BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 2683 of 2021
First date of hearing: 30.07.2021
Date of decision : 30.07.2021

Mr. Gulshan Kumar Batra
R/o: - House No. 1726/31,
Kamla Nagar, Rohtak, Haryana- 124001 **Complainant**

Versus

M/s Ramprashtha Promoters and
Developers Private Limited.
Regd. office: - Plot No.114,
Sector-44, Gurugram-122002. **Respondent**

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

APPEARANCE:
Sh. Nilotpal Shyam Advocate for the complainant
Sh. Sougat Sinha Advocate for the respondent

ORDER

1. The present complaint dated 14.07.2021 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 related 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.	Project name and location	"The Edge Tower", Sector- 37D, Gurugram.
2.	Project area	60.5112 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no. and validity status	33 of 2008 dated 19.02.2008 valid till 18.02.2020
5.	Name of licensee	M/s Ramprastha Builders Private Limited and 13 others as mentioned in licence no. 33 of 2008 issued by DTPC Haryana
6.	RERA Registered/ not registered	**Registered vide no. 279 of 2017 dated 09.10.2017 (Tower No. A to G, N and O)**
7.	RERA registration valid up to	31.12.2018
8.	**Extension RERA registration**	EXT/98/2019 dated 12.06.2019
9.	**Extension RERA registration**	31.12.2019

	valid upto	
10.	Unit no.	304, 3rd floor, tower H [Page no. 34 of complaint]
11.	Unit measuring	1310 sq. ft. [Super area]
12.	Date of execution of apartment buyer's agreement	11.09.2010 [Page no. 30 of complaint]
13.	Date of allotment letter	11.09.2010 [Page no. 27 of complaint]
14.	Payment plan	Construction linked payment plan. [Page no. 61 of complaint]
15.	Total consideration	Rs.48,30,526/- [as per account statement page no. 62 of complaint]
16.	Total amount paid by the complainants	Rs.41,66,445/- [as per account statement page no. 62 of complaint]
17.	Due date of delivery of possession as per clause 15(a) of the apartment buyer agreement: 31.08.2012 plus 120 days grace period for applying and obtaining occupation certificate in group housing colony. [Page no. 44 of complaint]	31.08.2012 [Note: - 120 days grace period is not allowed]
18.	Details of Occupation Certificate, if any	Date of OC granted, if any, by the competent Authority: Dated 13.02.2020 Area/Tower for which OC obtained- H

		[as per information by tcpharyana.gov.in]
19.	Date of offer of possession	25.02.2021 [page no. 75 of complaint]
20.	Delay in handing over possession till 25.04.2021 i.e. date of offer possession (25.02.2021) + 2 months	8 years 7 months and 30 days

B. Facts of the complaint

3. The complainant has submitted he has respected citizen of India and respondent company through their representative had approached the complainants and represented that the respondent company residential project namely "The Edge Towers" situated at Ramprastha City, Sector-37D, Gurugram, Haryana will effectively serve the purpose of complainants as it has best of the amenities.

4. That they have obtained license from the Director General, Town & Country Planning, Haryana (DGTCP) for development of the project Land into Group Housing Complex comprising of multi-storied residential apartments in accordance with law.

5. That based on aforementioned representation and enquiries made, he has submitted application for allotment of unit no. H-304, proposed to be built on 3rd floor of block-H in the

impugned project. The said application form dated 17.08.2010 was submitted along with the earnest money to it. The complainant had opted for 45- days CLP plan.

6. That pursuant to the booking, the respondent company issued allotment letter dated 11.09.2010 wherein the total consideration for the said unit no. H-304, admeasuring 1310 sq. ft. along with one parking in Edge Tower project located at Ramprastha City, Sector-37D, Gurugram was fixed as Rs. 47,45,038/-. Thereafter both the parties entered into apartment buyer's agreement dated 11.09.2010 for the sale of said unit number no. H-304 admeasuring 1310 sq. ft. along with one covered parking in Edge Tower project located at Ramprastha City, sector-37D, Gurugram.

7. That the respondent company agreed to sell/convey/transfer the impugned unit H-304, with the right to exclusive use of parking space for an amount of Rs.47,45,038/- which includes basic sale price, car parking charges, external development charges and infrastructure development charges, preferential location charges plus applicable taxes. He has already paid a sum of Rs.41,66,445/- towards the sale consideration in respect of the impugned unit. It is noteworthy that the said payments were made by May 2012

itself wherein, the complainant availed a loan from LIC Housing Finance for paying the said amount to it.

8. That they have paid more than 90% of the total sale consideration wherein all the demand made by the it till date was honored by the complainant. Despite the said payments, the respondent company failed to deliver the possession in agreed timeframe for reasons best known to them and the respondent company never bothered to intimate rhymes and reasoning for the delay to the complainants. Even, the grace time period has long ago been breached by the respondent company with no clarity about the delivery of possession till date. Therefore, the respondent company have the breached the sanctity of the agreement for sell i.e. apartment buyer agreement.

9. That a new date of completion of the impugned project as 31.12.2018 was granted to the respondent company vide aforementioned registration certificate subject to the right of the allottee to withdraw from the project in accordance with section 18 of the RERA Act, 2016. However, the respondent company has failed to honor the said date of completion of project and subsequently handing over the possession as granted by the authority since they have not applied for occupancy certificate of impugned tower till today. Therefore,

the respondent company seems to be a continuous and recurring defaulter and is in the habit of making false claims to dupe the hard-earned money of homebuyers like the complainants.

10. That the respondent company failed to handover the possession to the complainants on the agreed date or even after the elapse of the grace period of 120 days as provided under agreement. The reason for the delay in handing over the possession despite payment of more than 90% of total consideration is only best known it as they have never bothered to intimate any rhymes and reasoning for the delay to the complainants. Therefore, it has breached the sanctity of the agreement. The respondent has deliberately maintained silence and never bothered to abreast the complainants of the latest development of the project and any rhymes and reason for such a gross and inordinate delay. Henceforth, it is liable to pay interest for delayed period of handing over the possession till the actual date of handing over the possession in accordance with section 18 of the RERA Act.

11. That the respondent company informed vide email dated 06.03.2018 to the complainant that the construction of the impugned unit is complete and accordingly the impugned unit no. H-304 is ready to be offered for possession. Further,

it was also sent a statement of account with regard to pending dues and invoice for maintenance charges for six months. It is a matter of record that no occupation certificate has been obtained by the respondent company till 13.02.2020 with regard to the impugned tower. However, the respondent company without having occupation certificate sent said email to complainant with malafide intent.

12. That the respondent company made it a condition precedent for the complainant to sign a NOC regarding settlement of all the dispute/claim with regard to the impugned unit for taking over possession. Further, it started levying holding charges as well as maintenance charges if the complainant failed to pay the last demand without insisting upon the adjustment of the delayed possession charges in the final demand. Thus the complainant has no option but to not take the possession of the impugned Unit till date as doing so will *ipso facto* result in waiving all the legal remedies against it including waiver of right to file the instant complaint. Therefore, the complainant is unable to take the possession of the impugned unit due to the fault of the respondent company and hence, the offer of possession intimation vide email dated 26.02.2020 is nullity in the eyes of law. As it is a settled principle of law that no one should take benefit of

their own wrong. At this juncture, allowing holding charges and maintenance charges to the respondent company before actual physical possession of the impugned unit is handed over would result in giving benefit to it for the wrong done by the respondent company, such a course is not permissible under law.

13. That the respondent company is a 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 respondent company actions seems to taken in bad faith and with ill motive to misappropriate complainants hard earned money. That there is almost 7 years of unexplained and inordinate delay in handing over the possession by it to the complainant and therefore a fit case wherein authority shall order for granting possession immediately along with the interest for unreasonable delay at the prescribed rate in view of the mandatory obligation as provided under section 18 of RERA Act, 2016 as well as on account of the acrimony of it wherein they obliterated the trust reposed on them by complainants by handing over their hard earned money always on time and in accordance with the agreement. The respondent company did not perform the required

reciprocity which goes to very root of any bilateral agreement.

C. Relief sought by the complainants:

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

    i. To direct the respondent company to immediately deliver the possession of impugned unit no. H-304 Edge Tower, Ramprastha City, Gurugram to the complainant.
    ii. To direct the respondent to pay interest at the prescribed rate (MCLR + 2%) for the delayed period of handing over the possession calculated from the date of delivery of possession till the actual date of handing over the possession of the impugned unit.
    iii. To adjust the delayed possession interest as per prayer (b) in the final demand raised by it.

15. 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

16. The respondent has contested the complaint on the following grounds. The submissions made therein, in brief are as under:

    i. That the present complaint has been filed by the complainant before the authority claiming for possession along with compensation against the

investment made by the complainant in one of the plots in the project "Ramprastha City" of the respondent. That the present authority is precluded from entertaining the present matter due to lack of cause of action and lack of jurisdiction of the authority. That further no violation or contravention of the provisions of the Act has been prima facie alleged by the complainant.

ii. That the HRERA amendment rules, 2019 has been notified on 12th September 2019 whereby inter alia amendments were made to Rule 28 and 29 of the Haryana Rules. The Rule 28 deals with the provisions related to the jurisdiction of the RERA authority.

iii. That further the High Court of Punjab and Haryana, vide an order dated 16.10.2020 in *Experion Developers Pvt Ltd Vs State of Haryana and Ors, CWP 38144 of 2018 and batch,* has observed as hereunder when a question was raised before the said Hon'ble High Court pertaining to the jurisdiction of the authority and the adjudicating officer with respect to the Haryana amendment rules, 2019.

iv. That in this context, firstly, to file a complaint before the authority within rule 28, it is utmost crucial that *any violation or contravention of the provisions of the Act or*

the rules and regulations made thereunder, against any promoter, allottee or real estate agent has been therefore alleged by the complainant. That in the present case, no such allegation has been made by the complainant which prima facie hints for a necessity for intervention of the authority. Therefore, the present case is liable to be dismissed before the authority for want of lack of cause of action and further, also the respondent cannot be held liable for an explanation when there is no such allegation of contravention.

v. That, further, another aspect which needs attention herein is that when it comes to the part of compensation or compensation in the form of interest, the adjudicating officer shall be the sole authority to decide upon the question of the quantum of compensation to be granted. In this regard, the main excerpts of rule 29 of the Haryana amendment rules, 2019.

vi. Therefore, the amendments have been upheld by the Hon'ble Punjab and Haryana High Court. That however when the same judgment dated 16.10.2020 was referred to the Hon'ble Supreme Court in ***M/s Sana Realtors Private Limited & Ors Vs Union of India*** , the Hon'ble Supreme Court vide an Order dated 25.11.2020 has

stayed the order dated 16.10.2020 until further orders. The hearings are being held on a day-to-day basis and the next date has 26.08.2021. It is submitted that the question of jurisdiction may kindly be deferred till the matter is finally decided by the Hon'ble Supreme Court.

vii. That therefore in view of the stay ordered by the Hon'ble Supreme Court, in any case, these matters require an erstwhile stay keeping in view the directions of the Supreme Court. In this aspect, the jurisdiction of the authority be subject to the final verdict of the Hon'ble Supreme Court.

viii. That the complainant has now filed a complaint in terms of the Haryana Real Estate (Regulation & Development) amendment rules, 2019 under the amended rule 28 in the amended 'Form CRA' and is seeking the relief of possession, interest, and compensation under section 18 of the Act. That it is most respectfully submitted in this behalf that the power of the appropriate Government to make rules under section 84 of the said Act is only for the purpose of carrying out the provisions of the said Act and not to dilute, nullify or supersede any provision of the said Act.

ix. That the power to adjudicate the complaints pertaining to refund, 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 said Act and not under the said rules and neither the said rules or any amendment thereof can dilute, nullify or supersede the powers of the adjudicating officer vested specifically under the said Act and therefore, the authority has no jurisdiction in any manner to adjudicate upon the present complaint.

x. That the complainant is not "Consumers" within the meaning of the Consumer Protection Act, 2019 since the sole intention of the complainant was to make investment in a futuristic project of the respondent only to reap profits at a later stage when there is increase in the value of flat at a future date which was not certain and fixed and neither there was any agreement with respect to any date in existence of which any date or default on such date could have been reckoned due to delay in handover of possession.

xi. That the complainant having full knowledge of the uncertainties involved have out of their own will and accord have decided to invest in the present futuristic

project of the respondent and the complainant has no intention of using the said flat for their personal residence or the residence of any of their family members and if the complainant had such intentions they would not have invested in futuristic project. The sole purpose of the complainant was to make profit from sale of the flat at a future date and now since the real estate market is seeing downfall, the complainant has cleverly resorted to the present exit strategy to conveniently exit from the project by arm twisting the respondent. That it is submitted herein that the complainant has purely commercial motives have made investment in a futuristic project and therefore, they cannot be said to be genuine buyers of the said apartment and therefore, the present complaint being not maintainable must be dismissed in limine.

xii. That the complainant has approached the respondent office in 2010 and have communicated that the complainant is interested in a project which is "not ready to move" and expressed their interest in a futuristic project. It is submitted that he was not interested in any of the ready to move in/near completion projects. It is submitted that on the specific

request of the complainant, the investment was accepted towards a futuristic project. Now he was trying to shift the burden on the respondent as the real estate market is facing rough weather.

xiii. That the statement of objects and reasons as well as the preamble of the said Act clearly state that the RERA is enacted for effective consumer protection and to protect the interest of consumers in the real estate sector. RERA is not enacted to protect the interest of investor. As the said Act has not defined the term consumer, therefore the definition of "Consumer" as provided under the Consumer Protection Act, 1986 has to be referred for adjudication of the present complaint. The complainant is investor and not consumer and nowhere in the present complaint have the complainant pleaded as to how the complainant is consumer as defined in the Consumer Protection Act, 1986 qua the respondent. The complainant has deliberately not pleaded the purpose for which the complainant entered into an agreement with the respondent to purchase the apartment in question. The complainant, who is already an owner of House no. 328, Sector 27, Gurugram (address provided at the time of booking application form) is an investor,

who never had any intention to buy the apartment for their own personal use and have now filed the present complaint on false and frivolous grounds. It is most respectfully submitted that the adjudicating officer has no jurisdiction howsoever to entertain the present complaint as the complainant have not come to the adjudicating officer with clean hands and have concealed the material fact that they have invested in the apartment for earning profits and the transaction therefore is relatable to commercial purpose and the complainant not being a 'consumers' within the meaning of section 2(1)(d) of the Consumer Protection Act, 1986, the complaint itself is not maintainable under the said Act. This has been the consistent view of the Hon'ble National Consumer Disputes Redressal Commission.

xiv. That therefore the complainant cannot be said to be genuine consumer by any standards; rather the complainant is mere investor in the futuristic project of the respondent. An investor by any extended interpretation cannot mean to fall within the definition of a "Consumer" under the Consumer Protection Act, 2019. Therefore, the complaint is liable to be dismissed merely on this ground.

xv. That the Complainant has not approached this authority with clean hands and has concealed the material fact that the complainant is defaulter, having deliberately failed to make the timely payment of installments within the time prescribed, which resulted in delay payment charges/interest, as reflected in the statement of account. That he has not cleared its outstanding dues and is in default of a large amount excluding the delay interests out of total consideration of Rs.47,45,038/-. Therefore, the complainant cannot rightfully claim for refund or possession since the possession has not been handed over due to complainant own default.

xvi. That he has already been offered possession in 2018 itself but it is the complainant who has not come forward to accept the possession of the property since past three years. That the initial offer of possession was made vide an email dated 06.03.2018, wherein the respondent has requested the complainant to clear all the outstanding dues and accept the possession of the property. However, the complainant with extraneous motives has intentionally delayed the acceptance of possession of property.

xvii. That further the reasons for delay are solely attributable to the regulatory process for approval of layout which is within the purview of the Town and Country Planning Department. The complaint is liable to be rejected on the ground that the complainant has indirectly raised the question of approval of zoning plans which is beyond the control of the respondent and outside the purview of consumer courts and in further view of the fact the complainant has knowingly made an investment in a future potential project of the respondent. The reliefs claimed would require an adjudication of the reasons for delay in approval of the layout plans which is beyond the jurisdiction of this authority and hence the complaint is liable to be dismissed on this ground as well.

xviii. That further the respondent has applied for the mandatory registration of the project with the RERA authority but however the same is still pending approval on the part of the RERA authority. However, in this background that by any bound of imagination the respondent cannot be made liable for the delay which has occurred due to delay in registration of the project under RERA. It is submitted that since there was delay in zonal approval from the DGTCP the same has acted as a

causal effect in prolonging and obstructing the registration of the project under the RERA for which the respondent is in no way responsible. That the approval and registration is a statutory and governmental process which is way out of power and control of the respondent. This by any matter of fact be counted as a default on the part of the respondent.

xix. There is no averment in the complaint which can establish that any so-called delay in possession could be attributable to the respondent as the finalization and approval of the layout plans has been held up for various reasons which have been and are beyond the control of the respondent including passing of an HT line over the layout, road deviations, depiction of villages etc. The complainant while investing in a plot which was subject to zoning approvals were very well aware of the risk involved and had voluntarily accepted the same for their own personal gain. There is no averment with supporting documents in the complaint which can establish that the respondent had acted in a manner which led to any so-called delay in handing over possession of the said plot. Hence the complaint is liable to be dismissed on this ground as well. Thereafter, the

respondent is owner of vast tracts of undeveloped land in the revenue estate of village Basai, Gadauli Kalan and falling within the boundaries of sector 37C and 37D Gurugram.

xx. That the complainant has approached the respondent, it was made unequivocally clear to the complainant that a specific plot cannot be earmarked out of large tracts of undeveloped and agricultural land; and ii) specific plot with preferred location can be demarcated only when the government releases the zoning plans applicable to the area Village Basai, Gadauli Kalan, Gurugram. It was on this basic understanding that a preliminary allotment was made in favour of the complainant. On the date of the receipt of payment, the said preliminary allotment was nothing more than a payment towards a prospective undeveloped agricultural plot.

xxi. That even in such adversities and the unpredicted wrath of falling real estate market conditions, the respondent has 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 respondent has been continuing with the

construction of the project and sooner will be able to complete the construction of the project.

xxii. That the complainant is short-term speculative investor, their only intention was to make a quick profit from the resale of the land and having failed to resell the said plot due to recession and setbacks in the real estate world, have resorted to this litigation to grab profits in the form of interests. It is submitted that the complainant was never interested in the possession of the property for personal use but only had an intent to resell the property and by this, they clearly fall within the meaning of speculative investors.

xxiii. Despite several adversities and the unpredicted and unprecedented wrath of falling real estate market conditions, it has 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 respondent has been continuing with the construction of the project and sooner will be able to complete the construction of the project.

xxiv. That the adjudicating officer is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the apartment buyer's agreement signed by the complainant/allotment offered to him. It is a matter of record and rather a conceded position that no such Agreement, as referred to under the provisions of said Act or said Rules, has been executed between both the parties. Rather, the agreement that has been referred to, for the purpose of getting the adjudication of the complaint, is the apartment buyer agreement dated 09.10.2013, executed much prior to coming into force of said Act or said Rules. The adjudication of the complaint for possession, refund, interest and compensation, as provided under sections 12, 14, 18 and 19 of said Act, has to be in reference to the agreement for sale executed in terms of said Act and said Rules and no other Agreement. This submission of the respondent *inter alia,* finds support from reading of the provisions of the said Act and the said Rules. Thus, in view of the submissions made above, no relief can be granted to the complainant.

xxv. That the occupation certificate for the present Tower "H" has already been received on 13.02.2020 vide Memo No. ***ZP-418VOLII/JD(NC)/2020/4234***.

xxvi. The projects in respect of which the respondent has obtained the occupation certificate are described as hereunder: -

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

17. 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 by the parties.

E. Jurisdiction of the authority

The respondent has raised a preliminary submission/ objection the authority has no jurisdiction to entertain the present complaint. The objection 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

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

E.II Subject matter jurisdiction

19. 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 do 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 have 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 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 entitlement of DPC on ground of complainant being investor

20. The respondent has taken a stand that the complainant is the investor and not consumer, 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 observes 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 buyers and they have paid total price of Rs.41,66,445/- to the promoter towards purchase of an apartment in its project. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

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

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.

F.II Objection regarding jurisdiction of authority w.r.t. buyer's agreement executed prior to coming into force of the Act

21. Another contention of the respondent is that authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the apartment buyer's agreement executed between the parties and no agreement for sale as referred to under the provisions of the Act or the said rules has been executed inter se parties. The authority is of the view that the Act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has

provided for dealing with certain specific provisions/ situation in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of ***Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)*** which provides 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.....*
>
> *122.We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."*

22. Also, in appeal no. 173 of 2019 titled as ***Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya***, in order dated 17.12.2019 the Haryana Real Estate Appellate Tribunal has observed-

"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."

23. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of any other Act, rules, statutes, instructions, directions issued thereunder and are not unreasonable or exorbitant in nature.

G. Findings on the relief sought by the complainants

Relief sought by the complainants: The respondent is directed to immediately delivery the possession of the unit along with prescribed rate of interest.

24. In the present complaint, the complainant 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."*

25. Clause 15(a) of the apartment buyer agreement (in short, 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."*

26. The authority has gone through the possession clause of the agreement and observes 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.

27. 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 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 a single default by the allottees in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of

allottees 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 dotted lines.

28. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the apartment by 31.08.2012 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's agreement. As per the settled law, one cannot be allowed to take advantage of his own wrongs. 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.*

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

> ***Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]***
>
> *(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.:*
>
> *Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates*

which the State Bank of India may fix from time to time for lending to the general public.

30. 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."*

31. 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., 30.07.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

32. 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,"*

33. 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 complainant in case of delayed possession charges.

34. 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 section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 15(a) of the apartment buyer's agreement executed between the parties on 11.09.2010, the possession of the subject apartment was to be delivered within stipulated time i.e., by 31.08.2012. 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 31.08.2012. Occupation certificate has been received by the respondent on 13.02.2020 and the possession of the subject unit was offered to the complainants on 25.02.2021. Copies of the same have been placed on record. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the complainant as per the terms and conditions of the apartment buyer's agreement dated 11.09.2010 executed between the parties. It is the failure on part of the promoter to fulfil its obligations and responsibilities as per the flat buyer's agreement dated 11.09.2010 to hand over the possession within the stipulated period.

35. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date

of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 13.02.2020. The respondent offered the possession of the unit in question to the complainant only on 25.02.2021, so it can be said that the complainant came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the complainant should be given 2 months' time from the date of offer of possession. This 2 month of reasonable time is being given to the complainant keeping in mind that even after intimation of possession, practically they have to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e. 31.08.2012 till the expiry of 2 months from the date of offer of possession (25.02.2021) which comes out to be 25.04.2021.

36. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainants are entitled to delay possession at prescribed

rate of interest i.e. 9.30% p.a. w.e.f. 31.08.2012 till 25.04.2021 as per provisions of section 18(1) of the Act read with rule 15 of the rules.

37. The allottee has requested for fresh statement of account of the unit based on the above determinations of the authority and the request is allowed. The respondent/builder is directed to supply the same to the allottee within 30 days.

H. Directions of the authority

38. 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 the interest at the prescribed rate i.e. 9.30% per annum for every month of delay on the amount paid by the complainant from due date of possession i.e. 31.08.2012 till 25.04.2021. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order as per rule 16(2) of the rules.

ii. The promoter may credit delay possession charges in the ledger account or 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 complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.

v. 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.

vi. The respondent shall not charge anything from the complainant which is not the part of the buyer's agreement. The respondent is debarred from claiming holding charges from the complainant/allottee at any point of time even after being part of apartment buyer's agreement as per law settled by hon'ble Supreme Court in civil appeal no. 3864-3899/2020 decided on 14.12.2020.

vii. 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.

39. Complaint stands disposed of.

40. File be consigned to registry.

(Samir Kumar)
Member

(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 30.07.2021
Judgement uploaded on 14.09.2021