BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

New Complaint no. : 178 of 2021
First date of hearing: 09.03.2021
Date of decision : 18.08.2021

1. Mr. Vikas Khanna
2. Mrs. Punam Khanna
Both RR/O: - 523, Sanskriti Apartments,
Sector- 19B, Pocket- 2, Dwarka,
New Delhi- 110075 **Complainants**

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. Nitin Tomar Advocate for the complainants
Sh. Bhrigu Dhami Advocate for the respondent

ORDER

1. The present complaint dated 12.01.2021 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 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 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	"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.	R032E01104, 11th floor, Tower- E [Page no. 23 of complaint]
9.	Unit measuring	1530 sq. ft. [super area]
10.	Date of execution of flat buyer agreement	14.07.2012 [page no. 21 of complaint]

11.	Payment plan	Construction linked payment plan [Page no. 23 of complaint]
12.	Total consideration	Rs.87,51,793/- [as per payment plan page 24 of complaint]
13.	Total amount paid by the complainants	Rs.81,44,328 /- [as per prepossession outstanding dated 17.04.2020 page 44 of Complaint]
14.	Due date of delivery of possession as per clause I (22) of the allotment letter by NOV 2014 + 6 Month grace period to cover any unforeseen circumstances and subject to timely payment. [Page 28 of complaint]	30.11.2014 [Note:- 6 month grace period is not allowed]
15.	Delay in handing over possession till the date of order i.e. 18.08.2021	6 years 8 months and 19 days
16.	Status of the project	On going

B. Facts of the complaint

3. The complainants have made the following submissions in the complaint: -

I. That the present complaint is being preferred by the complainant under section 31 of the Real Estate (Regulation and Development) Act, 2016 for seeking directions and relief against the errant actions of the respondent who despite assuring the possession of the unit by 31.05.2015 failed to deliver the same and thereby

committed the breach of the flat buyer's agreement dated 14.07.2012 and the provisions stated under the Real Estate (Regulation and Development) Act, 2016.

II. That the cause of action to file the instant complaint has occurred within the jurisdiction of this authority as the unit which is the subject matter of the present complaint is situated in Sector 79, Naurangpur, Manesar, District Gurugram. Hence, this authority has the power to try and adjudicate upon the instant complaint.

III. That the complainant believing upon the representations and fake claims made by the respondent with respect to its market reputation to be true and correct, booked unit no. 1104, tower E, admeasuring 1530 sq. ft. in its project "Araville" for a total sale price consideration of Rs.95,90,265/- inclusive of all the charges i.e. covered parking charge, club membership, corner & club park facing, development charges, fire fitting, power backup, IFMS & service tax.

IV. That for the purpose of the purchase of the said unit, the complainants submitted an allotment application form on 08.05.2012 with the respondent. Further, by an allotment letter, the above said was allotted to the complainant. Thereafter, in furtherance of the purchase of the unit, the complainants executed flat buyer's agreement with the respondent on 14.07.2012.

V. That as per the clause 22 of the flat buyer agreement dated 14.07.2012, the respondent had assured the

complainants to deliver the possession of the unit by 30.11.2014. Further, as per clause 21 of the agreement 180 days additional grace period was mentioned which can be taken by the respondent in the event of delay after the commitment period and according to that also respondent was supposed to deliver the possession of the said unit by 31.05.2015.

VI. Further it was agreed in clause 24 of the flat buyer agreement dated 14.07.2012 that in the event of delay in the delivery of possession on the part of the respondent, it was liable to pay penalty @ Rs.5/- per square feet per month on super area.

VII. That as per the flat buyer agreement dated 14.07.2012; the complainants in discharge of their financial obligations towards the respondent has made timely payments to the tune of Rs.81,44,328/- inclusive of development charges, covered parking charge, corner-club-park-facing charges & club membership charges till date, which amounts to 80% of the total sale price consideration. That all the payments made by the complainants were duly acknowledged by the respondent. Further, the complainants made all the payments to the respondent and as when demanded by it. However despite that the possession of the unit was delayed beyond reasonable time by the respondent.

VIII. The complainants further submitted that they had been granted housing loan of Rs.68,00,000/- on payment of

interest @7.90% p.a. from Housing Development Finance Corporation Limited.

IX. That the complainants repeatedly asked for possession of their unit from the respondent, but it avoided sharing the details of handing over of the unit with them on one pretext or the other.

X. That the respondent had delayed the project beyond reasonable time and despite that it had not provided any delayed penalty to the complainants regarding the same. It is most respectfully submitted here that the date of possession as per flat buyer agreement was 31.05.2015 including the grace period of 180 days. It is further submitted that there is almost a delay of 65 months as per the flat buyer agreement.

XI. That as per section 19 (6) of the Real Estate (regulation and Development) Act, 2016, the complainant had fulfilled their responsibility with regard to making the necessary payments in the manner and within the time specified in the flat buyer agreement. Therefore, the complainants herein has not breached any of the terms of the agreement dated 14.07.2012.

XII. That the respondent has not only harassed the complainant mentally and financially but had also breached the terms and condition of the flat buyer agreement dated 14.07.2012, thereby infringing the rights of the innocent complainant, who have spent their entire hard-earned savings in buying the flat.

XIII. That the inconsistent and lethargic manner in which the respondent has conducted it business and its lack of commitment in completing the project on time has caused the complainants great financial and emotional loss.

XIV. That keeping in view its inability in developing the project in time and in the light of the half-hearted promises made by the respondent, the chances of getting physical possession of the apartment as per the agreement in near future seems bleak and that the same is evident from the irresponsible and desultory attitude and conduct of the respondent, consequently injuring the interest of the buyers including the complainant who has spent their entire hard earned savings in the purchase of the unit and now stands at a crossroad to nowhere.

C. Relief sought by the complainants.

4. The complainants had sought following relief(s):

- Pass an order for delayed penalty due to delay in handing over of the possession @ 12% per annum, from the due date of possession till the date of actual possession of the unit is not handed over, in favour of the complainants and against the respondent.
- Pass an order making the demand dated 17.04.2021 null and void directing the respondent to issue a new demand after adjusting the delay penalty.
- Direct the respondent to exclude development charges, covered parking charge, corner-club-park-facing charges

& club membership charges from the final demand since the same has already been paid by the complainant.

- Direct the respondent not to charge GST charges from the complainants at the time of raising final demand in lieu of judgment passed by Panchkula Authority in *"Madhu Sareen vs. BPTP Ltd"*.
- Restrain the respondent from charging electrification charges separately at the time of final demand.
- Direct the respondent for issuing offer of possession letter to the complainant after obtaining OC/CC and without asking any escalation charges and any other charges which were already paid by the complainant for the unit.

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 submissions made therein, in brief are as under:-

I. That complainants booked an apartment being number no. R032E01104 having a super area of 1530 sq. ft. (approx.) for a total consideration of Rs.87,51,793 /- vide a booking form.

II. That consequentially, after fully understanding the various contractual stipulations and payment plans for the said apartment, the complainants executed the flat buyer agreement dated 14.07.2012. That as per clause 22 of the terms and conditions 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 be given to allottees akin to the complainants who have booked their apartment under any special scheme such as 'No EMI till offer of possession, under a subvention scheme.' Further, it was also categorically stipulated that any delay in offering possession due to '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 complainants. 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 embargogs qua construction at full operational level.

V. That the said project is registered with this Hon'ble authority vide registration no. 16 of 2018 dated 13.10.2018 and the completion date as per the said registration is December 2019.

VI. That the delay if at all, has been beyond the control of the respondent 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 allottees, like the complainants 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, it 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 complainants have 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 complainants are mere speculative investor who has no interest in taking

possession of the apartment. In fact a bare perusal of the complaint would reflect that they have cited 'financial incapacity' as a reason, to seek a refund of the monies paid by them 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 complainants 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 it 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 RERA Act 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 sector market. The main intension of the respondent is just to complect the project within stipulated time submitted before the authority. According to the terms of the builder buyer agreement also it is mentioned that all the amount of delayed possession will be completely paid/adjusted to the complainants at the time final settlement or on 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 could not be 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 labour 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 was 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 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 its reply pleaded the force majeure clause on the ground of Covid- 19. It is also pleaded that 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. 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 submissions that the project is complete 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 complainants being investors.

10. 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 observes that the respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time, preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if the promoter contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the apartment buyer's agreement, it is revealed that the complainants are buyer and they have paid total price of **Rs.81,44,328/-**to the promoter towards purchase of an apartment in its project. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

> *"2(d) "allottee" in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said*

allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;"

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

G. Findings on the relief sought by the complainant

G.I. Delay Possession Charges

12. 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."

13. Clause I (22) of the flat buyer's developer 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 **Nov 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 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 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 complainants 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 doted lines.

16. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the apartment by November 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 allottees are in default w.r.t timely payments. As per buyer agreement the construction of the project was to be completed by November 2014 which is not complete 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. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges at the rate of 12% 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.

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. 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%.

20. 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;"

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

G.II Whether the respondent to be directed withdraw the demand raised via prepossession letter dated 17.04.2020?

22. **Validity of intimation regarding 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 developer. 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.

23. The authority observes that it is evident that the respondent/builder has not yet obtained occupation certificate of the project in which the allotted unit of the complainants 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 Firstly, it should be after receiving occupation certificate; Secondly, the subject unit should be in habitable condition and thirdly, the offer must not be accompanied with any unreasonable demand. But while issuing intimation regarding prepossession on 17.04.2020, the builder has neither obtained occupation certificate. Hence, the intimation regarding prepossession offered by respondent promoter on 17.04.2020 is not a valid or lawful offer of possession.

G.II Whether the respondent should exclude development charges, covered parking charges, corner club park facing & club membership charges, from the final demands since the same has already been paid by the complainant?

24. As on date, the cause of action has not arisen with regard to the aforesaid reliefs. The respondent has not raised the demand on account of offer of possession till date and it is mere contingency that the respondent may or may not raise demand

on account of development charges, covered parking charges, electricity charges, power backup charges, and club membership charges. The respondent shall not charge anything from the complainant which is not the part of the flat buyer's agreement. Therefore, the complainant is advised to approach the authority as and when cause of action arises.

G.III Whether the respondent not to charge GST charges from the complainant at the time of raising final demand in lieu of judgment passed by Panchkula Authority in *"Madhu Sareen vs. BPTP Ltd.*

25. The complainant has sought the relief that the respondent has not to charge GST to the complainant at the time of raising final demand. The authority has observed that the GST has been levied strictly in accordance with the terms and conditions of the buyer's agreement.

26. The relevant clause from the agreement is reproduced as under: -

> ***"F. TERMS OF LOCAL AREA DEVELOPMENT AUTHORITY: -***
> *19. That all taxes or charges, by whatever name called, present or future, on land or building, levied by any authority/Govt. from the date of booking shall be borne and paid by the Allottee(S). However, so long as each unit of the said complex is not assessed on the whole complex. If such taxes/charges are increased with retrospective effect after the execution of the Sub Lease Deed, then these charges shall be treated as unpaid price of the unit and the company shall have right to recover the equivalent amount from the allottees and the allottee(S) shall pay that demanded amount to the company without any objection."*

27. As per the flat buyer's agreement, taxes shall be payable as per the government rules as applicable from time to time. Taxes

are levied as per government norms and rules and are leviable in respect of real estate projects as per the government policies from time to time. Therefore, there is no substance in the plea of the complainant in regard to the illegality of the levying of the said taxes.

28. The authority after hearing the parties at length is of the view that admittedly, the due date of possession of the unit was 30.11.2014. No doubt as per clause F(19) of the flat buyer's agreement, the complainants/allottees has agreed to pay all the Government rates, tax on land, municipal property taxes and other taxes levied or leviable now or in future by Government, municipal authority, or any other government authority, but this liability shall be confined only up to the due date of possession i.e. 30.11.2014. The delay in delivery of possession is the default on the part of the respondent /promoter and that time the GST has not become applicable. But it is settled principle of law that a person cannot take the benefit of his own wrong/default. So, the respondent /promoter was not entitled to charge GST from the complainant/allottee as the liability of GST had not become due up to the due date of possession as per the agreements.

29. 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 flat buyer agreement executed between the parties on 14.07.2012, 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 flat buyer agreement dated 14.07.2012 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.

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

31. 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 through a valid offer of possession after obtaining the occupation certificate from the competent authority.

ii. The complainants are 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 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;

iv. The rate of interest chargeable from the allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottees, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

v. The respondent shall not charge anything from the complainants which is not the part of the flat buyer agreement. The respondent is also not entitled to claim holding charges from the complainants at any point of time even after being part of the buyer's agreement as per law settled by hon'ble Supreme Court in civil appeal nos. 3864-3889/2020 decided on 14.12.2020.

32. Complaint stands disposed of.

33. 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 19.10.2021