BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	:	**8005 of 2022**
Date of filing:		**06.01.2023**
Date of order	:	**10.12.2024**

1. Mr. Raj Kumar Rana
2. Mrs. Shanti Rana
   Both RR/O: C-403, Unique Aartments, Plot no. 38, Sector-6, Dwarka, New Delhi-110075 **Complainants**

Versus

1. M/s Advance India Projects Limited
   Regd. office: 232-B, 4th floor, Okhla Industrial Estate, Phase-III, New Delhi-110020
2. Wellworth Project Developers Private Limited
   Regd. Office: A-11, C.R. Park, New Delhi - 110010 **Respondents**

CORAM:	
Shri. Arun Kumar	**Chairperson**
Shri. Vijay Kumar Goyal	**Member**

APPEARANCE WHEN ARGUED:	
Dhruv Lamba (Advocate)	Complainants
Sh. Dhruv Rohtagi (Advocate)	Respondent no. 1
None	Respondent no. 2

ORDER

1. The present complaint has been filed by the complainant/allottees under Section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the

promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the rules and regulations made there under or to the allottees 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, date of buyer's agreement etc, have been detailed in the following tabular form:

S. No.	Particulars	Details
1.	Name of the project	"AIPL Joy Central", Sector-65, Gurgaon
2.	Nature of project	Commercial colony
3.	DTPC License no.	249 of 2007 dated 02.11.2007
	Validity status	01.11.2024
	Licensed area	3.987 acres
	Name of licensee	M/s Wellworth Project Developers Pvt. Ltd.
4.	RERA Registered/ not registered	183 of 2017 dated 14.09.2017 valid up to 31.12.2022
5.	Unit no.	Shop no. SF-55, Second floor (Page no. 29 of the compliant)
6.	Unit area admeasuring	190.95 sq. ft. [Super area]
7.	Allotment letter for shop bearing no. 2043 on 2nd floor	02.06.2017 (Page no. 22 of the compliant)
8.	Date of execution of buyer's agreement	20.11.2020 (Page no. 26 of the compliant)
9.	Possession clause	**7. POSSESSION OF THE UNIT** **7.1 Schedule for possession of the unit:** - *The Promoter agrees and understands that timely delivery of possession of the Unit to the Allottee and the Common Areas is the essence of the Agreement.*

		(Page no. 39 of the complaint)
		5. TIME IS ESSENCE: *The Promoter shall abide by the tune schedule for completing the Unit/Project,* ***handing over the possession of the Unit to the Allottee by 31 December 2022 as disclosed at the time of registration of the Project with the Authority*** *or such extended period as may be intimated and approved by Authority from time to time. The completion of the Project shall mean grant of Occupancy Certificate for the Unit/ Project. It is agreed between the Parties that for the purpose of this Agreement "handing over the possession of the Unit" shall mean issuance of Notice of Offer of Possession of the Unit (defined hereinafter) by the Promoter to the Allottee.* (Page no. 38 of the complaint)
10.	Due date of possession	31.12.2022
11.	Total sale consideration	Rs.22,18,332/- [As per statement of accounts dated 18.01.2022 on page no. 69 of complaint]
12.	Amount paid by the complainant	Rs.28,11,738/- [As per statement of accounts dated 18.01.2022 on page no. 69 of complaint]
13.	Occupation certificate	24.12.2021 (page no. 128 of the reply)
14.	Offer of constructive possession	28.01.2022 [Page 131 of the reply]

B. Facts of the complaint

3. The complainants have submitted as under:

a. That in 2007, the respondents M/s. ADVANCE INDIA PROJECTS LIMITED and M/s WELLWORTH PROJECT DEVELOPERS PVT. LTD. issued an advertisement w.r.t launching of a Commercial Colony namely "AIPL Joy Central" situated at Sector - 65, Village Badshahpur, Tehsil Badshahpur, District Gurugram under the license no. 249 of 2007 dated 02.11.2007, issued by DTCP, Haryana, Chandigarh and thereby invited applications from prospective buyers for the purchase of units in the subject project.

b. That relying on the assurances and promises of the respondents, on 09.01.2017, the present complainants namely Mr. Rajkumar Rana and Ms. Shanti Rana had booked a unit in the subject project and in lieu of the same paid an amount of Rs.4,00,000/-. The payment was acknowledged by the respondent's company and accordingly reflected in the statement of accounts issued by the respondent's company.

c. That on 02.06.2017, an allotment letter was issued by the respondent's company in the name of the present complainants namely Mr. Rajkumar Rana and Ms. Shanti Rana vide which a retail shop bearing no. 2043 on Second Floor having a super area of 190.67 sq. ft. was allotted at BSP @ Rs. 10,315/- per sq. ft., Development charges @ Rs. 676/- per sq. ft., PLC @ Rs. 1,060/- per sq. ft. and IFMS @ Rs. 100/- per sq. ft.

d. That the complainants have made all the payments well on time as and when demanded by the respondents. It is a matter of fact that complainants have paid an amount of Rs.4,00,000/-, Rs. 2,00,000/-, Rs. 5,00,000/-, Rs. 1,08,292.68/- and Rs. 11,50,095/- on 09.01.2017,

14.02.2017, 16.05.2017, 03.06.2017 and 09.03.2020 respectively against the total sale consideration of the subject unit. All the payments as mentioned above are acknowledged by the respondents and the same are also reflected in the statement of accounts issued by the respondents.

e. That right from the time of allotment, the complainants were eager to get the buyer's agreement executed and kept on pursuing their grievance w.r.t the same with the respondents but the respondents never gave a satisfactory reply and keep on lingering the matter. It is pertinent to mention over here that the present complainants were law abiding citizens and made each and every payment as and when demanded by the respondents. It is a matter of fact that the respondents collected more than 98% of the total sale consideration of the subject unit from the complainants without even executing a buyer's agreement. Furthermore, just to bring to the kind notice of the Hon'ble Authority, the respondents took almost 4 years from the date of booking to execute the buyer's agreement with the present complainants and that too after collecting more than 98% of the Total sale consideration. This is just to bring to the kind notice of this Hon'ble Authority that how the builders like the present one is misusing their dominant position and harassing the naïve allottees after looting their hard-earned monies. In the light of the submissions made above, the respondents are liable to pay interest of the hard-earned monies of the allotter which they have collected and used for their personal wrongful gains without even executing a buyer's agreement for 4 long years after booking of the subject unit.

f. That after the continuous effort of the present complainants for almost 4 years (from booking of the subject unit) and after making a payment of almost 98% of the total sale consideration of the subject unit, on 20.11.2020, a buyer's Agreement was executed between respondents and the present complainants) wherein a retail shop bearing no. SF-55 on Second Floor having a super area of 190.95 sq. ft., Carpet area of 80.21 sq. ft., Unit Covered area of 95.48 sq. ft. was allotted. As per Clause 1.2 of the buyer's agreement, the total sale consideration of the subject unit was Rs. 23,85,471.68/-. It is pertinent to mention over here that Clause 5 of the said agreement talks about Time is Essence and specifies Due date of possession to be 31.12.2022, Clause 7 of the said agreement talks about Possession of the Unit, clause 20 specifies Physical possession of the Unit.

g. That to the utter shock and surprise of the complainants, the respondent's requested the complainants to sign a buyer's agreement whose terms were completely arbitrary and one sided. The complainants objected to the same but the builder who was in a dominant position threatened the complainants to cancel the allotment and forfeiture of their hard-earned monies and accordingly the forceful consent (under undue influence) of the present complainant was obtained and accordingly, a pre-printed buyer's agreement containing unilateral, arbitrary, one sided clauses heavily loaded in the favour of the builder was executed. The consent of the present complainants so obtained was not a free consent as defined in Section 14 of the Indian Contract Act, 1872. The clause 7 of the buyer's agreement speaks about "Possession of The

Unit" wherein a new word "Constructive possession" was inducted in place of physical possession which is a violation of the provisions of the Act of 2016 and Rules of 2017. Further, vide clause 5 of the buyer's agreement dated 20.11.2020, which was executed after 4 years (from the date of booking) of continuous efforts of the complainants, the promoters have promised to handover the possession of the subject unit by 31.12.2022.

h. That on 18.01.2022, a notice of offer of possession was sent by the respondent company to the present complainants along with final statement of account. The subject of the said notice reads as "Intimation of Constructive Possession of Unit no.....". Not only this, but the said statement of account also consisted of certain illegal demands as Sinking Fund, Labour cess, Infrastructure Augmentation Charges, Electric switch-in station & Deposit Charges, Sewage/ Storm Water/ Water Connection charges, Electric Meter Charges etc.

i. That the said notice of offer of possession was completely illegal and unlawful as firstly, it nowhere talks about physical handing over of possession. So, such an offer of possession where practically no physical possession is offered is itself null and void in the eyes of law. Secondly, the said notice of offer of possession was accompanied by many illegal demands as Sinking Fund, Labour cess, Infrastructure Augmentation Charges, Electric switch-in station & Deposit Charges, Sewage/ Storm Water/ Water Connection charges, Electric Meter Charges, to name a few. This Hon'ble Authority in many of its judgements have held that an offer of possession which is accompanied by unlawful and illegal demands is not a valid / lawful

offer of possession. It is most humbly prayed before this Hon'ble Authority to struck down the said notice of offer of possession along with the illegal demands made by the respondent's company and declare the same as unlawful and invalid. Further, it is also most humbly prayed that a direction w.r.t issuance of a fresh offer of possession in which physical possession of the subject unit is offered.

j. That the present complainants had made all the payments well on time as and when demanded by the respondent builder. It is a matter of fact that the complainants had made a payment of Rs.28,11,738.83/- towards the total sale consideration of the subject unit against the demanded amount of Rs.24,00,992.29/-.

k. That further it is of immense importance to submit here that no valid/ lawful offer of possession has been made to the complainants till date. Furthermore, as per clause 5 of the agreement dated 20.11.2020, the promoters have promised to handover possession of the subject unit by 31.12.2022. But it's a matter of fact that till date, the possession of the subject unit is not handed over to the present complainants and in view of the same, the respondents are liable to pay delay possession charges at the prescribed rate from the due date of possession i.e., 31.12.2022 till actual handing over of the possession as per the provisions of the Act of 2016.

l. That the respondent builder cannot charge Holding charges from the present complainants. However, as per the law settled by the Hon'ble Supreme Court in civil appeal no. 3864-3889/2020 dated 14.12.2020, the holding charges shall also not be charged by the

respondent builder at any point of time even if they are part of the agreement.

m. That due to the acts of the respondents and the deceitful intent as evident from the facts outlined above, the complainants have been unnecessarily harassed mentally as well as financially, and therefore the opposite party is liable to compensate the complainants on account of the aforesaid unfair trade practice. Without prejudice to the above, the Complainants reserves the right to file a complaint before the Hon'ble Adjudicating Officer for compensation.

C. Relief sought by the complainants:

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

a. Direct the respondent to handover physical possession of the subject unit as per the provisions of the Act of 2016.

b. Direct the respondent to pay interest at prescribed rate as per the provisions of the Act of 2016.

c. Direct the respondent to withdraw all the illegal demands as Sinking Fund, Labour-cess, Infrastructure Augmentation Charges, Electric switch-in station & Deposit Charges, Sewage/ Storm Water/ Water Connection charges, Electric Meter Charges, Payment due area change.

d. Direct the respondent to charge CAM charges from the date of handing over of the actual physical possession of the subject unit.

e. Direct the respondent to not charge "Holding charges" from the complainants.

f. Direct the respondent to not charge anything from the present complainants which is not part of the agreement.

5. On the date of hearing, the authority explained to the respondent /promoters 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 no. 1

6. The respondent no. 1 has contested the complaint on the following grounds:

a. The present complaint raises several such issues which cannot be decided in summary proceedings. The said issues require extensive evidence to be led by both the parties and examination and cross-examination of witnesses for proper adjudication. Therefore, the disputes raised in the present complaint can only be adjudicated by the Civil Court. The present complaint deserves to be dismissed on this ground alone. That the Complainants are not "Allottees" but are Investors who has booked the apartment in question as a speculative investment in order to earn rental income/profit from its resale.

b. That the Complainants had approached the Respondent No. 1 and expressed an interest in booking an apartment in the commercial colony developed by the Respondent No. 1 and booked the unit in question, bearing number SF/2043, Second Floor admeasuring 190.67 sq. ft. (tentative area) situated in the project developed by the Respondent No. 1, known as "AIPL Joy Central" at Sector 65, Gurugram, Haryana. That thereafter the Complainants vide application form in 2017, applied to the Respondent No. 1 for provisional allotment of a unit bearing number SF/2043, Second Floor in the project. It is submitted that the Complainants prior to

approaching the Respondent No. 1, had conducted extensive and independent enquiries regarding the project and it was only after the Complainants were fully satisfied with regard to all aspects of the project, including but not limited to the capacity of the Respondent No. 1 to undertake development of the same, that the Complainant took an independent and informed decision to purchase the unit, un-influenced in any manner by the Respondent No. 1. The Complainants consciously and willfully opted for down payment plan as per their choice for remittance of the sale consideration for the unit in question and further represented to the Respondent No. 1 that they shall remit every installment on time as per the payment schedule. That the Respondent No. 1 had no reason to suspect bonafide of the Complainants.

c. That at this instance, it needs to be noted that relationship between the Parties is commercial in nature and sacrosanct to the agreed terms. That in the present case, the Complainants purchased the Unit only on the categorical understanding that the Unit shall not be for physical possession. That the booking was categorically, willingly and voluntarily made by the Complainant with an understanding of the same being for leasing purposes and not self-use, as can be noted in clause 43 of the Schedule I of the Application form:

> *"43. The Applicant has clearly understood that the Unit is not for the purpose of self-occupation and use by the Applicant and is for the purpose of leasing to third parties along with combined units as larger area. The Applicant has given unfettered rights to the Company to lease out the unit along with other combined units as a larger area on the terms and conditions that the Company would deem fit. The Applicant shall at no point of time object to any such decision of leasing by the Company"*

d. That pursuant to the execution of the Application Form, the Respondent No. 1 had no reason to suspect the bonafide of the Complainants and the Allotment letter dated 02.06.2017 was issued to the Complainants. That as can be noted from the above-mentioned clause 43, the Complainants had given unfettered right to the Respondent to lease the Unit and had agreed to not object to the decision of leasing at any point in time. However, despite having booked the Unit on these very terms, the Complainants, have malafidely filed the present complaint with the motive to seek wrongful gains from the Respondent.

e. That the Unit allotted was provisional and subject to change as was categorically agreed between the parties. That the Clause 1 of the Schedule 1 of the Application Form is reiterated as under:

> *"The Applicant has applied for the provisional allotment of a Unit (the "Unit") in the Project and clearly understands that the allotment of the Unit by the Company shall be purely provisional till such time that the Unit Buyer's Agreement, in the format prescribed by the Company, is executed between the Company and the Applicant".*

f. That the Respondent, vide its Letter dated 23.06.2017 sent 02 copies of the Buyer's Agreement for its execution by the Complainants. However, the said request was ignored by the Complainants deliberately and intentionally. As an abundant caution, the Respondent once again sent a reminder to the Complainants vide its letter dated 18.08.2017, which too was deliberately ignored by the Complainants for reasons best known to them, or on the misconceived notion that they shall remain unbound by the terms of the Agreement and hence, intentionally procrastinated from their obligation to execute the Buyer's Agreement.

g. That thereafter, after persistent requests, the Buyer's Agreement was executed by the Complainants as late as on 20.11.2020, which delay cannot be attributed to the Respondent. It is pertinent to note that as per clause 18 of the Schedule I of the Application Form, *the Applicant shall get possession of the Unit only after the Applicant has fully discharged all his obligations and there is no breach on the part of the Applicant and complete payment of Sale Consideration against the Unit has been made and all other applicable charges/dues/taxes of the Applicant have been paid. Conveyance / Sale Deed/necessary transfer documents in favour of the Applicant shall be executed and/or registered upon payment of the entire Sale Consideration and other dues, taxes, charges etc. in respect of the Unit by the Applicant. After taking the possession of the Unit, it shall be deemed that the Applicant has satisfied himself/herself/itself with regard to the construction or quality of workmanship.* That in the present case, the Complainants failed to abide by the terms and conditions of the Buyer's Agreement and defaulted in remitting timely installments. That the Respondent was constrained to issue reminders to the Complainants. The delay in making the payments is evidenced from the various payment reminders and demand letters. The Respondent had categorically notified the Complainants that they had defaulted in remittance of the amounts due and payable by him. It was further conveyed by the Respondent to the Complainants that in the event of failure to remit the amounts mentioned in the said notice, the Respondent would be constrained to cancel the provisional allotment of the unit in question. Further as per clause 5 of the Buyer's Agreement, the

possession of the unit in question was proposed to be handed over by 31.12.2022. It is relevant to submit that the OC was applied for on 09.05.2021, which was granted on 24.12.2021. Hence, there is no delay whatsoever on the part of the Respondent. It is the Complainants themselves, who have been in default of his obligations of timely payment of the instalments, and hence, are not entitled to any relief whatsoever. Despite the aforesaid delays and defaults, the Respondent has given an interest waiver of Rs.8,144/- to the Complainants. It is submitted that the Complainants despite being in default, has been offered the possession of the said unit in question within the stipulated time. That in terms of Clause 5 of the Agreement to Sell dated 20.11.2020, the due date possession of the unit in question was 31.12.2022, or any other date, as may be extended by the Hon'ble Authority.

h. That it is submitted that the project underwent a change/modification and upon the same being done, objections/suggestions for approval of building plans were invited from the Complainants on 21.11.2019, to which the Complainants had given their consent and no objection.

i. That the Respondent No. 1 was miserably affected by the ban on construction activities, orders by the NGT and EPCA, demobilization of labour, etc. being circumstances beyond the control of the Respondent and force majeure circumstances, that the construction was severely affected during this period and the same was rightfully intimated to the Complainants by the letter dated 30.11.2019.

j. That it is pertinent to highlight that the arrangement between the parties was to transfer the constructive possession of the Unit and the same was categorically agreed between the Parties in the Application form and the no protest in this regard had ever been raised by the Complainants and the same was willingly and voluntarily accepted by the Complainants. That the leasing arrangement furthers the constructive possession of the Unit. It may be necessary to point out that due to the lapses on the part of the Complainants to make the outstanding dues towards the possession, has caused severe prejudice to the Respondent No. 1 as, the unit in question could have generated valuable returns not only for the Respondent No. 1 but for the Complainants as well.

k. That it is an entrenched principle of law that a lease may be limited to take effect either immediately or from a future date. That by virtue of such an understanding, the Complainants/ allottee enjoys the rights of the lessor and hence, enjoys the constructive possession of the Unit, after the notice of possession.

l. Further, it needs to be categorically noted that a lessor is always considered to part with the physical possession of the property and stay in constructive possession through the lessee. That such a relationship is valid and has been recognized in law at various occasions. For instance, it was observed in ***Motilal Govindram vs. Gopikrishna Shadilalji and Ors. (06.08.1960-MPHC): MANU/MP/0284/1960.***

m. That without prejudice to the preliminary objections on maintainability, it is vehemently submitted that the physical

possession cannot be given, and the Unit shall be leased out, It was observed in ***Gunwantlal v. The State of M.P., MANU/SC/0130/1972: AIR 1972 SC 1756, 1759***. That possession can be shown not only by acts of enjoyment of the land itself but also by ascertaining as to in whom the actual control of the thing is to be attributed or the advantage of possession is to be credited, even though some other person is in apparent occupation or the land. In one case, it would be actual possession and in the other case, it would be constructive possession.

n. That the Complainants by filing the present complaint and by taking such baseless and untenable pleas is just trying to conceal the material facts in order to somehow cover up their own wrongs, delays and latches and to wriggle out of their contractual obligations by concocting false and frivolous story. Despite all the goodwill gestures extended by the Respondent, the Complainants are trying to illegally extract benefits from the Respondent No. 1 and their main aim is to cause wrongful gain to themselves and wrongful loss to the Respondent No. 1 from time to time. Therefore, the present Complaint is filed with grave illegalities and lack of jurisdiction and the same is liable to be dismissed at the very outset and the Complainants shall be directed to file pursue the complaint before the civil court for any dispute arises from the Agreement in the form of investment agreement and lease agreement.

o. That the law of equity and justice cannot allow such Complainants to reap benefits of such opportunistic attitude and will strive for balance of rights of both the parties at dispute. That this Hon'ble

Authority should not allow the Complainants to mislead the Hon'ble Authority and to misuse Real Estate (Regulation and Development) Act, 2016 for harassing the builder. That despite the utter failure of the Complainants in fulfilling the obligations, the Respondent No. 1 has always showed exemplary conduct.

p. That thereafter, the Complainants, through the letter dated 20.05.2020 were informed about the re-numbering of the Unit number SF/2043 to SF-55, on Second floor.

q. That it is further submitted that despite there being a number of defaulters in the project, the Respondent itself infused funds into the project and has diligently developed the project in question. The Respondent had applied for Occupation Certificate on 09.05.2021. Occupation certificate was thereafter issued in favour of the Respondent vide memo bearing no. ZP-322-Vol.-II/AD(RA)/2021/32717 dated 24.12.2021. It is pertinent to note that once an application for grant of Occupation Certificate is submitted for approval in the office of the concerned statutory authority, the Respondent ceases to have any control over the same. The grant of sanction of the Occupation Certificate is the prerogative of the concerned statutory authority over which the Respondent cannot exercise any influence. As far as the Respondent is concerned, it has diligently and sincerely pursued the matter with the concerned statutory authority for obtaining of the Occupation Certificate. No fault or lapse can be attributed to the Respondent in the facts and circumstances of the case. Therefore, the time period utilized by the statutory authority to grant occupation certificate to

the Respondent is necessarily required to be excluded from computation of the time period utilized for implementation and development of the project.

r. That the Complainants were thereafter offered possession of the unit in question through letter of offer of possession dated 28.01.2022. The Complainants were called upon to remit balance payment including delayed payment charges and to complete the necessary formalities/documentation necessary for handover of the unit in question to the Complainants. That the copy of the offer of possession dated 28.01.2022 is herewith annexed. The Respondent No. 1 earnestly requested the Complainants to obtain constructive possession of the unit in question and to further complete all the formalities regarding delivery of possession. However, the Complainants did not pay any heed to the legitimate, just and fair requests of the Respondent No. 1 and threatened the Respondent with institution of unwarranted litigation. It is relevant to note here that the Respondent No. 1 company had complied with its obligations by offering the possession well within time.

s. That it is pertinent to mention that the Complainants did not have adequate funds to remit the balance payments requisite for obtaining possession in terms of the Buyer's Agreement and consequently in order to needlessly linger on the matter, the Complainants refrained from obtaining possession of the unit in question. The Complainants needlessly avoided the completion of the transaction with the intent of evading the consequences enumerated in the Buyer's Agreement. Therefore, there is no equity

in favour of the Complainants. Without admitting or acknowledging in any manner the truth or correctness of the frivolous allegations levelled by the Complainants and without prejudice to the contentions of the Respondent No. 1, it is submitted that the alleged interest frivolously and falsely sought by the Complainants is illegal and bereft of logic. The Complainants are not entitled to contend that they are entitled for any sort of interest even after receipt of offer for possession within stipulated time. The Complainants has consciously and maliciously refrained from obtaining possession of the unit in question.

t. That it is the obligation of the Complainants under the Act to take the possession of the allotment within two months of Occupancy Certificate after completion of all formalities including the payment of outstanding dues of stamp duty and registration charges, as per the notice of offer of possession. That the Complainants have intentionally distorted the real and true facts in order to generate an impression that the Respondent No. 1 has reneged from its commitments. No cause of action has arisen or subsists in favor of the Complainants to institute or prosecute the instant complaint. The Complainants has preferred the instant complaint on absolutely false and extraneous grounds in order to needlessly victimize and harass the Respondent No. 1.

u. That it is submitted that several allottees, including the Complainants have defaulted in timely remittance of payment of installments which was an essential, crucial and an indispensable requirement for conceptualization and development of the project

in question. Furthermore, when the proposed allottees default in their payments as per schedule agreed upon, the failure has a cascading effect on the operations and the cost for proper execution of the project increases exponentially whereas enormous business losses befall upon the Respondents. The Respondents, despite default of several allottees, has diligently and earnestly pursued the development of the project in question and has constructed the project in question as expeditiously as possible.

v. That it was an obligation of the Complainants to make the payments against the Unit, however, the Complainants have gravely defaulted in the same. That there are outstanding dues towards stamp duty and registration charges, against the unit to the tune of Rs. 10,26,403/- as stated above.

w. That it is submitted that this Hon'ble Authority has no jurisdiction to deal with the cases pertaining to leasing. That the Act is entirely silent on the same. That had the legislature intended the jurisdiction of the Act to extend to leasing arrangements, the same would have been incorporated. It is a settled principle that what cannot be attained directly, cannot be attained indirectly. Accordingly, the Hon'ble Authority has no jurisdiction to deal with the present matter and the present Complaint need to be dismissed at the outset.

x. That it is submitted that the Respondent No. 1 has acted strictly in accordance with the terms and conditions of the Agreement between the parties. There is no default or lapse on the part of the Respondent No. 1. The allegations made in the Complaint inter-alia that the Respondent No. 1 has failed to comply with its obligations

are completely false and bereft of any merits. On the contrary, it is the Complainants who are in clear breach of the terms of the Agreement by not remitting the outstanding amount of the said unit in question within the stipulated time and by not coming forward to take the possession of the said unit in question. That the Respondent No. 1 has duly fulfilled its obligations. There is no default or lapse in so far as the Respondent No. 1 is concerned. The allegations levelled by the Complainants are totally baseless. Thus, it is most respectfully submitted that the present complaint deserves to be dismissed at the very threshold.

y. It is also submitted that the all the facts and submissions set out in the Complaint are incorrect, and are denied as if the same are specifically set out herein and traversed, except those which are specifically admitted herein. Further, the contents of the preliminary objections, set out hereinabove, should be deemed to be incorporated in reply to all paras of the Complaint as well as in reply to the list of dates.

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 those undisputed documents and submissions made by the parties.

8. The present complaint was filed on 06.01.2023 in the authority. The notice for hearing was duly served to respondent no. 2. However, despite providing enough opportunity for filing the reply, no written reply has been filed by the respondent no. 2. Thus, keeping in view the opportunity given to the respondent no. 2, that despite lapse of one year the

respondent has failed to file the reply in the registry. Therefore, in view of the above-mentioned fact, the defence of the respondent no. 2 is hereby struck off by the authority. Further, respondent no. 2 failed to put in appearance before the authority and has also failed to file reply. In view of the same, the matter is proceeded ex-parte against respondent no. 2.

9. Written submissions filed by the complainant and respondent no. 1 are also taken on record and considered by the authority while adjudicating upon the relief sought by the complainant.

E. Jurisdiction of the authority

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

E. I Territorial jurisdiction

11. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana, the jurisdiction of Haryana Real Estate Regulatory Authority, Gurugram shall be entire Gurugram district for all purposes. 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

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

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

13. 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 maintainability of complaint on account of complainant being investor

14. 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 allotment letter, it is revealed that the complainant is buyer, and they have paid a considerable amount to the respondent-promoter towards purchase of 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"

15. 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 complainant, it is crystal clear that the complainant are allottee(s) 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 are not entitled to protection of this Act also stands rejected.

G. Findings on application under section 35 being filed by the complainant on 24.09.2024.

16. On 24.09.2024 the respondent made an application under section 35 of the Act, 2016 in the present matter wherein the complainant prayed for appointment of inquiry officer/expert to examine the agreement executed in the year 2020 inter se parties and to ascertain whether the said agreement is in compliance with RERA Act, 2016 or not. Thereafter abrogate the clauses which are arbitrary and against the law and to initiate penal proceedings against the errant respondent promoter for violation of provisions of the Act, 2016 & Rules, 2017.

17. In the present matter the complainants executed the buyers' agreement on 20.11.2020 which as per complainant is not in consonance with RERA Act, 2016. The authority considering the said request of complainants hereby directs the planning branch of the Authority to examine the BBA executed with the complainants and the draft BBA submitted by the respondent at the time of registration with the model Buyers' agreement

as per RERA Rules, 2017 and issue show cause notice and initiate penal proceedings as per the Act, 2016 for any violation of the provisions thereof, if any.

18. Further, the complainants may approach adjudicating officer for compensation under the Act, 2016 if the respondents are found guilty under the Act, 2016.

H. Findings on the relief sought by the complainant.

H.I. Direct the respondent to handover physical possession of the subject unit as per the provisions of the Act of 2016.
H.II. Direct the respondent to pay interest at prescribed rate as per the provisions of the Act of 2016.

19. In the present matter the authority observed that the registered buyers' agreement executed inter se parties on 20.11.2020. Clause 5 provides for the handing over of possession of the subject unit by 31.12.2022. As per the documents available on record the respondent offered the possession of the unit on 28.01.2022 after obtaining OC from the competent authority on 24.12.2021.

20. Before adjudicating upon the relief of delay possession charges it would be relevant to give observation upon the validity of the offer of possession dated 28.01.2022. The complainants in the present matter have pleaded that the respondent offered the constructive offer of possession although as per BBA but the clauses of the said BBA were arbitrary, illegal and are in violation of provisions of the Act, 2016. On the contrary the respondent, contended that the arrangement between the parties was to transfer the constructive possession of the unit and the same was mutually agreed between the parties in application form and thereafter in the BBA.

21. The authority herein observes that the complainants have failed to put forth any document to show that the agreement dated 20.11.2020 was executed under coercion. Also, no objection/protest whatsoever, was made by the complainants at any point of time since the execution of the new BBA. Moreover, clause 7.1 of the BBA specify that whenever the possession of the unit in this agreement with reference to the subject is made, it shall always mean constructive/symbolic/notional possession of the unit and not physical handover of the Unit to the allottee.

22. Accordingly, the physical possession was never the intent of the respondent and therefore, the offer of possession dated 28.01.2022 is in terms of the agreement dated 20.11.2020 executed between the parties is valid. In view of the above findings no delay in handing over the possession of the subject unit on part of respondent is established and accordingly no case of delay possession charges is made out.

H.III. Direct the respondent to withdraw all the illegal demands:

- **Infrastructure Augmentation Charges**
- **Electric switch-in station & Deposit Charges**

23. The complainant has sought the relief for quashing the above-mentioned charges charged by the respondent at the time of offer of possession dated 28.01.2022. The authority is of the view that the respondent is directed not to charge anything which is not the part of BBA dated 20.11.2020.

- **Sinking Fund**

24. The authority observes that the term sinking fund is not mentioned anywhere in the BBA executed inter-se parties. Moreover, sinking fund and IFMS are the same as both of them are collected for the same purpose. Therefore, the respondent cannot charge it under different heads and is

directed to quash the amount of ₹ 43,699/- charged towards sinking fund as the respondent has already charged the maintenance security.

- **Labour-cess**

25. 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 26.9.1996. 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 no.962 of 2019 titled ***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 complainant is completely arbitrary and the complainant 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. Accordingly, the respondent is directed to quash the amount of ₹3,322/- charged from the complainants on account of labour cess.

- **Sewage/ Storm Water/ Water Connection charges.**

26. The authority has already deliberated the said issue in complaint bearing no. ***4031 of 2019*** **titled as** ***Varun Gupta V/s Emaar MGF Land Ltd.*** wherein the authority has held that the promoter would be entitled to recover the actual charges paid to the concerned departments from the complainant/allottee on pro-rata basis on account of electricity connection, sewerage connection and water connection, etc., i.e.,

depending upon the area of the flat allotted to the complainant 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.

- **Electric Meter Charges**

27. The respondent also demands a sum of ₹ 9,440/- besides taxes as meter connection charges and the demand has been challenged by the allottee being illegal. However, while deliberating this issue in complaint bearing no. ***4031 of 2019*** **titled as** ***Varun Gupta V/s Emaar MGF Land Ltd.*** the authority has held that the promoter would be entitled to recover the actual charges paid to the concerned departments from the complainant/allottee(s) on pro-rata basis on account of electricity connection. However, the complainant(s) would also be entitled to proof of such payments to the concerned department along with a computation proportionate to the allotted unit, before making payment under the aforesaid heads. The model of the digital meters installed in the complex be shared with allottee(s) so that they could verify the rates in the market and the coloniser.

- **Payment due area change**

28. As per the documents available on record it is observed that the complainants and the respondents has already entered into an agreement on 20.11.2020 wherein the super area of the allotted unit was increased to 190.95 sq. ft. As per the agreed payment plan annexed at schedule E of the BBA dated 20.11.2020 the respondent mentioned the total sale consideration (inc. of taxes) as ₹ 23,85,471/-. Therefore, the authority opines that the respondent already mentioned the sale

consideration of the unit in the BBA dated 20.11.2020 and the respondent cannot charge for change of area of the said unit as the area mentioned in offer of possession dated 28.01.2020 is same as that of BBA dated 20.11.2020.

H.IV. Direct the respondent to charge CAM charges from the date of handing over of the actual physical possession of the subject unit.

29. In the present matter, although the respondent has offered the possession of the said unit on 28.01.2022 after receiving OC. But vide said letter dated 28.01.2022 only constructive possession has been offered by the respondent which means the complainants are not in actual physical possession of the said unit. The respondent has very specifically mentioned in its application form and BBA executed inter se parties that physical possession was never to be handed over and is for the purpose of lease only. Furthermore, it is the obligation of respondent to put the said unit on lease. Accordingly, the CAM charges shall be payable by the lessee once the said unit is put on lease by the respondent and the complainants are not liable to pay the CAM charges.

H.V. Direct the respondent to not charge "Holding charges" from the complainants.

H.VI. Direct the respondent to not charge anything from the present complainants which is not part of the agreement.

30. The complainant has also challenged the demand raised by the respondent builder in respect of holding charges. On the contrary, the respondent submitted that all the demands have been strictly raised as per the terms of the flat buyer agreement.

31. The authority observes that the SOA annexed with the offer of possession dated 28.01.2020 does not mention any charges under the head of "Holding Charges". Although, this issue already stands settled by the Hon'ble Supreme Court vide judgment dated 14.12.2020 in civil appeal

no. 3864-3889/202, whereby the Hon'ble Court had upheld the order dated 03.01.2020 passed by NCDRC, which lays in unequivocal terms that no holding charges are payable by the allottee to the developer.

32. Thus, the respondent is not entitled to demand holding charges from the complainant at any point of time even after being part of the buyer's agreement as per law settled by Hon'ble Supreme Court in civil appeal nos. 3864-3889/2020 decided on 14.12.2020.

33. In the present case, the authority (Shri. Arun Kumar, Hon'ble Chairperson, Shri. Vijay Kumar Goyal, Member & Shri. Sanjeev Kumar Arora, Member) heard the complaint and reserved the order on 02.07.2024, the same was fixed for pronouncement of order on 01.10.2024 and 22.10.2024 respectively. The same could not be pronounced on that day and the matter was adjourned to 10.12.2024. On 16.08.2024, one of the member Shri. Sanjeev Kumar Arora got retired and has been discharged from his duties from the Authority. Hence, rest of the presiding officers of the Authority have pronounced the said order.

I. Directions of the authority:

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

    a. The respondent has already changed the sale consideration of the unit as per the revised area as mentioned in the BBA dated 20.11.2020 therefore, the respondent cannot charge for change of area of the said unit being already agreed between the parties in BBA dated 20.11.2020.

b. The respondent is directed to quash the amount of ₹3,322/- charged from the complainants on account of labour cess.

c. The respondent cannot charge it under different heads and is directed to quash the amount of ₹43,699/- charged towards sinking fund as the respondent has already charged the maintenance security.

d. The CAM charges shall be payable by the lessee once the said unit is put on lease by the respondent and the complainants are not liable to pay the CAM charges since the said unit is not for the purpose of self-occupation.

e. The respondent is not entitled to demand holding charges from the complainant at any point of time even after being part of the buyer's agreement as per law settled by Hon'ble Supreme Court in civil appeal nos. 3864-3889/2020 decided on 14.12.2020.

f. A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.

35. Complaint stands disposed of.

36. File be consigned to registry.

(Vijay Kumar Goyal)
Member

(Arun Kumar)
Chairperson

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 10.12.2024