BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 4870 of 2020
First date of hearing : 30.03.2021
Date of decision : 03.08.2021

1. Mr.Abhay Pratap Singh
2. Ms. Shweta Singh Deo

Address: - V 602, Tower 5, Adarsh Palm Retreat, Devarbeesanahallli, Bellandur, Bengaluru, Karnataka - 560103. **Complainants**

Versus

Orris Infrastructure Pvt. Ltd.
Office address: - C-3/260, Janankpuri, New Delhi – 110058.
Also at: J-10/5, DLF Phase - II, Mehrauli-Gurgaon Road - 122002. **Respondent**

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

APPEARANCE:
Shri Harshit Batra Advocate for the complainants
Ms. Charu Rustagi Advocate for the respondent

ORDER

1. The present complaint dated 14.01.2021 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 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 them.

A. Unit and project related details

2. The particulars of the project, the details of 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	Aster Court Premier, Sector 85, Gurugram.
2.	Project area	25.018 acres
3.	Nature of the project	Residential Housing Project
4.	DTCP license no. and validity status	39 of 2009 dated 24.07.2009 valid upto 23.07.2024 and 99 of 2011 dated 17.11.2011 valid upto 16.11.2024
5.	Name of licensee	BE Office Automation Products Pvt. Ltd. And 8 others **(For license no. 39 of 2009)** 1. M/s Radha Estate Pvt. Ltd. 2. M/s Elegant Land and Housing Pvt. Ltd.

		2. M/s Salmon Land and Housing Pvt. Ltd. **(For license no. 99 of 2011)**
6.	RERA Registered/ not registered	**Registered** vide Registration no. 19 of 2018 dated 13.10.2018 valid till 30.10.2020
7.	Unit no.	701, 7th Floor, Block No. 3K
8.	Unit measuring	1970 sq. ft. **(Initial super area)** (As per the buyer's agreement) 2120 sq. ft. **(Revised super area)** (As per the final statement of account dated 16.04.2021)
9.	Date of execution of Apartment Buyers Agreement	27.01.2012 (Page 24, annexure C2 of the complaint)
10.	Payment plan	Special payment plan (Page 41 of the complaint)
11.	Total sale consideration	Rs. 1,15,03,834/- (As per final statement of account dated 16.04.2021 on page 125 of the reply)
12.	Total amount paid by the complainants	Rs. 90,78,679/- (As per final statement of account dated 16.04.2021 on page 125 of the reply)
13.	Date of sanction of building plans	10.04.2012 (As per project details)
14.	Date of commencement of construction	Not provided

15.	Due date of delivery of possession (As per clause 10.1 within a period of three years from the date of construction, sanction of building plans or date of execution of agreement, whichever is later)	10.04.2015 (No grace period is given) (Due date of delivery of possession is calculated from the date of sanction of building plans)
16.	Offer of possession	16.04.2021 (Page 124, annexure R4 of the reply)
17.	Delay in handing over possession till 16.04.2021 i.e., till 16.06.2021	6 years, 2 months and 6 days
18.	Occupation Certificate received on	12.04.2021 (Page 120 of the reply)

B. Facts of the complainants

3. The complainants have made the following submissions:

i. That the complainants have booked an apartment bearing no. 701 on seventh floor in block – 3K admeasuring 1970 sq. ft. in the project 'Aster Court Premier', in sector 85 (hereinafter, 'the project'). for a total sale consideration of Rs. 94,80,010/- and was allotted the said unit vide allotment letter dated 20.12.2011 by paying an amount of 5,00,000/- entered into a apartment buyer agreement (hereinafter referred to as the ABA) with the respondents. 27.01.2012 & paid Rs. 5,00,000/- as booking amount.

ii. That the allottees took financial assistance from Dewan Housing Finance Limited (hereinafter, DHFL) for an amount of

Rupees 74,00,000/- under subvention scheme under which it was responsibility of respondent to pay pre-EMI to DHFL for 30 months. The complainants, the respondents and Dewan Housing Finance Corporation (hereinafter, DHFL) entered into tripartite agreement dated 21.02.2012.

iii. That as per clause 10.1 of the ABA, agreement, the respondent was liable to complete the project within 36 months of the signing of the agreement plus an extended period of six months due to force majeure conditions. Hence, the due date is 27.01.2015 and could have been extended upto 27.07.2015 on account of force majeure conditions. However, the then prevailing conditions do not constitute a force majeure condition and the respondent has extended the 59 months of time period without giving any reasonable reasons and has had mala fide intent to deceive the complainants.

iv. That as per section 13(1) of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as the Act), the promoter cannot accept more than 10% of the cost of apartment as an advance payment or an application fee without first entering into written agreement for sale. However, in the case the respondent has accepted Rs.

vii. That the complainants have always been punctual in paying the payments as per the agreement and has paid a total amount of 89,87,098/- which is 95% of the total sale consideration. It is further submitted that in spite of making a substantial part of the payment, the respondent has failed to complete the project, as promised.

viii. That the respondent had unilaterally and without taking prior written consent from the complainants increased the super area of the unit. Previously, the super area of the unit was 1970 square feet and now as clearly evident in the statement of account it is showing that the super area of the unit has been increased from 1970 square feet to 2120 square feet and the total increase is 7.7 % in the super area which is a clear violation of section 14 of the Act.

ix. That due to increase in super area of the unit, the respondent has increased other charges to be paid by the complainants. Specifically, the preferred location charges are increased due to increase in super area of the unit. As per statement of account dated 01.12.2014, the preferred location charges are Rs. 2,95,000/- as per statement of account dated 08.12.2020 the preferred location charges are Rs. 3,18,000/-, EDC and IDC

in statement dated 01.12.2014 are Rs. 6,56,000/- and in statement of account dated 08.12.2020 these charges are Rs. 7,05,960/-.

x. That the time for delivery of possession of unit in the agreement is 27.07.2015 with 6 months grace period. If the respondent would have given the possession of the unit at that time, the complainants would not been into the unreasonable trap of paying GST over the outstanding demands. The GST came into effect in year 2017 however the possession agreed by both respondent and the complainants is on the date 27.07.2015 and at the time Value added tax was the only burden over the complainants. The difference between the two different taxes is substantial and the respondent is responsible for the financial burden over the complainants. GST charged in the statement of account is over the amount paid as VAT by the complainants and the same is unacceptable.

xi. That the unit of the complainants are not yet ready and the same is not in a habitable condition. The unit is still pending for completion of construction. The respondent has delayed possession for more than 5 years and now offered possession without completion of the construction of the unit. That this

behaviour of the respondent is not acceptable by the complainants as the dream to have own home is getting delayed since very long period of time.

xii. That the present case is a clear exploitation of innocence and beliefs of the complainants and an act of the respondent to retain the complainants' hard-earned money in illegal manner.

xiii. That the respondent has utterly failed to fulfil his obligations to deliver the possession of the apartment in time and adhere to the contentions of the agreement which has caused mental agony, harassment and huge losses to the complainants, hence the present complaint.

C. Relief sought by the complainants:

4. The complainants have sought the following reliefs:

i. To direct the respondent to provide the complainants with prescribed rate of interest on delay in handing over of possession of the apartment on the amount paid by the complainants from the due date of possession as per the ABA till the actual date of possession of the apartment;

ii. To direct the respondent to cancel the demands which are being made in proportion to area increase namely base price,

preferred location charges, EDC and IDC charges raised due to increase in super area.

iii. To direct the respondent to not charge any amount for increased super area as per the model agreement for sale given in the Haryana RERA Rules, 2017.

iv. To direct the respondent to charge taxes at the same rate which were supposed to be paid if the possession was handed over on the agreed date of delivery of the unit as the respondent should charge service tax at VAT and not GST or to adjust the difference between two taxes with the amount payable as dues by the complainant.

v. To direct the respondent to complete the construction of the unit prior to demanding the dues from the complainants and submit an affidavit as to on what date the construction of the unit will be complete in order to take actual physical possession of the unit by the complainants.

D. Reply by the respondent:-

The respondent has raised certain preliminary objections and has contested the present complaint on the following grounds:

i. That the present complaint pertains to possession along with compensation for a grievance under section 18 of the Act and

is required to be filed before the adjudicating officer under rule-29 of the rules and not before this authority under rule-28. In the present case, the complainants are seeking possession of the apartment along with compensation and other reliefs. That the complainants have filed the present complaint under rule-28 of the said rules and is seeking the possession of the apartment, compensation and interest under section 18 of the said Act. It is submitted that the complaint, if any, is required to be filed before the adjudicating officer under rule-29 and not before this authority under rule-28 as the authority has no jurisdiction whatsoever to entertain such complaint and as such the complaint is liable to be rejected on this ground alone.

ii. That in the present case as per clause 10.1 of the ABA dated 27.01.2012, the respondent was supposed to hand over the possession within a period of 36 months from the date of the signing of agreement or within 36 months plus 6 months grace period i.e. altogether 42 months from the date of execution of ABA by the company or sanctions of plans or commencement of construction whichever is later.

iii. That the respondent has further held that the time for giving possession comes out to be 42 months and can be further increased if the respondent-builder faces hardships or due to

the conditions mentioned under clause 11.1,11.2, 11.3 and 38 of the ABA. Clause Clauses 11.1 is reproduced below:

> ***"11.1 Delay due to reasons beyond the control of the Company*** *If, however, the completion of the said Building / said Complex is delayed by reason of non - availability of steel and/or cement or other building materials or water supply or electric power or slow down, strike or due to dispute with the construction agency(ies) employed by the Company, lock-out or civil commotion, by reason of war or enemy action or terrorist action or earthquake or any act of God or if non - delivery for possession is as a result of any Act, Notice, Order, Rule and Notification of the Government and / or any other Public or Competent Authority or due to delay in sanction of building / zoning plans, grant of completion / occupation certificate by any Competent Authority or for any other reasons beyond the control of the Company then the Allottee agrees that the Company shall be entitled to the extension of time for delivery of possession of the said Apartment. The Company, as a result of such contingency arising, reserves the right to alter or vary the terms and conditions of this Apartment Buyer Agreement or if the circumstances beyond the control of the Company so warrant, the Company may suspend the Scheme for such period as it may consider expedient and the Allottee agrees not to claim compensation / loss / damages of any nature whatsoever (including the compensation stipulated in Clause (11.5) of this Apartment Buyer Agreement) during the period of suspension of the Scheme."*

iv. That clause 11.2 is "failure to deliver possession due to non-approval of building plan". As per the project report of the said project, approval for the building plan has already been received dated 10.04.2012 and the approval no. being ZP-556-JD(BS)/2012/5150.

v. That in the intervening period when the construction and development was under progress, there were various factors because of which the construction works had to be put on hold due to reasons beyond the control of the respondent. It is submitted that the parties have agreed that if the delay is on

account of force majeure conditions, the respondent shall not be liable for performing its obligations. It is submitted that the project got delayed and proposed possession timelines could not be completed on account of various reasons few of which are stated below.

vi. That in the year, 2012 on the directions of the Supreme Court, the mining activities of minor minerals (including sand) were regulated. Supreme Court directed framing of Modern Mineral Concession Rules. The competent authorities took substantial time in framing the rules and in the process the availability of building materials including sand which was an important raw material for development of the said project became scarce in the ncr region. Further, it is pertinent to state that the National Green Tribunal in several cases related to Punjab and Haryana had stayed mining operations including in O.A No. 171/2013, wherein vide order dated 2.11.2015 mining activities by the newly allotted mining contracts by the State of Haryana was stayed on the yamuna river bed. These orders inter-alia continued till the year 2018. Similar orders staying the mining operations were also passed by the National Green Tribunal. The stopping of mining activity not only made procurement of material difficult but also raised the prices of sand/gravel exponentially.

vii. That it is important to highlight that on account of non-payment of installments/dues (along with agreed amount of interest on such delayed payments) of this construction linked allotment by the respondent, it has been hard for the respondent to gather funds for the development of the project which is also one of the major reasons for delay in delivery of the project. It appears that it has become a trend amongst the allottees nowadays to first not to pay of the installments due or considerably delay the payment of the same and later on knock the doors of the various courts seeking refund of the amount along with compensation or delayed possession compensation, thus taking advantage of their own wrongs, whereas the developer comes under severe resource crunch leading to delays in construction or/and increase in the cost of construction thereof putting the entire project in jeopardy. The crux of the matter which emerges from the aforesaid submission is that had the complainants as well as other similarly situated persons paid of their installments in time, the respondent developer would have sufficient funds to complete the project which is not the case herein. By failing to deposit the installments on time the complainants have violated his contractual commitment and are estopped from raising any plea of delay in construction. Haryana Real Estate Regulatory Authority having been enacted by the legislature

with the motive of balancing the rights and liabilities of the developer as well as the allottees, thus the complaint is liable to be dismissed on the this ground itself.

viii. That the completion of project requires availability of infrastructure like road, water supply, electricity supply, sewerage, etc. and after charging EDC and IDC from the promoter, the Haryana Urban Development Authority, has failed to provide the same. The promoter has paid all dues towards the said IDC and EDC however, till date no infrastructure has not been developed. Thus, due to the non-availability of basic infrastructure which was supposed to be developed by competent authorities, it is very difficult for the real estate developers to meet the timeline.

ix. That it is pertinent to mention here that the respondent had already applied for fire NOC and occupation certificate for the aforesaid towers falling in phase-I. The occupation certificate was applied on 10.11.2019. According to Haryana Real Estate Regulatory Authority registration, the date of competition of the project was 30.6.2020 which was duly extended due to COVID-19 by a period of 6 months i.e. up to 30.12.2020, vide order dated 26.5.2020 passed by Haryana Real Estate Regulatory Authority, Gurugram. Thus, the respondent is already in receipt of the fire NOC, thus no delay accountability

can be ascertained upon the respondent for the year 2020 due to the ongoing pandemic.

x. That in addition to the grounds as mentioned above, the project was also delayed due to on-going litigation filed by one of the collaborator/ landowner of land in the project – BE Automation Products (P) Ltd. who was the owner of only 5.8 acres of land in the entire project. BE Automation Products (P) Ltd. indulged in frivolous litigation and put restraints in execution of the project and sale of apartments. BE Automation Products (P) Ltd. filed cases against the company in each and every forum to create nuisance.

xi. That a collaboration agreement dated 22.10.2007 was executed between the respondent and BE Automation Products (P) Ltd. setting out the terms and conditions of the collaboration. The said collaboration agreement also provided for the area entitlement of both the parties in the area to be developed on the 25.018 acres and the same was to be calculated on basis of saleable area attributable to 5.8 acres as contributed by BE Automation Products (P) Ltd..

xii. That after the aforesaid agreement with BE Automation Products (P) Ltd. in 2007, the respondent had acquired 4.5 acres additional land by the virtue of which more flats could have been constructed. BE Automation Products (P) Ltd., by misrepresenting the collaboration agreement raised a claim

that it was entitled to proportionate share in the construction on the additional land acquired by the respondent. That after the aforesaid event BE Automation Products (P) Ltd. moved court and filed an application under section 9 of the Arbitration and Conciliation Act, 1996 before the Additional District and Sessions Judge, Gurgaon (hereinafter, ADJ).

xiii. That the ADJ granted a blanket stay in favour of BE Automation Products (P) Ltd. and against the respondent, whereby the respondent was restrained from creating third party interest in respect of any apartments, villas and commercial areas till the matter could be decided finally by the arbitrator. The respondent was also restrained from receiving any money in respect of sale of apartments, villas and commercial sites etc. or club membership charges or in any other form from any person.

xiv. That after the above said stay order was passed, the respondent filed F.A.O. No. 9901 of 2014 (O&M) whereby Punjab and Haryana High Court vacated the stay. Then the respondent and BE Automation Products (P) Ltd. went for arbitration and J. Chandramauli Kumar Prasad (retd.), was appointed as sole arbitrator to adjudicate and decide the dispute between the two parties by the High Court vide order dated 30.01.2015. Final award was granted on 12.12.2016 whereby contentions of the respondent were upheld and the

share of BE Automation Products (P) Ltd. was restricted to the original 82 flats selected by it. The dispute between the respondent and BE Automation Products (P) Ltd. was further raised on various platforms and the respondent claims that the BE Automation Products Pvt Limited is also responsible for the delay in the construction of the project on account of various frivolous litigation initiated by the same.

E. Jurisdiction of the authority

6. The preliminary objections raised by the respondent regarding jurisdiction of the authority to entertain the present complaint stands rejected. The authority observed that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I Territorial jurisdiction

7. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana 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

8. The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as

per the provisions of section 11 (4) (a) leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

F. Findings of the authority on the objections raised by the respondent:

7. With regards to the above contentions raised by the promoter/developer, it is worthwhile to examine following issues:

F1. Admissibility of grace period due to various orders by NGT and other judicial bodies

8. The respondent has raised an objection that the time of giving possession comes out to be 42 months and got delayed further due to numerous orders passed by NGT and other judicial bodies. This led to respondent facing commercial hardships to collect raw materials, labour for the completion of the said project in timely manner.

9. The respondent has relied upon various NGT orders for justifying the delay caused in completion of the project and to seek extension in the time-period. However, the various orders as placed on record do not pertain to the ban of construction acclivity in the state of Haryana, particularly in Gurugram. It may be stated that asking for extension of time

in completing the construction is not a statutory right nor has it been provided in the rules. This is a concept which has been evolved by the promoters themselves and now it has become a very common practice to enter such a clause in the agreement executed between the promoter and the allottee. It needs to be emphasized that for availing further period for completing the construction the promoter must make out or establish some compelling circumstances which were in fact beyond his control while carrying out the construction due to which the completion of the construction of the project or tower or a block could not be completed within the stipulated time. Now, turning to the facts of the present case the respondent promoters has not assigned such compelling reasons as to why and how they shall be entitled for further extension of time 180 days in delivering the possession of the unit.

10. The authority is of the view that commercial hardships does not give the respondent an exception to not perform the contractual obligations. The promoter had proposed to hand over the possession of the apartment by 10.04.2015 and further provided in agreement that promoter shall be

entitled to a grace periods of six month each unless there is a delay for reason mentioned in clauses 11.1, 11.2, 11.3 and 38. As a matter of fact, the promoter has not given the valid reason for delay to complete the project within the time limit prescribed by the promoter in the ABA. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace periods of six months each cannot be allowed to the promoter at this stage.

F2. Non-payment of installments by the complainants and other allottees

11. The respondent has raised another objection that due to non-payment of installments by the complainants and other allottees, he faced a financial crunch and wasn't able to finish the project on time. The objection raised by the respondent regarding delay in making timely payments by the complainants who have committed breach of terms and conditions of the contract by making default in timely payment of the installments which has led to delay in completion of construction at the end of respondent.

12. That the ABA was entered into between the parties and, as such, the parties are bound by the terms and conditions

mentioned in the said agreement. The said agreement was duly signed by the complainants after properly understanding each and every clause contained in the agreement. The complainants were neither forced nor influenced by respondent to sign the said agreement. It was the complainants who after understanding the clauses signed the said agreement in their complete senses.

13. In the present complaint, it is an obligation on the part of the complainants/ allottees to make timely payments under section 19(6) and 19(7) of the Act. Section 19(6), (7) proviso read as under.

> *"**Section 19: - Right and duties of allottees.-***
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> .....
>
> *Section 19(6) states that every allottee, who has entered into an agreement for sale to take an apartment, plot or building as the case may be, under section 13[1], shall be responsible to make necessary payments in the manner and within the time as specified in the said agreement for sale and shall pay at the proper time and place, the share of the registration charges, municipal taxes, water and electricity charges, **maintenance charges**, ground rent, and other charges, if any.*
>
> *Section 19(7) states that the allottee shall be liable to pay interest, at such rate as may be prescribed, for any delay in payment towards any amount or charges to be paid under sub-section (6).*

14. The authority has observed that the total consideration of the apartment of Rs. 1,15,03,834/- and the complainant has paid Rs. 90,78,679/-. The allottee has failed to make payment

payment despite several demand letters and reminders issued by the promoter. As per clause 8 of apartment buyer agreement, it is the obligation of the allottee to make timely payments and the relevant clause of apartment buyer agreement is reproduced as under:

> ***8. Time is the Essence: Buyer's Obligation***
> *Time is the essence with respect to the Allottee's obligations of the Buyer to pay the price of the said Apartment in accordance with the Schedule of Payments as given in Annexure-I along with other payments such as applicable stamp duty, registration fee, Taxes and other charges stipulated under this Apartment Buyer Agreement to be paid on or before due date or as and when demanded by the Company as the case may be and also perform or observe all other obligations of the Allottee under this Apartment Buyer Agreement. It is clearly agreed and understood by the Allottee that it shall not be obligatory on the part of the Company to send Demand Notices/ reminder regarding the payment to be made by the Allottee as per Schedule of Payments (Annexure-I) or obligations to be performed by the Allottee. In the event the Allottee fails to make the paymens on or before the due date, the Company may cancel the allottment made herein. However, in case of any default/ delay in payment by the Allottee, the Company may, at its sole option and discretion, without prejudice to its rights as set out in Clauses (4) and (12) of this Agreement, waive the breach by the Allottee in not making the payments as per the Schedule of Payments given in Annexure I but on condition that the Allottee shall pay to the Company interest which shall be charged after due date @ 15% per annum for the first ninety days from the date it was due and 18% per annum for all periods exceeding first ninety days. It is made clear and so agreed by the Allottee that the exercise of discretion by the Company in case of one Allottee shall not be construed to be precedent and/ or binding on the Company to exercise such discretion in case of other Allottees."*

15. The allottee has paid 78% of the total sale consideration as per the statement of account dated 16.04.2021 on page 125 of the reply. The complainants were sent a

offer of possession of the unit dated 16.04.2021 wherein the increase in the super area was increased from 1970 sq. ft. to 2120 sq. ft.. With the increase in the super area, the total sale consideration was increased in turn. Thus, the allottee cannot be said to be in violation of his duties and obligations arising out of sections 19 (6) and (7) nor clause 8 of the ABA.

16. The authority is of the view that the complainants have taken a loan from DHFL (as admitted by him in facts and corresponding documents have also been furnished along with the complaint) thus, the respondent cannot be given benefit of this objection.

F3. Delay due to ongoing pandemic in getting required approvals from various competent authorities

17. The respondent has raised an objection that the delay in getting occupation certificate and other necessary approvals has been caused due to the ongoing pandemic and lockdown imposed by the government in return. The application for issuance of occupancy certificate shall be moved in the prescribed form and accompanied by the documents mentioned in sub-code 4.10(1) of the Haryana Building Code, 2017 (hereinafter, the Code). The said section is reproduced below:

Section 4.10: Occupation Certificate

"(1) Every person who intends to occupy such a building or part thereof shall apply for the occupation certificate in Form BR-IV(A) or BR-IV(B), which shall be accompanied by certificates in relevant Form BR-V (1) or BR-V(2) duly signed by the Architect and/ or the Engineer and along with following documents:

(i) Detail of sanctionable violations from the approved building plans, if any in the building, jointly signed by the owner, Architect and Engineer. (ii) Complete Completion drawings or as-built drawings along with completion certificate from Architect as per Form BR-VI. (iii) Photographs of front, side, rear setbacks, front and rear elevation of the building shall be submitted along with photographs of essential areas like cut outs and shafts from the roof top. An un-editable compact disc/ DVD/ any other electronic media containing all photographs shall also be submitted. (iv) Completion certificate from Bureau of Energy Efficiency (BEE) Certified Energy Auditor for installation of Rooftop Solar Photo Voltaic Power Plant in accordance to orders/ policies issued by the Renewable Energy Department from time to time. (v) Completion Certificate from HAREDA or Bureau of Energy Efficiency (BEE) Certified Energy Auditor for constructing building in accordance to the provision of ECBC, wherever applicable. (vi) No Objection Certificate (NOC) of fire safety of building from concerned Chief Fire Officer or an officer authorized for the purpose.

(2) No owner/ applicant shall occupy or allow any other person to occupy new building or part of a new building or any portion whatsoever, until such building or part thereof has been certified by the Competent Authority or by any officer authorized by him in this behalf as having been completed in accordance with the permission granted and an 'Occupation Certificate' has been issued in Form BRVII. However, Competent Authority may also seek composition charges of compoundable violations which are compoundable before issuance of Form BRVII. Further, the water, sewer and electricity connection be released only after issuance of said occupation certificate by the Competent Authority.

(3) The 'Occupation Certificate' shall be issued on the basis of parameters mentioned below:-

(i) Minimum 25% of total permissible ground coverage, excluding ancillary zone, shall be essential for issue of occupation certificate (except for industrial buildings) for the first time or as specified by the Government:

Provided, in case of residential plotted, minimum 50% of the total permissible ground coverage shall be essential to be constructed to obtain occupation certificate, where one habitable room, a kitchen and a toilet forming a part of submitted building is completed.

(ii) The debris and rubbish consequent upon the construction has been cleared from the site and its surroundings.

(4) After receipt of application, the Competent Authority shall communicate in writing within 60 days, his decision for grant/ refusal of such permission for occupation of the building in Form BR-VII. The E-register shall be maintained as specified in Code-4.8 for maintaining record in respect of Occupation Certificate.

(5) If no communication is received from the Competent Authority within 60 days of submitting the application for "Occupation Certificate", the owner is permitted to occupy building, considering deemed issuance of "Occupation certificate" and the application Form BR-IV (A) or BR-IV(B) shall act as "Occupation Certificate". However, the competent authority may check the violations made by the owner and take suitable action."

18. As per the provisions of above-mentioned section 4.10 of the Code, there are certain statutory formalities that are to be complied with before the submission of application for grant of occupation certificate. The utmost significance is given to the 'no-objection certificate' from the fire department (clause vi of section 4.10 of the Code). Though the application for the grant of occupation certificate/ completion certificate has been made by the respondent in 2019 itself. However, the NOC from the fire department was obtained by the promoter on 17.02.2021. Thereafter, the occupation certificate was received on 12.04.2021. Thus, as the requisite document (NOC of the fire department) was not submitted along with application, the application for issuance of occupation certificate cannot be said to be complete. There is no applicability of deemed occupation certificate (clause 5 of section 4.10 of the Code) in case of deficient application,

application not being in prescribed form, application not accompanied by prescribed documents or without meeting the prerequisite for applying for occupation certificate. Incomplete application is no application in eyes of law.

19. Thus, as the builder-respondent failed to apply for OC within the period of 36 months and the possession has been offered only after 16.04.2021, the respondent cannot claim benefit of the grace period of six months.

F4. Delay due to on-going litigation filed by collaborator/ landowner

20. The last objection raised by the respondent is that there was delay in development of the project as the respondent was involved in litigation at various forums and arbitration proceedings with the landowner/ collaborator. The authority is of the view that the various proceedings between the respondent and the collaborator were ongoing till 15.03.2017 (fact admitted by the respondent), yet the possession has been offered as late as 16.04.2021. Thus, the respondent's claim for getting the delay condone is rejected as an innocent allottee should suffer because of the dispute between the promoters.

H. Findings on the reliefs sought by the complainants

H1. Admissibility of delay possession charges at prescribed rate of interest

21. In the present complaint, the complainants intend to continue with the project and are seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under.

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

22. The possession clause 10.1 of the ABA is reproduced below:

> *10.1 **Schedule for possession of the said apartment***
> *"The company based on its present plans and estimates and subject to all just exceptions: contemplates to complete construction of the said Building/ said Apartment within the period of 36 months plus grace period of 6 months from the date of execution of the Apartment Buyer Agreement by the Company or Sanction of Plans or Commencement of Construction whichever is later, unless there shall be delay or there shall be failure due to reasons mentioned in Clauses (11.1).(11.2). (11.3) and Clause (38) or due to failure of Allottee(s) to pay in time the price of the said Apartment along with all other charges and dues in accordance with the schedule of payments given in Annexure I or as per the demands raised by the Company from time to time or any failure on the part of the Allottee(s) to abide by any terms or conditions of this Apartment Buyer Agreement."*

23. 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 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 favor 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 ABA 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.

24. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within period of 36 months from the date of start of construction or execution of the agreement, whichever is later. In the present complaint, the date of start of construction has not been provided therefore, the due date of handing over possession comes out to be 10.04.2015 which is calculated from date of sanction of building plans i.e., 10.04.2012. It is further provided in agreement that promoter shall be entitled to a grace period of

6 months for pursuing the occupancy certificate etc. from DTCP under the Act in respect of the project. As a matter of fact, the respondent has himself admitted that he had applied for the occupation certificate in respect of the said tower only in 2019 and the said document was issued to the promoter on 12.04.2021. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 6 months cannot be allowed to the promoter at this stage.

25. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges at simple interest. 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. The same 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]***
> *"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."*

26. The legislature in its wisdom in the subordinate legislation under 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.

27. 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., 3.08.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

28. **Rate of interest to be paid by complainants for delay in making payments:** 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—*
> *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 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;"*

29. 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 same as is being

granted to the complainants in case of delayed possession charges.

H.II. Whether the respondent is justified for charging GST charges?

30. The complainants have sought the relief that the demand qua GST shall be revoked. As per the documents put on record, the final statement of account dated 16.04.2021, the respondent has raised a demand of Rs. 3,56,872/- out of which Rs. 2,22,454/- has already been paid.

34. Clause 2 of the ABA, wherein the complainants agreed to pay any tax/charges including any fresh incidence of tax as may be levied by the government of Haryana/Competent Authority/Central Government, even if it is retrospective in effect as and when demanded by the respondent on the super area of the flat and the same is reproduced below:

> ***"Clause 2 - Payment of taxes,***
>
> *That the Allottee agrees to pay directly or if paid by the Company then reimburse to the Company on demand, Government rates, property taxes, service tax, education cess, sales tax/VAT, other taxes of all and any kind by whatever name called whether levied or leviable now or in future on the said land, Complex and/ or building(s) constructed on the said Land or the said apartment, as the case may be, as assessable/ applicable from the date of application of the Allottee and the same shall be borne and paid by the Allottee in proportion to the Super Area of the said apartment in the said building/ complex as determined by the company."*

35. The due date of possession was 10.04.2015 i.e., prior to the coming into force of the GST Act 2016. They complainants are not liable to incur additional financial burden of GST. As per the buyer's agreement though taxes shall be payable as per the government rules as applicable from time to time but there is

no liability to pay GST or its arrears as the same came in effect from 01.07.2017.

36. The authority is of the view that the due date of possession of the unit was 10.04.2015 but the offer of possession has been made only on 16.04.2021. Had the unit been delivered within the due date or even with some justified delay, the incidence of GST would not have fallen on the allottee. Therefore, an additional tax burden with respect to GST was enforced upon the buyer for no fault of his and is due to the wrongful act of the promoter in not delivering the unit within due date of possession. The same view has been upheld in the appeal no. 21 of 2019 titled as ***M/s Pivotal Infrastructure Pvt. Ltd. vs. Prakash Chand Arohi***, decided by Haryana Real Estate Appellate Tribunal on 20.05.2020 where in it was observed that the possession of the flat in term of buyer's agreement was required to be delivered on 1.10.2013 and the incidence of GST came into operation thereafter on 01.07.2017. So, the complainants cannot be burdened to discharge a liability which had accrued solely due to respondent's own fault in delivering timely possession of the flat. The relevant portion of the judgement is reproduced below:

> *"93. This fact is not disputed that the GST has become applicable w.e.f. 01.07.2017. As per the first Flat Buyer's Agreement dated 14.02.2011, the deemed date of possession comes to 13.08.2014 and as per the second agreement dated 29.03.2013 the deemed date of possession comes to 28.09.2016. So, taking the deemed date of possession of both the agreements, GST has not become applicable by that date. No doubt, in Clauses 4.12 and 5.1.2 the respondent/allottee 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 deemed date of possession. The delay in delivery of possession is the default on the part of the appellant/promoter and the possession was offered on 08.12.2017 by that time the GST had become applicable. But it is settled principle of law that a person cannot take the benefit of his own wrong/default. So, the appellant/promoter was not entitled to charge GST from the respondent/allottee as the liability of GST had not become due up to the deemed date of possession of both the agreements."

37. Thus, to conclude it would be appropriate to say that though as per clause 2 of ABA, the complainants/allottees have agreed to pay all the government taxes, municipal property taxes and other taxes levied or leviable in future by any government or municipal authority. However, this liability shall be confined only up to the deemed date of possession. The respondent was liable to handover possession by 10.04.2015. The delay in delivery of possession is the default on the part of the respondent/promoter and the possession was offered on 16.04.2021 by that time GST had become applicable. So, in the present complaint, the respondent/promoter is not entitled to charge GST from the complainants/allottees as the liability of GST had not become due up to the deemed date of possession as per the agreement.

38. The promoter is entitled to charge VAT from the allottee for the period up to 10.04.2015 @ 1.05% (one percent VAT + 5 percent surcharge on VAT). The respondent-promoter is directed to adjust the said amount, if charged from the allottee

with the dues payable by the allottee or refund the amount if no dues are payable by the allottee.

39. On consideration of the documents available on record and submissions made by the parties regarding contravention as per 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 10.1 of the buyer's agreement executed between the parties on 27.01.2012, possession of the said unit was to be delivered within a period of 36 months from the date of execution of agreement, sanction of building plans or start of construction. The date of sanction of building plans is 10.04.2012, the date of start of construction has not been provided. Thus, the due date of possession is calculated from the date of sanction of building plans as it is later. The respondent-builder had claimed a grace period of 6 months because of circumstances out of the control of the company (clause 11.1), delay in getting approval of building plans (clause 11.2), also because of the delay caused due to government orders (11.3) and clause 38 that the allottees to pay for the super area proportionate to their share. The grace period cannot be allowed to the respondent as the delay in getting a government document i.e., occupation certificate from the competent authority was due to the failure of the

builder/ promoter to complete the project on time and the occupation certificate was received as late as 12.04.2021. Thus, grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over possession comes out to be 10.04.2015. In the present case, the complainants was offered possession by the respondent on 16.04.2021. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the complainants as per the terms and conditions of the buyer's agreement dated 27.01.2012 executed between the parties.

40. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 12.04.2021. However, the respondent offered the possession of the unit in question to the complainants only on 16.04.2021, so it can be said that the complainants came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, he should be given 2 months' time from the date of offer of possession. These 2 months' of reasonable time is being given to the complainants keeping in mind that even after intimation of possession practically he has to arrange a lot of logistics and

requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e. 10.04.2015 till the expiry of 2 months from the date of offer of possession (16.04.2021) which comes out to be 16.06.2021.

41. 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 prescribed rate of the interest @ 9.30 % p.a. w.e.f. 10.04.2015 till 16.06.2021 as per provisions of section 18(1) of the Act read with rule 15 of the Rules.

H. Directions of the authority

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

i. The respondent is directed to pay the interest at the prescribed rate i.e. 9.30 % per annum for every month of delay on the amount paid by the complainants from due date

of possession i.e. 10.04.2015 till 16.06.2021 i.e. expiry of 2 months from the date of offer of possession (16.04.2021).

ii. The arrears of such interest accrued from 10.04.2015 till 16.06.2021 shall be paid by the promoter to the allottee within a period of 90 days from the date of this order as per rule16 of the Rules.

iii. The complainants are directed to make the outstanding payments, if any, to the respondent alongwith prescribed rate of interest i.e., equitable interest which has to be paid by both the parties in case of failure on their respective parts.

iv. The respondent shall not charge anything from the complainants which is not the part of the buyer's agreement. The respondent is debarred from claiming holding charges from the complainants/allottees at any point of time even after being part of the builder buyer's agreement as per law settled by hon'ble Supreme Court in **Civil appeal nos. 3864-3889/2020 decided on 14.12.2020.**

43. Complaint stands disposed of.

44. File be consigned to registry.

(Samir Kumar)
Member

(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 03.08.2021

JUDGEMENT UPLOADED ON 26.10.2021