for every month of delay shall be paid by the promoter to the allottee before 10th of the subsequent month as per rule 16(2) of the rules.

iv. The complainant is directed to pay outstanding dues if any after adjustment of delayed possession charges and to take the possession of the alternative unit as per section 19(10) of the Act.

v. The rate of interest chargeable from the allottee by the promoters, in case of default shall be charged at the prescribed rate i.e., 10.85%

by the respondent/promoters which is the same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

35. Complaint stands disposed of.

36. File be consigned to registry.

(Ashok Sangwan)
Member

(Vijay Kumar Goyal)
Member

(Arun Kumar)
Chairman
Haryana Real Estate Regulatory Authority, Gurugram
Dated: 14.05.2024