BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 5550 of 2019
First date of hearing: 06.02.2020
Date of decision : 01.04.2021

1. Smt. Bhairvin Mathur
2. Shri Vikramaditya Mathur

Both RR/o: - 273, SFS Apartments, Hauz Khas, New Delhi-110016 **Complainants**

Versus

M/s Vatika Limited
Regd. office: Vatika Triangle, 4th Floor, Sushant Lok, Phase-I, MG Road, Gurugram-122002 **Respondent**

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

APPEARANCE:
Ms. Priyanka Agarwal Advocate for the complainants
Shri C.K. Sharma and Dhruv Dutt Sharma Advocates for the respondent

ORDER

1. The present complaint dated 27.11.2019 has been filed by the complainants/allottees in Form CRA 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 to the allottee as per the agreement for sale executed inter-se them.

A. Project and unit 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
1.	Name and location of the project	Iris Floors-Vatika India Next, Sector 82,82A,83,84,85 Gurugram, Haryana 122004.
2	Nature of the project	Residential project
3	Project area	182.8 acres
4.	DTCP License	113 of 2008 dated 01.06.2008 valid up to 31.05.2018
5.	Name of Licensee	Browz Technologies pvt. Ltd. Mark Buildtech Pvt. Ltd. and 11 others
6.	RERA registered/ not registered	**Not registered**
7.	Date of execution of plot buyer's agreement	21.01.2010
8.	Unit no.	Plot No. 5, ground floor, block-C admeasuring 1415 sq. ft.
9.	New unit	19/GF/82E-9/VIN admeasuring 1581.46 sq. ft.

		(as per addendum to agreement dated 28.12.2012 on pg. 94 of the complaint)
10.	Revised unit	i-4, 1, ground floor admeasuring 1585 sq. ft. (As per addendum to agreement dated 22.12.2015 on pg. 93 of the reply)
11.	Payment plan	Construction linked plan (At page 70 of the complaint)
12.	Total consideration	Rs. 47,28,576/- (as per statement of account dated 11.03.2020 annexed at page 37 of the reply)
13.	Total amount paid by the complainants	Rs. 44,55,931/- (as per statement of account dated 11.03.2020 annexed at page 37 of the reply)
14.	Due date of delivery of possession (as per clause 10 of the agreement: 3 years from the date of execution of agreement)	21.01.2013
15.	Date of intimation of possession of unit no. ground floor-1,1-4, Vatika India Next, Gurgaon at independent floors	05.09.2017
16.	Delay in handing over of possession till date of order i.e 01.04.2021	8 years 2 months and 11 days

17.	Specific relief sought	(i)Pay delay interest on paid amount of Rs.4096619.59/- from 21/01/2013 along with pendente lite and future interest till actual possession. (ii) Direct the respondent to quash charges of PLC. (iii)Direct the respondent to quash the increased in super area of floor.

B. Facts of the complaint:

3. That the complainants approached the respondent for booking a Premium Floor in the 'Vatika India Next". Sector-82, Gurugram. The initial booking amount of Rs393000/- was paid through cheque dated 21/04/2009 (approx 10 year back). Respondent again raised the demand of Rs 391600 /- and complainants had paid in a time bound manner on dated 14/09/2009.That the complainants got welcome letter dated 04/05/2009 in which mentioned how builder shall do allotment of unit for the project "IRIS Floor" in the 'Vatika India Next". Sector-82, Gurugram. The complainants were allotted unit IRIS Ground Floor, Plot no. 05. Park C1 Street dated 14/09/2009 in the 'Vatika India Next". Sector-82, Gurugram. admeasuring 1415 sq. ft. (3BHK+S)

4. That the respondent to dupe the complainants executed floor buyer agreement signed between complainants and M/s Vatika Limited

on dated 21/01/2010, Just to create a false belief that the project shall be completed in time bound manner and in the garb of this agreement persistently raised demands due to which they were able to extract huge amount of money from the complainants. That the total cost of the said floor is Rs 3993750/- exclusive BSP, EDC IDC, IFMS Out of this a sum of Rs 4096619.59/- inclusive taxes was paid by allottees, as per demand raised by respondent.

5. That the respondent changed the allotted unit unilaterally on 17/07/2013 IRIS Ground Floor, Plot no. 05. Park C1 Street Sector 82 into unit no. 19, GF, Street no. 82E-9 Sector 82E and increased the area of unit 1415 sq. ft to 1581.46 sq. ft and imposed PLC of amount 240000/- and raised the new demand of Rs 461500.06 /- which was generated due to increased area and is illegal arbitrary and unilateral. Due to change in allotment of unit the cost of unit was also increased by the builder unilaterally from Rs.3993750/- to 4233750/-

6. That the respondent is in obligation to hand over the vacant physical possession of the said unit but intimated about possession on 20/01/2013 but till date builder not given physical possession. The respondent miserably failed to complete the construction of work of the project within assured time limit, thereby grossly violating the terms and conditions of the buyer's agreement as entered

between the complainants and respondent and has not met its obligations.

7. That the respondent again changed the unit dated 22/12/2015 and allotted new unit – GF,1,1-4, in Vatika India Next, Gurugram and increased super area 1581 to 1585 sq. ft unilaterally but under the force, complainants signed the addendum agreement. That the builder raised the last demand of Rs 6,59,111.70/- on dated 05th September,2016. The complainants were getting loan from HDFC for buying this property and it had sent the demand to the bank for payment. In the reply, the bank refused to disbursement because builder has not registered the project under RERA. The complainants were informed by the builder through email 04/12/2017.

8. That the builder till date has not registered the project under RERA and imposed the delay interest on complainants @ of 18 %. Even the complainants never know that offer of possession is legal or not after long perusal builder was not disclosed the reason of non-registration of project under RERA and not shown occupancy certificate which was mandatory for the builder before offer of possession.

C. Relief sought by the complainants:

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

i. To pass an order for delay interest on paid amount of Rs.4096619.59/- from 21/01/2013 along with pendente lite and future interest till actual possession.

ii. To direct the respondent to quash charges of PLC.

iii. To direct the respondent to quash the increased in super area of floor.

10. 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:

11. It has been categorically agreed between the parties that subject to the complainants having complied with all the terms and conditions of the buyer's agreement and not being in default under any of the provisions of the said agreement and having complied with all provisions, formalities, documentation etc., the developer contemplates to complete construction of the said building/ said independent dwelling unit within a period of 3 years from the date of execution of the agreement, which period would automatically stand extended.

12. That it is pertinent to mention here that the respondent had already been intimated about possession to the complainants vide letter

dated 05.09.2017 and reminder Letter dated 29.09.2017 and 23.11.2017. It is submitted that the complainants are deliberately avoiding taking the possession of the unit for the reasons best known to them. As per clause 10.2 of the buyer's agreement, the complainants should have taken the possession.

13. However, the complainants have till date not taken the possession of their unit. It is pertinent to mention here that as per Clause 10.3 of the buyer's agreement the complainants are liable to pay the holding charges @ Rs. 5/- per sq. ft. of the built-up area plus the common area maintenance charges per month for the entire period of such delay. Reference may be made to clause 10.3 of the buyer's agreement. In the present case, the complainants are liable to pay the holding charges as per the buyer's agreement from 04.10.2017 till the taking over of possession.

14. That the total sale consideration of the unit booked by the complainants was Rs. 47,28,575.96/-. It is submitted that the complainants defaulted in making payments towards the agreed sale consideration of the unit from the very inception. It is further submitted that there is an outstanding amount of Rs. 10,34,825.42/- including interest payable by the complainants as on 11.03.2020. It is submitted that in the facts and circumstances detailed above, the complainants have grossly failed to adhere to

the payment plan and as such have severely defaulted in payment of instalments qua the purchase of the said unit.

15. That the respondent has already completed the construction of the unit allotted to the complainants. It is submitted that it is important to understand that one particular buyer who makes payment in time can also not be segregated, if the payment from other perspective buyer does not reach in time. It is relevant that the problems and hurdles faced by the developer or builder have to be considered while adjudicating complaints of the prospective buyers. It is relevant to note that the slow pace of work affects the interests of a developer, as it has to bear the increased cost of construction and pay to its workers, contractors, material suppliers, etc.

16. Copies of all the relevant documents have been filed and placed on the record by the parties. Their authenticity is not in dispute. Even both the parties have also placed written submissions in the file and the same has been used by the authority Hence, the complaint can be decided on the basis of these undisputed documents.

E. Jurisdiction of the authority

The plea of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that

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

E.I Territorial jurisdiction

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 completed territorial jurisdiction to deal with the present complaint.

E.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 complainants nowhere sought the relief of refund and regarding compensation part the complainant has stated that they are 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 Relief Sought filed by the complainants:

Relief sought by the complainants:

(a) To pass an appropriate award directing the respondent to pay the delayed amount along with interest for the period of delay.

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

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

18. As per clause 10.1 of the apartment buyer's agreement dated 21.01.2010, the possession of the subject apartment was to be handed over by of 21.01.2013. At the outset, it is relevant to comment on the present possession clause of the agreement

wherein the possession has been subjected to all kinds of terms and conditions of this agreement and the complainants not being in default under any provisions of these 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 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. This is just to comment as to how the builder has misused his dominant position and drafted such clause in the agreement and the allottee is left with no option but to sign on doted lines. Clause 10.1 of the apartment buyer agreement (in short, agreement) provides for handover possession and is reproduced below:

10.1 Schedule or possession of the said unit

That the Company based on its present plans and estimates and subject to all just exceptions, contemplates to complete construction of the said Building/ said independent dwelling unit within a period of three years from the date of execution of this Agreement unless there shall be delay or there shall be failure due to reasons mentioned in Clauses (12.1), (12.2), (12.3) and Clause (38) or due to failure of Allottee(s) to pay in time the price of the said independent dwelling unit along with all other charges and dues in accordance with the schedule of payments given in Annexure III or as per the demands raised by the Company from time to time or any failure on the part of the Allottee(s) to abide by any of the

terms or conditions of this Agreement. However, it is agreed that in the event of any time overrunning completion of construction of the said building/said dwelling unit, the Company shall be entitled to reasonable extension of time for completing the same".

19. At the outset, it is relevant to comment on the pre-set possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and the complainants not being in default in making payments as per the schedule of payment or upon demand raised by the promoter or failure on part of the allottee to abide by any of the terms and conditions of the buyer's agreement. 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. The promoter has proposed to

hand over the possession of the apartment by 21.01.2013. 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.

20. 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 provisions of the Act. By virtue of clause 15(a) of the agreement executed between the parties on 21.01.2010, the possession of the subject apartment was to be delivered within stipulated time i.e. by 21.01.2013. Therefore, the due date of handing over possession is 21.01.2013. 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 complainants are entitled to delay possession charges at prescribed rate of interest i.e. **9.30%** p.a. w.e.f. 21.01.2013 till the handing over possession as per provisions of section 18(1) of the Act read with rule 15 of the rules.

21. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are 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.*

22. 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."

23. 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., 11.02.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

24. 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;"*

Therefore, interest on the delay payments from the complainant 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.

25. On consideration of the documents available on record and submissions made by both the parties, the authority is satisfied that the respondent is in contravention of the provisions of the Act. Vide application form dated 27.09.2009, the complainants booked a unit in the project 'Premium Floor' in Vatika India Next'. In pursuance of aforesaid application form, the complainants and the respondent executed the buyer's agreement on 21.01.2010 in respect of unit no. Plot No. 5, Ground Floor, Block-C admeasuring 1415 sq. ft. Thereafter, due to unavoidable reasons beyond the control of the respondent, the complainants were reallotted an alternate plot/unit/apartment and an addendum dated 28.12.2012 was

executed to that effect allotting a new unit bearing no. 19/GF/82E-9/GF/VIN admeasuring 1581.46 sq. ft. The relevant para of the addendum is reproduced below:

> *"...That Allottee have booked a Iris Unit with the company i.e 'Vatika ltd.' Having its registered office at Floor no. 621 A,6th floor Devika Towers,06, Nehru Place and have been allotted an Iris floor (old unit) no. Plot no. 5,GF,Iris,Park C1 Street, Sector82 C Vatika India Next admeasuring about 1415 sq. ft. built up area in its Group housing project " Vatika India Next". That now aforesaid Iris Floors has been changed due to circumstances, which has been explained to and understood by the Allottee and accordingly, Allottee has been re-allotted a new Iris Floor (new unit) no.19/GF/82E-9/VIN admeasuring about 1581.46 sq. ft. built up area in project "Vatika India Next" in lieu of the old unit no. Plot no. 5, GF, Iris, Park C1 Street, Sector82 C Vatika India Next which has been duly accepted by the allottee. The Allottee is fully satisfied and readily accepts the allotment of new no.19/GF/82E-9/VIN admeasuring about 1581.465 sq. ft. super area in project "Vatika India Next' without any demur or protest. In view thereof, Allottee has been left with no right, title and interest in the old unit no. Plot no. 5, GF, Iris, Park C1 Street, Sector82 C Vatika India Next. Therefore, in Builder Buyer's Agreement dated ---- executed between Allottee, and the company herein the Iris unit, wherever it is written in the Agreement, shall be read as Unit no. 19/GF/82E-9/VIN. Allottee undertakes to pay the Sale Consideration on the basis of actual super Area & location of new allotted Unit no. 19/GF/82E-9/VIN. in Project "Vatika India Next". All other terms and condition of the Builder buyer Agreement dated ---- and consequent documentation and understandings in this regard executed between the Parties herein shall remain and hold good and valid for this new allotted Unit no. 19/GF/82E-9/VIN and all payment received on account of Plot no. 5,GF,Iris,Park C1 Street, Sector82 C Vatika India Next shall be treated as part payment of sale consideration of new Unit no. 19/GF/82E-9/VIN and shall constitute a valid discharge to such effect. All the terms and conditions of the executed Builder Buyer's Agreement shall remain the same & binding on the parties.*
>
> *This Addendum shall be considered as an integral part & parcel of the Builder Buyer's Agreement dated ------- modifying only those terms as have been specifically mentioned hereinabove, all other terms and conditions of the Builder Buyer's Agreement dated --------shall remain unaltered and*

effective."

26. Subsequently, another addendum dated 22.12.2015 was executed between the parties whereby the unit of the complainants were changed again and a new unit bearing no. Ground Floor 1,1-4,Vatika India Next,Gurgaon-122004 admeasuring about 1585 Sq. Ft was reallotted in their favour. The relevant clauses of the addendum dated 22.12.2015 are reproduced below:

> *"...That Allottee have booked a Iris Unit with the company i.e 'Vatika ltd.' Having its registered office at VATIKA LIMITED Vatika Triangle,4th Floor, Sushant Lok, Phase 1,Block A, Mehrauli-Gurgaon Road,Gurgaon-122002 have been allotted an Iris floor (old unit) no. Plot no. 19/ST 82E-9/300/GF/82E/Vatika India Next admeasuring about 1581.46 sq. ft. built up area in its Independent floors project "Vatika India Next" .And the allottee has executed the builder buyer agreement dated 21/01/2010. That now aforesaid Iris Floors has been changed due to circumstances, which has been explained to and understood by the Allottee and accordingly, Allottee has been re-allotted a new Iris Floor (new unit) Ground Floor, 1,1-4,Vatika India Next, Gurgaon-122004 admeasuring about 1585 sq. ft. built up area in project "Vatika India Next" in lieu of the old unit no. 19/ST 82E-9/300/GF/82E/Vatika India Next which has been duly accepted by the allottee. The Allottee is fully satisfied and readily accepts the allotment of new no. Ground Floor, 1,1-4, Vatika India Next, Gurgaon-122004 admeasuring about 1585 sq. ft. built up area in project "Vatika India Next' without any demur or protest. In view thereof, Allottee has been left with no right, title and interest in the old unit no. 19/ST 82E-9/300/GF/82E/ Vatika India Next. Therefore, in Builder Buyer's Agreement dated 21/01/2010 executed between Allottee, and the company herein the Iris unit, wherever it is written in the Agreement, shall be read as Ground Floor, 1,1-4, Vatika India Next, Gurgaon-122004. Allottee undertakes to pay the Sale Consideration on the basis of actual super Area & location of new allotted Unit no. Ground Floor, 1,1-4, Vatika India Next, Gurgaon-122004 in Project "Vatika India Next". All other terms and condition of the Builder buyer Agreement dated 21/1/2010 and consequent documentation and understandings in this regard executed between the Parties herein shall remain and hold good and valid for this new allotted Unit no. 19/GF/82E-9/VIN and all payment received on account of Plot*

no. 5,GF,Iris,Park C1 Street, Sector82 C Vatika India Next shall be treated as part payment of sale consideration of new Unit no. Ground Floor, 1,1-4, Vatika India Next, Gurgaon-122004 and shall constitute a valid discharge to such effect. All the terms and conditions of the executed Builder Buyer's Agreement shall remain the same & binding on the parties.

This Addendum shall be considered as an integral part & parcel of the Builder Buyer's Agreement dated 21/1/2010 modifying only those terms as have been specifically mentioned hereinabove, all other terms and conditions of the Builder Buyer's Agreement dated 21/1/2010 shall remain unaltered and effective."

27. From the above clauses of addendum to the buyer's agreement, it is quite evident that these addendum form an integral part and parcel of the buyer's agreement dated 21.01.2010 and the original agreement shall stand changed only to the extent of change in unit number and its location. In other words, all the terms and conditions of buyer's agreement dated 21.01.2010 including but not limited to possession clause (clause 10.1) remained effective and unaltered except change in unit. Therefore, the due date of possession shall be calculated as per clause 10.1. of the agreement dated 21.01.2010. As far as disentitlement to claim compensation as per aforesaid clause of addendum dated 28.12.2012 is concerned, the respondent has not clarified as to why a need arose for the complainants to agree on such a clause and as to why the complainants have agreed to surrender their legal rights which were available or had accrued in their favour. The respondent has also not stated the compelling circumstances on grounds of which

it kept on changing the unit allotted to the complainant. The respondent has not provided any documentary proof which shows that the unit has been changed again and again on the request of the complainant-allottee. So, it can be concluded that the change in unit and execution of addendum was only at the unilateral wish of the respondent. In these circumstances, it can be said that the allottee were left with no choice but to sign on the dotted lines of the addendum. Also, it can be said that by incorporating such clause wherein the allottee was compelled to waive his right to compensation for delay in handing over possession, the respondent-promoter can be said to be in a win-win situation wherein on one hand, he has violated terms of buyer's agreement dated 21.01.2010 by not handing over possession within time stipulated therein and on the other hand, disentitling the allottee to claim delay possession charges. So, the clause regarding waiving of delay possession charges incorporated in the addendum becomes ineffectual. Such a clause whereby a person gave up his valuable rights must be shown to have been executed in a free atmosphere and should not give rise to a suspicion. If even a slightest of doubt arises in the mind of the adjudicator that such an agreement was not executed in an atmosphere free of doubts and suspicions, the

same would be deemed to be against public policy and would also amount to unfair trade practices.

28. By virtue of clause 10.1 of the dwelling unit buyer's agreement executed between the parties on 21.01.2010, possession of the booked unit was to be delivered within a period of 3 years from the date of execution of the agreement which comes out to be 21.01.2013. Though it is version of respondent builder that intimation of possession of reallotted unit was given to the complainants on 05.09.2017 with subsequent reminders on 29.9.2017 and 23.11.2017 but the same cannot be valid offer of possession. These letters about intimation of possession were only issued to clear pending dues against the complainants. It was specifically mentioned in the letters dated 05.09.2017 that

> *Once the payments are cleared and requisite documents are executed, you may fix up an appointment with Vatika for taking possession of the unit. On the date of actual /formal handover we would request you along with all the applicants if any to visit your property to take over the keys and physical possession of your unit.*

So it means upto that date the respondent builder has not obtained a part of Occupation Certificate of the project and was not in a position to offer physical possession of the allotted unit , to complete with all the amenities of the habitable unit so it can't be set by a virtue of letter dated 05.09.2017 along with subsequent letter dated 29.09.2017 and 23.11.2017.There was any valid offer

of possession of the allotted unit by the respondent builder in favour of the complainants.

29. Since, the respondent has not offered the possession of the subject unit to the complainant so far, it is the failure on the part of the respondent-promoter to fulfil its obligations and responsibilities as per the dwelling unit buyer's agreement dated 21.01.2010 to hand over the possession within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) of the Act on the part of the respondent is established. As such, the complainants are entitled to delayed possession charges at prescribed rate of interest i.e. 9.30% p.a. w.e.f. 21.01.2013 till the date of handing over the possession, as per provisions of section 18(1) of the Act read with rule 15 of the rules.

Directions of the authority

30. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act:

    i. The respondent is directed to pay interest at the prescribed rate of 9.30% p.a. for every month of delay from the original due date of possession i.e. 21.01.2013 till the date of handing over the possession of the re allotted unit of increased size.

    ii. The respondent is directed to pay interest accrued from 21.01.2013 till the date of offer of possession to the

complainants within 90 days from the date of order and subsequent interest to be paid till the date of handing over possession on or before the 10th of each succeeding month;

iii. The respondent is directed to adjust the amount already received against the remaining sale consideration of re-allotted unit if any and return the remaining amount within two months of offer of possession with interest at the prescribed rate from the date the same became due upto the date of actual payment to the complainants.

31. Complaint stands disposed of.

32. File be consigned to registry.

(Samir Kumar)
Member

(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 01.04.2021

Judgement uploaded on 04.09.2021.