BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 3085 of 2020
First date of hearing: 27.10.2020
Date of decision : 18.08.2021

Sucheta Loharuka
R/o: -136, Jessore Road, Avani Oxford Phase-1, Block-4, Lobby-1, Flat No. 3E, Lake Town, Kolkata- 700055 (WB) **Complainant**

Versus

M/s Supertech Limited.
Office at: 1114, 11th floor Hamkunt Chambers, 89, Nehru Place, New Delhi- 110019
2. Housing Development Finance Corporation Limited.
Office at: -The Capital Court, Olof Plame Marg, Munirka, New Delhi- 110067 **Respondents**

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

APPEARANCE:
Sh. Rajan Kumar Hans Advocate for the complainant
Sh. Bhrigu Dhami Advocate for the respondent no. 1
Sh. Dharmender Sehrawat Advocate for the respondent no. 2

ORDER

1. The present complaint dated 07.10.2020 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 unit details, sale consideration, the amount paid by the complainant, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S.No.	Heads	Information
1.	Project name and location	"Hill Town", Sector 2, Sohna Road, Gurugram.
2.	Project area	100.36875 acres [As per land schedule detail provided in the DTCP licence]
3.	Nature of the project	Residential plotted 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. 97 of 2017 dated 24.08.2017 (towers 1 to 8)**
7.	RERA registration valid up to	30.06.2021
8.	Unit no. (as per the allotment letter)	R045T601406, 14thfloor, Tower-6 [Page no. 21 of complaint]
9.	Unit measuring	1275 sq. ft. [super area]
10.	Date of execution of allotment letter	30.04.2016 [Page no. 20of complaint]
11.	Date of execution of tripartite agreement	23.06.2016 [Page no. 41 of complaint]
12.	Date of execution of memorandum of understanding	30.04.2016 [Page no. 36 of complaint]
13.	Payment plan	Subvention Payment Plan [Page no. 21of complaint]
14.	Total consideration	Rs.69,25,823/- [as per payment plan page no. 21 of complaint]
15.	Total amount paid by the complainant	Rs.66,94,206/- [as per statement of payment received dated09.08.2020, page no. 50 of complaint]
16.	Due date of delivery of possession as per clause I (25) of the allotment letter: by December 2019plus 6 Month grace period upto offer letter of possession or actual physical possession whichever is earlier. [Page 28 of complaint]	31.12.2019 [Note: - 6 month grace period is not allowed]
17.	Delay in handing over possession till the date of order i.e. 18.08.2021	2 years 7 months and 18 days

B. Facts of the complaint

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

I. That she has received a marketing call from the office of respondent/builder about investment in the upcoming project, situated at Sector 2, Sohna, Gurugram. The marketing staff of the respondent shows rosy pictures of the project and allure with proposed specifications and invited for site visit.

II. That on date 18.12.2014 she paid an amount of Rs.5,00,000/- towards expression of interest for the unit vide issuing cheque no. 046502 drawn on ICICI Bank. That on date 30.04.2016, a pre-printed one sided, arbitrary, and unilateral allotment letter cum flat buyer agreement for unit no. T06-1406 admeasuring 1275 sq.ft. was executed between complainant and respondent no. 1. That as per clause 25, the respondent has to complete the construction of flat by December 2019 subject to further grace period of 6 months i.e. until June 2020. The complainant further submitted that from April 2016, respondent no. 1 kept raising the demand and the complainant paid all the demands on time.

III. That on 30.04.2016, a memorandum of understanding was signed between the complainant and respondent no. 1 whereas they agreed on "No Pre Emi-Scheme". That on 31.05.2016, a side letter of MOU was issued by respondent no. 1 whereas it agreed to ccontinue the scheme of Pre-Emi till the possession of the apartment.

IV. That on 23.06.2016 a tripartite agreement was signed between the complainant, and both the respondents. A loan amount of Rs.55,00,000/- was agreed to be paid by respondent no. 2.

V. That till date, the respondent no. 1 had called Rs.64,88,837/-for payment and the complainant had paid Rs.66,94,206/- i.e. 103% of total money called including with interest and other allied charges of actual purchase price. But when complainant observed that there is no progress in construction of subject flat for a long time, she raised grievance to respondent no. 1 through various verbal communications over a period of time, but no satisfactory answer was received. That the main grievance of the complainant is that in spite of having paid more than 100% of the demanded amount of flat and ready and willing to pay the remaining

amount if any, the respondent no. 1 has failed to deliver the possession of the flat.

VI. That she had purchased the flat with an intention that after the purchase, her family will live in their own flat. That it was promised by the respondent party at the time of receiving payment for the flat that the possession of fully constructed flat along like surface parking, landscaped lawns, club/pool, EWS etc. as shown in brochure at the time of sale would be handed over to the complainant as soon as construction work is complete i.e. by December 2019. The complainant visited the project site in March 2020 and found that the construction activity had stopped since the last 18-24 months and the site and tower no. 6 in particular is far from completion.

VII. There is clear unfair trade practices and breach of contract and deficiency in the services of the respondents and much more a smell of playing fraud with the complainant and others is prima facie clear on the part of respondent party which makes them liable to this authority.

VIII. That for the first-time cause of action for the present complaint arose in 30.04.2016, when a one sided,

arbitrary and unilateral flat buyer agreement was executed between the parties. Further the cause of action arose on December 2019 when the respondent no. 1 failed to offer the possession as agreed mutually in allotment letter cum buyer's agreement. The cause of action is alive and continuing and will continue to subsist till such time as this authority restrains the respondent party by an order of injunction and/or passes the necessary orders.

C. Relief(s) sought by the complainant:

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

i. To pass an appropriate award directing the respondent no. 1 to pay delayed possession interest @ 18% compounding from due date possession i.e. June 2020 till actual date of possession.

ii. To pass an appropriate award directing the respondent no. 1 to clear the pending pre-Emi's (amount of Rs.5,73,072/- till Aug 2020) and continue paying pre-Emi's directly to HDFC as per the term & conditions of the entered agreement;

iii. To pass an appropriate order against respondent no. 1 to provide an actual date of possession, failing which the

complainant would be entitled to seek refund of full amount.

iv. To pass an appropriate order of penalty against respondent no. 2 who has issued the payment to the respondent no. 1 without checking and keeping a tab on construction which resulted in delay in possession.

5. On the date of hearing, the authority explained to the respondent/promoter about the contravention as alleged to have been committed in relation to section 11(4)(a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent no. 1.

6. The respondent no. 1 has contested the complaint on the following grounds. The submission made therein, in brief is as under: -

I. That the complainant booked an apartment being number no. R045T601406 in tower T6, 14th floor, having a super area of 1275 sq. ft. (approx.) for a total consideration of Rs.69,25,823/- vide a booking form;

II. That consequentially, after fully understanding the various contractual stipulations and payment plans for the said apartment, the complainant executed the flat buyer agreement dated 30.04.2016. Thereafter, further submitted that as per clause 25 of the terms and

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

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

IV. That in interregnum, the pandemic of 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.

V. That the said project is registered with this Hon'ble authority vide registration no. 97 of 2017 dated 24.08.2017 and the completion date as per the said registration is 30.06.2021.

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

VII. The force majeure clause, it is clear that the occurrence of delay in case of delay beyond the control of the respondent, including but not limited to the dispute with the construction agencies employed by it for completion of the project is not a delay on account of the respondent for completion of 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 allottees, like the complainant herein, the delay in completion of project was on account of the following reasons/ circumstances that were above and beyond the control of the respondent:

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

X. The respondent has further submitted that the intention of the force majeure clause is to save the performing party from the consequences of anything over which he

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

XI. It is public knowledge, and several courts and quasi-judicial forums have taken cognizance of the devastating impact of the demonetisation of the Indian economy, on the real estate sector. The real estate sector is highly dependent on cash flow, especially with respect to payments made to labourers and contractors. The advent of demonetisation led to systemic operational hindrances in the real estate sector, whereby the respondent could not effectively undertake construction

of the project for a period of 4-6 months. Unfortunately, the real estate sector is still reeling from the aftereffects of demonetisation, which caused a delay in the completion of the project. The said delay would be well within the definition of 'Force Majeure', thereby extending the time period for completion of the project.

XII. That the complainant has not come with clean hands before this authority and have suppressed the true and material facts from this authority. It would be apposite to note that the complainant is a mere speculative investor who has no interest in taking possession of the apartment. In fact, a bare perusal of the complaint would reflect that she has cited 'financial incapacity' as a reason, to seek a refund of the monies paid by her for the apartment. In view thereof, this complaint is liable to be dismissed at the threshold.

XIII. The respondent has submitted that the completion of the building is delayed by reason of non-availability of steel and/or cement or other building materials and/ or water supply or electric power and/ or slow down strike as well as insufficiency of labour force which is beyond the control of respondent and if non-delivery of possession is as a result of any act and in the aforesaid events, the

respondent shall be liable for a reasonable extension of time for delivery of possession of the said premises as per terms of the agreement executed by the complainant and the respondent. The respondent and its officials are trying to complete the said project as soon as possible and there is no malafide intention of the respondent to get the delivery of project, delayed, to the allottees. It is also pertinent to mention here that due to orders also passed by the Environment Pollution (Prevention & Control) Authority, the construction was/has been stopped for a considerable period day due to high rise in pollution in Delhi NCR.

XIV. That the enactment of RERA Act is to provide housing facilities with modern development infrastructure and amenities to the allottees and to protect the interest of allottees in the real estate sector market. The main intension of the respondent is just to complete the project within stipulated time submitted before the authority. According to the terms of the agreement also, it is mentioned that all the amount of delay possession will be completely paid/adjusted to the complainant at the time final settlement on slab of offer of possession.

The project is ongoing project and construction is going on.

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

XVI. 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 'Hill view' 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 travelled 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.

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

XVIII. That the pandemic of covid-19 has had devastating effect on the world-wide economy. However, unlike the agricultural and tertiary sector, the industrial sector has been severally hit by the pandemic. The real estate sector is primarily dependent on its labour force and consequentially the speed of construction. Due to government-imposed lockdowns, there has been a complete stoppage on all construction activities in the

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

XIX. The respondent no. 1 further submitted that the authority vide its Order dated 26.05.2020 had acknowledged the covid-19 as a force majeure event and had granted extension of six months period to ongoing projects. Furthermore, it is of utmost importance to

point out that vide notification dated 28.05.2020, the Ministry of Housing and Urban Affairs has allowed an extension of 9 months vis-à-vis all licenses, approvals, and completion dates of housing projects under construction which were expiring post 25.03.2020 in light of the force majeure nature of the covid pandemic that has severely disrupted the workings of the real estate industry.

XX. That the pandemic is clearly a 'Force Majeure' event, which automatically extends the timeline for handing over possession of the apartment.

D.II. Reply by the respondent no. 2.

7. The respondent no. 2 has contested the complaint on the following grounds. The submissions made therein, in brief are as under: -

I. That the present complaint has arisen due to the alleged default on part of respondent no. 1 in timely construction and handover of the project. However, the complainant has decided to wrongly impleaded HDFC as respondent no. 2 and has claimed relief of penalty under clause (4) of the prayer para. The complainant has chosen to ignore the fact that the relationship of HDFC

and the complainant has arisen out a loan agreement which has no correlation whatsoever with the builder.

II. The instant complaint is liable to be dismissed on account of misjoinder of parties. The complainant has failed to disclose any separate cause of action against the respondent no. 2.

III. That the HDFC Ltd. is no way concerned with the present complaint except that it has sanctioned and disbursed the home loan in terms and conditions of the home loan agreement and the supplementary loan agreement (loan account no. 619031629), and tripartite agreement dated 23.06.2016.However, it is clarified that the complainant has availed a home loan facility of Rs.57,68,457/-, out of which Rs.57,68,035/- has been disbursed by the answering respondent i.e. HDFC Ltd as per the terms and conditions of the home loan agreement (loan account no. 619031629) and supplementary loan agreement dated 26.04.2017. The loan is advanced under the loan agreement and supplementary agreement, not tripartite agreement. The tripartite agreement is executed for additional security of the loan. It is submitted that home loan facility by the answering respondent has been provided to the complainant based on her repayment

capability, her interest and satisfaction shown towards the property being developed by the respondent no. 1 and her express undertaking to repay the loan in time. At the relevant time of obtaining the loan, the borrower/complainant has made unequivocal assurances and representations for regular repayments of the loan to the answering respondent. In this context, the recital of the tripartite agreement may be noted as follows: -

> "WHEREAS the borrower has represented that the builder is of his choice and that he has satisfied himself with regard to integrity, capability for quality construction of the builder and the builder's ability for timely completion and on time delivery of the project".
>
> "AND WHEREAS the borrower has represented, and such representation being a continuing representation, that borrower's obligation to repay the loan shall be a distinct and independent obligation more particularly independent of any issues/concern/dispute of whatsoever nature between the borrower and builder".

IV. That the dispute between the complainant and the builder does not affect in any way the relationship of the complainant with the answering respondent towards repayment of loan amount. The subvention is an understanding/agreement between the borrower and the builder, wherein the builder assumes the liability of the borrower for certain period of time towards repayment of EMI/Pre-EMI, while the primary liability

being of the borrower. The decision for opting for a subvention plan has been between the complainant and the respondent no. 1 and the answering respondent has no role to play in this decision/option.

8. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents.

E. Jurisdiction of the authority

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

F. Findings on the objections raised by the respondent no. 1

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

10. The respondent has taken a stand that the complainant is the investor and not consumer, therefore, she is not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate

sector. The authority observes that the respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time, preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if it 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 complainant is buyer and paid total price of **Rs.66,94,206/-**to the promoter towards purchase of an apartment in the project of the promoter. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

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

11. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment buyer's

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

F. II. Objection regarding the respondent is reiterating that the promoter is being delayed because of force majeure circumstances and contending to invoke the force majeure clause.

12. 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 its contention pleaded the force majeure clause on the ground of Covid- 19. 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. 29.05.2020held 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. It is very clearly submitted by the respondent/promoter in its reply (on page no. 38 of the complaint) stated that only 42% of the physical progress has been completed in the project. The respondent/promoter has not given any reasonable explanation as to why the construction of the project is being delayed and why the possession has not been offered to the complainant/allottee by the promised/committed time. The lockdown due to pandemic in the country began on 25.03.2020. So the contention of the respondent/promoter to invoke the force majeure clause is to be rejected as it is a well settled law that ***"No one can take benefit out of his own wrongs"***. 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 completed upto 42% 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 To pass an appropriate award directing the respondent no. 1 to pay delayed possession interest @ 18% compounding from due date possession i.e.June 2020 till actual date of possession.

13. In the present complaint, the complainant intends to continue with the project and is seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under.

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

14. Clause I (25) of the allotment letter provides for handing over of possession and is reproduced below: -

> **"I. POSSESSION OF ALLOTTED FLOOR/APARTMENT: -**
> *25. 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."

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

16. 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 complainant not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may

make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the 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.

17. **Admissibility of grace period:** As per clause I (25) of the buyer developer agreement, the possession of the allotted unit was supposed to be offered by the December 2019 with a grace period of 6(six) months i.e. June 2020. There is nothing on record to show that the respondent has completed the project in which the allotted unit is situated and has applied for occupation certificate by December 2019. Rather, it is evident from the pleadings of the respondent that the construction of the project is upto 42% complete and the entire project may take some time to get it completed and thereafter make offer of possession to the allottee. So in view of these facts, the developer can't be allowed grace period of

6 months more beyond December 2019 as mentioned in clause I (25) in the buyer developer agreement.

18. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges at the rate of 18% p.a. However, proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

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

19. 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.

20. 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.

21. 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%.

22. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

> *"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.*
> *Explanation. —For the purpose of this clause—*
> *(i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*
> *(ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"*

23. Therefore, interest on the delayed payments from the complainant shall be charged at the prescribed rate i.e.,

9.30% by the respondent/promoter which is the same as is being granted her in case of delayed possession charges.

G. II **To pass an appropriate award directing the respondent no. 1 to clear the pending pre-Emi's (amount of Rs.5,73,072/- till Aug 2020) and continue paying pre-Emi's directly to HDFC as per the term & conditions of the entered agreement.**

24. **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 as demanded, at various stages of construction. 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 amount of interest is borne by the builder for a limited period and the buyer can repay the amount to the bank in the form of EMI later. In these types of cases, despite an agreement for sale is executed inter-se the builder and the buyer, sometimes there is execution of one or more documents in the shape of memorandum of understanding (MoU) and tripartite agreement (TPA). In the buyer's agreement, there are 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 period i.e. either upto the date of offer of possession or thereafter. In the third case there is a tripartite 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 of delivery of possession. The MoU and tripartite agreements fall within the definition of agreement of sale and can be enforced by the regulatory authority in view of the provisions of The 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.

25. Under the subvention scheme, there is a tri-partite agreement dated 23.06.2016 between the allottee, financial institution and developer wherein the financial institution is required to release the loan amount sanctioned in favour of the allottee to the builder as per the schedule of construction. The para 4 of the tripartite agreement is reproduced as below: -

> *"That irrespective of the stage of construction of the Project and irrespective of the date of handing over the possession of the residential apartment to the Borrower by the builder shall be liable to pay to HDFC regularly each month the EMIs as laid down in the Loan agreement to be signed by and between HDFC and the Borrower. The Borrower shall execute an indemnity and such other documents as may be required by HDFC in favour of HDFC in this regard."*

It is an obligation on the part of the builder to pay the pre-EMI interest till the date of offer of possession to the financial institution on behalf of the allottee. The clause 3 of the triparty agreement is reproduce below: -

> *"The Borrower has informed HDFC of the scheme of agreement between the Borrower and the Builder in terms where of the Builder hereby assumes the liability of payments under the loan agreement as payable by the Borrower to HDFC* ***from date of first disbursement till 31.01.2018*** *(the period be referred as the "liability period" and the liability be referred to as "Assumed Liability") it is however agreed that during the liability period the repayment liability is joint and several by and between the Borrower and the Builder. The assumption*

of liability by the builder in no manner whatsoever release, relinquishes and /or reduces the liability of the Borrower and the same shall not be affected in any manner on account of difference and /or dispute between the Borrower and the Builder under the agreement between them."

26. In the instant complaint, the allottee and the developer entered into a memorandum of understanding dated 30.04.2016 whereby the developer as per clause (b) agreed to the tenure of subvention scheme as 36 months or offer of possession whichever is earlier with regard to the booked unit/flat issued to the buyer. Further, clause (c) of the memorandum of understanding provides that the scheme shall 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, is 36 months or offer of possession whichever is earlier".

"(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:** - That the Buyer shall take the possession of the flat within 30 days of having received the Offer of Possession Letter by the Developer.*
>
> *(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 of the Allotment Letter and company policies."*

27. 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.

28. 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".

29. 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.

30. 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."

31. A perusal of memorandum of understanding dated 30.04.2016 entered into between the buyer and developer shows that the subvention scheme was to be governed as per clause (b & c) of that document which have already been detailed in para 31 of the order. The tenure of that scheme is 36 months or offer of possession whichever is earlier. Secondly the said scheme was to be *operative and effective* on the buyer paying 90% of the total sale price of the allotted unit to the developer though 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 dated 30.04.2016 is Rs.69,25,823/- and as per subvention payment plan, the allottee was required to pay a sum of Rs.62,33,239/- i.e. 90% of the total sale price. That amount was admittedly paid by her to the builder by 26.04.2017 as evident from statement of payment received dated 09.08.2020. It is evident from a perusal of the status report of the project filed by the developer that the construction of the project is complete upto 42%. Though the tenure of subvention scheme is 36 months or offer of possession

whichever is earlier but after passage of more than 5.3 years neither the construction is completed nor offer of possession of the allotted unit has been made to the allottee by the builder. Even, there is nothing on the record to show as agreed between the parties as per memorandum of understanding dated 30.04.2016 that the builder is paying any pre-Emi during the tenure of subvention scheme. So, on its failure to pay that amount to the financial institution being paid by the allottee, the builder is liable to pay that amount as per subvention scheme. So, as per the memorandum of understanding dated 30.04.2016, the respondent/developer is liable to pay the arrears of Pre-Emi from 26.04.2017 to 26.04.2020 i.e. for 36 months as per clause (b). During the above mentioned said period, the complainant/buyer has already paid Pre-Emi/Emi to the financial institution i.e. respondent no. 2. So, the respondent/developer is also liable to pay the arrears of Pre-Emi/Emi to the complainant.

32. On consideration of the circumstances, the documents, submissions made by the parties and based on the findings of the authority regarding contravention as per provisions of rule 28(2), the Authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of clause I (25) of the allotment letter executed between the parties on

30.04.2016, 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 complainant as per the terms and conditions of the buyer developer agreement dated 30.04.2016 executed between the parties. Further no OC/part OC has been granted to the project. Hence, this project is to be treated as on-going project and the provisions of the Act shall be applicable equally to the builder as well as allottee.

33. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainant is entitled to delay possession charges at rate of the prescribed interest @ 9.30% p.a. w.e.f. 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, 2017.

34. 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/builder is directed to pay arrears of Pre-Emi/Emi to the complainant/allottee from 26.04.2017 to 26.04.2020 as per memorandum of understanding.

ii. The respondent/builder is further directed to pay delayed possession charges 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;

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

iv. 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 allottee within a period of 90 days from date of this order and interest for every month of delay shall be paid by the promoter to the allottee

before 10th of the subsequent month as per rule 16(2) of the rules;

v. 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 allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

vi. The respondent shall not charge anything from the complainant which is not the part of the allotment letter cum buyer's agreement. The respondent is not entitled to charge holding charges from the complainant/allottee at any point of time even after being part of allotment letter as per law settled by Hon'ble Supreme Court in civil appeal no. 3864-3889/2020 decided on 14.12.2020.

35. Complaint stands disposed of.

36. 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 24.10.2021