BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 3495 of 2020
First date of hearing : 23.12.2020
Date of decision : 30.07.2021

1. Brig Rajeshwar Singh
2. Anju Singh
3. Abhimanyu Singh
   All R/o: - Bir Sunar Wala, P.O.
   Nehru College, Jhajjar – 124104 **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. Aditi Mishra Advocate for the complainants
Sh. Dheeraj Kapoor Advocate for the respondent

ORDER

1. The present complaint dated 22.10.2020 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.	BG-04, ground floor, block/tower B [Page 57 of complaint]

11.	Unit measuring	2390 sq. ft.
12.	Date of execution of apartment buyer's agreement	19.08.2010 [Page 52 of complaint]
13.	Allotment letter	04.08.2010 [Page 49 of complaint]
14.	Payment plan	Construction linked payment plan. [Page 82 of complaint]
15.	Total consideration	Rs.80,77,832/- [as per schedule of payment page 82 of complaint]
16.	Total amount paid by the complainants	Rs.72,00521 /- [as per receipt information page 17 to 48 of complain
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 66&67 of complaint]	31.08.2012 [Note: - 120 days grace period is not allowed]
18.	Delay in handing over possession till date of this order i.e. 30.07.2021	8 years 10 months and 30 days

B. Brief fact of the complaint

3. The complainants submitted that in the month of July 2010, the respondent approached them regarding purchase of a residential flat and visited the above said premises for the purpose of purchase of a flat. That the complainants reached the above said premises, representatives of the respondent approached the complainants to visit the entire complex and

finalize the flat. Thereafter, the complainants were ready to purchase one flat having address at flat no. B-G04, tower- B, "The Edge Tower", in Ramprastha City, Sector 37D, Gurugram, and for the same, they issued a cheque no. 128244 dated 30.07.1010 in favour of respondent for an amount of Rs.2,50,000/- drawn on HSBC Bank and the respondent issued an allotment letter dated 04.08.2010 w.r.t. apartment bearing no. B-G04. Subsequently, an apartment buyer's agreement dated 19.08.2010 was entered between the complainants and the respondent. The earnest money paid as above, the complainants over a period of time commencing from August 2010 to November 2012 made payment of a total sum of Rs. 72,00,521/- to the respondent.

4. The respondent had undertaken to hand over possession of the flat to the complainants by August 2012 with a further grace period of 4 months, i.e. December 2012 for applying and obtaining the occupation certificate in respect of the group housing complex. Hence, the complainants ought to have handed over possession of the flat by December 2012.

5. The respondent charged unusual interest @ 19.56% p.a. for delayed payment of one instalment from the complainants even though the complainants informed the respondent that the complainant no. 1 was posted at counterinsurgency and Jungle Warfare School, Mizoram and due to security issues

involved could not make payment as requested by the respondent.

6. The respondent sent numerous e-mails to the complainants starting from November 2015 to February 2017 extending the timeline for completion of construction of the flat from December 2016 to September 2017. Thereafter, the above assurances by the respondent, failed to deliver the possession of the flat to the complainants and a total of 7 years intimated to the complainants by an e-mail dated 14th August 2019 that tower B in which the flat is situated, is still under construction. That the cause of action arose for the present complaint in or around in July 2010, when the complainants booked the flat. The cause of action further arose on numerous occasions during 2010 to 2012 when the complainants paid the instalments and 2015, 2016, 2017 and 2019 when emails pertaining to the flat were being exchanged between the parties. The cause of action continues to subsist as the respondent has delayed the possession of the apartment to the complainants and has failed to hand over it till date of filing this complaint.

C. Relief sought by the complainants:

i. To pay interest at the rate of 19.5% p.a. for every month of delay from the due date of possession i.e. 31.08.2012

till the actual handing over the possession of the booked unit to the complainants.

7. 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

8. 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 complaint filed by the complainants 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 and section 19 of the Act lies with the adjudicating officer under sections 31 and 71 read with rule 29 of the rules.

ii. That the complaint pertains to the alleged delay in delivery of possession for which the complainant has 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 i.e. "EDGE TOWER" in Ramprastha City, sector-37D, Gurugram is covered under the definition of "ongoing projects" and registered with the 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 the authority has no jurisdiction whatsoever to entertain such complaint and such complaint is liable to be rejected.

iii. The respondent is further substantiated by the proviso to section 71 which clearly states that even in a case where a complaint is withdrawn from a consumer forum /commission/NCDRC for the purpose of filing an application under the said Act and said rules, the application, if any, can only be filed before the adjudicating officer and not before the authority.

iv. The Haryana Real Estate (Regulation & Development) Amendment Rules, 2019 the complainant has 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. It is pertinent to mention here that as the present

complaint is not in the amended 'Form CRA', therefore the present complaint is required to be rejected.

v. That the power of the appropriate Government to make rules u/s 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. The powers of the adjudicating officer to adjudicate the complaints pertaining to refund, possession, compensation and interest for a grievance under section 12, 14, 18 and 19 are vested with it under section 71 read with section 31 of the said Act and not under the said rules and neither the said rules nor any amendment thereof can dilute, nullify or supersede the powers of the adjudicating officer, vested with it under section 71 read with section 31 of the said Act, and hence the authority has no jurisdiction whatsoever to entertain the present complaint. the above stated that the position is further substantiated by section 84(2) (zc), which clearly states that it is only the manner of inquiry under Section 71(1) for which a rule can be made by the Appropriate Government and not by whom that inquiry is to be made as that is clearly provided in section 71 i.e. adjudicating officer.

vi. That the complaint is signed by only two complainants i.e. complainant no.1 (Brig. Rajeshwar Singh) and complainant no.2 (Mrs. Anju Singh) and not by the third complainant i.e. complainant no.3 (Abhimanyu Singh). It is pertinent to mention here that even though three affidavits supporting the complaint have been filed along with the complaint, however, the affidavit of the complainant no. 3 (Abhimanyu Singh) is not signed by the complainant no. 3, but it has been signed by the complainant no.1, thereby making it a false affidavit on oath. It is also pertinent to mention that even though the complaint as well as the affidavit of the complainants supporting the complaint are signed and verified on 21.08.2020 at Jhajjar Haryana. However, the affidavit is attested in Delhi on the same date i.e. 21.08.2020, which clearly establishes the fact that the complainants were not present in New Delhi on 21.08.2020 at the time of attestation of their affidavits. In view of the above, in the absence of a signed complaint and vakalatnama by all the complainants and a proper verified and attested affidavit supporting the complaint, the complaint is liable to be rejected.

vii. That the absence of signatures of all the complainants and vakalatnama; in the absence of the affidavit of all the

complainants; and also in the absence of the properly verified and attested affidavit supporting the complaint, the complaint is liable to rejected.

viii. 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 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 an agreement with the respondent to purchase the apartment in question. The complainants, who are already the owner of Bir Sunar Wala, P.O. Nehru College, Jhajjar, Haryana-124104 (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. It is most respectfully submitted that the authority has no jurisdiction to entertain the present complaint as the complainants have not come to this authority 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 complainants not being a 'Consumer' 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.

ix. That the authority has no jurisdiction to entertain the present complaint as the complainants have not come to the authority with clean hands and have concealed the material fact that the complainants are defaulters, having deliberately failed to make the payment of installments within the time prescribed, which resulted in delay payment charges/interest, as reflected in the statement of Account.

x. That the date of booking till the filing of the present complaint, the complainants have never ever raised any issue whatsoever and have now concocted a false story

and raised false and frivolous issues and have filed the present complaint on false, frivolous, and concocted grounds. This conduct of the complainants clearly indicates that the complainants are mere speculators having invested with a view to earn quick profit and due to slowdown in the market conditions, the complainants have filed the present complaint on false, frivolous, and concocted grounds.

xi. Despite several adversities, the respondents have continued with the construction of the project and are in the process of completing the construction of the project and have already obtained the OC of 8 towers out of 15 towers and should be able to apply the occupation certificate for the other towers (including the apartment in question) by 31.12.2020 (as mentioned at the time of application for extension of registration of the project with RERA) or within such extended time, as may be extended by the authority, as the case may be. However, as the complainants were only short term and speculative investors, therefore they were not interested in taking over the possession of the said apartment. It is apparent that the complainants 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.

xii. That the humble submission of the respondents, of 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 19.08.2010, 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 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 complainants.

xiii. That no cause of action has ever accrued in favour of the complainants to file the present complaint before this authority. The complaint being without any cause of action is liable to be dismissed at this ground alone.

xiv. That the respondents have made huge investments in obtaining approvals and carrying on the construction and development of 'EDGE' project and despite several adversities is in the process of completing the construction of the project and have already obtained the OC of 8 towers out of 15 towers and should be able to apply the occupation certificate for the other towers (including the apartment in question) by 31.12.2020 (as mentioned at the time of application for extension of Registration of the project with RERA) or within such extended time, as may be extended by the authority, as the case may be. The complainants persuaded the respondents to allot the said apartment in question to them with promise to execute all documents as per format of the respondents and to make all due payments.

The respondents continued with the development and construction of the said apartment and also had to incur interest liability towards its bankers. The complainants prevented the respondents from allotting the said apartment in question to any other suitable customer at the rate prevalent at that time and thus the respondent have suffered huge financial losses on account of breach of contract by the complainants.

xv. That the fact that (a) till date, the complainants kept on making payment as per the payment plan, though not within the time prescribed, which resulted in delay payment charges/interest; and (b) that from the date of booking till the filing of the present complaint, the complainants never raised any issue whatsoever, clearly reveals that the complainants had no issue or concern about the said apartment/agreement and terms and conditions of the said apartment buyer's agreement and are now unnecessarily raising false and frivolous issues and has filed the present complaint.

xvi. 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	400	OC received
	Tower H, N	160	OC received
	Tower-O (Nomenclature-P)	80	OC received
	(Tower A, B, C, D, E, F, G)	640	OC to be applied
4.	EWS	534	OC received
5.	Skyz	684	OC to be applied
6.	Rise	322	OC to be applied

xvii. The respondent submitted that out of the total amount paid by the complainants i.e. Rs. 72,00,521/-, towards the sale consideration. That out of total amount paid i.e. Rs.71,00,198/- only Rs.68,10,590/- has been paid towards the sale consideration. The balance amount of Rs. 1,94,886/- is towards the service tax and Rs.94,722/- is towards delay payment interest as reflected in the statement of account.

xviii. That the proposed estimated time of handing over the possession of the said apartment i.e. 31.08.2012 plus 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.

xix. That the section 19(4) of said Act provides that the allottee shall be entitled to claim the refund of the amount paid along with interest at such rates as may be prescribed and compensation in the manner as provided in the Act, from the promoter, if the promoter fails to comply or is unable to give possession of the apartment, plot or building, as the case may be, in accordance with the terms of agreement for sale. sub-section 3 of section 19 provides that the allottee shall be entitled to claim the

possession of the apartment, plot or building, as the case may be, as per the declaration given by the Promoter under section 4(2)(l)(c). Thus, conjoint reading of both the provisions, as aforementioned, would show that the entitlement to claim the possession or refund would only arise once the possession has not been handed over as per the declaration given by the promoter under section 4(2)(l)(c). In the present case, the respondents had made a declaration in terms of section 4(2)(l)(C) that it would complete the project by 31.12.2019 and has also applied for a further extension of one year with the revised date as 31.12.2020. Thus, no cause of action can be said to have arisen to the complainants in any event to claim possession or refund, along with interest and compensation, as sought to be claimed by them. Thus, on this score also, no relief, as sought, can be claimed by the complainants.

xx. 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.

9. 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 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

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

E.II Subject matter jurisdiction

11. 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 complainants have stated that they are reserving the right for compensation and at present seeking only delayed 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 format of the complaint

12. The respondent has raised contention that the present complaint is not maintainable as the complainants have filed the present complaint before the adjudicating officer and the same is not in amended CRA format. The authority observed that the complainants have addressed the present complaint was to the authority and the authority has no hesitation is saying that the respondent is trying to mislead the authority by saying that the said complaint was filed before adjudicating officer. There is a prescribed proforma for filing complaint before the authority under section 31 of the Act in form CRA. There are 7 different headings in this form (i) particulars of the complainants have been provided in the complaint (ii) particulars of the respondent have been provided in the complaint (iii) is regarding jurisdiction of the authority- that has been also mentioned in para 14 of the complaint (iv) facts

of the case have been given at page no. 6 to 10 (v) relief sought that has also been given at page 12 of complaint (vi) no interim order has been prayed for (vii) declaration regarding complaint is not pending with any other court- has been mentioned in para 15 at page 9 of complaint (viii) particulars of the fees already given on the file (ix) list of enclosures that have already been available on the file. Signatures and verification part is also complete. Although complaint should have been strictly filed in CRA format but in this complaint all the necessary details as required under CRA have been furnished along with necessary enclosures. Reply has also been filed. At this stage, asking complainants to file reply in form CRA, strictly will serve no purpose, rather getting into technicalities will delay the justice in the matter and as they say, ***"Justice delay is Justice denied"***. Therefore, the said plea of the respondent w.r.t rejection of complaint on this ground is also rejected and the authority has decided to proceed with this complaint as such.

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

13. 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.

14. 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.

15. 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...."*

16. 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.III Objection regarding entitlement of DPC on ground of complainants being investor

17. 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 buyers and they have paid total price of Rs.72,00,521/- 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 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.IV Objection regarding jurisdiction of authority w.r.t. buyer's agreement executed prior to coming into force of the Act

18. 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."

19. 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 <u>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</u>. 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."

20. 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 under any statute, law, act applicable in India and are not unreasonable or exorbitant in nature.

G. Finding of the relief sought by the complainants

Relief sought by the complainants: - The respondent is directed to pay interest at the rate of 19.5% p.a. for every month of delay from the due date of possession i.e., 31.12.2012

till the actual handing over of the possession of the subject apartment to the complainants.

21. 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."*

22. 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."*

23. 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.

24. 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 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.

25. **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.

26. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges at the rate of 18% p.a. however, proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

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

27. 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."*

28. 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%.

29. 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;"*

30. 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 them in case of delayed possession charges.

31. On consideration of the documents available on record and submissions made by both the parties regarding contravention of provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 15(a) of the agreement executed between the parties on 19.08.2010, 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. The respondent has failed to handover possession of the subject apartment till date of this order. Accordingly, it is the failure of the respondent/promoter to fulfil its obligations and responsibilities as per the agreement to hand over the possession within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with proviso to section 18(1) of the Act on the part of the respondent is established. As such the allottee shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 31.08.2012 till the handing over of the possession, at prescribed rate i.e., 9.30 % p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules.

32. 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 allottee within 30 days.

H. Directions of the authority

33. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

i. The respondent is directed to pay interest at the prescribed rate of 9.30% p.a. for every month of delay from the due date of possession i.e., 31.08.2012 till the date of handing over possession.

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

iii. If there is no amount outstanding against the allottees 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 arrears of such interest accrued from 31.08.2012 till the date of order by the authority shall be paid by the promoter to the allottees within a period of 90 days from date of this order and interest for every month of delay shall be paid by the promoter to the allottees before 10th of the subsequent month as per rule 16(2) of the rules.

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

vi. 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 allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

vii. The respondent shall not charge anything from the complainants which is not the part of the buyer's agreement. The respondent is debarred from claiming holding charges from the complainants/allottees 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.

viii. The promoter is directed to furnish to the allottees the 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 the 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 the allottee may approach the authority by filing separate application.

34. Complaint stands disposed of.

35. 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 07.09.2021