BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 1369 of 2020
First date of hearing : 13.05.2020
Date of decision : 30.07.2021

Mr. Baljinder Chatha
R/o: - C6, 1002, The Legends,
Sec-57, Gurugram- 122002 **Complainant**

Versus

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

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

APPEARANCE:
Sh. Harshit Batra Advocates for the complainant
Sh. Sougat Sinha Advocate for the respondent

ORDER

1. The present complaint dated 19.03.2020 has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations,

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

A. Unit and project related details

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

S.No.	Heads	Information
1.	Project name and location	"The Edge Tower", Sector-37D, Gurugram.
2.	Project area	60.5112 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no. and validity status	33 of 2008 dated 19.02.2008 valid till 18.02.2020
5.	Name of licensee	M/s Ramprastha Builders Private Limited and 13 others as mentioned in licence no. 33 of 2008 issued by DTPC Haryana
6.	RERA Registered/ not registered	**Registered vide no. 279 of 2017 dated 09.10.2017 (Tower No. A to G, N and O)**
7.	RERA registration valid up to	31.12.2018
8.	**Extension RERA registration**	EXT/98/2019 dated 12.06.2018
9.	**Extension RERA registration valid upto**	31.12.2019
10.	Unit no.	P-1504, 15th floor, Tower P

		[Page 19 of complaint]
11.	Unit measuring	1675 sq. ft.
12.	Date of execution of apartment buyer's agreement	27.10.2010 [Page 15 of complaint]
13.	Allotment letter	29.10.2010 [Page 11 of complaint]
14.	Tripartite agreement	27.10.2010 [Page 45 of complaint]
15.	Payment plan	Possession linked payment plan [Page 44 of complaint]
16.	Total consideration	Rs.57,77,203/- (including taxes) [as per statement of account annexure-A page no 57 of complainant]
17.	Total amount paid by the complainant	Rs.49,94,942/- [as per statement of account annexure-A page no 57 of complainant]
18.	Due date of delivery of possession as per clause 15(a) of the apartment buyer agreement: 31.08.2012 plus 120 days grace period for applying and obtaining occupation certificate in group housing colony. [Page 29 of complaint]	31.08.2012 [Note: - 120 days grace period is not allowed]
19.	Intimation regarding offer of possession	24.01.2020 [Page no. 56 of complaint]
20.	Details of Occupation Certificate, if any	Date of OC granted, if any, by the competent Authority: Dated 13.02.2020 Area/Tower for which OC obtained- P

21.	Delay in handing over possession till date of this order i.e. 30.07.2021	8 years 10 months and 30 days

B. Facts of the complaint

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

I. That the real estate project "The Edge Towers" at Sector-37D, Gurugram, Haryana came to the knowledge of the complainant, who is resident of Gurugram, 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 of the respondent.

II. The complainant is simple person and believing on such false representation and claims at the pretext of the respondent through its authorized representatives, booked an apartment in the said project on 05.08.2010 details of being such a flat bearing no. P-1504 having 3BHK (L) (1675 sq. ft.) along with one parking in Tower-P "The Edge Towers" located at Southern Court,

Ramprastha City, Sec. 37-D, Gurgaon, Haryana for a total consideration of the said property of Rs.54,88,723/-. Thereafter, an apartment buyer's agreement dated 27.10.2010 was executed between the parties. As per clause 15(a) of the agreement the possession of the apartment shall be handed over by 31.08.2012 by the respondent with a grace period of 120 days.

III. That the complainant made prompt payments as per the requirement of section 19(1) of the act. The total amount towards the said unit was paid by the complainant as per the demand raised by the respondent.

IV. The complainant took financial assistance from Housing Development Finance Corporation Ltd. (H.D.F.C) in the form of a housing loan of Rs. 47,50,000/- towards payment of the sale/purchase consideration of the residential apartment in the project.

V. That a tripartite agreement was executed between the complainant, the respondent and the lender i.e. HDFC Ltd. on 27.10.2010 and Housing Development Finance Corporation Ltd had granted a housing loan towards payment of the sale/purchase consideration of the residential apartment in the project.

VI. That an indemnity bond was also executed on by the complainant to always indemnify HDFC Ltd. for all/any loss that may be a direct or remote consequence of HDFC's disbursing the entire loan amount to the complainant.

VII. The respondent being a world class developer had gotten the complainant into its trap because of its name, fame and projections done at the time of purchase, i.e. in the year 2010. The respondent has also made several vague promises to crate big dreams in the mind of the complainant such as, "timely possession, ease of communication, 24*7 services for resolution of problems, best in class club house, approachable markets with the society etc."

VIII. The respondent vide its letter dated 24.01.2020 intimated that the construction work of tower "P" in their project "The Edge Towers", has been completed and the flat is ready to be offered to the complainant for possession.

IX. That after a delay of almost more than 9 years the possession was not given to the complainant. The complainant requested many times for demanding payment of delayed possession and interest, but the opposite party choose to ignore it all.

X. The present case is a clear exploitation of innocence and beliefs of the complainant and an act of the respondent to retain the complainant hard-earned money in illegal manner.

XI. The respondent has utterly failed to fulfil his obligations to deliver the possession of the apartment in time and has caused mental agony, harassment, and huge losses to the complainant

C. Relief sought by the complainant

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

(i) To direct the respondent to provide the complainant with prescribed rate of interest on delay in handing over of possession of the apartment on the amount paid by the complainant from the due date of possession as per the buyer's agreement till the actual date of offer of possession of the apartment;

(ii) To direct the respondent to hand over the possession of the said unit at earliest;

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 has contested the complaint on the following grounds.

I. That the present complaint is not maintainable in its authority and the complaint is liable to be dismissed on the grounds presented hereunder by the respondent. That the Haryana Real Estate Regulatory Authority has no jurisdiction to entertain the present complaint. The respondents have also filed an application questioning the jurisdiction of the authority based on several provisions of the relevant statutes. It is submitted therefore that this reply is without prejudice to the rights and contentions of the respondents contained in the said application.

II. That the present complaint has been filed by the complainant authority claiming for possession against the investments made by the complainant in one of the apartments in the project "Ramprastha City" of the respondent. That in this behalf, it is submitted that the present authority is precluded from entertaining the present complaint as the same falls within the exclusive jurisdiction of the adjudicating officer under rule 29 of the Haryana Real Estate (Regulation & Development) Rules,

2017, which maybe hereinafter be referred as the said rules read with section 31 and 71 of the Real Estate (Regulation and Development) Act, 2016.

III. That the complaints pertaining to refund, possession, compensation and interest for a grievance under section 12, 14, 28 and 19 of the Real Estate (Regulation and Development) Act, 2016 are necessitated to be brought before the adjudicating officer under rule 29 of the Haryana Real Estate (Regulation & Development) Rules, 2017 read with section 31 and 71 of the said Act. Therefore the complaint ought to be filed before the adjudicating officer under rule 29 of the said rules and not before the authority under rule 28 of the said rules.

IV. That the present project falls within the definition of "ongoing projects" and has been registered with the regulatory authority constituted under the said Act, the complaint, purported to be filed against the said project ought to be filed before the adjudicating officer under rule 29 of the said rules and not before this authority under rule 28 as this authority does not possess jurisdiction to entertain the present complaint and on this ground alone, the present complaint ought to be dismissed at its root level.

V. That further without prejudice to the above, the proviso to section 71 further substantiates the above contention which clearly states that even in a case where a complaint is withdrawn from a Consumer Forum/ Commission/ NCDRC for the purpose of filing an application under the said Act and said rules, the application, if any, can only be filed before the adjudicating officer and not before the authority.

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

VII. The power to adjudicate the complaints pertaining to refund, possession, compensation and interest for a grievance under section 12,14,18 and 19 are vested with the adjudicating officer under section 71 read with

section 31 of the said Act and not under the said rules and neither the said rules or any amendment thereof can dilute, nullify or supersede the powers of the adjudicating officer vested specifically under the said Act and therefore, the authority has no jurisdiction in any manner to adjudicate upon the present complaint.

VIII. That the complainant is not a genuine buyers of the apartment but are merely speculative investors who have purchased the present property in question with sheer commercial motives. That the RERA has to be read in consonance with Consumer Protection Act. That the combined reading of RERA, 2016 and the Consumer Protection Act does not establish the present complainant as a 'Consumer' within the meaning of the Consumer Protection Act. Further, that even the complainant has failed to adduce any kind of documentary proof to establish the fact that they are 'consumers' and thence, genuine buyers of the apartment. This clearly shows that the complainant had sheer commercial motives.

IX. That the statement of objects and reasons as well as the preamble of the said Act categorically specify the objective behind enacting the said Act to be for the purpose of protecting the interests of consumers in the

real estate sector. However, the present complainant cannot be termed as a consumer or a genuine buyer in any manner within the meaning of Consumer Protection Act or the RERA. The present complainant is only an investor in the present project who has purchased the present property for the purposes of investments/ commercial gain. The present complaint is a desperate attempt of the complainant to harass the respondent and to harm the reputation.

X. That since the RERA Act does not provide any definition for the term "Consumer", the same may be imported from the terminology prescribed under the Consumer Protection Act, 1986. That the plain reading of the definition of the term "Consumer" envisaged under the CPA makes it clear that the present complainant does not fall within the walls of the term "Consumer". That further the complainant is a mere investor who has invested in the project for commercial purposes.

XI. That further they have nowhere provided any supportive averments or proofs as to how they fall within the boundaries of the definition of "Consumer". Therefore the complainant cannot be said to be Consumers of respondent within the caricature of Consumer within the

Consumer Protection Act, 1986. They have deliberately concealed the motive and intent behind purchasing of the said unit. In this behalf, the authority may strictly direct the complainant to adduce any documentary evidence in support of their averments.

XII. That the complainant has booked an apartment in the project in Ramprastha City in sector 37D, Gurgaon on 05.08.2010 and accordingly, an allotment letter dated 29.10.2010 was issued by the respondent against the unit no. P-1504, Tower P, EDGE towers admeasuring 1675 sq. ft. for a total consideration of Rs.54,88,723/-. Thereafter, an apartment buyer agreement dated 27.10.2010 was executed between the parties.

XIII. That as per their own statements of the complainant, possession has already been offered by the respondent vide letter dated 24.01.2020 subject to clearing of outstanding dues of Rs.7,82,261/- plus other charges which itself proves that it is solely due to the default of the complainant that the said unit has still not been handed over by the respondent.

XIV. That the complainant is already in ownership of one property bearing no. C-6, 1002, The Legends, Sector 57, Haryana-122002. Hence, by any standard of imagination,

the present complainant cannot to be said to have purchased the present property for personal use; rather it can be clearly interpreted that the said unit was only purchased for the purposes of commercial advantage or gain, hence, the complainant is plainly investor who have filed the present complaint on the basis of a totally concocted and fabricated story filled with fallacies and concealments. Therefore, the complainant cannot be said to have approached this authority with clean hands and have approached this authority only with malafide intention to harass the respondent in the most harm causing way possible.

XV. That the complainant is not entitled to claim possession as the claimed by the complainant in the complaint as the claim is clearly time barred. That it is due the lackadaisical attitude of the complainant along with several other reasons beyond the control of the respondent as cited by the respondent which caused the present delay. If any objections to the same was to be raised the same should have been done in a time bound manner while exercising time restrictions very cautiously to not cause prejudice to any other party. The complainant herein cannot now suddenly show up and thoughtlessly file a complaint

against the respondent on its own whims and fancies by putting the interest of the Builder and the several other genuine allottees at stake. If at all, the complainant had any doubts about the project, it is only reasonable to express so at much earlier stage. Further, filing such complaint after lapse of several years at such an interest only raises suspicions that the present complaint is only made with an intention to arm twist the respondent. The entire intention of the complainant is made crystal clear with the present complaint and concretes the status of the complainant as an investor who merely invested in the present project with an intention to draw back the amount as an escalated and exaggerated amount later.

XVI. That the respondent had to bear with the losses and extra costs owing due delay of payment of installments on the part of the complainant for which they are solely liable. However, the respondent owing to its general nature of good business ethics has always endeavored to serve the buyers with utmost efforts and good intentions. The respondent constantly strived to provide utmost satisfaction to the buyers/allottees. However, now, despite of its efforts and endeavors to serve the buyers/allottees in the best manner possible, is now

forced to face the wrath of unnecessary and unwarranted litigation due to the mischief of the complainant.

XVII. That the delay has occurred only due to unforeseen and untackleable circumstances which despite of best efforts of the respondent hindered the progress of construction, meeting the agreed construction schedule resulting into unintended delay in timely delivery of possession of the apartment for which the respondent cannot be held accountable. However, the complainants despite having knowledge of happening of such force majeure eventualities and despite agreeing to extension of time in case the delay has occurred as a result of such eventualities has filed this frivolous, tainted and misconceived complaint in order to harass the respondent with a wrongful intention to extract monies.

XVIII. 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: -

- The project faced various roadblocks and hindrances including approvals from different authorities which

were beyond the control of the opposite party and which in turn lead to unforeseeable delay in the construction/completion of the project and hence handing over of the possession of the flat to the complainant.

- active implementation by the Government of alluring and promising social schemes like National Rural Employment Guarantee Act ("NREGA") and Jawaharlal Nehru National Urban Renewal Mission ("JNNURM"), further led to sudden shortage of labour/ workforce in the real estate market as the available labour were tempted to return to their respective States due to the guaranteed employment under the said NREGA and JNNURM Schemes. The said factor further created a vacuum and shortage of labour force in the NCR region. Large numbers of real estate projects, including the present project of the opposite party herein, were struggling hard to cope with their construction schedules, but all in vain.
- Extreme water shortage, which was completely unforeseen by any of the real estate companies, including shortage of labour. The said factor of

shortage of water directly affected the construction of the project at the site. To make the conditions worse, the Hon'ble High Court of Punjab and Haryana vide Order dated 16.07.2012 restrained the usage of ground water and directed to use only treated water from available Sewerage Treatment Plants. As the availability of STP, basic infrastructure and availability of water from STP was very limited in comparison to the requirement of water in the ongoing constructions activities in Gurugram District, it became difficult to timely complete the construction activities as per the schedule. The availability of treated water to be used at construction site was very limited and against the total requirement of water only 10-15% of required quantity was available at construction sites. In furtherance to the directions of Hon'ble High Court of Punjab and Haryana, a letter was received bearing memo no 2524 dated 01.09.2012 from the Deputy Commissioner, Gurugram, Haryana, informing the respondent/ builder about the complete ban on the use of underground water for construction purposes and

use of only recycled water being permitted for the said purposes.

- Order of Hon'ble Supreme Court of India in the case ***Deepak Kumar etc. v. State of Haryana*** (I.A. No. 12-13 of 2011 in SLPs (C) nos. 19628-29 of 2009 with SLPs (C) No. 729-731/2011, 21833/2009, 12498-499/2010, SLP(C) CC... 16157/2011 & CC 18235/2011 dated 27.02.2012) and correspondingly, the construction progress slackened. This also caused considerable increase in cost of materials. It is noteworthy that while multiple project developers passed on such incremental costs attributable to the above reasons to the buyers, the management of the respondent company assured its customers that it will not and has held fast on its promise by not passing on any of such costs to the buyers.

XIX. That the respondent has made huge investments in obtaining approvals and carrying on the construction and development of 'EDGE' project and despite several adversities is in the process of completing the construction of the project and have already obtained the OC of 8 towers out of 15 towers and should be able to

apply the occupation certificate for the other towers by 31.12.2020 (as mentioned at the time of application for extension of Registration of the project with RERA) or within such extended time, as may be extended by the authority, as the case may be. The complainants persuaded the respondents to allot the said apartment in question to them with promise to execute all documents as per format of the respondent and to make all due payments. The Respondent continued with the development and construction of the said apartment and also had to incur interest liability towards its bankers. The complainants prevented the respondent from allotting the said apartment in question to any other suitable customer at the rate prevalent at that time and thus the respondent has suffered huge financial losses on account of breach of contract by the complainant.

XX. That even in such unpredicted eventualities and adversities in the real estate market conditions, the respondent has made an attempt to sail through the adversities only to handover the possession of the property at the earliest possible to the utmost satisfaction of the buyers/allottees. That even in such harsh market conditions, the respondent has been continuing with the

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

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

S. No	Project Name	No. of Apartments	Status
1.	Atrium	336	OC received
2.	View	280	OC received
3.	Edge Tower I, J, K, L, M Tower H, N Tower-O (Nomenclature-P) (Tower A, B, C, D, E, F, G)	 400 160 80 640	 OC received OC received OC received OC to be applied
4.	EWS	534	OC received
5.	Skyz	684	OC to be applied
6.	Rise	322	OC to be applied

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

The respondent has raised a preliminary submission/ objection the authority has no jurisdiction to entertain the present complaint. The objection of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below

E.I Territorial jurisdiction

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

E.II Subject matter jurisdiction

9. 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 complainant at a later stage.

F Findings on the objections raised by the respondent

F.I 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 consumers of the real estate sector. The authority observed that the respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if the promoter contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the apartment buyer's agreement, it is revealed that the complainants are buyer and they have paid total price of Rs.49,94,942/- to the promoter towards purchase of an apartment in the project of the promoter. At this stage, it is

important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

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

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

G. Findings on the relief sought by the complainant

Relief sought by the complainant: respondent to provide the complainant with prescribed rate of interest of handing over of possession of the apartment on the amount paid by the complainant from due date of possession till actual handing over of possession;

11. 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."*

12. Clause 15(a) of the apartment buyer agreement (in short, agreement) provides for handing over of possession and is reproduced below:

> **"15. POSSESSION**
>
> ***(a)*** **Time of handing over the possession**
>
> *Subject to terms of this clause and subject to the Allottee having complied with all the terms and condition of this Agreement and the Application, and not being in default*

under any of the provisions of this Agreement and compliance with all provisions, formalities, documentation etc., as prescribed by RAMPRASTHA. RAMPRASTHA proposed to hand over the possession of the Apartment by 31/08/2012 the Allottee agrees and understands that RAMPRASTHA shall be entitled to a grace period of hundred and twenty days (120) days, for applying and obtaining the occupation certificate in respect of the Group Housing Complex."

13. 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 apartment buyer agreement, commencement of construction, approval of building plan etc. This is a welcome step, and the authority appreciates such firm commitment by the promoter regarding handing over of possession but subject to observations of the authority given below.

14. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and application, and the complainants not being in default under any provisions of these agreements and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and

uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

15. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the apartment by 31.08.2012 and further provided in agreement that promoter shall be entitled to a grace period of 120 days for applying and obtaining occupation certificate in respect of group housing complex. As a matter of fact, the promoter has not applied for occupation certificate within the time limit prescribed by the promoter in the apartment buyer's agreement. As per the settled law one cannot be allowed to take advantage of his own

wrong. Accordingly, this grace period of 120 days cannot be allowed to the promoter at this stage.

16. The authority observes that the respondent/builder has obtained occupation certificate dated 13.02.2020 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 offer of possession. 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 offer of possession on 24.01.2020, the builder has neither obtained occupation certificate. Hence, the intimation regarding prepossession offered by respondent promoter on 24.01.2020 is not a valid or lawful offer of possession

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 @18% 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., 30.07.2021 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.

23. On consideration of the documents available on record and submissions made by both the parties regarding contravention of provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as

per the agreement. By virtue of clause 15(a) of the agreement executed between the parties on 27.10.2010, the possession of the subject apartment was to be delivered within stipulated time i.e., by 31.08.2012. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over possession is 31.08.2012. The respondent has failed to handover possession of the subject apartment till date of this order. Accordingly, it is the failure of the respondent/promoter to fulfil its obligations and responsibilities as per the agreement to hand over the possession within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with proviso to section 18(1) of the Act on the part of the respondent is established. As such the allottee shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 31.08.2012 till the handing over of the possession, at prescribed rate i.e., 9.30 % p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules.

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

H. Directions of the authority

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

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

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

iii. If there is no amount outstanding against the allottees or less amount outstanding against the allottee then the balance delay possession charges shall be paid after adjustment of the outstanding against the allottee.

iv. The arrears of such interest accrued from 31.08.2012 till the date of order by the authority shall be paid by the promoter to the allottees within a period of 90 days from date of this order and interest for every month of delay

shall be paid by the promoter to the allottee before 10th of the subsequent month as per rule 16(2) of the rules.

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

vi. 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.

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

viii. The promoter is directed to furnish to the allottees the statement of account within one month of issue of this order. If there is any objection by the allottee on statement of account, the same be filed with the promoter after fifteen days thereafter. In case the grievance of the allottee relating to statement of account is not settled by

the promoter within 15 days, thereafter the allottee may approach the authority by filing separate application.

26. Complaint stands disposed of.

27. File be consigned to registry.

(Samir Kumar)
Member

(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 30.07.2021
Judgement uploaded on 14.10.2021