

**BEFORE THE HARYANA REAL ESTATE REGULATORY
AUTHORITY, GURUGRAM**

Complaint no. : 885 of 2020
First date of hearing : 15.04.2020
Date of decision : 18.08.2021

1. Akshay Kumar
2. Satish Kumar
3. Anita

All RR/o: - House No. 677, Sector-1,
Part-2, Huda Shahabad Markanda,
Distt. Kurukshetra (136135)

Complainants

Versus

1. M/s Supertech Limited.
Office at: 1114, 11th floor
Hamkunt Chambers, 89,
Nehru Place, New Delhi- 110019
2. India bulls Housing Finance
Office at: 448-451, Udyog Vihar
Phase-V, Gurugram- 122016

Respondents

CORAM:

Shri Samir Kumar
Shri Vijay Kumar Goyal

Member
Member

APPEARANCE:

Sh. Rajan Kumar Hans
Sh. Bhrigu Dhami
Sh. Gaurav Dua
Ms. Shiwani Bhargav

Complainants in person
Advocate for the respondent no. 1
Advocate for the respondent no. 2

ORDER

1. The present complaint dated 18.02.2020 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 as provided under the provision of the Act or the Rules and regulations made there under or to the allottee as per the agreement for sale executed *inter se*.

A. Unit and project related details

2. The particulars of 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	"Hill Town" in Sector- 02, Sohna Road Gurugram.
2.	Project area	18.37 acres [as per RERA Registration]
3.	Nature of the project	Residential Colony
4.	DTCP license no. and validity status	124 of 2014 dated 23.08.2014 valid till 22.08.2019
5.	Name of licensee	M/s Dolphin Build well Private Limited and 10 others
6.	RERA Registered/ not registered	Registered vide no. 258 of 2017 Dated 03.10.2017
7.	RERA registration valid up to	02.10.2020
8.	First allotment letter	06.08.2016 [page 34 of complaint]
9.	First allotment letter unit detail	E40C, 3 rd floor, Tower E40

		[Page 34 of complaint]
10.	Unit measuring both of unit	1720 sq. ft.
11.	Second allotment letter	12.03.2018 [Page 64 of complaint]
12.	Second allotment letter unit detail	R1450L350A, 1 st floor, Tower L350 [Page no. 65 of complaint]
13.	Payment plan of both unit	Subvention linked payment plan [Page no. 35 & 65 of complaint]
14.	Indian bulls loan sanction letter	17.08.2016 [Page no. 50 of complaint]
15.	Total consideration as per payment plan of both unit	Rs.67,50,007/- [Page no. 35 & 65 of complaint]
16.	Indian Bulls Home Loan sanction amount letter dated 17.08.2016	Rs.55,00,000/- [Page no. 50 of complaint]
17.	Total amount paid by the complainant as per customer statement	Rs.35,24,944/- [Page no. 28 of complaint]
18.	Due date of delivery of possession as per clause L (26) of the allotment letter by December 2019 + 6 month's grace period upto offer letter of possession or actual physical possession whichever is earlier. [Page 73 of complaint]	31.12.2019 [Note: - 6 months grace period is not allowed]
19.	Delay in handing over possession till date to this order i.e. 18.08.2021	1 years 7 months and 18 days

B. Facts of the complaint

3. The complainant submitted that the respondent company i.e. Supertech Ltd launched the "Officers Enclave" low rise project at Hill Town situated at Sector-2, Sohna Road, Gurgaon, Haryana-122103. complainants came to know about this project and booked a flat no.



E40-C under subvention scheme which is "No Pre EMI till possession scheme" in July -2016.

4. That the complainant visited the site in November 2017 and found that there is no construction going on for their flat no E40-C and when complainant raised this issue with respondent no. 1, they informed the complainant that there will not be any construction for the allotted flat anytime soon (E40-C) since they have shifted that flat to the phase 2 part of the project. This was not communicated to the complainants by any means. complainants were then given another flat L350-A of phase 1 construction promising timely delivery, in the same project. Thus, flat no L350-A was allotted to the complainant in February 2018 which was also covered under subvention scheme "No Pre EMI till possession scheme".
5. The complainant submitted that he had taken a loan of Rs 55,00,000/- from India Bulls Bank. Thereafter, respondent 2 had disbursed the first installment of Rs 27,91,755 /- for flat no E40-C instead of knowing that this flat will not be constructed and has been transferred to Phase 2 of the project. Therefore, respondent no. 2 has disbursed the amount without any legal and technical verification (as per the agreed terms and conditions mentioned on loan sanction letter) which proves the mutual conspiracy of respondents. That the respondent no. 1 started delaying the Pre-EMI from April 2019. Currently total Pre-EMI amount pending till 20.01.2020 at respondent no. 1 end is Rs 101,355/-.



6. The complainant submitted that the employee of the respondent no.1 Ankita Sahni had shared an email with her higher authorities stating that non-payment of Pre-EMI is the fault from respondent no. 1 end and requested her higher authorities to pay the Pre-EMI amount to the Respondent no. 2 and the complainant. Thereafter, complainants received an email from Manvi Jetly Bhagat stating that respondent 1 will not be able to pay pre-Emi to the bank. This email suggested complainant to pay it from their pocket and the amount will be adjusted latter at the time of possession. Currently complainants are living on rented accommodation and are not in a position to pay the rent as well as Pre-EMI due to huge financial stress.
7. The complainant submitted that respondent no. 1 has breached MOU and made false promises of paying the pre-Emi till possession. That the respondent no. 2 has breached terms and conditions on "Loan sanction Letter" and disbursed the loan amount without any verification.
8. The date of possession as per the BBA and MOU was Dec 2019 and there is no construction or very less construction at the site from the last one to two years. Currently only 15-20% work is completed and there is no construction going on for Flat no L350A. Hence, respondent no. 1 has exceeded the committed timelines and will not be able to deliver it in the coming time also.

C. Relief(s) sought by the complainant:



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

- (i) To direct the respondent no. 1 to pay the pending Pre-Emi amount of Rs. 1,01,355/- (pending till 20 Jan 2020) to the complainants;
- (ii) To direct the respondent no. 1 to pay Pre-Emi of amount Rs. 23,614/- to the complainants every month till possession;
- (iii) To direct the respondent no. 2 to return the disbursed loan amount of Rs. 27,91,755/- back to the complainant's loan amount;
- (iv) To direct the respondent no. 1 to pay monthly rent regularly to the complainants until possession, since the possession timelines have been exceeded.

D. Reply by the respondent no. 1

10. The respondent no. 1 contested the complaint on the following grounds. The submissions made therein, in brief are as under: -

- I. that complainants booked an apartment being number (E-40-C). However, later as per approval of the Complainant the unit was changed to R1450L350A/ FLAT #L350A, 1st Floor, having an area of approximately 1720 Sq. ft.
- II. that consequentially, after fully understanding the various contractual stipulations and payment plans for the said apartment, the complainant executed the second allotment letter dated 12.03.2018. Thereafter, further submitted that as per Clause 26 of the terms and conditions of the agreement, the



possession of the apartment was to be given by December 2019, with an additional grace period of 6 months.

- III. that as per clause 27 of the agreement, compensation for delay in giving possession of the apartment would not be given to allottee akin to the complainant who has booked their apartment under any special scheme such as 'No EMI till offer of possession, under a subvention scheme.' Further, it was also categorically stipulated that any delay in offering possession due to 'Force Majeure' conditions would be excluded from the aforesaid possession period.
- IV. that complainant had elected the Subvention Scheme whereby the complainant, the respondent and the respondent No. 2 had executed a tripartite agreement. The TPA inter alia determined the liability of the complainants and the respondents qua the loan sanctioned by the Bank for the said apartment. As per Clause 4 of the TPA, the Respondent was liable to pay Pre-EMI installments under the Liability Period.
- V. That in interregnum, the pandemic of covid19 gripped the entire nation since March 2020. The Government of India has itself categorized the said event as a 'Force Majeure' condition, which automatically extends the timeline of handing over possession of the apartment to the complainant. Thereafter, it would be apposite to note that the construction of the Project is in full

swing, and the delay if at all, has been due to the government-imposed lockdowns which stalled any sort of construction activity. Till date, there are several embargos qua construction at full operational level.

- VI. that the said project is registered with this Hon'ble Authority vide registration no. 258 of 2017 dated 03.10.2017 and the completion date as per the said Registration is October 2020;
- VII. that the delay if at all, has been beyond the control of the respondents and as such extraneous circumstances would be categorized as 'Force Majeure', and would extend the timeline of handing over the possession of the unit, and completion the project.
- VIII. that the timeline stipulated under the flat buyer agreement was only tentative, subject to force majeure reasons which are beyond the control of the respondent. The respondent in an endeavor to finish the construction within the stipulated time, had from time to time obtained various licenses, approvals, sanctions, permits including extensions, as and when required. Evidently, the respondent had availed all the licenses and permits in time before starting the construction;
- IX. that apart from the defaults on the part of the allottee, like the complainants herein, the delay in completion of project was on



account of the following reasons/circumstances that were above and beyond the control of the respondent:

- shortage of labour/workforce in the real estate market as the available labour had to return to their respective states due to guaranteed employment by the Central/ State Government under NREGA and JNNURM Schemes;
- that such acute shortage of labour, water and other raw materials or the additional permits, licenses, sanctions by different departments were not in control of the respondent and were not at all foreseeable at the time of launching of the project and commencement of construction of the complex. The respondent cannot be held solely responsible for things that are not in control of the respondent.

X. That compounding all these extraneous considerations, the Hon'ble Supreme Court vide order dated 04.11.2019, imposed a blanket stay on all construction activity in the Delhi- NCR region. It would be apposite to note that the 'Hues' project of the Respondent was under the ambit of the stay order, and accordingly, there was next to no construction activity for a considerable period. It is pertinent to note that similar stay Orders have been passed during winter period in the preceding years as well, i.e. 2017-2018 and 2018-2019. Further, a

complete ban on construction activity at site invariably results in a long-term halt in construction activities. As with a complete ban the concerned labour was let off and they traveled to their native villages or look for work in other states, the resumption of work at site became a slow process and a steady pace of construction as realized after long period of time.

D.II. Reply by the respondent no. 2

11. The respondent no. 2 contests the complaint on the following grounds.

The submissions made therein, in brief are as under: -

- I. That he is well established financial company and has earned par excellence in the market. It is worth to mention herein that the respondent no. 2 is regulated by National Housing Bank and follow all the rules and guidelines, as and when provided by its regulatory authorities i.e. Reserve Bank of India, National Housing Bank and Ministry of Corporate affairs etc.
- II. That the complainants approached the answering respondent for availing loan against mortgage of property for purchasing a property from Respondent No. 1. Consequently, based upon the representations and documents submitted to the answering Respondent, the answering Respondent No. 2 sanctioned loan on 17.08.2016 and thereafter the Loan Agreement was executed on 31.08.2016 for the loan of Rs.55,00,000/- vide Loan account No.HHLGRG00291520 against the property bearing E40-C,

“Officers Enclave” project at Hill Town located at Sector-2, Sohna, Haryana-122103.

- III. That the parties entered into the tripartite agreement whereby it was agreed that there would be no repayment default of loan amount for any reason whatsoever including but not limited to any concern/issues by and between the complainants and respondent No. 1. It was further agreed that the complainant's obligation to repay the loan shall be a distinct and independent of any issues/concern/dispute of whatsoever nature between the complainants and respondent No.1.
- IV. That the complainants also declared and confirmed that they have agreed and consented to the terms of the payment plan upon understanding that nature of risks and consequences associated with the payment plan opted by them. They represented and undertook that they shall be solely responsible and shall continue to repay the loan amount in terms of the loan agreement irrespective of the stage of construction/delay or failure to develop/construct the said project by Builder within the stipulated period.
12. 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.

E. Jurisdiction of the authority

13. The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as per provisions of section 11(4)(a) of the Act leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

F. Findings on the objections raised by the respondent

F.I. Objection regarding entitlement of DPC on ground of complainants being an investor.

14. The respondent has taken a stand that the complainants are 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/promoter 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/promoter 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.35,24,944/-** 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;"

15. 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. 000600000010557 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.



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

16. From the bare reading of the possession clause of the buyer developer agreement, it becomes very clear that the possession of the apartment was to be delivered by **December 2019**. The respondent in his contribution pleaded the force majeure clause on the ground of Covid-19. That in the High Court of Delhi in case no. **O.M.P (I) (COMM.) No. 88/2020 & I.As. 3696-3697/2020 title as M/S HALLIBURTON OFFSHORE SERVICES INC VS VEDANTA LIMITED & ANR. 29.05.2020** it was held that The past non-performance of the Contractor cannot be condoned due to the COVID-19 lockdown in March 2020 in India. The Contractor was in breach since September 2019. Opportunities were given to the Contractor to cure the same repeatedly. Despite the same, the Contractor could not complete the Project. The outbreak of a pandemic cannot be used as an excuse for non-performance of a contract for which the deadlines were much before the outbreak itself. Now this means that the respondent/promoter has to complete the construction of the apartment/building by December 2019. The respondent/promoter has not given any reasonable explanation as to why the construction of the project is being delayed and why the possession has not been offered to the complainants/allottees by the promised/committed time. That the lockdown due to pandemic in the country began on 25.03.2020. So the contention of the respondent /promoter to invoke the force majeure clause is to be rejected as it is a



well settled law that ***"No one can take benefit out of his own wrong"***. Moreover there is nothing on record to show that the project is near completion, or the developer applied for obtaining occupation certificate. Rather it is evident from its submissions that the project is ongoing, and it may take some more time to get occupation certificate. Thus, in such a situation, the plea with regard to force majeure on ground of Covid- 19 is not sustainable.

G. Findings on the relief sought by the complainant

G. I The respondent/promoter to pay the pending Pre EMI amount of Rs.1,01,355/- to the complainants

17. Subvention Scheme: - A subvention scheme is a financial plan wherein the buyer pays some value of the total property at the time of booking the property. This amount includes registration fee, stamp duty, GST etc. After the initial payment or a couple of payments, the bank or the financial institute pay the remaining amount of the property at various stages of construction making it a construction linked plan. Once a certain amount of payment is done, the buyer pays the remaining amount along with the bank equally at the time of possession. The cost of interest is borne by the builder for a limited period and the buyer can repay the amount to the bank in EMI later. In these type of cases despite an agreement for sale entered into between the builder and the buyer, sometimes there is execution of two or more documents in the shape of memorandum of understanding (MoU) and tripartite agreement (TPA). In the builder buyer



agreement, there are as usual terms and conditions of sale of allotted unit, payment of its price, delivery of possession by certain dates and the payment schedule etc. In the second document i.e. MoU, there are certain conditions with regard to payment of the price of the allotted unit by the buyer to the builder and payment of interest of that amount by the builder to the financial institution for a limited i.e. either upto the date of offer possession or thereafter. In the third case there is a triparty agreement between the buyer, builder, and the financial institution to pay the remaining amount of the allotted unit to the builder on behalf of the buyer by the financial institution and payment of interest on that amount by the builder to the financial institution for a certain period i.e. either upto date offer of possession or till the time or delivery of possession the MoU and tripartite agreements fall within the definition of the agreement fall within the definition of agreement of sale and can be enforced by the regulatory authority in view of the provisions of Real Estate Regulation and Development Act, 2016 and held by the National Consumer Dispute Redressal Commission in case of IDBI Bank Limited Vs Parkash Chand Sharma and Anr, 2018(iii) National Consumer Protection Judgement, 45 and formed by the hon'ble Apex court of land in Bikram Chatterji Vs Union of India and Ors. In writ petition no. 940 of 2017 decided on 23.07.2019 and wherein it was held that when the builder fails with the obligations under the subvention scheme thereby causing a double

loss to the allottee then, the court can intervene, and the builder has to comply with the same in case it is proved that there was a diversion of funds.

18. In the instant complaint, the allottee and the developer entered into a memorandum of understanding dated 13.03.2018 whereby as per clause (b) the developer has agreed that the tenure of subvention scheme shall be 21 months and the developer propose to offer possession of the booked unit to the buyer within said time frame. However, if the possession gets delayed due to any reason, then the developer has agreed to pay the pre-EMI only to the buyer even after 21 months. Further, as per clause (c) of the memorandum of understanding, the scheme will become operative and effective when the buyer shall pay 90% of the total sale consideration of the said unit to the developer and the balance 10% will be paid at time of possession. The said clause is reproduced as under: -

"(b) That the tenure of this subvention scheme, as approved by Indiabulls Housing Finance Limited is 21 months. The developer expects to offer of possession of the booked unit to the buyer by that time. However, if due to any reason, the possession offer of the booked unit gets delayed, then the Developer undertakes to pay the pre-EMI only to the Buyer even after 21 months. The payment of Pre EMI shall continue till offer of possession with regards to the booked flat is issued to the buyer".

"(c) That the present scheme shall become operative and effective when the Buyer shall pay 90% of the Total Sale Price of the said Flat to the Developer through the bank loan as well as through his/her own contribution. The balance 10% will be paid at the time of possession."



Further, clause (e) of the memorandum of understanding provides that from the date of offer of possession letter, the subvention scheme shall be treated as closed and the buyer shall be solely liable to pay the entire EMI of her bank. Also, clause (f) of the said MoU states as under:

“(e) Possession & Closer of Scheme: - That the Buyer shall take the possession of the flat within 30 days of having received the Offer of Possession Letter by the Developer. From the date of Offer of Possession Letter, the present scheme shall be treated as closed and buyer shall be solely liable to pay the entire EMI of his bank loan.”

“(f) That the present Memorandum of Understanding is in addition to the Allotment Letter executed between the parties and all other conditions/situations not covered under this MOU shall be governed by the terms and conditions of the Allotment Letter and company policies.”

19. The authority observes that no doubt, it is the duty of the allottee to make necessary payments in the manner and within the time specified in the agreement for sale as per the obligations u/s 19(6) and 19(7) of the Act reduced into writing or as mutually agreed to between the promoter and allottee and are covered under section 19(8) of the Act. But the memorandum of understanding and tri-partite agreement both stipulate that the payments are subject to handing over of the possession of the unit within stipulated period as per the agreement to sell. So, the said documents being supplementary or incidental thereto are legally enforceable against the promoter. Hence, it cannot absolve himself from its liability from paying the pre-EMI's.
20. The *National Consumer Disputes Redressal Forum, New Delhi* in the case of *IDBI Bank Ltd. Vs. Prakash Chand Sharma & Ors., (Supra)* observed that the complainants drew our attention to the special

payment plan, the terms and conditions whereof are detailed as follows: -

"This special plan has been designed through a special arrangement with IDBI Bank Ltd. In order to avail of this plan the buyer shall have to take Home Loan only through IDBI Bank Ltd.

Under this special payment plan the buyer shall have no liability whatever towards paying any interest or Pre EMI till the time of possession of the apartment. All interest accrued during the period till the time of possession shall stand waived off with respect to the buyer.

The obligation of the buyer to pay his EMIs shall be applicable after the possession of the apartment as per the standard terms of IDBI Bank Ltd. (or as specifically agreed between the buyer and the bank through the loan agreement) In the event the buyer wishes to terminate the Apartment Buyers Agreement for any reason whatsoever prior to taking over possession and registration of the property in his/her favour, then he/she shall be liable to pay to 'M/s. Amy HomeServices Ltd. the entire interest amount (with the prescribed 18% penal interest) that has been paid off during the period till the date".

21. Under the special payment plan, the buyer has no liability whatsoever towards paying any interest or pre EMIs till the offer of possession and all interest amount accrued during the period till the time of possession would stand waived off with respect to the buyer if it is proved that the builder violated the terms and conditions of contractual obligations contained in the builder buyer agreement/tripartite agreement/memorandum of understanding respectively.

22. Therefore, the terms and conditions of allotment and/or the buyer's agreement, memorandum of understanding and tri-partite agreement clearly shows that the developer is under liability to pay the pre- EMIs or interest part of the loan amount received, and any non-compliance shall be in violation of section 11(4) of the Act in the event promoter



fails to keep its obligations under subvention scheme. In such cases, the allottee has all the right to seek relief under the RERA Act under section 31 which states that any aggrieved person may file a complaint with the authority or adjudicating officer for any violation or contravention of the provisions of RERA or the rules and regulations framed thereunder against any promoter or real estate agent and the authority may give a direction to the respondent/builder to pay EMI so that the home buyer does not get any notice from the bank or financial institution. A similar direction in this regard was issued by the hon'ble Apex court in **Supertech Limited VS Emerald Court owner Resident Welfare Association & Others** in SLP(C) no.11595/2014 dated 31.08.2021. "The Amicus Curiae submitted that if the buildings are ordered to be demolished, the appellant may close the home loans and refund the amounts contributed by the homebuyers with such interest as this Court may determine. On the other hand, if the buildings stand, the appellant may be directed to clear the outstanding EMIs and continue paying them until possession. Since the buildings have been ordered to be demolished under the directions of this Court in the present judgment, the appellant shall close the home loans and refund the amounts contributed by each of the above home buyers with interest at the rate of twelve per cent per annum within two months."

23. A perusal of memorandum of understanding dated 18.03.2015 entered into between the buyer and developer shows that the subvention



scheme was to be governed as per clause (b & c) of the same which have already been detailed in para 18 of the order. The tenure of that scheme as approved by India bulls Housing Finance Limited is 21 months or offer of possession whichever is earlier. Secondly the said scheme was to be operative and effective on the event of buyer paying 90% of the total sale price of the allotted unit to the developer through the bank loan as well as through his/her own contribution. The total sale consideration of the allotted unit as per allotment letter cum buyer's agreement is Rs.67,50,007/- and as per memorandum of understanding, the allottee is required to pay 90% of the total sale price to avail the benefit of the subvention scheme. Even as on date, the complainant has failed to pay the required amount. That amount was admittedly not paid by the complainant to the builder till date. Though the tenure of subvention scheme is 21 months or offer of possession whichever is earlier. The subvention scheme was to be operative and effective on the buyer's paying 90% of the total sale price of the allotted unit to the developer through the bank loan as well as through his/her contribution. But the complainants have clearly mentioned in the complaint that they have paid an amount of Rs.35,24,944/- against the total sale consideration of Rs.67,50,007/- which comes out to be 52.22% and has violated the clause (c) of the memorandum of understanding dated 13.03.2018. An MoU can be considered as an agreement for sale interpreting the definition of the

"agreement for sale" under Section 2(c) of the Act and broadly by taking into consideration the objects of RERA. Therefore, the promoter and allottee would be bound by the obligations contained in the memorandum of understanding and the promoter shall be responsible for all obligations, responsibilities, and functions to the allottee as per the agreement for sale executed inter se them under section 11(4)(a) of the Act. But the allottee has also failed to fulfil those obligations as per these documents within the stipulated period. So no benefit can be claimed by him under the subvention scheme.

G.II The respondent no. 1 to pay monthly rent regularly to the complainant until possession, since the timelines has been exceeds.

24. While filing the complaint, the complainants sought monthly rent of the allotted unit as the due date of handing over of possession has expired. It is evident from a perusal of allotment letter cum buyer's agreement dated 12.03.2015, that the possession of the allotted unit was to be offered on 31.12.2019 and that date has already expired. If the complainants want any amount of compensation, then they are at liberty to approach adjudicating officer by filing the proper complaint. However, since the due date for offer of possession of the allotted unit has been expired, so in such a situation they are entitled to delayed possession charges till the actual offer of possession.
25. Clause L (26) of the allotment letter provides for handing over of possession and is reproduced below: -

"I. POSSESSION OF ALLOTTED FLOOR/APARTMENT: -



*26. The possession of the allotted floor/apartment shall be given by **DEC, 2019** with an extended grace period of 6'(six) months. The Developer also agrees to compensate the Allottee/s @ Rs. 5.00/- (five rupees only) per sq. ft. of area of the Floor/Apartment beyond the given promised period plus the grace period of 6(Six) months and upto the Offer Letter of possession or actual physical possession whichever is earlier."*

26. 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 offer letter of possession or actual physical possession whichever is earlier. 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.
27. 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 this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee



and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the allotment letter 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.

28. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the floor/apartment by December 2019. The allotment letter buyer's agreement was executed on 12.03.2018. Further it was provided in the buyer's agreement that promoter shall be entitled with an extended grace period of 6 months subject to force majeure conditions. There is no material evidence on record that the respondent/promoter had completed the said project within stipulated time i.e., December 2019 and no force majeure conditions as mentioned in clause (C) of the agreement had arose. 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 respondent/promoter at this stage.

29. **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.

30. 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.
31. Taking the case from another angle, the complainant-allottee was entitled to the delayed possession charges/interest only at the rate of Rs.5/- per sq. ft. per month as per relevant clauses of the buyer's agreement for the period of such delay; whereas the promoter was entitled to interest @ 24% per annum compounded at the time of every succeeding installment for the delayed payments. The functions of the authority are to safeguard the interest of the aggrieved person, may be the allottee or the promoter. The rights of the parties are to be balanced and must be equitable. The promoter cannot be allowed to



take undue advantage of his dominate position and to exploit the needs of the home buyers. This authority is duty bound to take into consideration the legislative intent i.e., to protect the interest of the consumers/allottees in the real estate sector. The clauses of the buyer's agreement entered into between the parties are one-sided, unfair and unreasonable with respect to the grant of interest for delayed possession. There are various other clauses in the buyer's agreement which give sweeping powers to the promoter to cancel the allotment and forfeit the amount paid. Thus, the terms and conditions of the buyer's agreement are ex-facie one-sided, unfair, and unreasonable, and the same shall constitute the unfair trade practice on the part of the promoter. These types of discriminatory terms and conditions of the buyer's agreement will not be final and binding.

32. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., **18.08.2021** is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.
33. The definition of term 'interest' as defined under section 2(z) 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:

"(z) "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;"*

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

35. On consideration of the circumstances, the documents, submissions made by the parties and based on the findings of the authority regarding contravention as per provisions of rule 28(2), the authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of clause L (26) of the allotment letter cum buyer's agreement executed between the parties on 12.03.2018, the possession of the subject apartment was to be delivered within stipulated time i.e., by 31.12.2019. 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 31.12.2019. The respondent has failed to handover possession of the subject apartment till date of this order. Accordingly, it is the failure of the respondent/promoter to fulfil its obligations and responsibilities as per the agreement to hand over the possession within the stipulated period. The authority is of

the considered view that there is delay on the part of the respondent to offer of possession of the allotted unit to the complainants as per the terms and conditions of the buyer's agreement dated 12.03.2018 executed between the parties. Further no OC/part OC has been granted to the project. Hence, this project is to be treated as on-going project and the provisions of the Act shall be applicable equally to the builder as well as allottees.

36. 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/promoter is established. As such the complainants are entitled to delay possession charges at rate of the prescribed interest @9.30% p.a. w.e.f. 31.12.2019 till the handing over of possession as per provisions of section 18(1) of the Act read with rule 15 of the rules.


H. Directions of the authority

37. 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/promoter 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. 31.12.2019 till the handing over of possession of the allotted unit;

- ii. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period;
 - iii. The arrears of such interest accrued from 31.12.2019 till the date of order by the authority shall be paid by the promoter to the allottees within a period of 90 days from date of this order and interest for every month of delay shall be paid by the promoter to the allottees before 10th of the subsequent month as per rule 16(2) of the rules;
 - iv. The rate of interest chargeable from the allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottees, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.
 - v. The respondent/promoter shall not charge anything from the complainant which is not the part of the allotment letter.
38. Complaint stands disposed of.
39. File be consigned to registry.


(Samir Kumar)
Member


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 18.08.2021

Judgement uploaded on 29.10.2021