BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 960 of 2020
First date of hearing: 24.03.2020
Date of decision : 25.03.2021

Mrs. Pooja Dogra
R/o: - L-49D, First floor,
Block-L, Saket, New-Delhi **Complainant**

Versus

1. M/s Ramprashtha Promoters and Developers Private Limited.
2. Blue Bell Proptech Pvt. Ltd.
Both having Regd. office: C-10, C Block Market, Vasant Vihar, New Delhi- 110057
Also, at: - Plot No. 114, Sector-44, Gurugram-122002. **Respondents**

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

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APPEARANCE:

Sh. Nilotpal Shyam
Ms. Shivali — Advocates for the complainant
Sh. Manoj Kumar — Advocate for the respondents

ORDER

1. The present complaint dated 28.02.2020 has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is *inter alia* prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the rules and regulations made there under or to the allottee as per the agreement for sale executed *inter se*.

A. Unit and project details

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

S.No.	Heads	Information
1.	Unit no.	1801, 18th floor, Tower E

		[Page 30of complaint]
2.	Unit measuring	1725 sq. ft.
3.	Date of execution of apartment buyer's agreement	29.11.2011 [Page 26 of complaint]
4.	Payment plan	"Construction linked payment plan." [Page 57 of complaint]
5.	Total consideration	Rs.78,10,763/- [as per schedule of payment plan at page 57 of complaint]
6.	Total amount paid by the complainants	Rs.68,28,824 /- [as per payment schedule and receipt information dated 10.02.2020 annexure-2 page no 59 to 63 of complaint and 33 of reply]
7.	Due date of delivery of possession as per clause 15(a) of the apartment buyer agreement: by 31.08.2014 [Page 40 of complaint]	31.08.2014
8.	Delay in handing over possession till date of this order i.e. 25.03.2021	6 Years 6 months and 25 days

3. The particulars of the project namely, "SKYZ" as provided by the registration branch of the authority are as under:

Project related details		
1.	Name of the promoter	Ramprastha Promoters & Developers Pvt Ltd
2.	Name of the project	The SKYZ
3.	Location of the project	Sector 37C, Village Gadauli Kalan, 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.	3	
8.	Total no. of phases in which it is proposed to be developed, if any	5	
9.	HARERA registration no.	320 of 2017	
10.	Registration certificate	Date	Validity
		17.10.2017	31.03.2019
11.	Area registered	102000 sq. mt.	
12.	Extension applied on	17.06.2020	
13.	Extension certificate no.	Date	Validity
		In principal approval on 12.06.2019	30.03.2020
Licence related details of the project			
1.	DTCP license no.	33 of 2008 dated 19.02.2008	
2.	License validity/ renewal period	18.02.2025	
3.	Licensed area	60.511 Acres	
4.	Name of the license holder	Ramprastha Builders Pvt Ltd and 11 others	
5.	Name of the collaborator	NA	
6.	Name of the developer/s in case of development agreement and/or marketing agreement	NA	

	entered into after obtaining license.		
7.	Whether BIP permission has been obtained from DTCP	NA	
Time schedule for commencement of the project			
1.	Date of commencement of the project	20.08.2009	
Details of statutory approvals obtained			
S.N.	**Particulars**	**Approval no and date**	**Validity**
1.	Approved building plan	12.04.2012	11.04.2017
2.	Environment clearance	21.01.2010	20.01.2015
3. (a)	Occupation certificate date	13.12.2017	
	Tower No.	Floors	
	Tower U, V, W, X, Y, Z	G+13th	
(b)	Occupation certificate date	13.02.2018	
	Tower No.	Floors	
	Tower I, J, K, L, M	G+19th	
(c)	Occupation certificate date	13.02.2020	
	Tower No.	Floors	
	Tower H, N, O	G+19th	
	Convenient shopping	GF	
4.	Completion certificate date	NA	

B. Facts of the complaint

4. The complainant has submitted that the respondents have obtained license from the Director General, Town & Country

Planning, Haryana (DTCP) for development of the project land into group housing complex comprising of multi-storied residential apartments in accordance with law. Further, the group companies of respondent no. 1 are the owner as well as one of the developers of impugned project land in whose name license from DTCP was granted and wherein the respondent no. 2 is the second developer (a group company of respondent no.1) having entered into the joint development agreement dated 28.06.2011 with respondent no. 1. It is noteworthy to state that all the payments by the complainants have been made to respondent no.1.

5. The complainant has submitted that they submitted an application for allotment of unit no. E-1801, proposed to be built on 18th floor of block-E in the impugned project. The complaint has opted for instalment plan. The complainant further submitted that the respondent no. 1 issued allotment letter wherein the total sale consideration for the said unit no. E-1801 was fixed as Rs.78,10,763/-. The parties entered into the apartment buyer agreement dated 29.11.2011 for the sale of the said unit no E-1801 the respondents in terms of the application of the complainant executed the agreement for sale and agreed to the terms and condition as set forth under this agreement.

6. The complainant has submitted that respondents agreed to sell/ convey/ transfer the apartment unit no. E-1801, 18th floor, Tower-E in the complex with the right to exclusive use of parking space for an amount of Rs.78,10,763/- which includes basic sale price, car parking charges, external development charges and infrastructure development charges, preferential location charges and interest free maintenance security and in addition to, club membership, electricity connection as per payment plan.

7. The complainant submitted that he has paid almost 90% of the total sale consideration of the said unit. Despite said payments, the respondent failed to deliver the possession in the agreed time framed for reasons best known to them and the respondents never bothered to intimate rhymes and reasoning for the delay to the complainants. Therefore, the respondents have the breached the sanctity for the agreement to sell i.e. ABA.

8. The complainant has further submitted that the respondent with malafide intent sent communications to the complainants giving false assurances regarding new dates of handing over of possession without assigning any reason whatsoever for such a prolonged delay. Vide email dated January 12, 2016, the Respondents informed new date for completion of

construction of tower as March 2017.Similarly, vide mail dated 28.02.2017, the Respondents gave a new deadline of March 2018 for the completion of the project.

9. The complainant has further submitted that the respondents have also not obtained necessary environment clearance from the concerned authority for all the projects located in sector-37D, Gurugram being developed by them. The necessary details with regard to a RTI reply by the Ministry of Environment are annexed with the complaint. The relevant RTI reply clearly reveals that the respondents do not have environment clearance with regard to the said project site. Therefore, under such circumstances, the completion of the impugned project seems to be only a distant dream in view of such serious lapses on the part of respondents.

10. That the respondents are continuous and recurring defaulter, and no respite is available against such a recurring either on justiciable or equitable ground. Any further extension to them will amount to travesty of justice as respondents actions seems to be taken in bad faith and with ill motive to misappropriate complainants hard earned money. That there is more than 6 years of unexplained and inordinate delay in handing over the possession by the Respondents to the

Complainants without any sign of them meeting the future deadline.

C. Relief sought by the complainant:

11. The complainant has sought following relief(s):

    i. to direct the respondent to immediately deliver the possession of Flat No. E-1801, 18th floor, "SKYZ" towers, Ramprastha city, Sector-37D Gurugram along with 18% per annum interest compounded quarterly for the delay period for handing over the possession calculated from the date of delivery of possession as mentioned in the ABA.

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 contests the complaint on the following grounds: -

    i. The present complaint is not maintainable in its present form and the complaint is strictly liable to be dismissed on the grounds presented hereunder by the respondents. That the Haryana Real Estate Regulatory Authority has no

jurisdiction to entertain the present complaint. The respondents have also filed an application questioning the jurisdiction of the authority on the basis of several provisions of the relevant statutes. It is submitted therefore that this reply is without prejudice to the rights and contentions of the respondents contained in the said application.

ii. The respondent no. 1 has submitted that the present project fall within the definition of "ongoings projects" and has been registered with the authority constituted under the said Act, the complaint purported to be filed against the said project ought to be filed before the adjudicating officer under rule 29 of the rules and not before the authority under rule 28 as this authority does not possess jurisdiction to entertain the present complaint and this ground alone, th present complaint ought to be dismissed at its root level.

iii. That the complainant has now filed a complaint in terms of the Haryana Real Estate (Regulation and Development) Amendment Rules, 2019 under the Amended rule 28 in the amended 'form CRA' and is seeking relief of possession, interest, and compensation under section 18 of the Act. the respondent is further submitted that the

power to adjudicate the complaints pertaining to refund, possession, compensation and interest for a grievance under section 12,14,18 and 19 are vested with the adjudicating officer under section 71 read with section 31 of the Act and not under the rules or any amendment thereof can dilute, nullify or supersede the powers of the adjudicating officer vested specifically under the Act and therefore, the authority has no jurisdiction in any manner to adjudicate upon the present complaint.

iv. The respondent no.1 submitted that an allotment letter was issued to the complainants confirming the allotment of flat no. E-1801 located on 18th Floor, having 1725 sq. ft. along with one parking space in block - E for a total consideration of Rs.78, 10,163/- in the said project. The parties thereafter mutually agreed on the terms and conditions of the allotment letter and signed a comprehensive agreement on 29.11.2011, the apartment buyer agreement with respect to purchase of the said apartment. The complainant agreed to pay the balance amount of the sale price as per the terms of the apartment buyer agreement dated 29.11.2011.

v. The respondent no.1 submitted that complainants have categorically agreed to the terms and conditions after

thoroughly walking through each clause of the agreement and only after completely satisfying themselves of the reasonability of the agreement has signed the present apartment buyer agreement. However the complainants are now reciting an entirely different story just to harass the opposite parties and thereafter, under the garb of it, claim possession along with an unreasonable and discriminatory interest rates in order to make profits of the present miserable and helpless condition of the opposite parties.

vi. That the statement of objects and reasons as well as the Preamble of th said Act categorically specify the objective behind enacting the said Act to be for the purpose of protecting the interest of consumers in the Real Estate Sector. However, the present complainant cannot be termed as a consumer or a genuine buyer in any manner within the meaning of Consumer Protection Act or RERA. The present complainant is only an investor in the present project who has purchased the present property for the purposes of investments/commercial gain. The complaint is a desperate attempt of the complainant to harass the respondents and to harm the reputation of the respondents. It is further submitted that the RERA Act

does not provide any definition for the term "consumer", the same may be imported from the terminology prescribed under the Consumer Protection Act, 1986. That the pain reading of the definition of the term "consumer" envisaged under the Consumer Protection Act makes it is clear that the present complainant does not fall within the walls of the term "consumer". That further the complainant is a mere investor who has invested in the project for commercial purpose.

vii. The respondent no.1 further submitted that complainants have nowhere provided any supportive averments or proofs as to how they fall within the boundaries of the definition of "Consumer". Therefore, the complainants cannot be said to be consumers of respondents within the caricature of consumer within the Consumer Protection Act, 1986. The complainants have deliberately concealed the motive and intent behind purchasing of the said unit. In this behalf, the Authority may strictly direct the complainants to adduce any documentary evidence in support of their averments.

viii. The complainant is already in ownership of one property bearing no. E-35, Ground Floor, Satyawati Colony, Ashok Vihar, Phase-III, Ashok Vihar Delhi- 110052. Hence, by

any standard of imagination, the present complainants cannot to be said to have purchased the present property for personal use; rather its cab be clearly interpreted that the said unit was only purchased for the purpose of commercial advantages or gain, hence, complainants are plainly investors who have filed the present complaint on the basis of a totally concocted and fabricated story filed with fallacies and concealments.

ix. The respondent no.1 submitted that the entire transaction of the complainants with the Respondent of purchasing a unit in the project was for a "commercial purpose" and hence, in view of catena of judgments of the Hon'ble National Consumer Disputes Redressal Commission, the complaint before the Authority is not maintainable in its present form and hence is liable to be dismissed at its very beginning.

x. The respondent no.1 further submitted that the complainant has concealed its own inactions and defaults since the very beginning. The complainants have deliberately concealed the material fact that the complainants are at default due to non-payment of several installments within the time prescribed, which has also resulted into delay payment charges/ interests.

the respondent had to bear with the losses and extra costs owing due delay of payment of installments on the part of the complainants for which they are solely liable. However, the respondent owing to its general nature of good business ethics has always endeavored to serve the buyers with utmost efforts and good intentions. The respondents constantly strived to provide utmost satisfaction to the buyers/allottees.

xi. The respondent no.1 further submitted that even in the cyclone of adversities and the unpredicted wrath of falling real estate market conditions, the respondents have made an attempt to sail through the adversities only to handover the possession of the property at the earliest possible to the utmost satisfaction of the buyers/allottees. That even in such harsh market conditions, the respondents have been continuing with the construction of the project and sooner will be able to complete the construction of the project. The complainants have already obtained the occupation certificate for 8 towers out of 15 towers and will most successfully be able to obtain occupation certificate for the other towers including the present one by 31.12.2020 as mentioned in the extension application filed before the

RERA Authority or within such extended time, as may be extended by the Authority, as the case may be.

xii. That section 19(3) of the Act provides that the allottee shall be entitled to claim the possession of the apartment, plot, or building, as the case may be, as per the declaration given by the promoter under section 4(2)(l)(C). Therefore, the concurrent interpretation of both the provision, would provide that the entitlement to claim the possession or refund would only arise when the possession has not been handed over as per the declaration given by the promoter. In the present case, the respondent has made a declaration that would complete the project by 31.12.2019 and further applied for extension of one year with a new date as 31.12.2020. Thus, no cause of action can be said to have arisen to the complainants in any event to claim possession or refund, along with interest and compensation, as sought to be claimed by them.

xiii. The respondent No.1 submitted that the respondent has been diligent in completing its entire project and shall be completing the remaining projects in phased manner.

S. No	Project Name	No. of Apartments	Status
1.	Atrium	336	OC received
2.	View	280	OC received
3.	Edge Tower I, J, K, L, M Tower H, N Tower-O (Nomenclature-P) (Tower A, B, C, D, E, F, G)	 400 160 80 640	 OC received OC received OC received OC to be applied
4.	EWS	534	OC received
5.	Skyz	684	OC to be applied
6.	Rise	322	OC to be applied

xiv. The respondent no.1 submitted that the delay in delivering the possession of the apartment to the Complainants herein has attributed solely because of the reasons beyond control of the opposite parties. further submitted that the delay has occurred only due to unforeseen and untackleable circumstances which despite of best efforts of the opposite party hindered the progress of construction, meeting the agreed construction schedule resulting into unintended delay in

timely delivery of possession of the Apartment for which the opposite parties cannot be held accountable.

xv. The respondent No.1 submitted that on account of the following reasons/circumstances that the project got delayed and timely possession could not be handed over to the complainants:

- Delay in getting approvals from different authorities which were beyond the control of the opposite party.
- shortage of labour/workforce in the real estate market as the available labour were tempted to return to their respective States due to the guaranteed employment under the said NREGA and JNNURM Schemes.
- extreme water shortage
- the Hon'ble High Court of Punjab and Haryana vide Order dated 16.07.2012 restrained the usage of ground water and directed to use only treated water from available Sewerage Treatment Plants (hereinafter referred to as "STP").
- In addition to the above, there has been a heavy shortage of supply of construction material i.e. river sand and bricks etc. through out of Haryana, pursuant to order of Hon'ble Supreme Court of India

in the case ***Deepak Kumar etc. v. State of Haryana*** (I.A. No. 12-13 of 2011 in SLPs (C) nos. 19628-29 of 2009 with SLPs (C) No. 729-731/2011, 21833/2009, 12498-499/2010, SLP(C) CC... 16157/2011 & CC 18235/2011 dated 27 February 2012) and correspondingly, the construction progress slackened.

14. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submission made the parties.

D. Jurisdiction of the authority

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

D.I Territorial jurisdiction

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

District, therefore this authority has complete territorial jurisdiction to deal with the present complaint.

D.II Subject matter jurisdiction

The respondent has contended that the relief regarding refund and compensation are within the jurisdiction of the adjudicating officer and jurisdiction w.r.t the same does not lie with the authority. It seems that the reply given by the respondent is without going through the facts of the complaint as the same is totally out of context. The complainant has nowhere sought the relief of refund and regarding compensation part the complainant has stated that he is reserving the right for compensation and at present he is seeking only delay possession charges. 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.***

F. Findings on the objections raised by the respondent

F.I Objection regarding handing over possession as per declaration given under section 4(2)(l)(C) of RERA Act

15. The counsel for the respondents has concluded that the entitlement to claim possession or refund would arise once the possession has not been handed over as per declaration given by the promoter under section 4(2)(l)(C). Therefore, next question of determination is whether the respondent is entitled to avail the time given to him by the authority at the time of registering the project under section 3 & 4 of the Act.

16. It is now settled law that the provisions of the Act and the rules are also applicable to ongoing project and the term ongoing project has been defined in rule 2(1)(o) of the rules. The new as well as the ongoing project are required to be registered under section 3 and section 4 of the Act.

17. Section 4(2)(l)(C) of the Act requires that while applying for registration of the real estate project, the promoter has to file a declaration under section 4(2)(l)(C) of the Act. The same is reproduced as under: -

> *Section 4: - Application for registration of real estate projects*
>
> *(2) The promoter shall enclose the following documents along with the application referred to in sub-section (1), namely: —*
>
> .....
>
> *(l): -a declaration, supported by an affidavit, which shall be signed by the promoter or any person authorised by the promoter, stating: — .....*
>
> *(C) the time period within which he undertakes to complete the project or phase thereof, as the case may be...."*

18. The time period for handing over the possession is committed by the builder as per the relevant clause of plot buyer's agreement and the commitment of the promoter regarding handing over of possession of the unit is taken accordingly. The new timeline indicated in respect of ongoing project by the promoter while making an application for registration of the project under section 3 and 4 of the Act does not change the commitment of the promoter to hand over the possession by the due date as per the plot buyer's agreement. The new timeline as indicated by the promoter in the declaration under section 4(2)(l)(C) is now the new timeline as indicated by him for the completion of the project one the purposes behind is that after doing so the promoters shall not be liable to be penalized to be violation of section 3 of under section 59 of the act. Thus, penal proceedings shall not be initiated against the builder for not meeting the committed due date of possession but now, if the promoter fails to complete the project in declared timeline, then he is liable for penal proceedings. The due date of possession as per the agreement remains unchanged and promoter is liable for the consequences and obligations arising out of failure in handing over possession by the due date as committed by him in the plot buyer's agreement and he is liable for the delayed possession charges

as provided in proviso to section 18(1) of the Act. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter. The same issue has been dealt by hon'ble Bombay High Court in case titled as ***Neelkamal Realtors Suburban Pvt. Ltd. and anr. vs Union of India and ors***. and has observed as under:

"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter..."

F.II Objection regarding entitlement of DPC on ground of complainant being investor

The respondent has taken a stand that the complainants are the investors and not consumers, 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. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority observed that the respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the

promoter if the promoter 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 apartment buyer's agreement, it is revealed that the complainants are buyer and they have paid total price of Rs.68,28,824/- to the promoter towards purchase of an apartment in the project of the promoter. 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;"*

In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment buyer's agreement executed between promoter and complainants, it is crystal clear that the complainants are allottee(s) as the subject unit was allotted to them by the promoter. The concept of investor is not defined or referred 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". The Maharashtra Real Estate

Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled as ***M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr.*** has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottee being an investor is not entitled to protection of this Act also stands rejected.

G. Findings on the relief sought by the complainant

Relief sought by the complainant: To direct the respondent to immediately deliver the possession of unit no. E-1801, 18th floor, SKYZ Towers, Ramprastha city, Sector-37D Gurugram along with @18% per annum interest compounded quarterly for the delayed period of handing over the possession calculated from the date of delivery of possession as mentioned in the ABA.

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."*

Clause 15(a) of the apartment buyer agreement provides for handing over of possession and is reproduced below:

"15. POSSESSION

(a) **Time of handing over the possession**

Subject to terms of this clause and subject to the Allottee having complied with all the terms and condition of this Agreement and the Application, and not being in default under any of the provisions of this Agreement and compliance with all provisions, formalities, documentation etc., as prescribed by RAMPRASTHA. RAMPRASTHA proposed to hand over the possession of the Apartment by 31.08.2012 the Allottee agrees and understands that RAMPRASTHA shall be entitled to a grace period of hundred and twenty days (120) days, for applying and obtaining the occupation certificate in respect of the Group Housing Complex."

20. The authority has gone through the possession clause of the agreement and observed that this is a matter very rare in nature where builder has specifically mentioned the date of handing over possession rather than specifying period from some specific happening of an event such as signing of apartment buyer agreement, commencement of construction, approval of building plan etc. This is a welcome step, and the authority appreciates such firm commitment by the promoter regarding handing over of possession but subject to observations of the authority given below.

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 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 31.08.2014 and further provided in agreement that promoter shall be entitled to a grace period of 120 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 agreement. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 120 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 18% 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.*

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."

24. 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., 25.03.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

25. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.
Explanation. —For the purpose of this clause—
(i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;
(ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"

26. 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.

27. 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 respondents are in contravention of the provisions of the Act. By virtue of clause 15(a) of the agreement executed between the parties on 29.11.2011, possession of the subject apartment was to be delivered within stipulated time i.e. by 31.08.2014. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over possession is 31.08.2014. 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., 31.08.2014 till the handing over of the possession, at 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.

The allottee requested for fresh statement of account of the unit based on the above determinations of the authority.

H. Directions of the authority

28. 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 respondents are 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., 31.08.2014 till the date of handing over possession.

ii. The promoter may credit delay possession charges in the account ledger/statement of account of the unit of the allottee, if the amount outstanding against the allottee is more than the DPC this will be treated as sufficient compliance of this order.

iii. If there is no amount outstanding against the allottee or less amount outstanding against the allottee then the

balance delay possession charges shall be paid after adjustment of the outstanding against the allottee.

iv. The arrears of such interest accrued from 31.08.2014 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.

v. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.

vi. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.30% by the respondents/promoters which is the same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

vii. The respondents 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.

viii. The promoter is directed to furnish to the allottee statement of account within one month of issue of this order. If there is any objection by the allottee on statement of account, the same be filed with promoter after fifteen days thereafter. In case the grievance of the allottee relating to statement of account is not settled by the promoter within 15 days thereafter then the allottee may approach the authority by filing separate application.

29. Complaint stands disposed of.

30. File be consigned to registry.

(Samir Kumar)
Member

(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 25.03.2021
Judgement uploaded on 01.06.2021