BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**4710 of 2022**
Date of Filing Complaint	**08.07.2022**
Order Pronounced On	**01.05.2024**

1. Hitesh Anand
2. Anshu Anand

Both R/o: C-17, Kirti Nagar, New Delhi- 110015 **Complainants**

Versus

M/s Shree Vardhmamn Infraheights Pvt. Ltd.

Regd. office: 302, 3rd Floor, Indraprakash Building, 21, Barakhambha Road, New Delhi- 110001 **Respondent**

CORAM:

Shri Ashok Sangwan **Member**

APPEARANCE:

Shri Nilotpal Shyam (Advocate) Complainants

Shri Shalabh Singhal and Shri Gaurav Rawat (Advocates) 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 provision of the Act or the Rules and Regulations made there under or to the allottee as per the agreement for sale executed inter se.

A. Unit and project related details

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

S. no.	Particulars	Details
1.	Name and location 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 (Residential Apartment)
4.	DTCP license no. and validity status	103 of 2010 dated 30.11.2010 valid upto 29.11.2020
5.	Name of the Licensee	Dial Soft Tech and two others
6.	RERA registered/ not registered and validity status	**Registered** Registered vide no. 70 of 2017 dated 18.08.2017 valid upto 31.12.2020
7.	Unit no.	801, Tower - C (Page no. 33 of complaint)
8.	Unit admeasuring	1350 sq. ft. (Page no. 33 of complaint)
9.	Date of buyer's agreement	17.10.2013 (Page no. 30 of complaint)
10.	Basic Sale Price	Rs. 74,11,500/- (Page no. 28 and 34 of complaint)
11.	Total amount paid by the complainants	Rs. 51,43,945/- (as per SOA annexed at page no. 52 of complaint)
12.	Date of commencement of construction	07.05.2014 (Page no. 50 of reply)
13.	Possession clause	**Clause 14(a) of FBA** *"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." **(Emphasis supplied)**
14.	Due date of delivery of possession	07.11.2018 (Calculated from the date of commencement of construction) Note: Grace period is included as it is unqualified. *(*Note: inadvertently mentioned due date of possession as 07.03.2018 vide proceedings dated 24.04.2024)*
15.	Reminders sent by respondent to complainants	05.05.2017, 15.05.2017 (Page no. 61 and 62 of reply)
16.	Final reminder to clear the outstanding dues sent by respondent	05.06.2017 (Page no. 63 of reply)
17.	Cancellation Letter	11.07.2017 (Page no. 64 of reply)
18.	Occupation certificate	13.07.2022 (Page no. 19 of reply)
19.	Offer of possession	05.08.2022 (Page no. 4 of additional documents placed on record on 13.02.2024)

B. Facts of the complaint:

3. That the respondent vide allotment letter dated 25.12.2012 allotted unit no. C-801 proposed to be built in tower-C of the impugned project admeasuring 1350 sq. ft. along with one parking wherein construction link plan was adopted for the purpose of the payment. The basic sale price for the impugned unit was Rs. 74,11,500/-.

4. That the complainants and the respondent entered into an apartment buyer's agreement dated 17.10.2013 for the sale of impugned unit. The agreement is a standard form of agreement which is biased, one sided, amounting to unfair trade practice as the complainant was compelled to sign on dotted lines in view of one sided standard form of agreement to sell.
5. That the complainants have already paid Rs. 25,94,025/- i.e. more than 30% of total consideration to the respondent before the execution of agreement to sell. The non-signing of the ABA would have resulted in cancellation of booking and forfeiture of earnest money i.e. 15% of basic sale price. Therefore, the complainants in view of the fear of losing the entire money paid to the respondent had no other option but to sign on dotted line of the agreement to sell.
6. That as per ABA, the respondent company agreed to sell/ convey/ transfer the apartment unit no. C-801, tower – C of the impugned project with the right to exclusive use of parking space for an amount of Rs. 74,11,500/- which includes basic sale consideration, external development charges and infrastructure development charges, preferential location charges, car parking charges electricity connection club membership but excludes interest free maintenance security deposit plus applicable taxes as per clause 2 of ABA.
7. That as per clause 14(a) of the buyer's agreement, the possession date for the impugned unit C-801 was agreed to be 07.09.2017.
8. That the respondent has not been able to handover the possession of the impugned unit even till date for the reasons only known to them.
9. That the complainants in pursuant to the agreement for sale made a total payment of Rs. 51,43,945/- as per the payment plan. The complainants have paid 60% of the sale consideration towards the cost of the unit no. C-

801 of Tower-C in the impugned project till 2018 including costs towards other facilities. Despite the said payments, the respondent failed to deliver the possession in agreed time-frame.

10. That the respondent arbitrarily charged the complainant Interest amounting to Rs. 46,00,972.98/- (including GST on the Interest amounting to Rs. 5,92,417/-) for the delayed payment of installment due for the impugned unit during the construction of the project. The interest charged at such higher rates is completely arbitrary.
11. That complainants also paid towards service tax for the impugned project. However, the said service tax was not payable for the period before July 2012.
12. That the complainants were compelled to pay Rs. 1,50,000/- for open car parking charges along with applicable charges over and above the basic sale price for the impugned flat.
13. That a final demand letter was handed over to the complainants, wherein the respondent raised the following arbitrary demands:
    a) Rs. 7,17,350.40/- on account of Interest on delayed payments upto 30.06.2017 and Rs. 32,59,925.97/- as interest on delayed payments from 01.07.2017 to 27.04.2022.
    b) Value Added Tax amounting to Rs. 3,17,938.43/-.
    c) Interest Free Maintenance Security (IFMS) @ Rs. 100/sq. ft.
    d) Sinking Fund @ Rs. 0.25 per sq. ft. of super area per month for 12 months.
    e) Common electricity charges @ Rs. 0.50 per sq. ft. per month for 12 months.
    f) Maintenance charges @ Rs. Per sq. ft. per month of super area with an advance of 12 months.
    g) Labour Cess @ Rs. 14 per sq. ft. i.e., a total of Rs. 18,900/-.
14. That there is more than 4 years of unexplained delay in handing over the possession by the respondent to the complainants without any sign of them meeting the future deadline. Therefore, the complainants have

genuine grievance which require the intervention of the Hon'ble Authority in order to do justice with them.

15. That the complainants wish to continue in the project while exercising his rights under Section 18 of the RERA Act. Accordingly, the complainant seeks delayed possession interest from respondent at prescribed rate for the delay period starting from the date of delivery of possession as mentioned in the ABA i.e. 07.09.2017 till the date of handing over the possession (no possession has been offered till date). The complainants had paid the full amount of consideration as per ABA within the stipulated time without any defaults in accordance with ABA and thus entitled to the interest at prescribed rate for the unreasonable delay in delivering the possession of impugned flat by the respondent.

C. Relief sought by the complainants:

16. The complainants have sought following relief(s):

(i) Direct the respondent to pay delay possession interest at the prescribed rate for the delayed period of handing over the possession calculated from the date of delivery of possession as mentioned in the ABA i.e.., from 07.09.2017 till the actual handing over the possession of the impugned flat.
(ii) Direct the respondent to deliver the possession of the flat.
(iii) Direct the respondent to restrain from charging interest on delayed payment charges made to the respondent.
(iv) Direct the respondent to restrain from charging Rs. 3,17,938.43/- towards VAT with regard to the impugned unit.
(v) Direct the respondent to restrain from charging IFMS @ Rs. 100 per sq. ft. of super area with regard to the impugned unit.
(vi) Direct the respondent from charging sinking fund @ Rs. 0.25 per sq. ft. of super area per month for 12 months with regard to the impugned unit.
(vii) Direct the respondent from charging common electricity charges @ 0.50 per sq. ft. of super area per month for 12 months with regard to the impugned unit.
(viii) Direct the respondent from charging labour cess @ Rs. 14 per sq. ft. of super are i.e., total Rs. 18,900 with regard to the impugned unit.

(ix) Direct the respondent from charging maintenance charges @ Rs. 3 per sq. ft. of super are per month for 12 months with regard to the impugned unit.

17. 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) of the Act to plead guilty or not to plead guilty.

D. Reply by respondent:

18. The respondent contested the complaint on the following grounds:

I. That the present complaint filed under Section 31 of the Real Estate (Regulation and Development) Act, 2016 is not maintainable as there has been no violation of the provisions of the Act. The complaint under Section 31 can only be filed after a violation or contravention has been established by the authority under Section 35. Since no violation or contravention has been established, the complaint should be dismissed. Additionally, Section 18 of the Act of 2016, under which the complainant seeks relief, is not applicable to the present case as it does not have retrospective effect and cannot be applied to transactions entered into before the Act of 2016 came into force. Therefore, Section 18 cannot be applied in the present case as buyers' agreement was executed before the Act of 2016.

II. That a flat buyer agreement dated 17.10.2013 was executed in respect of flat C-801 between the complainants and the respondent.

III. 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.

IV. That the respondent sent a reminder on 05.05.2017 and 15.05.2017 to clear the outstanding dues, wherein it was clearly notified that in event of non-payment within 15 days, the booking would be considered under cancellation. A final reminder dated 05.06.2017 was sent to make the payment of arrears of Rs. 20,64,856.80/- towards the cost of flat and Rs. 6,83,407.55/- towards interest. The complainants neither made any payment nor responded to the sad letters/reminders and therefore, the unit of the complainants was cancelled and same was communicated to them vide letter dated 11.07.2017. Upon cancellation of the booking, the earnest money, i.e., 15% of the basic sale price stood forfeited in terms of clause 5(a) of the buyers agreement.

V. 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. The occupancy certificate in respect thereof was applied on 23.02.2021, as such the answering respondent cannot be held liable for payment of any interest and/or compensation for the period beyond 23.02.2021.

VI. The said tentative period given in clause 14(a) of the Agreement was not the essence of the contract and the allottee(s) were aware that there could be delay in handing over of possession. Clause 14(b) even provided for the compensation to be paid to the Allottee(s) in case of delay in completion of construction which itself indicate that the period given in clause 14(a) was tentative and not essence of the contract.

VII. That 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 particular 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.

VIII. 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 and timely payment of instalments by all the buyers in the said complex including the complainant. As aforesaid many buyers / allottees in the said complex, including the complainants.

IX. 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.

X. 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 EPCA vide its notification No. EPCA-R/2018/L-91 dated 27/10/2018.

XI. 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.

XII. The Hon'ble Supreme Court of India vide its order dated 04.11.2019 passed in Writ Petition No. 13029/1985 titled as," MC 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.

XIII. 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 Ist 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.

XIV. That every responsible person/institution in the country has responded appropriately to overcome the challenges thrown by COVID-19 pandemic and have Suo-Moto extended timelines for various compliances. The Hon'ble supreme court of India has extended all timelines of limitations for court proceedings with effect from 15/03/2020 till further order; the Hon'ble NCDRC had also extended the timelines on the similar lines; RERA authorities also had extended time periods given at the time of registration for completion of the project; even income tax department, banking and financial institutions have also extended timelines for various compliances.

XV. That after the receipt of OC, the offer of possession was sent to the allottees and same was also sent to the complainants inadvertently as a result of mistake of commercial department of the respondent. The said offer of possession was sent only on account of a bona fide error and it was never intended to be withdrawal of the aforesaid cancellation. The said offer of possession is non-est in the eyes of law and therefore, respondent withdraws the same as abundant caution. The defaults in payment by the complainants and other allottees adversely affected the pace of construction and caused significant financial losses. Therefore, the complainant should be held liable for payment of interest at the agreed rate mentioned in the agreement to compensate for the losses caused by the defaults of delay payments.

19. 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 these undisputed documents and submission made by the parties.

E. Jurisdiction of the authority:

20. The authority has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

21. 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

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

> ***Section 11(4)(a)***
> *Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;*
> ***Section 34-Functions of the Authority:***
> *34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.*

23. 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 complainants at a later stage.

F. Findings on the objections raised by the respondent:

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

24. The respondent submitted that the complaint is neither maintainable nor tenable and is liable to be outrightly dismissed as the buyer's agreement was executed between the parties prior to the enactment of the Act and the provision of the said Act cannot be applied retrospectively.

25. The authority is of the view that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. The Act nowhere provides, nor can be so construed, that all previous agreements would be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation would be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. The numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of ***Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017) decided on 06.12.2017*** which provides as under:

> *"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior*

to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter..... 122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."

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

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

27. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of any other Act, rules, statutes,

instructions, directions issued thereunder and are not unreasonable or exorbitant in nature.

F.II Objections regarding force majeure.

28. The respondents-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 National Green Tribunal to stop construction, non-payment of instalment by allottees. The plea of the respondent regarding various orders of the NGT and other authorities advanced in this regard are devoid of merit. The orders passed by NGT banning construction in the NCR region was for a very short period of time and thus, cannot be said to impact the respondent-builder leading to such a delay in the completion. Also, there may be cases where allottees has not paid instalments regularly but all the allottees cannot be expected to suffer because of few allottees. Thus, the promoter respondent cannot be given any leniency on based of aforesaid reasons and it is well settled principle that a person cannot take benefit of his own wrong.

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

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

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

30. In the present case also, the respondents were liable to complete the construction of the project and handover the possession of the said unit by 07.11.2018. It is claiming benefit of lockdown which came into effect on 23.03.2020 whereas the due date of handing over of possession was much prior to the event of outbreak of Covid-19 pandemic. Therefore, the authority is of the view that outbreak of a pandemic cannot be used as an excuse for non-performance of a contract for which the deadlines were much before the outbreak itself and for the said reason, the said time period cannot be excluded while calculating the delay in handing over possession.

G. Findings regarding relief sought by the complainants.

31. That the complainants were allotted unit no. C-801, tower C, in the respondent's project at basic sale price of Rs.74,11,500/-. A buyer's agreement was executed on 17.10.2013 between the parties. The possession of the unit was to be offered within 4 years from the date of commencement of construction and it is further provided in agreement that promoter shall be entitled to a grace period of six months. The date of construction commencement was initially to be commenced from 07.05.2014 as per the intimation/demand letter dated 16.04.2014 issued by the respondent. Therefore, the due date of possession comes out to be 07.11.2018 including grace period of six months being unqualified and unconditional.

32. The respondent cancelled the subject unit vide letter dated 11.07.2017 on account of non-payment of demands raised by it. However, an offer of possession letter dated 05.08.2022 had also been sent to the complainants post the receipt of occupation certificate on 13.07.2022. The respondent has contended that the said offer of possession was sent only on account

of a bona fide error, and it was never intended to be withdrawal of the aforesaid cancellation.

33. The contention raised by the respondent with respect to the said offer of possession post cancellation is denied as the respondent itself offered the possession of the subject unit to the complainants and by offering the said possession, the cancellation letter is automatically deemed to be withdrawn as the respondent itself along with offer of possession asked the complainants to clear the outstanding dues. Had it not been intentional, the respondent could not have raised demands and issue statement of accounts for the subject unit. Therefore, the said cancellation dated 11.07.2017 is held to be bad in the eyes of law and is hereby quashed.

G.I Direct the respondent to pay delay possession interest at the prescribed rate for the delayed period of handing over the possession calculated from the date of delivery of possession as mentioned in the ABA i.e., from 07.09.2017 till the actual handing over the possession of the impugned flat.

34. In the present complaint, the complainants intend to continue with the project and are seeking delay possession charges as provided under the Proviso to Section 18(1) of the Act. Section 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."*

35. Clause 14(a) of the apartment buyer's agreement provides the time period of handing over possession and the same is reproduced below:

> *"14.a **The construction of the flat is likely to be completed within a period of 40 months of commencement of construction of the***

particular tower/ block in which the subject flat is located with a grace period of 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.*

36. **Due date of possession and admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within 40 months from the date of commencement of construction and it is further provided in agreement that promoter shall be entitled to a grace period of six months. The date of construction commencement was initially to be commenced from 07.05.2014 as per the intimation/demand letter dated 16.04.2014 issued by the respondent. Therefore, the due date of possession comes out to be 07.11.2018 including grace period of six months being unqualified and unconditional.

37. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant(s) are seeking delay possession charges. However, Proviso to Section 18 provides that where an allottee does not intend to withdraw from the project, they shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under Rule 15 of the rules. Rule 15 has been reproduced as under:

> *"**Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]***
> *(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.:*
>
> *Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public."*

38. 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.

39. 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., 01.05.2024 is 8.85%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.85%.

40. 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;"*

41. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 10.85 % by the respondent/promoter which is the same as is being granted to them in case of delayed possession charges.

42. On consideration of the circumstances, the evidence and other record and submissions made by the parties, the authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of clause 14(a) of the buyer's agreement executed between the parties on 17.10.2013, the possession of the said unit was to be delivered within a

period 40 months from the date commencement of construction i.e. 07.05.2014 and it is further provided in agreement that promoter shall be entitled for a grace period of six months. As far as grace period is concerned, the same is allowed being unconditional and unqualified. Therefore, the due date of handing over of possession comes out to be 07.11.2018. In the present complaint the complainant was offered possession by the respondent on 05.08.2022 after obtaining occupation certificate dated 13.07.2022 from the competent authority. The authority is of view that there is a delay on the part of the respondent to offer physical possession of the allotted unit to the complainant as per the terms and conditions of the buyer's agreement dated 17.10.2013 executed between the parties.

43. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 13.07.2022. The respondent offered the possession of the unit in question to the complainant only on 05.08.2022, so it can be said that the complainants came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the complainants should be given 2 months' time from the date of offer of possession. These 2 months' of reasonable time is being given to the complainants keeping in mind that even after intimation of possession practically they have to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession till the expiry of 2 months from the date of offer

of possession (05.08.2022) which comes out to be 05.10.2022, or till the date of actual handing over of possession of the unit, whichever is earlier.

44. Accordingly, the non-compliance of the mandate contained in Section 11(4)(a) read with Section 18(1) of the Act on the part of the respondent is established. As such the complainant are entitled to delay possession charges at prescribed rate of the interest @ 10.85 % p.a. w.e.f. 07.11.2018 till expiry of 2 months from the date of offer of possession (05.08.2022) i.e., up to 05.10.2022 or till the date of actual handing over of possession of the unit, whichever is earlier, as per the provisions of Section 18(1) of the Act read with Rule 15 of the Rules, ibid.

G.II Direct the respondent to deliver the possession of the flat.

45. The respondent has obtained the occupation certificate from the competent authority on 13.07.2022 and offered the possession of the allotted unit vide letter dated 05.08.2022.

46. As per Section 17(1) of the Act of 2016, the respondent is obligated to handover physical possession of the subject unit to the complainant. therefore, the respondent shall handover the possession of the allotted unit as per specification of the buyer's agreement entered into between the parties.

G.III Direct the respondent to restrain from charging interest on delayed payment charges made to the respondent.

47. The respondent is well within his rights to claim interest on the delayed payment charges in accordance with the provision of Section 2(za) of the Act, 2016. Therefore, 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.

G.IV Direct the respondent to restrain from charging Rs.3,17,938.43/- towards VAT with regard to the impugned unit.

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

49. The builder/developer opting for this scheme here-in-after shall be referred to as the 'Composition Developer'. This scheme remained in force till 30.06.2017. The purpose of the lump sum scheme was to mitigate the hardship being caused in determining the tax liability of the builders/ developers. Again, most of the builders opted/availed the benefit of the scheme. The list of the builders who opted the scheme is also available on the website of Excise and Taxation Department, Haryana. Thus, the VAT liability for developer/builder opted for this scheme for the period 01.04.2014 to 30.06.2017 comes to 1.05%.

50. Further, in case any builder/ developer had not opted for any of the above two schemes then the VAT liability comes to approximately 4-5 percent (maximum). It is noteworthy that the amnesty scheme was available up to 31.03.2014, however the same was silent on the issue of charging VAT @ 1.05% from the buyers/ prospective buyers whereas in the lump-sum/ composition scheme under rule 49(a) of the HVAT Rules, 2003, it was

specifically mentioned that incidence of cost has to be borne by the promoter/ builder/developer only. Thus, the builders/developers who opted for the lump-sum scheme, were not eligible to charge any VAT from the buyers/prospective buyers during the period 01-04-2014 to 30-06-2017. In other words, the developer/builder has to discharge the VAT liability out of their own pocket.

51. The promoter is entitled to charge VAT from the allottee for the period up to 31.03.2014 @ 1.05% (one percent VAT + 5 percent surcharge on VAT) under the amnesty scheme. The promoter shall not charge any VAT from the allottees/prospective buyers during the period 01.04.2014 to 30.06.2017 since the same was to be borne by the promoter-developer only. The respondent-promoter is directed to adjust the said amount, if charged from the allottee with the dues payable by the allottee or refund the amount if no dues are payable by the allottee.

G.V Direct the respondent to restrain from charging IFMS @ Rs. 100 per sq. ft. of super area with regard to the impugned unit.

G.VI Direct the respondent from charging sinking fund @ Rs. 0.25 per sq. ft. of super area per month for 12 months with regard to the impugned unit.

52. The above mentioned reliefs sought by the complainants are being taken together as the findings in one relief will definitely affect the result of the other relief and the same being interconnected.

53. The promoter may be allowed to collect a reasonable amount from the allottees under the head "IFMS". However, the authority directs that the promoter must always keep the amount collected under this head in a separate bank account and shall maintain that account regularly in a very transparent manner. If any allottee of the project requires the promoter to give the details regarding the availability of IFMS amount and the interest accrued thereon, the promoter must provide details to the allottee. It is further clarified that out of this IFMS/IBMS, no amount can be spent by the

promoter for the expenditure it is liable to incur to discharge its liability and obligations as per the provisions of Section 14 of the Act.

54. As far as Sinking fund is concerned, the IFMS and the sinking fund are similar and the respondent cannot charge for the same under different heads.

G.VII Direct the respondent from charging common electricity charges @ 0.50 per sq. ft. of super area per month for 12 months with regard to the impugned unit.

55. The respondent is demanding electricity charges from the complainants at the rate of Rs. 0.50 per sq. ft. of super area per month for a period of 12 months. There is no doubt that these charges are payable to various departments for obtaining service connections from the concerned departments including security deposit for sanction and release of such connections in the name of the allottee and are payable by the allottee. Moreover, this issue too has already been dealt with by the authority in complaint bearing no. 4031 of 2019 titled as "***Varun Gupta Vs. Emaar MGF Land Limited***" decided on 12.08.2021, wherein it was held that these connections are applied on behalf of the allottee and allottee has to make payment to the concerned department on actual basis. In case instead of paying individually for the unit if the builder has paid composite payment in respect of the abovesaid connections including security deposit provided to the units, then the promoters will be entitled to recover the actual charges paid to the concerned department from the allottee on pro-rata basis i.e. depending upon the area of the flat allotted to the complainant viz- à-viz the total area of the particular project. The complainant/allottee will also be entitled to get proof of all such payment to the concerned department along with a computation proportionate to the allotted unit, before making payment under the aforesaid head.

G.VIII Direct the respondent from charging labour cess @ Rs. 14 per sq. ft. of super are i.e., total Rs. 18,200 with regard to the unit.

56. Labour cess is levied @ 1% on the cost of construction incurred by an employer as per the provisions of sections 3(1) and 3(3) of the Building and Other Construction Workers' Welfare Cess Act, 1996 read with Notification No. S.O 2899 dated 26.09.1996. It is levied and collected on the cost of construction incurred by employers including contractors under specific conditions. Moreover, this issue has already been dealt with by the authority in complaint bearing no.962 of 2019 titled as "***Mr. Sumit Kumar Gupta and Anr. Vs Sepset Properties Private Limited***" wherein it was held that since labour cess is to be paid by the respondent, as such no labour cess should be charged by the respondent. The authority is of the view that the allottee is neither an employer nor a contractor and labour cess is not a tax but a fee. Thus, the demand of labour cess raised upon the complainants is completely arbitrary and the complainants cannot be made liable to pay any labour cess to the respondent and it is the respondent builder who is solely responsible for the disbursement of said amount.

G.IX Direct the respondent from charging maintenance charges @ Rs. 3 per sq. ft. of super area per month for 12 months with regard to the impugned unit.

57. This issue has already been dealt with by the authority in complaint bearing no. 4031 of 2019 titled as "***Varun Gupta Vs. Emaar MGF Land Limited***" decided on 12.08.2021, wherein it was held that the respondent is right in demanding advance maintenance charges at the rate prescribed therein at the time of offer of possession. However, the respondent shall not demand the advance maintenance charges for more than one year from the allottee even in those cases wherein no specific clause has been prescribed in the agreement or where the AMC has been demanded for more than a year.

H. Directions of the Authority:

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

i. The respondent is directed to pay delayed possession charges at the prescribed rate of interest i.e., 10.85% p.a. for every month of delay on the amount paid by the complainant to the respondent from the due date of possession 07.11.2018 till the date of offer of possession (05.08.2022) plus two months i.e., 05.10.2022 or till the date of actual handover of possession, whichever is earlier, as per Section 18(1) of the Act of 2016 read with Rule 15 of the Rules, ibid. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order as per Rule 16(2) of the Rules, ibid.

ii. The rate of interest chargeable from the allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 10.85% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottees, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

iii. The respondent is directed to issue a revised statement of account after adjustment of delayed possession charges, and other reliefs as per above within a period of 30 days from the date of this order. The complainant is directed to pay outstanding dues if any, after adjustment of delay possession charges within a period of next 30 days, thereafter.

iv. The respondent is directed to handover physical possession of the subject unit within 30 days from the date of this order as occupation certificate of the project has already been obtained by it from the competent authority.

v. The promoter is entitled to charge VAT from the complainants for the period up to 31.03.2014 @ 1.05% (one percent VAT + 0.05 percent surcharge on VAT). However, the promoter cannot charge any VAT from the allottees/prospective buyers for the period 01.04.2014 to 30.06.2017 as the same was to be borne by the promoter-developer only.

vi. The IFMS and Sinking fund are same and the respondent cannot charge for the same under different heads. Also, the promoter must provide details of the amount charged towards IFMS to the complainants.

vii. The respondent would be entitled to recover the actual charges paid to the concerned departments' from the complainants/allottee(s) on pro-rata basis on account of common electricity charges depending upon the area of the flat allotted to complainants vis-à-vis the area of all the flats in this particular project. The complainant would also be entitled to proof of such payments to the concerned departments along with a computation proportionate to the allotted unit, before making payments under the aforesaid heads.

viii. The respondent is not entitled to charge labour cess as it is the respondent builder who is solely responsible for the disbursement of said amount.

ix. The respondent shall not demand the advance maintenance charges for more than one year from the allottees even in those

cases wherein no specific clause has been prescribed in the agreement or where the AMC has been demanded for more than a year.

x. The respondent shall not charge anything from the complainants which is not the part of the flat buyer's agreement.

59. Complaint stands disposed of.

60. File be consigned to the registry.

Dated: 01.05.2024

(Ashok Sangwan)
Member
Haryana Real Estate
Regulatory Authority,
Gurugram

HARERA
GURUGRAM