HARERA
GURUGRAM

BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.: 2385 of 2023
Date of filing: 20.06.2023
Order pronounced on: 24.10.2024

1. Dharampal Singh
2. Manjit Kaur Swami — **Complainants**

R/o: - 5, Narmada Apartment, Alaknanda
New Delhi-110019

Versus

M/s Raheja Developers Limited
Regd. Office: - W4D, 204/5, Keshav Kunj,
Western Avenue, Cariappa Marg, Sainik
Farms, — **Respondent**
New Delhi- 110062

CORAM:
Shri Vijay Kumar Goyal — **Member**

APPEARANCE:
Shri Nilopta Shyam (Advocate) — Complainants
Shri Garvit Gupta (Advocate) — Respondent

ORDER

1. This 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 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 complainants, 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 and location of the project	"Raheja Shilas", Sector-109, Gurugram
2.	Nature of the project	Group Housing
3.	Project area	14.812acres
4.	DTCP License and validity	257 of 2007 dated 07.11.2007 valid up to 06.11.2024
5.	Name of the licensee	Brisk Construction Pvt. Ltd. and 3 others
6.	RERA Registration	90 of 2017 dated 28.08.2017 valid up to 31.12.2020
7.	Unit no. and floor no.	IF-20, First floor Floor and Block-IF-20 (As per page no. 28 of the complaint)
8.	Unit area admeasuring	2062.33 sq. ft. (Super area) (As per page no. 28 of the complaint)
9.	Allotment letter	14.06.2010 (As per page no. 25 of the complaint)
10.	Date of execution of flat buyer's agreement	14.06.2010 (As per page no. 27 of the complaint)
11.	Possession clause	***4.2 Possession Time and Compensation*** *That the company shall endeavor to give possession of the apartment to the allotttee* ***within thirty-six (36) months in case of towers and thirty (30) months in case of independent floors from the date of the execution this Agreement*** *and after providing necessary infrastructure in the sector by the Government, but subject to force majeure conditions circumstances and reasons beyond the control of the company.....* (As per page no. 36 of the complaint)

12.	Due date of possession	14.12.2012 (Note: 30 months from the date of execution of agreement to sell i.e., 14.06.2010 being independent floor)
13.	Total sale consideration	Rs.73,91,150/- (As per applicant ledger on page no. 62 of the complaint)
14.	Amount paid by the complainants	Rs.65,54,646/- (As per applicant ledger on page no. 62 of the complaint)
15.	Occupation Certificate/ completion certificate	Not received
16.	Offer of possession	Not offered

B. Facts of the complaint:

3. The complainants have made the following submissions:

I. That the respondent company through their representative had approached the complainants and represented that the respondent's residential project namely "Raheja Shilas" situated at Sector-109, Gurugram will effectively serve the purpose of complainants and has best of the amenities.

II. That the respondent had claimed that they are seized and possessed of land admeasuring approximately 14.812 acres at the project site and accordingly, obtained License from Director General, Town & County Planning (DTCP), Haryana for development of residential group Housing Colony on the said land vide license no. 257 of 2007 dated 07.11.2007. It was further represented by the respondent that the project is an extension of "Raheja Atharva" project having all the necessary sanctions and approvals from the competent authority.

III. That the complainants showed their willingness to book a unit in the project on the basis of huge announcement of the respondent being a

renowned builder i.e., Raheja Group along with the aforesaid representation made by the respondent.

IV. That the complainants paid Rs.5,73,762/- towards the booking amount to the respondent for an independent unit in "Raheja Shilas". Accordingly, allotment letter dated 14.06.2010 was issued by the respondent to the complainants for the allotment of unit no. IF20-02 admeasuring 2062 sq. ft. It is noteworthy that 14.06.2010 was taken as deemed date of allotment of the unit.

V. That the complainants on the same date of allotment letter also entered into the agreement to sell/ flat buyer's agreement for the said unit on 14.06.2010 between M/s Raheja Developers Ltd. and the complainants. It is noteworthy that the said agreement to sell is a standard form of agreement which is biased, one sided, amounting to unfair trade practice as the complainants were compelled to sign on dotted lines in view of one sided standard form of agreement to sell with no right to bargain especially in view of the fact that the complainants were in fear to lose the money already paid to the respondent if refuses to honor the dictate of the respondent.

VI. That the agreement to sell signed between complainants and the respondent is a standard form of contract which was signed by every other allottee wherein there was no option to the complainants but to sign on the dotted lines of a contract which was framed by the builder with no room for any negotiation whatsoever. Clause 3.7 of the agreement may be referred in this regard wherein it was made obligatory upon the complainants to sign on the dotted lines on the standard form of the agreement and return the duly signed agreement back to the respondent within 30 days failing which the respondent shall cancel the allotment and forfeit the earnest money

(i.e., 15% of sale price with other charges as mandated in clause 3.6) along with interest on delayed payment charges, brokerage/commission etc. Further, the balance amount (if any) after forfeiture shall be refunded that too without any interest. The amount of unfairness, one-sidedness in the agreement to sell is *ex facie* visible from the said clause and the same has not been replaced for the sake of brevity.

VII. That in accordance with the agreement to sell dated 14.06.2010, the respondent agreed to sell convey /transfer the unit with the right to exclusive use of parking space in the impugned project for sale consideration of **Rs.57,37,621/-** in addition to cost of parking rights, club membership, electricity connection, IFMS, as per the payment plan plus applicable taxes. Accordingly, the total consideration approximately comes to **Rs.73,91,750/-** as per the statement of account issued by the respondent. The said amount also includes service tax which is legally not chargeable. The statement of account dated 29.12.2017 issued by the respondent confirming the receipt of aforesaid amount from the complainants.

VIII. That the respondent committed under the agreement to sell to handover the possession of the unit within 30 months from the date of execution of the agreement. Thus, the commitment of the respondent to deliver the possession of the unit to the complainants was till December, 2012. However, the respondent has failed to hand over the possession of the unit to the complainants till today. It is submitted that there has been no force majeure condition till date justifying the non-handing over the possession even after elapse of more than 10.5 years from the date as promised in the agreement. The reason for non-delivery of possession is solely attributable to the

respondent and hence the respondent cannot claim benefit off his own wrong.

IX. That the clause 4.2 of the agreement to sell further provided that if the respondent failed to complete construction of the said unit within thirty months from the date of execution of the agreement to sell, shall pay compensation @ 7/-per sq. ft. of the super area per month of the entire period of such delay which is proportionate to the rental income for similar property in the area or average rental equivalent sized unit in the vicinity, whichever is higher.

X. That the respondent failed to keep their promised of delivery of the unit within the time prescribed under the agreement to sell i.e., latest by 14.12.2012. The respondent did not even bother to give reason about such unreasonable delays in handing over the possession of unit to the complainants. The respondent does not respond to the genuine problems faced by the complainants. While the respondent failed to keep its legally binding promise of due date of possession of the unit, the complainants were compelled to pay compound interest @18% per annum for any delay in payment of due instalments.

XI. That there is almost 10.5 years of unexplained delay in handing over the possession of the unit by the respondent to the complainants. Therefore, the complainants have genuine grievance which require the intervention of the Hon'ble Authority in order to do justice with them.

C. Relief sought by the complainants:

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

(i) Direct the respondent to immediately (not more than 30 days from the date of order) deliver the possession of unit no. IF-20-02 after adjusting the delayed possession interest.

5. 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:

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

I. That the complaint is not maintainable as the agreement contains an arbitration clause which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute i.e. clause 15.2 of the agreement.

II. That the complainants after checking the veracity of the respondent's project applied for allotment of a commercial project vide booking application form and agreed to be bound by the terms and conditions of the booking application form.

III. That the complainants are investors who had booked the commercial unit in question with a view to earn quick profit in a short period. However, it appears that her calculations have gone wrong on account of severe slump in the real estate market and the complainants are now raising untenable and illegal pleas on highly flimsy and baseless grounds.

IV. That based on the application for booking, the respondent allotted to the complainants a unit no. IF-20-02. The complainants were continuous defaulters from the very inception and despite being aware that timely payment was the essence of the allotment, they failed to remit the same on time and the respondent was constrained to remind them frequently. The complainants signed and executed the agreement to sell and the complainants agreed to be bound by the terms contained therein.

V. That the respondent raised payment demands from the complainants in accordance with the mutually agreed terms and conditions of allotment as well as of the payment plan and the complainants made the payment

of the earnest money and part-amount of the total sale consideration and is bound to pay the remaining amount towards the total sale consideration of the unit along with applicable registration charges, stamp duty, service tax as well as other charges payable at the applicable stage.

VI. That the possession of the unit was supposed to be offered to the complainants in accordance with the agreed terms and conditions of the buyer's agreement. The use of expression endeavour to give the possession' in clause 4.2 of the buyer's agreement clearly shows that the company has merely held out a hope that it will try to give the possession to the complainants within a specified time. However, no unequivocal promise was made to the prospective buyers that possession of the unit will be delivered at the end of a particular period.

VII. That the time period for calculating the due date of possession shall start only when the necessary approvals will be provided by the governmental authorities. The non-availability of the occupational certificate is beyond the control of the respondent and the same also falls within the ambit of the definition of force majeure' condition as stipulated in clause 4.4 of the agreement to sell.

VIII. That the OC's were granted for '*Raheja Atharva*' and '*Raheja Shilas - high rise*' on 20.05.2014 and 19.11.2014, respectively. Most notably, the said OC dated 19.11.2014 categorically mentions building block nos. I, II, and III, which are otherwise identified as '*Raheja's Shilas*' high-rise development. At this time, the OC remained for only 94 apartments (*which formed part of Raheja's Shilas low rise development*) in the project.

IX. That the 94 units/apartments under "*Shilas low-rise development*" were completed in 2016-2017 by the respondent. Thus, it is not a case where construction has been delayed due to the conduct of the real estate

developer, but unfortunately where, without any fault on part of the respondent, occupancy certificate has not been granted by the authorities due to technical and illegitimate claims.

X. That pursuant to the grant of aforementioned OC's dated 20.05.2014 and 19.11.2014, M/s Enkay Buildwell Pvt. Ltd. (*Collaborator of respondent*) applied to DTCP on 27.04.2017 for grant of partial OC for remaining 94 apartments (*which formed part of Raheja's Shilas low rise development*). However, the said certificate was not issued in a timely manner and was withheld by the Government/ Regulatory authorities on technical grounds.

XI. That based on applicable circular, on 12.05.2011, the respondent wrote to Haryana Vidyut Prasaran Limited (HVPL), declaring that its 'ultimate power load requirement' with respect to the project was envisaged to be 4158.26 KW. In light of the applicable circular the 'ultimate power load requirement' submitted by the respondent, the voltage level for the connection to be supplied to the project was on 11 KV feeder line.

XII. That as per the relevant rules, the necessary infrastructure for obtaining power supply for the nearest sub-station of DHBVN had to be created by the project developer. Consequently, the respondent submitted necessary plans and estimates for building such infrastructure and the same was sanctioned by DHBVN.

XIII. That the necessary internal and external infrastructure work, as sanctioned by the authorities, for supplying power to the project was completed in early 2014 by setting up three transformers of 11/.415KV, as well setting up diesel generator set approved by the Chief Electrical Inspector. However, even though the necessary infrastructure was created by the respondent, the same was not energized by the authorities. In fact, even after a lapse of nearly nine years, the said

infrastructure had not energized by the Authorities on domestic connection applying domestic tariff.

XIV. That vexed by the continued inaction on part of the authorities, the respondent sent various reminders to DHBVN for energizing the 11KV feeder line on domestic connection with applicable domestic tariff. The respondent highlighted the practical and economic non-feasibility of setting up the infrastructure for 33 KV at this belated stage. In fact, even Atharva Residents Welfare Association had sent a letter dated 28.05.2016 to DHBVN requesting energizing the 11KV feeder liner. It was highlighted that it would not be practical to change the infrastructure to 33KV at this belated stage.

XV. That on 27.03.2018, DHBVN issued Sales Circular No. D-14/2018 wherein it was decided that 220/66/11KV systems in new sectors of Gurugram would be eliminated and transmission/distribution system of 220/33 KV would be introduced. It is admitted in the said letter @ clause 7, that final 33KV network will take shape only when the complete network of 220/33KV substations gets commissioned. However, switching station for converting 66 KV transmission line to 33 KV distribution line is not constructed. The said decision was taken in complete disregard to the state of developers, including the respondent, who had already invested in setting up infrastructure for 11KV voltage levels after obtaining due sanction from the authorities. Till date no builder has got domestic connection on 33KV feeder line.

XVI. That on 12.01.2021, DHBVN granted its approval to the electrification plan submitted by the respondent for ultimate load of 4731 KW or 5257 KVA, along with sanction of partial load of 1500KW or 1666.67 KVA. However, while granting approval, it was illegally and unfairly mandated that the ultimate load would be fed from 33KV switching station to be

developed by the group of builders in their offered land in view of the aforesaid Sales Circular No. D-14/2018. The respondent was asked to now create infrastructure for 33KV despite the fact that it had already created infrastructure for 11KV after spending huge amounts. As a direct consequence, the residents of the project and the respondent have been left high and dry by the authorities and are being forced to pay for electricity at commercial rates, which is much higher than the applicable domestic rates.

XVII. That on 28.06.2021, DTCP informed M/s Enkay Buildwell Pvt. Ltd. (*collaborator of respondent*) that HVPNL had not recommended issuance of occupation certificate because of non-submission of bank guarantee of internal and external infrastructure. Consequently, the Enkay Buildwell Pvt. Ltd. was asked to submit the requisite bank guarantee to HVPNL. Similar letter was issued to the Enkay Buildwell Pvt. Limited again on 14.03.2022.

XVIII. That despite incurring a huge expenditure in excess, due to incessant and illegitimate demands made by the Authorities and their continued apathy, the respondent was constrained to give-in to their demands. Consequently, on 02.08.2022, the respondent gifted 571 sq. yds. of land to DHBVN for the purpose of setting up a 33KV switching station. Thereafter, DHBVN vide its letter dated 29.10.2022 directed the respondent to submit a bank guarantee of Rs.2,33,58,000/- with DHBVN and deposit Rs.1,27,00,000/- with one M/s Sobha for ultimate load. However, with a view of to protect its investment, show its bonafide, and to make sure that the remaining homebuyers/allottees are not left in lurch, the respondent duly furnished the bank guarantee dated 21.07.2023 for Rs.2,33,58,000/- with DHBVN. Further, the respondent

wrote to DTCP vide letter dated 21.07.2023 for grant of OC for the remaining units which form part of the project.

XIX. That DTCP vide its letter dated 11.08.2023 informed M/s Enkay Builders Pvt. Ltd. and the respondent, that certain compliances, including *inter alia*, empanelment of a structural engineers, and obtaining a structural stability certificate are required to be completed. This has been done and the same was intimated vide letter dated 22.09.2023.

XX. That the complainants willingly and voluntarily signed the application for allotment, after carefully reading and understanding the terms thereof and agreed to be bound by the terms and conditions of the booking application form. The complainants were not forced nor pressurized to apply for the allotment of the independent floor. The agreement was in symmetry with the application form signed by the complainants. Further the buyer's agreement was executed between the parties. The agreement was duly signed by the complainants after going through the same and understanding each and every clause contained in the agreement as well as the application form.

XXI. That the complainants have not come to this Hon'ble Authority with clean hands and has concealed and suppressed the true and correct facts. It is submitted without prejudice to the aforesaid narrated facts, and submissions with regards to the maintainability of the present application that the respondent is regularly following up and duly complying with the directions of DTCP to obtain the occupancy certificate and give possession of the applicants at the earliest. The present complaint, devoid of merit, is liable to be dismissed with heavy costs payable by the complainants to the respondent.

7. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be

decided on the basis of these undisputed documents and submissions made by the parties.

E. Jurisdiction of the Authority:

8. The authority has complete territorial and subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I Territorial Jurisdiction

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

E.II Subject-matter Jurisdiction

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.*

9. 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 the complainants being investors.

10. The respondent took a stand that the complainants are investors and not consumers and therefore, they are not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. However, it is pertinent to note that any aggrieved person can file a complaint against the promoter if he contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the flat buyer's agreement, it is revealed that the complainants are buyers and they have paid a total price of Rs.65,54,646/- to the promoter towards purchase of a unit in its project. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

> *"2(d) "allottee" in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;"*

11. In view of the above-mentioned definition of "allottee" as well as all the terms and conditions of the buyer's agreement executed between promoter and complainants, it is crystal clear that the complainants are allottees as the subject unit was allotted to them by the promoter. The concept of investor is not defined or referred to in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". Thus, the contention of the promoter that the allottee being investor is not entitled to protection of this Act also stands rejected.

F.II Objection regarding agreements contains an arbitration clause which refers to the dispute resolution system mentioned in agreement.

12. The buyer's agreement executed between the parties dated 14.06.2010 contains a clause 15.2 relating to dispute resolution between the parties. The clause reads as under:

> ***15.2***
> ***"All or any disputes arising out or touching upon or in relation to the term's this Flat Buyer Agreement and / or Conveyance Deed including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties, which cannot be amicably settled, shall be settled through arbitration****. The arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory amendments / modifications thereof for the time being in force. The arbitration proceedings shall be held at the Office of the Company in New Delhi by a sole arbitrator who shall be appointed by the Managing Director of the Company. The Allottee(s) hereby confirms that he/she shall have no objection in this appointment. In case of any proceeding, reference etc. touching upon the arbitration subject including any.....*
>
> ***(Emphasis Supplied)***

13. The authority is of the opinion that the jurisdiction of the authority cannot be fettered by the existence of an arbitration clause in the buyer's agreement as it may be noted that section 79 of the Act bars the jurisdiction of civil courts about any matter which falls within the purview of this authority, or the Real Estate Appellate Tribunal. Thus, the intention to render such disputes as non-arbitrable seems to be clear. Also, section 88 of the Act says that the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. Further, the authority puts reliance on catena of judgments of the Hon'ble Supreme Court, particularly in ***National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506***, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, consequently the authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause. Therefore, by applying same analogy the presence of arbitration clause could not be construed to take away the jurisdiction of the authority.

14. Further, in ***Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017***, the National Consumer Disputes Redressal Commission, New Delhi (NCDRC) has held that the arbitration clause in agreements between the complainants and builders could not circumscribe the jurisdiction of a consumer.
15. Therefore, in view of the above judgements and considering the provision of the Act, the authority is of the view that complainants are well within his right to seek a special remedy available in a beneficial Act such as the Consumer Protection Act and RERA Act, 2016 instead of going in for an arbitration. Hence, we have no hesitation in holding that this authority has the requisite jurisdiction to entertain the complaint and that the dispute does not require to be referred to arbitration necessarily.

F.III Objection regarding the circumstances being 'force majeure'.

16. The respondent has contended that the project was delayed because of the 'force majeure' situations like delay on part of government authorities in granting approvals/Occupation certificate, issue of provision of 33 KV power line etc. non-availability of necessary infrastructure facilities like road connectivity and laying down of water to be provided by the government for carrying out development activities which were beyond the control of respondent. However, all the pleas advanced in this regard are devoid of merits. First of all, the possession of the unit in question was to be offered by 14.12.2012. Further, the time taken in getting governmental approvals/clearances cannot be attributed as reason for delay in project. Moreover, some of the events mentioned above are of routine in nature happening annually and the promoter is required to take the same into consideration while launching the project. Thus, the promoter-respondent cannot be given any leniency on based of aforesaid reasons and it is a well settled principle that a person cannot take benefit of his own wrong and the

objection of the respondent that the project was delayed due to circumstances being force majeure stands rejected.

G. Findings on the relief sought by the complainants.

G.I Direct the respondent to immediately (not more than 30 days from the date of order) deliver the possession of unit no. IF-20-02 after adjusting the delayed possession interest.

17. The above-mentioned reliefs sought by the complainants are taken together being inter-connected.

18. 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. 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."***
>
> ***(Emphasis supplied)***

19. Clause 4.2 of the flat buyer's agreement provides for handing over of possession and is reproduced below for ready reference:

> ***4.2 Possession Time and Compensation***
>
> *"**That the company shall endeavour to give possession of the apartment** to allottee within thirty-six (36) months in case of towers and **thirty (30) months in case of Independent Floor from the date of the execution this Agreement** and after providing necessary infrastructure in the sector by the Government, but subject to force majeure conditions or nay Government/Regulatory authority's action, inaction or omission and reasons beyond the control of the company. The Company on obtaining certificate for occupation and use by the Competent Authorities shall hand over the Apartment to the Allottee(s) for his / her occupation and use and subject to the Allottees) having complied with all the terms and conditions of this Flat Buyer Agreement. In the event of his / her failure to take over and / or occupy and use the Apartment provisionally and / or finally allotted within thirty (30) days from the date of intimation in writing by the Company, then the same shall lie at his / her risk and cost and the Allottee(s) shall be liable to pay compensation @Rs. 5/-sq. ft. of the super area per month as holding charges for the entire period of such delay. **If the Company fails to complete the construction of the said building / Apartment within thirty-six***

(36) months in case of towers and Thirty (30) months in case of Independent Floors from the date of execution of this Agreement and after providing necessary infrastructure in the sector by the Government, as aforesaid, then the Company shall pay to the Allottee(s) compensation @ Rs. 7/- sq. ft. of the super area per month for the entire period of such delay. *The adjustment of compensation shall be done at the time of conveying of the Apartment and not earlier. The said compensation shall be a distinct charge in addition to maintenance charges and not related to any other charges as provided in this Agreement. If there is any delay in payments / remittances by the Allottee(s) or in order to comply with any specific request of the Allottee(s) such as providing additional fitments in his / her Apartment,* ***then the abovesaid period of thirty-six (36) months in case of towers and Thirty (30) months in case of Independent Floors will automatically and correspondingly get extended by the period of such delay and in that case Company shall not be liable for any such delay. The Allottee(s) has understood and agreed that due to typographical error in the clause 32 of the Application form possession of independent floor is indicated as Twenty four (24) months instead of Thirty months (30) mentioned as indicated in payment plan. The said error is rectified in this Agreement".***

(Emphasis Supplied)

20. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to providing necessary infrastructure specially road, sewer and water in the sector by the government, but subject to force majeure conditions or any government /regulatory authority's action, inaction or omission and reason beyond the control of the seller. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favor of the promoter and against the allottee that even a single default by the allottee in making payment as per the plan may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the agreement to sell by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous

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

21. **Due date of possession of the apartment:** The due date of possession of the apartment as per clause 4.2 of the flat buyer's agreement dated 14.06.2010, is to be calculated as 30 months from the execution of flat buyer's agreement in case of independent floors. Therefore, the due date of possession comes to 14.12.2012.

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

> ***Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]***
>
> *(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India 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.*

23. 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.

24. Taking the case from another angle, the complainants-allottees were entitled to the delayed possession charges/interest only at the rate of Rs.7/- per sq. ft. per month as per clause 4.2 of the buyer's agreement for the period of such delay, whereas the promoter as per clause 4.1 of the buyer's agreement was entitled to charge interest @ 18% per annum for the period

of delay in depositing the sale consideration according to the payment plan. The functions of the authority are to safeguard the interest of the aggrieved person, may be the allottee or the promoter. The rights of the parties are to be balanced and must be equitable. The promoter cannot be allowed to take undue advantage of its dominant position and to exploit the needs of the home buyer's. The authority is duty bound to take into consideration the legislative intent i.e., to protect the interest of the consumer/allottee in the real estate sector. The clauses of the buyer's agreement entered between the parties are one-sided, unfair and unreasonable with respect to the grant of interest for delayed possession. There are various other clauses in the buyer's agreement which give sweeping powers to the promoter to cancel the allotment and forfeit the amount paid. Thus, the terms and conditions of the buyer's agreement are ex-facie one-sided, unfair, and unreasonable, and the same shall constitute the unfair trade practice on the part of the promoter. These type of discriminatory terms and conditions of the buyer's agreement would not be final and binding.

25. 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;"*

26. 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., 24.10.2024 is **9.10%.** Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **11.10%.**

27. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 11.10% by the respondent/promoter which is the same as is being granted to her in case of delayed possession charges.

28. The counsel for the respondent vide proceedings of the day dated 22.08.2024 submitted that the unit of the complainants is complete and OC is not yet granted due to issue of provision of 33 KV power line and requisite compliance for the same has been made and OC is expected shortly and delay possession charges are to be paid only till completion of formality of OC as per clause 4.2 of the buyer's agreement. 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 and hence respondent is directed to handover the possession after obtaining necessary approvals/occupation certificate from the competent Authority. As till date no OC has been granted for the project hence, this project is to be treated as on-going project and the provisions of the Act shall be applicable equally to the builder as well as allottees.

29. On consideration of the circumstances, the documents, submissions made by the parties and based on the findings of the authority regarding contravention as per provisions of rule 28(2), the Authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of clause 4.2 of the buyer's agreement executed between the parties on 14.06.2010, the possession of the subject unit was to be delivered within 30 months from the date of execution of this agreement. Therefore, the due

date of handing over possession comes out to be 14.12.2012. The respondent has failed to handover possession of the subject unit till date of this order. Accordingly, it is the failure of the respondent/promoter to fulfil its obligations and responsibilities as per the agreement to hand over the possession within the stipulated period. The authority is of the considered view that there is delay on the part of the respondent to offer of possession of the allotted unit to the complainants as per the terms and conditions of the buyer's agreement dated 14.06.2010 executed between the parties.

30. 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 complainants are entitled to delay possession charges at rate of the prescribed interest @11.10% p.a. w.e.f. 14.12.2012 till actual handing over of possession or offer of possession plus two months, whichever is earlier, as per section 18(1) of the Act of 2016 read with rule 15 of the rules.

H. Directions of the authority:

31. 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 respondent is directed to pay interest to the complainants against the paid-up amount at the prescribed rate i.e. 11.10% p.a. for every month of delay from the due date of possession i.e., 14.12.2012 till a valid offer of possession after obtaining occupation certificate from the competent authority plus two months or actual handing over of possession, whichever is earlier, as per section 18(1) of the Act of 2016 read with rule 15 of the rules.

ii. The arrears of such interest accrued from due date of possession till the date of order by the authority shall be paid by the promoter to the allottee within a period of 90 days from date of this order and interest for every month of delay shall be paid by the promoter to the allottees before 10th of the subsequent month as per rule 16(2) of the rules.

iii. The complainants are directed to pay outstanding dues, if any, after adjustment of delay possession charges. The respondent/promoter shall handover possession of the unit on obtaining of occupation certificate from the competent authority.

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

v. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 11.10% 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.

32. Complaint stands disposed of.

33. File be consigned to registry.

Dated: 24.10.2024

(Vijay Kumar Goyal)
Member
Haryana Real Estate
Regulatory Authority,
Gurugram