BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 121 of 2019
First date of hearing: 24.09.2019
Date of decision : 07.04.2021

1. Hurunnisha
2. Rana Imam

Both R/o C-302, La Lagune, Sector-54,
Golf Course Road, Gurgaon-122011 **Complainants**

Versus

Pioneer Urban Land and Infrastructure Ltd.
Address:- Registered Office at A-22, Green Park, 3rd floor, Aurobindo Marg, New Delhi-110016
Corporate Office:- Paras Downtown Centre, 7thfloor, Golf Course Road, Sector-53, Gurgaon, Haryana-122002 **Respondent**

CORAM:
Dr. K.K. Khandelwal **Chairman**
Shri Samir Kumar **Member**
Shri Vijay Kumar Goyal **Member**

INDEX

SR. NO.	PARTICULARS	PAGE NO.
1.	A. Unit and project related details	2-7
2.	B. Facts of the complaint	7-10
3.	C. Relief sought by complainant(s)	10
4.	D. Reply by respondent	10-20
5.	E. Written arguments filed by the respondent	21-24
6.	F. Jurisdiction of the authority	24
7.	G. Findings of authority on the objections raised by	25-34

8.	H. Findings on the relief sought by the complainant	34-41
9.	I. Directions of the authority	41-43

APPEARANCE:

Sh. Kuldeep Kumar Kohli — Advocate for the Complainants
Sh. Venket Rao — Advocate for the Respondent

BRIEF

1. The present complaint dated 21.01.2019 has been filed by the complainants/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provisions of the Act or the rules and regulations made there under or to the allottee as per the agreement for sale executed inter se them.

A. Unit and project related details

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

S.No.	Heads	Information

2.	Unit measuring	2455 sq. ft. As per allotment letter, page 168 of the complaint
3.	Increase area	2440 sq. ft. (as per intimation of possession, page 60 of the complaint)
4.	Date of allotment	15.04.2010 (page 168 of the complaint)
5.	Date of execution of Flat Buyers Agreement	20.08.2010 (page 31 of the complaint)
6.	Agreement to sell is executed on	07.10.2014 (page 131 of the compliant)
7.	Payment plan	Construction linked payment plan
8.	Total Sale consideration	Rs. 1,42,77,460/- (As per agreement, page 31 of the complaint)
9.	Total amount paid by the complainants	Rs. 1,33,06,250/- (As per receipts attached with file)
10.	Due date of delivery of possession (As per clause 9.2 -36 months from the date of signing of the buyer's agreement plus 180 days grace period)	20.08.2013 [due date calculates from the date of signing of the agreement] (Grace period is not given to the respondent)
11.	Intimation for possession	20.11.2018 (Page 137 of the complaint)
12.	Delay in handing over possession till offer of possession	5 years 3 months

13.	Date of Occupation Certificate	20.11.2018 (page 30 of the reply)

3. The particulars of the project namely, "Pioneer Park (Presidia)" as provided by the registration branch of the authority are as under:

Project related details			
1.	Name of the promoter	Registered no. 69 of 2017 dated 18.08.2017 valid upto 30.12.2019	
2.	Name of the project	"Pioneer Park (Presidia)"	
3.	Location of the project	Sector-61 and 62, Gurugram	
4.	Nature of the project	Group Housing	
5.	Whether project is new or ongoing	Ongoing	
6.	Registered as whole/phase	Phase	
7.	If developed in phase, then phase no.	1	
8.	Total no. of phases in which it is proposed to be developed, if any	2	
9.	HARERA registration no.	69 of 2017	
10.	Registration certificate	Date	Validity
		18.08.2017	30.12.2019
11.	Area registered	4.40 acres	
12.	Extension applied on	No	
Licence related details of the project			
1.	DTCP license no.	268 of 2007 dated	

		03.12.2007	
2.	License validity/ renewal period	02.12.2024	
3.	Licensed area	24.606 acres	
4.	Name of the license holder	Pioneer Urban Land Infrastructure ltd.	
5.	Name of the collaborator	NA	
6.	Name of the developer/s in case of development agreement and/or marketing agreement entered into after obtaining license.	NA	
7.	Whether BIP permission has been obtained from DTCP	NA	
Date of commencement of the project			
1.	Date of commencement of the project	01.11.2011	
Details of statutory approvals obtained			
S.N.	**Particulars**	**Approval no and date**	**Validity**
1.	Approved building plan	09.02.2011	08.02.2016
2.	Revalidation of building plan	15.05.2017	
3.	(a) For (Tower A,B,C,D, E and Basement 1&2)	09.02.2016	08.02.2021
4.	(b) EWS, Shop 1& 2, Meter Room & Guard Room	09.02.2013	09.02.2017
5.	Environment clearance	04.06.2008	03.06.2013
6. (a)	Occupation certificate date	01.02.2018	

	Tower	C
(b)	Occupation certificate date	23.07.2018
	Tower	F
	Basement	1,2 & 3
(c)	Occupation certificate date	14.02.2019
	Tower	D
(d)	Occupation certificate date	03.04.2019
	Tower	G
7.	Completion certificate date	NA

Details of Phases				
Phase	RC No.	Registration	Details of Tower	Details of Area
Phase 1	69 of 2017	18.08.2017 upto 30.12.2019	C, D, E and Shops	4.40 acres
Phase 2	101 of 2017	24.08.2017 upto 31.12.2019 Extension dated 11.06.2020 upto 31.12.2020		98858.8217 sqm

Details of OC		
OC Dated	Details of Tower in OC	Details of Area
28.07.2017	A, EWS	18352.154 sqm 2623.669 sqm 15282.648 sqm 15889.985 sqm

14.11.2017	B	16346.502 sqm
01.02.2018	C	12168.119 sqm
23.07.2018	F	24924.616 sqm
20.11.2018	E	11729.355 sqm
14.02.2019	D	9866.147 sqm
03.04.2019	G	24663.876 sqm
14.06.2019	H	24663.876 sqm

B. Facts of the complaint

4. The complainants have submitted that Siddhartha Khosla and Mrs. Sonali Khosla were the original buyers who bought and were allotted the unit bearing number E-301, tower E, floor no.3 Project "Pioneer Park (Presidia)" Sector 62 and 63 Gurugram. The buyer's agreement was duly executed between the original buyer's and the respondent on 20.08.2010 and then deposited an amount of Rs.10,00,000/- as booking amount to the respondent and thereafter paid all the instalments to the respondent upto September 2014. The original buyer's paid a total sum of Rs.1,33,07,717/-. Thereafter the complainants jointly purchased the unit from the original buyers for a total sale consideration of Rs.1,57,28,835/- inclusive of BSP, EDC & IDC, car parking and

service tax and club charges demanded at the time of possession and about Rs. 6,13,750/- pertained to preferential location charges (PLC). The agreement sell dated 07.10.2014 executed between the original buyer and the complainants. The complainants had paid a total sum of Rs.1,44,12,469/- to the original buyer's and remaining amount of Rs.13,16,365/- was to be paid directly by the complainants to the respondent.

5. The unit was subsequently purchased by the complainants from the original buyers was duly acknowledged and accepted by the respondent and was subsequently endorsed. Thereafter no demand was raised by the respondent until 20.11.2018. However, despite the complainants having paid more than 91% of the entire agreed consideration amount along with miscellaneous and additional charges etc, the complainants neither received nor were offered the said Unit finished in the manner agreed in buyer's agreement.

6. As per clause 9.2 of the buyer's agreement, the respondent had assured and represented that the possession of the said unit after its construction will be handed over within a period of 36 months from the date of execution of the buyer's agreement, the respondent was entitled for an additional

grace period of six months for applying and obtaining the Occupation Certificate in respect of the said complex.

7. According to the buyer's agreement, the unit was supposed to be delivered by the respondent to the complainants on or before 20.02.2014. The respondent offered possession of the Unit vide letter dated 20.11.2018 and raised an illegal cumulative demand of Rs. 27,12,820/- under various pretexts. The demands were illegal and were never agreed upon and never formed part of the payment scheme which was agreed upon between the parties.

8. The same illegitimate demand of the respondent was absolutely denied by the complainants via a letter, which is annexed as **annexure-c/5.** The possession was offered in-spite of the fact that the unit was still incomplete as various works were yet to be taken up by the construction team.

9. As per the biased clause 9.5 of the buyer's agreement the complainants were liable to pay simple interest at the rate of 18% p.a. for the delay in making payment by them however the respondent had agreed to pay a trivial sum at the rate of Rs. 5/-per sq. ft. per month of the super area till the date of notice of possession in case of delay in handing over possession. This aspect read with other clauses of the buyer's agreement clearly show the biasness of the agreement towards the respondent and against the complainants. The complainants had no option but to accept the terms of the Buyer's agreement without any negotiation because of the

assurance given by the respondent and the hope of the complainants that the respondent will stick to their assurances and promises. However, evidently, the respondent has miserably failed in keeping their promises and assurances causing irreparable losses and injury to the complainants.

10. The complainants have suffered a loss and damage in as much as they had deposited the money in the hope of getting the said unit for residential purpose. They have not only been deprived of the unit but also the benefit of escalation of price of the unit and the prospective return they could have got had they not invested in the project of the respondent.

C. Relief sought by the complainants:

11. The complainants have sought following relief(s):
    (i) Directing the respondent to hand over the possession of the apartment with the best amenities and specifications as promised in all completeness without any further delay as early as possible;
    (ii) Award pendent lite interest @24% per annum from the date of payment of amounts till realization.

12. On the date of hearing, the authority explained to the respondent/promoter about the contravention 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

13. The respondent has contested the complaint on the following grounds.

i. That the present complaint is filed with the oblique motive of harassing the respondent company and to extort illegitimate money while making absolutely false and baseless allegations against the respondent.

ii. That the respondent has already received the Occupation Certificate for the particular tower-E of Presidia Project on 20.11.2018, in which the complainants have the unit. Copy of the **Occupancy Certificate dated 20.11.2018 is annexed as annexure R-2**. Moreover, the respondent after the receipt of the OC without any delay, on the very same day has offered possession to the complainant i.e. on 20.11.2018 itself, which the complainants chose to completely ignore. That the complainants have no cause of action to file the present complaint.

iii. That in the letter of intimation of possession dated 20.11.2018, the respondent clearly mentioned that in order to takeover possession, the complainants needs to complete the required process of documentation/formalities and was also requested to clear the outstanding payments, stamp duty, registration charges etc., which the complainants chose to utterly ignore and are trying to shift their onus of failure on the respondent. The complainants are guilty of not placing complete facts before this authority.

iv. The complainants stepped into the shoes of the original allottees when they signed the change of right to

purchase/ transfer document on 27.10.2014. The complainants agreed to accept the terms and conditions as set out in the apartment buyers agreement. Therefore, the complainants are now obligated in terms of ABA dated 20.08.2010 to take possession and also to clear all outstanding dues including interest on delayed payments & other charges, stamp duty, registration charges etc. to the respondent. It is also submitted that Section 19(10) of the RERA act also casts a duty upon the allottee to take physical possession of the apartment within a period of two months of the occupancy certificate.

v. It is the complainants who failed to perform their part of the agreement by miserably failing to pay the instalments in accordance with the payment schedule, despite repeated payment reminders being sent by the respondent from time to time and to take possession.

vi. As the complainants stepped into the shoes of the original allottees on 27.10.2014 by transferring the right to purchase from the original allottee to the complainants and got the BBA endorsed in their favour, therefore, the clauses of the buyer's agreement came into force effectively from 27.10.2014. Since the agreement was executed with the original allotees on 20.08.2010 which was endorsed to the complainants on 27.10.2014. Therefore, the terms of the buyer's agreement came into effect with respect to the

complainants only from 27.10.2014. As per the terms of the Agreement, the Occupation certificate was to be applied by 27.04.2018, including 180 days of grace period from the effective date of 21.10.2014, wherein the transfer took place. It is reiterated that the occupation certificate with respect to the tower-E was received on 20.11.2018 itself and possession was offered on 20.11.2018.

vii. That considering the original execution date of 20.08.2010 with the original allottees, the occupation certificate was to be applied by 20.022014, including 180 days of grace period. The complainants stepped into the shoes of the original allottees only on 27.10.2014 after having due knowledge that there has been a delay in obtaining the occupation certificate. Thus, this clearly shows that the complainants took over the unit from the original allottees with an ulterior motive of receiving delayed penalties from the respondent. In **Haryana Urban Development Authority vs Raje Ram (2008) 17 SCC 407**, the Hon'ble Supreme Court has held that the case of second allottee cannot be compared to the case of first allottee as the Complainant was aware delay, but in spite of it, the complainant took re-allotment. The complainant was aware that there is a delay in handing of the possession. The relevant para of the judgment is reiterated below for ready reference:

"Respondents in the three appeals are not the original allottees. They are re-allottees to whom re-allotment was made by the appellant in the years 1994, 1997 and 1996 respectively. They were aware, when the plots were re-allotted to them, that there was delay. In spite of it, they took re-allotment. Their cases cannot be compared to cases of original allottees who were made to wait for a decade or more for delivery and thus put to mental agony and harassment. They were aware that time for performance was not stipulated as the essence of the contract and the original allottees had accepted the delay. The appellant offered possession *to respondents (re-allottees) and they took possession the respective plots on 27.6.2002, 21.3.2000, and 13.9.1999 respectively. They approached the District Forum in 1997, within a short period from the date of re-allotment in their favour. They had not paid the full price when they approached the District Forum. In the circumstances, having regard to the principles laid down by this Court in* ***Ghaziabad Development Authority v. Balbir Singh - 2004 (5) SCC 65, Darsh Kumar (supra) and Banalore Develoment Authority v. Syndicate Bank - 2007 (6) SCC 711,*** *we are of the view that the award of interest was neither warranted nor justified.*

viii. That the project was delayed, in context to the execution date of the agreement with the original allottees, due to force majeure conditions which were beyond the control of the respondent. That the Hon'ble Supreme Court on 08.05.2009 had suspended all the mining operations in the Aravali Hill range falling in the State of Haryana within the area of 448 sq. Kms. approx. in the district of Faridabad and Gurugram. This led to the acute shortage of building materials and sand which directly affected the construction schedules and activities of the respondent. That the acute shortage of labour, water and other raw materials severely

affected the real estate, and these reasons were not in the control of the respondent and were not at all foreseeable by the respondent. As per the agreement, the project was delayed due to reasons that were beyond the control of the respondent therefore, the respondent cannot be held liable for the things that were not in the control of the respondent.

ix. Furthermore, this authority in the matter of **Mr. Suresh Kumar Vs M/S Bestech India Pvt Ltd, Case no. 787/2018** vide order dated 29.01.2019 had granted the respondent, the period of one year which was beyond the control of the respondent as zero period while calculating the date of completion of the project. That in this case of the respondent too, the period which was beyond the control of the respondent be termed as zero period and not be counted in calculating the date of completion of the project. Therefore, the proposed date of completion after reducing the zero period was 20.02.2015. The actual delay in obtaining the OC is of 1 year 4 months and 1 day. It is noted that the allottees who have complied with the terms and conditions of the ABA are entitled to compensation in case of any delay. In view of the failure to abide by the payment schedule and make timely payments, the complainants are not eligible to receive any compensation for delay in possession from the respondent. However even though the complainants have utterly failed to abide by the payment schedule and make timely payment, still the respondent being a thoughtful builder has issued a credit note of

Rs.11,63,496/- dated 20.11.2018 for the delay even though the delay was due to the reasons beyond the control of the respondent. The complaint is liable to be dismissed with imposition of exemplary cost for wasting the precious time and resources of the Authority.

x. **It was only on account of the following reasons/circumstances which were beyond the control of the respondent that the project got delayed:**

a. **Delay in Payments by many Customers:** The most important factor in the delay of the project is that customers who did not make timely payments which lead to the squeezing of the working capital of the respondent. As a customer centric company, the Respondent did not cancel the allotments even though there has been delay as well as non-payment by the customers but today these very customers are threatening/are filing fictitious litigation against the respondent for delay in possession.

b. **Dispute with Contractors:** There was a big dispute with the contractors resulting into foreclosure and termination of their contracts and respondent had to suffer huge losses and delayed timelines in this project. The respondent had given the contract of construction of the towers to the reputed constructing agency M/S

Urban Ecoinfra Private Limited, a company registered under the provisions of the Companies Act. 1956, for construction of multi storied residential towers at Sector-62, Gurgaon within 30 months. However, from time to time, it was observed that the contractor was not constructing the project as per the assured timelines and resulted into the labour slowdown and increase in labour disputes. The respondent thereafter took over the construction to continue the construction from midway on its own. It is relevant to note that around the same time there was an acute shortage of labour due to social schemes detailed below which also was a fundamental factor in the delay of the project. It is submitted that the dispute with the previous constructing agency namely M/S. Urban Ecoinfra Pvt. Ltd and thereafter to support faster and quality construction of the remaining contract the respondent appointed new construction consultant agency of international repute namely M/S. Leighton India Contractors Pvt. Ltd for assisting in the construction from the point it was abruptly stopped had a major impact on the progress of the project.

c. **Water Shortage:** In addition to the labour the respondent as per the High Court order which imposed a

ban on ground water on the construction, faced extreme water shortage which was completely unforeseen by any of the Real Estate companies in the NCR region. The respondent, already coping up hard with the above mentioned shortage of labour, was now also faced with the acute shortage of water in the NCR region. It is a well-known fact that there is extreme shortage of water in State of Haryana and the construction vitas directly affected by the shortage of water.

d. **Lack of Infrastructural support from State Government:** The respondent duly paid the external development charges as per the license awarded in its favour. The state government was supposed to lay the whole infrastructure in that licensed area for providing the basic amenities such as drinking water, sewerage, drainage including storm water line, roads etc. However, even on repeated requests the department paid no heed and ignored to provide such basic amenities in these upcoming new sectors of Gurgaon.

e. **Delay in approvals by the State Government:** It is submitted by the respondent herein that such acute shortage of labour- water and other raw materials or the additional permits, licenses, sanctions by different

departments were not in control of the respondent and were not at all foreseeable at the time of launching of the project and commencement of construction of the complex. The respondent cannot be held solely responsible for things that are not in control of the respondent.

f. **Jat Reservation Agitation:** The Jat reservation agitation was a series of protests in February 2016 by Jat people of North India, especially those in the state of haryana, which paralyzed the state including city of gurgaon wherein the project of respondent are situated for 8-10 days. The protesters sought inclusion of their caste in the Other Backward Class (OBC) category, which would make them eligible for affirmative action benefits. Besides Haryana, the protests also spread to the neighbouring states, such as Uttar Pradesh, Rajasthan, and also the National Capital Region.

g. **NGT Order:** The respondent stopped its development activities in compliance with the National Green Tribunal (NGT) order to stop construction in April, 2015 & November 2016 due to emission of dust. The NGT orders simply ordered to stop the construction activities

as the pollution levels were unprecedented took time of a month or so.

h. **Demonetization of Rs. 500/- and Rs. 1000/- currency notes:** The Real Estate Industry is dependent on un-skilled/semi-skilled unregulated seasonal casual labour for all its development activities. The respondent awards its contracts to contractors who further hire daily labour depending on their need. On 8th November 2016, the Government of India demonetized the currency notes of Rs. 500 and Rs. 1000 with immediate effect resulting into an unprecedented chaos which cannot be wished away by putting blame on respondent. Suddenly there was crunch of funds for the material and labour. The labour preferred to return to their native villages. The whole scenario slowly moved towards normalcy, but development was delayed by at least 4-5 months.

13. The terms of a contract are binding upon the party signing the contract and the same should be duly abided by and followed by the said party. It is settled law that in case of any breach of any terms of the contract or any lapses committed by any of the party to the contract, the terms of the contract to the extent of providing damages in case of such breach or lapses are binding upon the parties and the same have to be

lapses are binding upon the parties and the same have to be duly complied with. The Apex Court vide various judgments has been pleased to uphold the view that the terms of the contract are binding upon the Party. Thus, in view of the settled law the complainants herein are barred from claiming any exaggerated amounts over and above what has been agreed by them in the agreements signed and executed by them with the respondent. The respondent is, thus, not liable to any interest. Thus, the present complaint, filed by the complainant is bundle of lies devoid of merits and hence liable to be dismissed with exemplary cost as it is filed without cause of action.

E. Written arguments filed by the respondent

14. The respondent has filled **written arguments on 09.04.2021** wherein the respondent has made following submission:-

    i. **Area Calculation:-** That clause 1.3 of the ABA clearly states that *"It is made clear by the FIRST PARTY and the SECOND PARTY agrees that the sale price of the said Premises shall be calculated on the basis of its Super Area (as per the definition of Super Area given in Annexure II). It is specifically clarified by the FIRST PARTY and is agreed to by the SECOND PARTY that the Super Area as stated in this Agreement is tentative and is subject to change till the construction of the Building is complete in all respects. The final Super Area of the said Premises shall be confirmed by the FIRST PARTY only upon the completion of the construction of the*

Building and grant of the occupation certificate by the competent authority. If there shall be an increase in Super Area, the SECOND PARTY agrees and undertakes to pay for the increase in Super Area immediately on demand, as per intimation received from the FIRST PARTY, and if there shall be a reduction in the Super Area, then the refundable amount due to the SECOND PARTY shall be adjusted by the FIRST PARTY from the final instalment as set forth in the Schedule of Payments (Annexure II. The final total price payable for the said Premises shall be calculated upon confirmation by the FIRST PARTY of the final Super Area of the said Premises and any increase or reduction in the Super Area of the said Premises shall be payable or refundable, as the case may be without any interest at the same rate per square meter square fool as agreed in Clause (1) of this Agreement. Accordingly, there has been an increase in the super area which also reflects in the Occupation Certificate of Tower E.

The Hon'ble National Consumer Disputes Redressal Commission has held in the matter of **Pawan Gupta vs Experion Developers Pvt. Ltd, NO. 286 OF 2018** has held that there is no harm in communicating and charging for the extra area at the final stage. Accordingly, in compliance to the captioned order, the increase in area calculation has been duly explained/communicated to the complainants.

ii. HVAT:- That HVAT was never challenged by the complainant in its complaint. However, it is pertinent to note that the Hon'ble Supreme Court in a catena of judgements have held that the parties to the suit cannot travel beyond the pleadings and that the Court cannot record any finding on issues which are not part of pleadings. In the matter of **Shivaji Balaram Haibatti Vs. Avinash Maruthi Pawar, Civil**

Appeal No. 19421 of 2017, the Hon'ble Apex Court held as follows:

28......... It is a settled principle of law that the parties to the suit cannot travel beyond the pleadings so also the Court cannot record any finding on the issues which are not part of pleadings. In other words, the Court has to record the findings only on the issues which are part of the pleadings on which parties are contesting the case. Any finding recorded on an issue de hors the pleadings is without jurisdiction.

In the matter of **Ram Swarup Gupta v. Bishun Narain Inter College (1987) 2 SCC 555** in which the Hon'ble Supreme Court had observed that: *(4.1) In the absence of pleadings, evidence, if any, produced by the parties cannot be considered.* ***No party should be permitted to travel beyond its pleadings and all necessary and material facts should be pleaded by the party in support of the case set up by it.*** *The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the party should state the essential material facts so that other party may not be taken by surprise.*

ii(a) Therefore, it is submitted that the there are no pleadings of the complainants with respect to the HVAT and raising such contentions at this belated stage clearly shows the malafide intentions of the complainants. Furthermore, clause 1.10 of the ABA clearly details about the payment of Government/Local body/Authority taxes:

1.10 ii) That the SECOND PARTY agrees to pay directly or if paid by the FIRST PARTY then reimburse to the FIRST PARTY on demand, Government rates, property taxes, Wealth Tax, taxes of all and any

kind by whatever name called, whether levied or leviable now or in future on the Plot and/or building(s) constructed on the Plot or the said Premises, as the case may be, as assessable/applicable from the date of application of the SECOND PARTY and the same shall be borne and paid by the SECOND PARTY in proportion to the Super Area of the said Premises to the Super Area of all said Premises in the Building as determined by the FIRST PARTY. Further the SECOND PARTY shall be liable to pay from the date of its application house-tax / property tax, fire fighting tax or any other Fee or Cess as and when levied by a Local Body or Authority and so long as the said Premises of the SECOND PARTY is not separately assessed to such Taxes, Fee or Cess, the same shall be paid by the SECOND PARTY in proportion to the Super Area of the said Premises to the total Super Area of all the premises in the Building / Plot as determined by the FIRST PARTY. These taxes, fees, cesses etc shall be paid by the SECOND PARTY irrespective of the fact whether the maintenance is carried out by the FIRST PARTY or its Nominee or the maintenance agency or any other Body or Association of all or some of said Premises owners.

In terms of the ABA, advance/deposit is only towards payment of HVAT, excess or shortfall would be paid off accordingly.

F. Jurisdiction of the authority

15. The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as held **in *Simmi Sikka v/s M/s EMAAR MGF Land Ltd.*** (complaint no. 7 of 2018) leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage. The said decision of the

authority has been upheld by the Haryana Real Estate Appellate Tribunal in its judgement dated 03.11.2020, in appeal nos. 52 & 64 of 2018 titled as *Emaar MGF Land Ltd. V. Simmi Sikka and anr.*

G. **Findings of the authority on the objections raised by the respondent:-**

With regards to the above contentions raised by the promoter/developer, it is worthwhile to examine following issues:

16. **Whether subsequent allottee is also allottee as per provisions of the Act?**

The term "allottee" as defined in the Act also includes and means the subsequent allottee, hence is entitled to the same reliefs as that of the original allottee. The definition of the term "allottee" as provided in the Act is reproduced as under:

> *"2 In this Act, unless the context otherwise requires-*
>
> *(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".*

Accordingly, following are allottees as per this definition:

(a) Original allottee: A 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.

(b) Allottees after subsequent transfer from the original allottee: A person who acquires the said allotment through sale, transfer or otherwise. However, allottee would not be a person to whom any plot, apartment or building is given on rent.

From the bare perusal of the definition, it is clear that the transferee of an apartment, plot or building who acquires it by any mode is an allottee. This may include (i) allotment; (ii) sale; (iii) transfer; (iv) as consideration of services; (v) by exchange of development rights; or (vi) by any other similar means. It can be safely reached to the only logical conclusion that no difference has been made between the original allottee and the subsequent allottee and once the unit, plot, apartment or building, as the case may be, has been re-allotted in the name of the subsequent purchaser by the promoter, the subsequent allottee enters into the shoes of the original allottee for all intents and purposes and he shall be bound by all the terms and conditions contained in the BBA including the rights and liabilities of the original allottee. Thus, as soon as the unit is re-allotted in his name, he will become the allottee and nomenclature "subsequent allottee" shall only remain superfluous and a misnomer for use by the unscrupulous promoters. Therefore, the authority does not draw any difference between the allottee and subsequent allottee.

17. Relevance is placed on the Judgment dated 26.11.2019 passed in Consumer Complaint no. **3775 of 2017 titled as**

Rajnish Bhardwaj vs. M/s CHD Developers Ltd. by NCDRC wherein it was held as under:

> *"15. So far as the issue raised by the Opposite Party that the Complainants are not the original allottees of the flat and resale of flat does not come within the purview of this Act, is concerned, in our view, having issued the Re-allotment letters on transfer of the allotted Unit and endorsing the Apartment Buyers Agreement in favour of the Complainants, this plea does not hold any water..."*

Therefore, taking the above facts into account, the authority is of the view that the subsequent allottee has been used synonymously with the term allottee in the Act. The subsequent allottee at the time of buying the unit/plot takes on the rights as well as obligations of the original allottee vis-a-viz the same terms and conditions of the BBA entered by the original allottee. Moreover, the amount if any paid by the subsequent or original allottee is adjusted against the unit in question and not against any individual.

18. The Authority concurs with the Hon'ble NCDRC's decision dated 26.11.2019 **Rajnish Bhardwaj vs. M/s CHD Developers Ltd. (supra)** that it is irrespective of the status of the allottee whether it is original or subsequent, an amount has been paid towards the consideration for a unit and the endorsement by the developer on the transfer documents clearly implies his acceptance of the complainant as an allottee.

F.II Objection regarding the delay in payment

The objection raised by the respondent regarding delay in payment by many customers is totally invalid because the allottee is already pay the 91% amount to the respondent. The complainants have already pay 91% of the amount required till the offer of possession and the complainants are not accepting the offer of possession as they are disputing the OC. If any amount is outstanding the allottee direct pay to the respondent as per provision of section 19 (6) of the RERA Act 2016 at the time of accepting offer of possession. The Real Estate (Regulation and Development) Act, 2016 (RERA) mandates under Sec 11 (4) (d), that the developer will be responsible for providing and maintaining the essential services, on reasonable charges, till the taking over of the maintenance of the project by the association of the allottees. Section 19(6) of the RERA also states that every allottee, who has entered into an agreement for sale, to take an apartment, plot or building as the case may be, under Section 19(6), shall be responsible to make necessary payments in the manner and within the time as specified in the said agreement for sale/BBA and shall pay within stipulated time and appointed place, the share of the registration charges, municipal taxes, water and electricity charges, maintenance charges, ground rent and other charges, if any.

F.III Objection raised by the respondent regarding force majeure condition:- The obligation to handover possession within a period of thirty-six months was not fulfilled. There is

delay on the part of the respondent the actual date to handover the possession in the year 2014 and various reasons given by the respondent is totally null and void as the due date of possession was in the year 2014 and the NGT Order refereed by the respondent pertaining to year 2015/2016 therefore the respondent cannot be allowed to take advantage of the delay on his part by claiming the delay in statutory approvals. The following reasons are given by the respondent: - (1) delay in payments by many customers (2) dispute with contractor (3) water shortage (4) lack of infrastructural support from state government (5) delay in approval by the state government (6) Jat reservation agitation (7) NGT Order (8) Demonetization.

The due date of possession in the present case as per clause 9.2 is 20.08.2013, therefore any situation or circumstances which could have a reason prior to this date due to which the respondent could not carry out the construction activities in the project are allowing to be taken into consideration. While considering whether the said situation or circumstances was in fact beyond the control of the respondent and hence the respondent is entitled to force majeure clause 9.5, however all the pleas taken by the respondent to plead the force majeure condition happened after 20.08.2013. the respondent has not given any specific details with regard to delay in payment of installments by many allottees or regarding the dispute with contractor or about the ban an extracting ground water by the High Court in Haryana. Even

no date of any such order has been given. Similar is the position with regard to the alleged lack of infrastructure support by the state government. So far as Jat reservation agitation, NGT order and demonetization of Rs. 500/- and Rs. 1000/- currency notes are concerned these events are stated to have taken pleas in the year 2015 and 2016 i.e., the post due delivery of possession of the apartment to the complainants.

Accordingly, authority holds that the respondent is not entitled to invoke clause 9.5 delay with force majeure condition.

F.IV One of the next contentions raised on the behalf of the respondent is that the complainants had purchased the apartment in question from the original allottees vide agreement to sell dated 07.10.2014 and this fact was also acknowledged and endorsed by the respondent on the same day i.e. 07.10.2014. Thus, the contention of the respondent is that on the date of purchase of the apartment in question from the original allottees the complainants had acquired the knowledge the compliance of the project was already running late but despite they preferred to buy the apartment on 07.10.2014 and hence are not entitled to delay possession charges. Reliance has been placed on a decision rendered by the Hon'ble Supreme Court of India **AIR 2009 Supreme Court 2030--Haryana Urban Development Authority Versus Raje Ram:**

"7. *Respondents in the three appeals are not the original allottees. They are re-allottees to whom re-allotment was made by the appellant in the years 1994, 1997 and 1996 respectively. They were aware, when the plots were re-allotted to them, that there was delay (either in forming the layout itself or delay in delivering the allotted plot on account of encroachment etc). In spite of it, they took re-allotment. Their cases cannot be compared to cases of original allottees who were made to wait for a decade or more for delivery and thus put to mental agony and harassment. They were aware that time for performance was not stipulated as the essence of the contract and the original allottees had accepted the delay. The appellant offered possession to respondents (re-allottees) and they took possession of the respective plots on 27.6.2002, 21.3.2000, and 13.9.1999 respectively. They approached the District Forum in 1997, within a short period from the dates of re-allotment in their favour. They had not paid the full price when they approached the District Forum. In the circumstances, having regard to the principles laid down by this Court in Ghaziabad Development Authority v. Balbir Singh - 2004 (5) SCC 65, Darsh Kumar (supra) and Bangalore Development Authority v. Syndicate Bank - 2007 (6) SCC 711, we are of the view that the award of interest was neither warranted nor justified."*

The contention on the face of it seems to be very attractive but if we go into the depth, it is forward that the contentions is infant spineless, and it is liable to be rejected.

F.V HUDA vs. Raje Ram (2008) he authority in this regard observes that the said judgment does not apply in the present case. In the said case the plots were allotted by the HUDA to the three original allottee on 12/12/86, 08/04/86 and 21/03/86 respectively. However, the physical possession of the plots was not given to them and they sold their respective plots to the three respondents (re-allottees) and the re-allotment was made in their names by the Appellant HUDA in the years 1994,1997 and 1996 respectively. The three

respondents filed consumer complaints before the consumer forum for compensation on account of delayed possession after receiving offer of possession letters for the plots. They won the legal battle before the district consumer forum and again before the state commission. The appellant HUDA took the matter before the National Commission but to no effect. The matter ultimately reached the Supreme Court. The Supreme Court allowed the appeal filed by the HUDA by observing that the re-allottees were aware about the delay (either in forming the lay out itself or delay in delivering the allotted plots on account of encroachment etc.) and in spite of it they took re-allotment. It was held that their cases could not be compared to cases of original allottees who were made to wait for a decade or more for delivery and thus put to mental agony and harassment. It was observed that the re-allottees were aware that time for performance was not stipulated as the essence of the contract and the original allottees has accepted the delay. Hence, the re-allottees were not held entitled to any debt. Thus, it is abundantly clear that this case is altogether a different case and had been decided on the basis of its own peculiar facts and circumstances.

F.VI Raje Ram also does not apply to the facts of the present case for another reason purchase of the apartment in question by the complainant from the original allottees was acknowledged and endorsed by the respondent on 07.10.2014. as soon as transfer of the apartment in the names of the complainants. The complainants become the allottees

foe all intends and purposes and also become bound by the terms and conditions stipulated in the agreement 20.08.2010. If it is so the complainant also become entitled to delay possession charges.

In number of judgements by various courts it has pointed that the terms of the agreement have been drafted mischievously and are ex-facie one sided as also held in para 181 of **Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI** and others. (W.P 2737 of 2017), wherein the Bombay HC bench held that:

> *"...Agreements entered into with individual purchasers were invariably one sided, standard-format agreements prepared by the builders/developers and which were overwhelmingly in their favour with unjust clauses on delayed delivery, time for conveyance to the society, obligations to obtain occupation/completion certificate etc. Individual purchasers had no scope or power to negotiate and had to accept these one-sided agreements."*

The Hon'ble Supreme Court also in the matter of Pioneer Urban Land & Infrastructure Ltd. v. Govindan Raghavan held that a term of a contract will not be final and binding if it is shown that the flat purchasers had no option but to sign on the dotted line, on a contract framed by the builder. The recent judgement passed by the Hon'ble Supreme Court in Wg. Cdr. Arifur Rahman Khan and Aleya Sultana and Ors. V. DLF Southern Homes Pvt. Ltd. (now Known as BEGUR OMR Homes Pvt. Ltd.) and Ors. (Civil Appeal No. 6239 of 2019) dated 24.08.2020 held as under:

5. Force majeure stipulations were illustrated in sub-clauses (b) and (c) of clause 11, which included delay due to the reasons beyond the control of the developer and failure to deliver possession due to Government rules, orders or notifications, respectively. Construction was behind schedule. The flat purchasers were informed on 12 January 2011 that possession of the apartments was expected to be completed by the middle of 2012. This assurance was not fulfilled. By a communication dated 18 June 2013, the developers issued a revised timeline intimating all flat buyers that the delivery of possession would commence from October 2013. However, on 8 August 2013 another communication was issued stating that the real estate industry was affected by an economic slowdown which had hampered the pace of construction. The date for handing over possession was extended to June 2014. A tentative schedule for delivery was indicated under which Towers D1 and D2 would be handed over by January 2014, and Towers A3 to A6, A7, B3 and B4 would be handed over by May 2014. On 8 August 2014, the timelines for handing over possession were again extended by the developers : under the revised schedule the flats in Towers D1 and D2 were to be handed over in August 2014, those in A1 to A-7 in February 2015, B1 to B6 in April 2015 and C1 to C4 in June 2015. On 4 May 2015, the developers issued another communication indicating the progress of the work and informed the purchasers that site visits had been initiated for the project "till we receive the occupancy certificate for clusters A, B and C". This is an admission of the fact that until then the occupation certificate had not been received. The obligation to handover possession within a period of thirty-six months was not fulfilled.

The authority while considering the facts of the case stated that it is apparent from the record that the authority **does not find any merit in any of** reasons submitted by the respondent towards the justification for the delay.

H. Findings on the relief sought by the complainants

Relief sought by the complainants:

(i) Directing the respondent to hand over the possession of the apartment with the best amenities and specifications as promised in all completeness without any further delay as early as possible;

(ii) Award pendent lite interest @24% per annum from the date of payment of amounts till realization.

19. In the present complaint, the complainants intend to continue with the project and is seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under.

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

20. Clause 9.2 of the apartment buyer agreement (in short, agreement) provides for handing over of possession and is reproduced below:

> **"9.2 POSSESSION**
>
> *"The FIRST PARTY shall make all efforts to apply for the Occupation Certificate of the proposed residential project within thirty-six (36) months from the date of singing of the Buyers Agreement subject to such limitations as be provided in this Buyers Agreement and the timely compliance of the provisions of the Buyers Agreement by the SECOND PARTY. The SECOND PARTY agrees and understands that the FIRST PARTY shall be entitled to grace period of one hundred and eighty days (180) days, after the expiry of thirty-six (36) months, for*

applying and obtaining the Occupation Certificate in respect of the said complex".

21. At the outset it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and application, and the complainants not being in default under any provisions of this agreements and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the doted lines.

22. **Admissibility of grace period**: The promoter has proposed to hand over the possession of the apartment by 20.08.2014 and further provided in agreement that promoter shall be entitled to a grace period of 180 days for applying and obtaining occupation certificate in respect of group housing complex. As a matter of fact, the promoter has not applied for occupation certificate within the time limit prescribed by the promoter in the apartment buyer's agreement. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 180 days cannot be allowed to the promoter at this stage. The same view has been upheld by the hon'ble Haryana Real Estate Appellate Tribunal in appeal nos. 52 & 64 of 2018 case titled as ***Emaar MGF Land Ltd. VS Simmi Sikka*** case and observed as under: -

> *68. As per the above provisions in the Buyer's Agreement, the possession of Retail Spaces was proposed to be handed over to the allottees within 30 months of the execution of the agreement. Clause 16(a)(ii) of the agreement further provides that there was a grace period of 120 days over and above the aforesaid period for applying and obtaining the necessary approvals in regard to the commercial projects. The Buyer's Agreement has been executed on 09.05.2014. The period of 30 months expired on 09.11.2016. But there is no material on record that during this period, the promoter had applied to any authority for obtaining the necessary approvals with respect to this project. The promoter had moved the application for issuance of occupancy certificate only on 22.05.2017 when the period of 30 months had already expired. So, the promoter cannot claim the benefit of grace period of 120 days. Consequently, the learned Authority has rightly determined the due date of possession.*

23. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges at the rate of 24% p.a. however, 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.*

24. 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. The Haryana Real Estate Appellate Tribunal in **Emaar MGF Land Ltd. vs. Simmi Sikka (Supra)** observed as under: -

"64. Taking the case from another angle, the allottee was only entitled to the delayed possession charges/interest only at the rate of Rs.15/- per sq. ft. per month as per clause 18 of the Buyer's Agreement for the period of such delay; whereas, the promoter was entitled to interest @ 24% per annum compounded at the time of every succeeding instalment for the delayed payments. The functions of the Authority/Tribunal 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 his dominate position and to exploit the needs of the homer buyers. This Tribunal is duty bound to take into consideration the legislative intent i.e., to protect the interest of the consumers/allottees in the real estate sector. The clauses of the Buyer's Agreement entered into 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 dated 09.05.2014 are ex-facie one-sided, unfair and unreasonable, and the same shall constitute the unfair trade practice on the part of the promoter. These types of discriminatory terms and conditions of the Buyer's Agreement will not be final and binding."

25. 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., 07.04.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

26. 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;"*

27. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same as is being granted to the complainants in case of delayed possession charges.

28. On consideration of the documents available on record and submissions made by both the parties regarding contravention of provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a)of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 9.2 of the agreement executed between the parties on 20.08.2010, the possession of the subject apartment was to be delivered within stipulated time i.e., by 20.08.2013. As far as grace

period is concerned, the same is disallowed for the reasons quoted above. The respondent has failed to handover possession of the subject apartment 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. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with proviso to section 18(1) of the Act on the part of the respondent is established. As such the allottee shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 20.08.2013 till the handing over of the possession i.e. 20.11.2018 at the prescribed rate i.e., 9.30 % p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules.

I. Directions of the authority

29. 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 at the prescribed rate of 9.30% p.a. for every month of delay from the due date of possession i.e., 20.08.2013 till the date of handing over possession 20.11.2018.

ii. The arrears of such interest accrued from 20.08.2013 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 allottee 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 interest for the delayed period.

iv. The rate of interest chargeable from the allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.30% 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.

v. The respondent shall not charge anything from the complainants which is not the part of the agreement, however, holding charges shall not be charged by the promoter at any point of time even after being part of agreement as per law settled by hon'ble Supreme Court in civil appeal no. 3864-3899/2020.

vi. The promoter is directed to provide the possession with all amenities and specifications as per the BBA.

30. Complaint stands disposed of.

31. File be consigned to registry.

(Samir Kumar)
Member

(Vijay Kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 07.04.2021

JUDGEMENT UPLOADED ON 01.06.2021.