BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

New Complaint no. : 767 of 2021
First date of hearing: 09.03.2021
Date of decision : 18.08.2021

Mr. Ajit Kumar
Through SPA Mrs. Madhu Kumari
R/O: - Flat No. 2106, Eboni, Taman Kemayoran Condominium, Kemyoran, Jakarta Pusat-10610, Indonesia

Complainant

Versus

M/s Supertech Limited
Regd. Office at: - 1114, 11th Floor, Hemkunt Chambers, 89, Nehru Place, New Delhi-110019

Respondent

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

APPEARANCE:
Sh. Pankaj Chandola — Advocate for the complainant
Sh. Bhrigu Dhami — Advocate for the respondent

ORDER

1. The present complaint dated 15.02.2021 has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is *inter alia* prescribed that the promoter shall be responsible for all obligations, responsibilities and functions as provided under

the provision of the Act or the Rules and regulations made there under or to the allottee as per the agreement for sale executed *inter se*.

A. Unit and project related details

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

S.No.	Heads	Information
1.	Project name and location	"Araville", Sector- 79, Gurugram.
2.	Project area	10.0 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no. and validity status	37 of 2011 dated 26.04.2011 valid till 25.04.2019
5.	Name of licensee	M/s Tirupati Buildplaza Private Limited
6.	RERA registered/not registered	**Registered vide no. 16 of 2018 Dated 13.10.2018 (Tower No. A to F)**
7.	RERA registration valid up to	31.12.2019
8.	Unit no.	0604, 6th floor, Tower- D [Page no. 46 of complaint]
9.	Unit measuring	1530 sq. ft.
10.	Date of execution of flat buyer agreement	05.07.2012 [page no. 43 of complaint]
11.	Date of execution of addendum to the allotment letter	22.09.2014 [page no. 72 of complaint]

12.	Payment plan	Construction linked payment plan [Page no. 46 of complaint]
13.	Total consideration	Rs.90,64,100/- [as per payment plan page 47 no. of complaint]
14.	Total amount paid by the complainant	Rs.71,70,770/- [as per possession outstanding statement dated 13.04.2020 page 85 of Complaint]
15.	Due date of delivery of possession as per clause I (22) of the allotment letter: by November 2014 plus 6 months grace period to cover any unforeseen circumstances and timely payment. [Page 51 of complaint]	30.11.2014 [Note: - 6 month grace period is not allowed]
16.	Delay in handing over possession till the date of order i.e. 18.08.2021	6 years 8 months and 20 days

B. Facts of the complaint

3. The complainant has made the following submissions in the complaint:

I. That the real estate project "**Araville**" at sector-79, Gurugram, Haryana came to the knowledge of the complainant, through the authorized representatives of the respondent. The real estate agents/local representative of the promoter allured the complainant with the brochure and special characteristics of the project which subsequently turned out to be false claims

and had deceived the complainant for booking a unit in the respective project.

II. That the complainant believing on the assurances and promises of the respondent, decided to move further to book a flat/apartment/floor/unit, in the project propagated as **"Araville"** situated at Sector 79, Gurugram, on dated 08.06.2012, and made the payment of Rs.7,00,000/- possessing cheque no. 803534 which was duly acknowledged by the respondent vide receipt dated 14.06.2012.

III. That the respondent company issued an allotment letter in reference to the aforementioned booking on dated 05.07.2012 and simultaneously, allotted the unit no- D-604, in the said project, comprising the admeasuring area as 1530 sq. ft. with total sale consideration of Rs.90,64,010/-.

IV. That both the parties entered into terms of agreement titled as "flat buyer agreement" which was duly executed on dated 05.07.2012. As per clause 22 of the agreement, the respondent was bound to handover the possession of the unit by November 2014 along with a further grace period of 6 months for covering any unforeseen circumstances. However, it is pertinent to mention before the authority that no such unforeseen circumstance was occurred during the course of development of the project; therefore, the respondent is not entitled to claim such grace period.

V. That before two months of handing over of possession, the respondent sent an amended payment plan to the complainant through email dated 29.08.2014 and asked the complainant to execute the same. Believing on the assurance and promise of the respondent, the complainant on 22.09.2014 signed the **"addendum to allotment letter"** which nonetheless was another trap of the respondent.

VI. That the complainant in November 2014 visited the site of the project and was shocked to see that there was no progress in the construction work of the project, and it is nowhere at the stage of completion. The construction/ development work of the project at the site was stalled since very long period. Thereafter, the complainant time and again tried to contact the officers of the respondent company to seek the clarification regarding the status of the project, however, never received any positive reply from their side. That the complainant after investing a huge amount of money in the project of the respondent company came to realize about the fraudulent commitment of the promoter and seeing no tenable progress at the work site which had caused mental agony to the complainant as the unprofessional work ethics of the promoter had broke the complainant to financial turmoil.

VII. That the complainant has furnished the second installment of payment as provided under the

addendum, therefore, the entire onus falls on the shoulder of the respondent to dispense the offer of possession after taking the occupational certificate.

VIII. That apprehended by the long delay in the project, the complainant on 17.11.2017 sent email to the respondent and expressed his great resentment over the delay in handing over of possession by 36 months. The complainant further asked them to provide the construction updates, expected date of possession and RERA registration number. In response to above said email, the respondent on 18.11.2017 replied that the possession of the unit is expected in the 1st quarter of 2018. However, did not share the RERA registration number.

IX. That on passing over of the first quarter of 2018 complainant got highly exhausted with the thought of being deceived by them and therefore, sent e-mail on 11.04.2018 to the respondent enquiring about the development status and occupation certificate of the project. However, being in a dominant position, the respondent on 12.04.2018 again extended the expected date for handing over of possession and stated that the possession is expected to be delivered in last quarter of 2018. That it is much evident from the observation of above passages that the respondent had no serious intention in accomplishing the said project and thereby changing the dates of the offer of possession is a

substantial element of volte face of repetitious stand taken by respondent.

X. That the respondent has not received occupational certificate in the said project and dishonestly communicated the wrong insight about the receiving occupational certificate in the electronic conversation happened with complainant dated 19.12.2018. However, when the complainant sought the detail and copy of Occupation certificate in reference to the tower D, the respondent didn't provide any reasonable response and ignored the emails sent by the complainant. The respondent through its actions has reflected their malign nature to deceit the complainant in the relation to the unit. It is explicitly submitted that respondent holds malicious and defrauding acts till every turn towards the reality.

XI. Thereafter, much deception and delay in the completion of project, the respondent, without obtaining occupation certificate, sent an offer of prepossession letter dated 13.04.2020 and asked the complainant to pay an amount of Rs.44,03,776/- which was completely unfair, illegal, unlawful, and not tenable in the eyes of law.

XII. That as per the understanding established under the agreement between both the parties, the final demand is to be paid on the valid offer of possession after obtaining occupation certificate. However, the respondent with dishonest intention sent such letter dated 13.04.2020 in

spite of being aware of the fact that no occupation certificate has been granted for the tower of the complainant and therefore, no demand can be raised.

XIII. That the respondent with the intention to threaten the complainant had mentioned in such letter that the due payment was required to be paid within 15 days. That the demand of Rs.44,03,776/- is nothing except unreasonable, baseless, and preposterously drafted and whereby the respondent has shattered every agreed term of the agreement and also of addendum where it was stated that complainant has to furnish the payment of 20% at the moment of granting possession. However, the complainant had already, made the payment of 80% as per the terms of addendum which evaluate in amount to be ₹ 71,70,770/- and therefore, the amount computed by the respondent in the annexure-A is absolutely frivolous and outlandish or an attempt to extract the hard-earned money of the complainant. It is not out of the place to mention that the respondent sent such letter without obtaining the occupation certificate for the complainant tower which is ***non est*** in the eyes of law and Void-ab-initio. It is further submitted that under the agreement between both the parties there was no concept of prepossession demand.

XIV. That the respondent sent statement of account on dated 08.12.2020, therefore the letter of statement of payment accentuates the total amount paid by the complainant

which compute to be 71,70,770/- whereby the stipulations for consideration have been duly fulfilled by the complainant.

XV. That the respondent has made false assurances, false and frivolous promise to the complainant and raised final demand and offered possession without obtaining occupation certificate as per the agreed terms. The complainant was threatened by the respondent to make the final payment without valid offer of possession to avoid the holding charges and interest.

XVI. That the case is a clear exploitation of innocence and beliefs of the complainant and an act of the respondent to diverse the hard-earned money collected from the complainant illegally and also failed to hand over possession along with all the promised amenities till date. The funds which were supposed to be utilized for this project have been diverted by the respondent.

C. Relief sought by the complainant.

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

(i) To direct the respondent to complete the development work of the complainant unit and hand over the possession of the unit immediately;

(ii) To direct the respondent to pay prescribed rate of interest per annum for delay in handing over of possession from December 2014 till the actual handing over the possession;

(iii) To direct the respondent to offer of possession only after obtaining occupation certificate;

(iv) To direct the respondent to withdraw the offer of prepossession letter and final demand letter dated 13.04.2020;

(v) To direct the respondent to provide a justification for escalation charges, if any;

5. 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.

6. The respondent contested the complaint on the following grounds. The submission made therein, in brief is as under: -

I. That the complainant booked an apartment being number no. R032D00604, having a super area of 1530 sq. ft. (approx.) for a total consideration of Rs.72,57,020/- vide a booking form dated 08.06.2012.

II. That consequentially, after fully understanding the various contractual stipulations and payment plans for the said apartment, the complainant executed the flat buyer agreement dated 05.07.2012. Thereafter, further submitted that as per Clause 24 of the agreement, the possession of the apartment was to be given by

November 2014, with an additional grace period of 6 months.

III. That as per clause 24 of the agreement, compensation for delay in giving possession of the apartment would not give to the allottees akin to the complainant who have booked their apartment under any special scheme such as 'No EMI till offer of possession'. Further it was also categorically stipulated that any delay in offering possession due 'Force Majeure' conditions would be excluded from the aforesaid possession period.

IV. That in interregnum, the pandemic of covid-19 gripped the entire nation since March 2020. The Government of India has itself categorized the said event as a 'Force Majeure' condition, which automatically extends the timeline of handing over possession of the apartment to the complainant. Thereafter, it would be apposite to note that the construction of the project is in full swing, and the delay if at all, has been due to the government-imposed lockdowns which stalled any sort of construction activity. Till date, there are several embargos qua construction at full operational level.

V. That the said project is registered with this authority vide registration no. 182 of 2017 dated 04.09.2017 and

the completion date as per the said registration is December 2021;

VI. That the delay if at all, has been beyond the control of the respondents and as such extraneous circumstances would be categorized as 'Force Majeure' and would extend the timeline of handing over the possession of the unit, and completion the project.

VII. The delay in construction was on account of reasons that cannot be attributed to it. It is most pertinent to state that the flat buyer agreement provide that in case the developer/respondent delays in delivery of unit for reasons not attributable to the developer/respondent, then the developer/respondent shall be entitled to proportionate extension of time for completion of the said project. The relevant clause which relates to the time for completion, offering possession extension to the said period are "clause 22 under the heading "possession of allotted floor/apartment" of the "allotment agreement". The respondent seeks to rely on the relevant clause of the agreement at the time of arguments.

VIII. The force majeure clause, it is clear that the occurrence of delay in case of delay beyond the control of the respondent, including but not limited to the dispute with

the construction agencies employed by the respondent for completion of the project is not a delay on account of the respondent for completion of the project.

IX. That the timeline stipulated under the flat buyer agreement was only tentative, subject to force majeure reasons which are beyond the control of the respondent. The respondent in an endeavor to finish the construction within the stipulated time, had from time to time obtained various licenses, approvals, sanctions, permits including extensions, as and when required. Evidently, the respondent had availed all the licenses and permits in time before starting the construction;

X. That apart from the defaults on the part of the allottee, like the complainant herein, the delay in completion of project was on account of the following reasons/ circumstances that were above and beyond the control of the respondent:

- shortage of labour/ workforce in the real estate market as the available labour had to return to their respective states due to guaranteed employment by the Central/ State Government under NREGA and JNNURM Schemes;
- that such acute shortage of labour, water and other raw materials or the additional permits, licenses,

sanctions by different departments were not in control of the respondent and were not at all foreseeable at the time of launching of the project and commencement of construction of the complex. The respondent cannot be held solely responsible for things that are not in control of the respondent.

XI. The respondent has further submitted that the intention of the force majeure clause is to save the performing party from the consequences of anything over which he has no control. It is no more res integra that force majeure is intended to include risks beyond the reasonable control of a party, incurred not as a product or result of the *negligence or malfeasance* of a party, which have a materially adverse effect on the ability of such party to perform its obligations, as where non-performance is caused by the usual and natural consequences of external forces or where the intervening circumstances are specifically contemplated. Thus, in light of the aforementioned it is most respectfully submitted that the delay in construction, if any, is attributable to reasons beyond the control of the respondent and as such the respondent may be granted reasonable extension in terms of the allotment letter.

XII. It is public knowledge, and several courts and quasi-judicial forums have taken cognisance of the devastating impact of the demonetisation of the Indian economy, on the real estate sector. The real estate sector is highly dependent on cash flow, especially with respect to payments made to labourers and contractors. The advent of demonetisation led to systemic operational hindrances in the real estate sector, whereby the respondent could not effectively undertake construction of the project for a period of 4-6 months. Unfortunately, the real estate sector is still reeling from the aftereffects of demonetisation, which caused a delay in the completion of the project. The said delay would be well within the definition of 'Force Majeure', thereby extending the time period for completion of the project.

XIII. That the complainant has not come with clean hands before this hon'ble form and have suppressed the true and material facts from this hon'ble forum. It would be apposite to note that the complainant is a mere speculative investor who has no interest in taking possession of the apartment. In fact a bare perusal of the complaint would reflect that he has cited 'financial incapacity' as a reason, to seek a refund of the monies

paid by him for the apartment. In view thereof, this complaint is liable to be dismissed at the threshold.

XIV. The respondent has submitted that the completion of the building is delayed by reason of non-availability of steel and/or cement or other building materials and/ or water supply or electric power and/ or slow down strike as well as insufficiency of labour force which is beyond the control of respondent and if non-delivery of possession is as a result of any act and in the aforesaid events, the respondent shall be liable for a reasonable extension of time for delivery of possession of the said premises as per terms of the agreement executed by the complainant and the respondent. The respondent and its officials are trying to complete the said project as soon as possible and there is no malafide intention of the respondent to get the delivery of project, delayed, to the allottees. It is also pertinent to mention here that due to orders also passed by the Environment Pollution (Prevention & Control) Authority, the construction was/has been stopped for a considerable period day due to high rise in Pollution in Delhi NCR.

XV. That the enactment of Real Estate (Regulation and Development) Act, 2016 is to provide housing facilities with modern development infrastructure and amenities

to the allottees and to protect the interest of allottees in the real estate market sector. The main intension of the respondent is just to complect the project within stipulated time submitted before the HARERA authority. According to the terms of the builder buyer agreement also it is mentioned that all the amount of delay possession will be completely paid/adjusted to the complainant at the time final settlement on slab of offer of possession. The project is ongoing project and construction is going on.

XVI. That the respondent further submitted that the Central Government has also decided to help bonafide builders to complete the stalled projects which are not constructed due to scarcity of funds. The Central Government announced Rs.25,000 Crore to help the bonafide builders for completing the stalled/ unconstructed projects and deliver the homes to the homebuyers. It is submitted that the respondent/ promoter, being a bonafide builder, has also applied for realty stress funds for its Gurgaon based projects.

XVII. That compounding all these extraneous considerations, the Hon'ble Supreme Court vide order dated 04.11.2019, imposed a blanket stay on all construction activity in the Delhi- NCR region. It would be apposite to note that the

'Araville' project of the respondent was under the ambit of the stay order, and accordingly, there was next to no construction activity for a considerable period. It is pertinent to note that similar stay orders have been passed during winter period in the preceding years as well, i.e. 2017-2018 and 2018-2019. Further, a complete ban on construction activity at site invariably results in a long-term halt in construction activities. As with a complete ban the concerned labor was let off and they traveled to their native villages or look for work in other states, the resumption of work at site became a slow process and a steady pace of construction as realized after long period of time.

XVIII. The respondent has further submitted that graded response action plan targeting key sources of pollution has been implemented during the winters of 2017-18 and 2018-19, These short-term measures during smog episodes include shutting down power plant, industrial units, ban on construction, ban on brick kilns, action on waste burning and construction, mechanized cleaning of road dust, etc. This also includes limited application of odd and even scheme.

XIX. That the pandemic of covid-19 has had devastating effect on the world-wide economy. However, unlike the

agricultural and tertiary sector, the industrial sector has been severally hit by the pandemic. The real estate sector is primarily dependent on its labour force and consequentially the speed of construction. Due to government-imposed lockdowns, there has been a complete stoppage on all construction activities in the NCR Area till July 2020. In fact, the entire labour force employed by the respondent were forced to return to their hometowns, leaving a severe paucity of labour. Till date, there is shortage of labour, and as such the respondent has not been able to employ the requisite labour necessary for completion of its projects. The Hon'ble Supreme Court in the seminal case of ***Gajendra Sharma v. UOI & Ors, as well Credai MCHI & Anr. V. UOI & Ors,*** has taken cognizance of the devastating conditions of the real estate sector, and has directed the UOI to come up with a comprehensive sector specific policy for the real estate sector. According to Notification no. ***9/3-2020 HARERA/GGM (Admn) dated 26.5.2020,*** passed by this hon'ble authority, registration certificate date upto 6 months has been extended by invoking clause of force majeure due to spread of corona-virus pandemic in Nation, which is beyond the control of respondent.

XX. The respondent has further submitted that the authority vide its Order dated 26.05.2020 had acknowledged the covid-19 as a force majeure event and had granted extension of six months period to ongoing projects. Furthermore, it is of utmost importance to point out that vide notification dated 28.05.2020, the Ministry of Housing and Urban Affairs has allowed an extension of 9 months vis-à-vis all licenses, approvals, end completion dates of housing projects under construction which were expiring post 25.03.2020 in light of the force majeure nature of the covid pandemic that has severely disrupted the workings of the real estate industry. That the pandemic is clearly a 'Force Majeure' event, which automatically extends the timeline for handing over of possession of the apartment.

7. 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

8. The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as per provisions of section 11(4)(a) of the Act leaving aside compensation which is to be decided by the

adjudicating officer if pursued by the complainants at a later stage.

F. Findings on the objections raised by the respondent

F.I. Objection regarding the project being delayed because of force majeure circumstances and contending to invoke the force majeure clause.

9. From the bare reading of the possession clause of the buyer developer agreement, it becomes very clear that the possession of the apartment was to be delivered by **November 2014.** The respondent in his contribution pleaded the force majeure clause on the ground of Covid- 19. That in the High Court of Delhi in case no. ***O.M.P (I) (COMM.) No. 88/2020 & I.As. 3696-3697/2020 title as M/S HALLIBURTON OFFSHORE SERVICES INC VS VEDANTA LIMITED & ANR. 29.05.2020*** it was held that *The past non-performance of the Contractor cannot be condoned due to the COVID-19 lockdown in March 2020 in India. The Contractor was in breach since September 2019. Opportunities were given to the Contractor to cure the same repeatedly. Despite the same, the Contractor could not complete the Project. The outbreak of a pandemic cannot be used as an excuse for non-performance of a contract for which the deadlines were much before the outbreak itself.* Now this means that the respondent/promoter has to complete the construction of the apartment/building by November 2014. It is clearly

mentioned by the respondent/promoter for the same project, in complaint no. 4140 of 2020 (on page no. 49 of the reply) that only 85% of the physical progress has been completed in the project. The respondent/promoter has not given any reasonable explanation as to why the construction of the project is being delayed and why the possession has not been offered to the complainant/allottee by the promised/ committed time. That the lockdown due to pandemic in the country began on 25.03.2020. So the contention of the respondent/promoter to invoke the force majeure clause is to be rejected as it is a well settled law that ***"No one can take benefit out of his own wrong"***. Moreover there is nothing on record to show that the project is near completion, or the developer applied for obtaining occupation certificate rather it is evident from his submission that the project is completed upto 85% and it may take some more time to get occupation certificate. Thus, in such a situation the plea with regard to force majeure on ground of Covid- 19 is not sustainable.

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

10. The respondent has taken a stand that the complainant is the investor and not consumer, therefore, they are not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. The respondent also

submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumer 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.71,70,770/**-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;"*

11. 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 complainant is allottee(s) as the subject unit was allotted to them by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled as ***M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr***. has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottee being an investor is not entitled to protection of this Act also stands rejected.

G. **Findings on the relief sought by the complainants.**

Relief sought by the complainants:

a) To direct the respondent to pay prescribed rate of interest per annum for delay in handing over in possession from December 2014 till actual offer of possession only after obtaining occupation certificate;

12. In the present complaint, the complainant intend to continue with the project and is seeking delay possession charges as

provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under.

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

13. Clause I (22) of the flat buyer agreement (in short, agreement) provides for handing over of possession and is reproduced below: -

> **I Possession of Unit**
>
> *22. The possession of the allotted unit shall be given to the Allottee(s) by the company by **November 2014.** However, this period can be extended due to unforeseen circumstances for a further grace period of 6 months to cover any unforeseen circumstances. The possession period clause is subject to timely payment by the Allottee(s) and the Allottee(s) agrees to abide by the same in this regard."*

14. The authority has gone through the possession clause of the agreement and observed that this is a matter very rare in nature where builder has specifically mentioned the date of handing over possession rather than specifying period from some specific happening of an event such as signing of buyer developer 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.

15. At the outset it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to timely payment and all kinds of terms and conditions of this agreement and application, and the complainant not being in default under any provisions of this agreement 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 developer 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.

16. **Admissibility of grace period:**The promoter has proposed to hand over the possession of the apartment by 31.11.2014 and further provided in agreement that promoter shall be entitled to a grace period of 6 months for unforeseen circumstances and subject to timely payment by the allottee. The respondent has not mentioned any grounds/ circumstances on the happening of which he would become entitled for the said extension of period. There is no document available on record that the allottee is in default w.r.t timely payments. As per buyer agreement the construction of the project is to be completed by November 2014 which is not completed till date. It may be stated that asking for the extension of time in completing the construction is not a statutory right nor has it been provided in the rules. Accordingly, this grace period of 6 months cannot be allowed to the promoter at this stage.

17. **Payment of delay possession charges at prescribed rate of interest:** Proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may

be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

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

18. 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.

19. Taking the case from another angle, the complainant-allottee was entitled to the delayed possession charges/interest only at the rate of Rs.5/- per sq. ft. per month as per relevant clauses 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 installment for the delayed payments. The functions of the authority 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 home buyers. This authority 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 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.

20. 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., 18.08.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

21. 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;"*

22. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same as is being granted to the complainant in case of delayed possession charges.

b). To withdraw the offer of prepossession letter and final demand letter dated 13.04.2020?

23. **Validity of Intimation of pre-possession:** At this stage, the authority would express its views regarding the concept of 'valid offer of possession'. It is necessary to clarify this concept because after valid and lawful offer of possession the liability of promoter for delayed offer of possession comes to an end. On the other hand, if the possession is not valid and lawful, liability of promoter continues till a valid offer is made

and the allottee remains entitled to receive interest for the delay caused in handing over valid possession. The authority after detailed consideration of the matter has arrived at the conclusion that a valid offer of possession must have following components:

i. **Possession must be offered after obtaining occupation certificate-** The subject unit after its completion should have received occupation certificate from the department concerned certifying that all basic infrastructural facilities have been laid and are operational. Such infrastructural facilities include water supply, sewerage system, storm water drainage, electricity supply, roads, and street lighting.

ii. **The subject unit should be in habitable condition-** The test of habitability is that the allottee should be able to live in the subject unit within 30 days of the offer of possession after carrying out basic cleaning works and getting electricity, water, and sewer connections etc from the relevant authorities. In a habitable unit all the common facilities like lifts, stairs, lobbies, etc should be functional or capable of being made functional within 30 days after completing prescribed formalities. The authority is further of the view that minor defects like

little gaps in the windows or minor cracks in some of the tiles, or chipping plaster or chipping paint at some places or improper functioning of drawers of kitchen or cupboards etc. are minor defects which do not render unit uninhabitable. Such minor defects can be rectified later at the cost of the developers. The allottees should accept possession of the subject unit with such minor defects under protest. This authority will award suitable relief for rectification of minor defects after taking over of possession under protest.

However, if the subject unit is not habitable at all because the plastering work is yet to be done, flooring works is yet to be done, common services like lift etc. are non-operational, infrastructural facilities are non-operational then the subject unit shall be deemed as uninhabitable and offer of possession of an uninhabitable unit would not be considered a legally valid offer of possession.

iii. **Possession should not be accompanied by unreasonable additional demands-** In several cases, additional demands are made and sent along with the offer of possession. Such additional demands could be unreasonable which puts heavy burden upon the allottees. An offer accompanied with unreasonable

demands beyond the scope of provisions of agreement should be termed as invalid offer of possession. Unreasonable demands itself would make an offer unsustainable in the eyes of law. The authority is of the view that if respondent has raised additional demands, the allottees should accept possession under protest.

24. The authority observes that the respondent /builder has not yet obtained occupation certificate of the project in which the allotted unit of the complainant is located. So, without getting occupation certificate, the builder/respondent is not competent to issue any intimation regarding prepossession. It is well settled that for a valid offer of possession there are three pre-requisites as detailed earlier. Hence, the intimation regarding prepossession offered by respondent promoter on 13.04.2020 is not a valid or lawful offer of possession.

25. On consideration of the circumstances, the documents, submissions made by the parties and based on the findings of the authority regarding contravention as per provisions of rule 28(2), the Authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of clause I (22) of the agreement executed between the parties on 05.07.2012, the possession of the subject apartment was to be delivered within stipulated time i.e., by 30.11.2014. As far as grace period is concerned, the same is disallowed for the

reasons quoted above. Therefore, the due date of handing over possession is 30.11.2014. The respondent has failed to handover possession of the subject apartment till date of this order. Accordingly, it is the failure of the respondent/ promoter to fulfil its obligations and responsibilities as per the agreement to hand over the possession within the stipulated period. The authority is of the considered view that there is delay on the part of the respondent to offer of possession of the allotted unit to the complainant as per the terms and conditions of the buyer developer agreement dated 05.07.2012 executed between the parties. Further no OC/part OC has been granted to the project. Hence, this project is to be treated as on-going project and the provisions of the Act shall be applicable equally to the builder as well as allottee.

26. 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 complainant is entitled to delay possession charges at rate of the prescribed interest @ 9.30% p.a. w.e.f. 30.11.2014 till the handing over of possession as per provisions of section 18(1) of the Act read with rule 15 of the Rules.

H. Directions of the authority

27. 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. 30.11.2014 till the handing over of possession of the allotted unit after obtaining the occupation certificate from the competent authority.

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

iii. The arrears of such interest accrued from 30.11.2014 till the date of order by the authority shall be paid by the promoter to the allottee within a period of 90 days from date of this order and interest for every month of delay shall be paid by the promoter to the allottee before 10th of the subsequent month as per rule 16(2) of the rules;

iv. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.30% by the 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.

v. The respondent shall not charge anything from the complainant which is not the part of the buyer developer 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. 3864-3889/2020 decided on 14.12.2020.

28. Complaint stands disposed of.

29. File be consigned to registry.

(Samir Kumar)
Member

(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 18.08.2021
Judgement uploaded on 15.10.2021