BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 946 of 2020
First date of hearing : 27.03.2020
Date of decision : 30.07.2021

1. Mr. Praveen Kumar Khandelwal
2. Mrs. Manju Khandelwal
Both R/o: - Legitime India L-49D,
1st Floor, L-block, Saket, Delhi-110017. **Complainants**

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 complainants
Sh. Dheeraj Kapoor Advocate for the respondent

ORDER

1. The present complaint dated 28.02.2020 has been filed by the complainants/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations,

responsibilities and functions under the 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 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.	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 18.02.2025
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 valid upto**	31.12.2019
10.	Unit no.	P-1102, 11th floor, Tower P

		[Page no. 42 of complaint]
11.	Unit measuring	1675 sq. ft.
12.	Date of execution of apartment buyer's agreement	27.09.2010 [Page no. 38 of complaint]
13.	Date of allotment letter	08.10.2010 [page no. 31 of complaint]
14.	Date of execution of tripartite agreement	03.09.2010 [Page no. 116 of reply]
15.	Payment plan	Possession linked payment plan. [Page no. 67 of complaint]
16.	Total consideration	Rs.56,26,173/- [as per schedule of payment page no 67 of complainant]
17.	Total amount paid by the complainants	Rs.50,63,558/- [as per statement of account annexure-2 page no 68 of complainant and receipt information page 54 of reply]
18.	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 52 of complaint]	31.08.2012 [Note: - 120 days grace period is not allowed]
19.	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, N & O [page no. 55 to 57 of complaint]
20.	Date of offer of possession	18.03.2020 [page no. 61 of reply]

21.	Delay in handing over possession till 18.05.2020 i.e. date of offer possession (18.03.2020) + 2 months	7 years 8 months and 18 days

B. Fact of the complaint

3. The complainants have submitted that the respondent company have obtained license from the Director General, Town & Country Planning, Haryana (DGTCP) for development of the project land into group housing complex vide memo no. 33 of 2008 dated 19.02.2008 comprising of multi-storied residential apartments in accordance with law.

4. The complainants have submitted that they have submitted an application for allotment of unit No. P-1102 proposed to be built on 11th Floor of Block-P in the impugned project. The said application form dated 25.07.2010 was submitted along with the earnest money to the respondent company. The complainants had opted for no EMI Plan. The respondent company issued allotment letter wherein the total consideration for the said unit No. P-1102 admeasuring 1675 sq. feet along with one parking in "EDGE TOWER" project located at Ramprastha City, Sector-37D, Gurugram was fixed as Rs.56,26,173/-. The complainants opted for new payment plan (no EMI).

5. That the parties entered into agreement i.e. apartment buyer's agreement dated 27.09.2010 for the sale of said unit number P-1102 admeasuring 1675 sq. feet along with one covered parking in "EDGE TOWER" project located at Ramprastha City, Sector-37D, Gurugram.

6. That respondent agreed to sell/convey/transfer the impugned unit P-1102, with the right to exclusive use of parking space for an amount of Rs.56,26,173/- which includes basic sale price, car parking charges, external development charges and infrastructure development charges, preferential location charges plus applicable taxes. The complainants have already paid a sum of Rs.50,63,558/- towards the sale consideration in respect of the impugned unit. It is noteworthy that the said payments were made in year 2010 itself wherein the complainants availed a loan of Rs. 47,82,000/- from HDFC bank vide tripartite agreement dated 03.09.2010.

7. As per clause 15(a) of the agreement the respondent was obligated to offer the possession of the unit to them by 31.12.2012 plus grace period of 120 days for applying and obtaining the occupation certificate in respect of the housing complex; the complainants have paid more than 90% of the total sale consideration but even after the expiry of the grace period on 31.12.2012 the respondent has not delivered the

possession so far and has thus breached the agreement. It is further stated that the respondent applied for registration of the project in question with this authority after the coming into force of the Act and the registration was granted vide registration No. 279 of 2017 dated 09.10.2017 and new date of completion of the project in question was granted to the respondent upto 31.12.2018; despite that the respondent has failed to abide by the said term by not even applying for the occupancy certificate of the tower in question; the complainant has already paid Rs. 1,12,543/- towards service tax though the said service tax/GST was not payable for the period before July 2012 in view of the judgment of the ***Delhi High Court in Suresh Kumar Bansal V/s Union of India and Ors. 2016 (43) STR (Delhi) followed by the Punjab and Haryana High Court in Balvinder Singh V/s Union of India CWP No. 23404 of 2016 decided on 25.09.2018***. It is further stated that the complainants were compelled to pay Rs. 2,50,000/- for covered parking charges along with the applicable charges over and above the basic sale price for the unit in question. It is, however, stated that the respondent vide email dated 24.01.2020 informed the complainants that the construction in the tower in question was complaint and the unit in question was ready to be offered for possession in

response to which the complaints enquired from the respondent about the status of the occupation certificate; the respondent company vide email dated 19.02.2020 informed that the (occupation certificate had been received with regard to tower-N, tower-P and tower-H vide memo No. ZP-418VoII/JD(ND)/2020/4234 dated 13.02.2020. It is further stated that the super aera of the unit in question has also been increased by 95 sq. ft. and accordingly the basic sale price and other charges have also been increased proportionately which is not sustainable. It is stated the demand raised are not of Rs. 1,47,500/- raised by the respondent towards club charges is also not legal because the club forms part of the common area for which the complainants have already paid on super area which includes the common areas willing or in any case the complainant to enjoy club facilities. According to the complainants the delay of almost 7 (seven) years in handing over the possession of the unit in question to them by the respondent has remained unexplained and it is an inordinate delay and hence the complainants are entitled to be awarded interest as per the mandatory obligation provided under section 18 of the Act.

C. Relief sought by the complainants

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

I. To direct the respondent company to immediately deliver the possession of impugned unit no. P-1102, "EDGE TOWER", Ramprastha City, Gurugram to the complainants by revoking illegal demands and adjusting the amount due with the amount of interest payable to the complainants in accordance with prayer (b).

II. To direct respondent company 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 as mentioned in the agreement till the actual date of handing over the possession of the impugned unit.

III. To set aside the final demand raised by respondent company with regard to offer of possession raised by the respondent company without obtaining occupation certificate.

IV. Any other order or relief which this authority may deem fit proper in the facts and circumstances of the case, may kindly be passed in favour of the complainants and against the respondent company.

9. 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

10. The respondent has filed an application for rejection of complaint on the ground of jurisdiction along with reply. The respondent has contested the complaint on the following grounds.

    i. The respondent submitted that the complaint filed by the complainant is not maintainable and the Haryana Real Estate Regulatory Authority, Gurugram, Haryana has no jurisdiction whatsoever to entertain the present complaint. According to the respondent the jurisdiction to entertain the complaints pertaining to refund, possession, compensation, and interest i.e. prescribed under sections 12,14,18,19 of the Act lies with the Adjudicating Officer under sections 31 and 71 read with Rule 28 of the Rules.

    ii. In the present case, the complaint pertains to the alleged delay in delivery of possession for which the complainants have filed the present complaint and is seeking the relief of possession, interest and compensation u/s 18 of the said Act. Therefore, even though the project of the respondent i.e., "EDGE" Ramprastha City, Sector-37D, Gurgaon is covered under the definition of "ongoing projects" and registered with

this authority, the complaint, if any, is still required to be filed before the adjudicating officer under rule 29 of the said rules and not before this authority under rule 28 as this authority has no jurisdiction whatsoever to entertain such complaint and such complaint is liable to be rejected.

iii. That now, in terms of the Haryana Real Estate (Regulation and Development) Amendment Rules, 2019 (hereinafter referred to as the "said amendment rules"), the complainants have filed the present complaint under the amended rule-28 (but not in the amended 'Form CRA') and is seeking the relief of possession, interest and compensation u/s 18 of the said Act.

iv. That the complaint is neither signed by the complainants nor supported by any proper affidavit with a proper verification. In the absence of a signed complaint and a proper verified and attested affidavit supporting the complaint, the complaint is liable to be rejected.

v. That without prejudice to the above, it is also pertinent to mention here that even though the affidavit of the complainants supporting the complaint is signed, verified and attested on 06.02.2020 at Ahmadabad,

Gujarat (page-25 to 28 of the complaint), however, the verification of the complaint (page-24 of the complaint) itself is signed by the complainants at New Delhi on 20.02.2020, which clearly establishes the fact that (a) the complainants have signed, verified and attested the affidavits supporting the complaint on 06.02.2020 at Ahmadabad, Gujarat, which is prior to the date of the verification signed by the complainants at New Delhi on 20.02.2020; and (b) the complainants were not present in New Delhi on 20.02.2020 i.e. the date of signing of the verification and the said complaint is not supported by any affidavit whatsoever. In view of the above, in the absence of a signed complaint and a proper verified and attested affidavit supporting the complaint, the complaint is liable to be rejected.

vi. That 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 investors. 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 complainants are investors and not consumers and nowhere in the present complaint have the complainants pleaded as to how the complainants are consumers as defined in the Consumer Protection Act, 1986 qua the respondent. The complainants have deliberately not pleaded the purpose for which the complainants entered into the agreement which the respondent to purchase the apartment in question. The complainants, who are already the owners of house no. 48, Inder Enclave, Balkeshvar Road, Agra UP- 282004 (address mentioned in the booking application form and apartment buyer agreement) and O-1601, ISCON Platinum, Near Bhopal Circle, S.P. Ring Road, Ahmedabad, Gujarat (address mentioned in the present complaint) are investors, 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.

vii. Despite several adversities, the respondents have continued with the construction of the project and even though the respondents were required to apply the occupation certificate for the unit in question by 31.12.2019 (as mentioned at the time of application for

extension of Registration of the project with RERA), however, the respondents applied the occupation certificate for the apartment in question on 17.07.2019 and have already obtained the OC of the apartment in question on 13.02.2020 and have also, vide Notice of possession dated 19.02.2020 and 18.03.2020, offered the possession of the apartment to the complainant. However, as the complainants were only short term and speculative investors and therefore, they were not interested in taking over the possession of the said apartment. It is apparent that the complainant had the motive and intention to make quick profit from sale of the said apartment through the process of allotment. Having failed to resell the said apartment due to general recession and because of slump in the real estate market, the complainants have developed an intention to raise false and frivolous issues to engage the respondents in unnecessary, protracted and frivolous litigation. The alleged grievance of the complainants has origin and motive in sluggish real estate market.

viii. That this 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

signed by the complainants/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 the complainants and the respondent. Rather, the agreement that has been referred to, for the purpose of getting the adjudication of the complaint, is the apartment buyer agreement dated 08.07.2010, executed much prior to coming into force of said Act or said rules. The adjudication of the complaint for 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 respondents *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 complainants.

ix. The respondent submitted that out of the total amount paid by the complainants i.e., Rs.50,63,558/-, only Rs.49,51,051/- has been paid towards the sale consideration. The balance amount of Rs.1,12,543/- is

towards the service tax as reflected in the statement of account.

x. The respondent submitted that the proposed estimated time of handing over the possession of the said apartment i.e. 31.08.2012 + 120 days, which comes to 31.12.2012, is applicable only subject to force majeure and the complainants having complied with all the terms and conditions and not being in default of any the terms and conditions of the apartment buyer agreement, including but not limited to the payment of instalments. In case of any default/delay in payment, the date of handing over of possession shall be extended accordingly solely at the respondent's discretion, till the payment of all outstanding amounts and at the same time in case of any default, the complainants will not be entitled to any compensation whatsoever in terms of clause 15 and clause 17 of the apartment buyer agreement.

xi. That there was no intentional delay in the construction on the part of the respondent. The respondent had started the construction of the above said project immediately after the approval of the building plan i.e. 13.08.2009 with the intention to complete the project within the stipulated time, but due to the following

situations beyond the control of the respondent, the construction of the project could be not be completed upto 31.08.2012: - (a) Default on part of the contractor i.e. Supreme Infrastructure India Ltd.; (b) That the ***hon'ble Punjab and Haryana High Court on 31.07.2012 in CWP No. 20032 of 2008 titled as Sunil Singh vs. MOEF & others*** had directed that ground water shall not be used for the construction purposes and further ordered to stop the construction immediately till the time company produce a confirmation from administrator, HUDA, Gurgaon to the effect that company is no more using ground water; (c) due to the heavy shortage of supply of construction material i.e. river sand and bricks etc through out of Haryana, due to the order of ***Hon'ble Supreme Court of India in the case titled as Deepak Kumar Vs. Haryana dated 27.02.2012***, construction work was stopped at site for considerable long time; (d) shortage of labour, etc.

xii. 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

xiii. The respondent has to be shelter of force majeure conditions as detailed in the reply. It is prayed that the demand the charges is as per the agreement and if the complainants are not willing to avail the club membership, then the charges of Rs. 1,25,000/- will be waived from their final dues.

11. 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 application of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observed that it has territorial as well as subject

matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I Territorial jurisdiction

12. 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

13. 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 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 handing over possession as per declaration given under section 4(2)(l)(C) of RERA Act

14. The counsel for the respondent has stated 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, the next question of determination is whether the respondent is entitled to avail the time given to it by the authority at the time of registering the project under section 3 & 4 of the Act.

15. 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.

16. 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 and 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...."*

17. The time period for handing over the possession is committed by the builder as per the relevant clause of apartment buyer 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 does not change the commitment of the promoter to hand over the possession by the due date as per the apartment buyer 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. Although, 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 apartment buyer agreement and he is liable for the delayed possession charges as provided in proviso to section 18(1) of the Act. 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 complainants being investor

18. 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.50,63,558/- 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 allottees being investors are not entitled to protection of this Act also stands rejected.

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

19. 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."

20. 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."

21. 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 complainant

Relief sought by the complainant: The respondent be directed to immediately deliver the possession of the impugned no. P-1102, EDGE Tower, Ramprastha City along with prescribed rate of interest.

22. 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."*

23. 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."

24. 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.

25. 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 complainant 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 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 dotted lines.

26. **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

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.*

27. **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.

28. 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."

29. 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%.

30. 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;"

31. 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 them, in case of delayed possession charges.

32. 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 27.09.2010, 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 18.03.2020. 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 27.09.2010 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 27.09.2010 to hand over the possession within the stipulated period.

33. 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 18.03.2020, 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 (18.03.2020) which comes out to be 18.05.2020.

34. 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 18.05.2020 as per provisions of section 18(1) of the Act read with rule 15 of the rules.

35. The allottees have 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 allottees within 30 days.

H. Directions of the authority

36. 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 complainants from due date of possession i.e. 31.08.2012 till 18.05.2020. The arrears of interest accrued so far shall be paid to the

complainants 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 allottees. If the amount outstanding against the allottees 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 allottees then the balance delay possession charges shall be paid after adjustment of the outstanding against the allottees.

iv. The complainants are 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 allottees statement of account within one month of issue of this order. If there is any objection by the allottees 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 allottees may approach the authority by filing separate application.

37. Complaint stands disposed of.

38. 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