

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

**Complaint no. : 4604 of 2020**  
**First date of hearing : 06.01.2020**  
**Date of decision : 18.08.2021**

Mr. Vipin Singhal  
R/O: -Tulip Orange Apartments, Tower-B5,  
Flat no. 604, Sector-70, Gurugram-122103

**Complainant**

Versus

1.M/s Supertech Limited.  
**Office at:** 1114, 11<sup>th</sup> floor  
Hemkunt Chambers, 89,  
Nehru Place, New Delhi- 110019  
2.PNB Housing Finance LTD.  
**Office at:** 9<sup>th</sup> Floor, Antarishk  
Building, 22, Kasturba Gandhi  
Marg, New Delhi

**Respondents**

**CORAM:**

Shri Samir Kumar  
Shri Vijay Kumar Goyal

**Member**  
**Member**

**APPEARANCE:**

Sh. Abhijeet Gupta  
Sh. Bhrigu Dharmi  
None

Advocate of the complainant  
Advocate for the respondent No. 1  
Advocate for the respondent No. 2

**ORDER**

1. The present complaint dated 14.12.2020 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	Officer's Enclave (Hill Crest) in "Hill Town" Sector-2, Sonha Road, Gurugram, Haryana-122103
2.	Project area	18.37 acres
3.	Nature of the project	Group Housing Project
4.	DTCP license no. and validity status	124 of 2014 dated 23.08.2014 valid till 22.08.2019
5.	Name of licensee	Dolphin Buildwell Pvt. Ltd. And others
6.	RERA Registered/ not registered	<b>Registered vide no.258 of 2017 dated 03.10.2017</b>
7.	RERA registration valid up to	02.10.2020
8.	Unit no.	N378C, 3 <sup>rd</sup> floor,

		tower/block- N378 [Page no.12 of complaint]
9.	Unit measuring	1375sq. ft. [super area]
10.	Date of execution of allotment letter	13.04.2018 [Page no. 11 of complaint]
11.	Payment plan	Subvention payment plan [Page no. 12 of complaint]
12.	Total consideration	Rs.5,236,254/- [as per payment plan page no. 12 of complaint]
13.	Total amount paid by the complainant	Rs.50,39,189/- [as per statement of payment received annexed by complaint]
14.	Due date of delivery of possession as per clause L (26) of the allotment letter: by dec 2019 + 6 month's grace period for offer of possession and actual physical possession whichever is earlier. [Page 18 of complaint]	31.12.2019  [Note: - 6month grace period is not allowed]
15.	Delay in handing over possession till the date of order i.e., 18.08.2021	1 year, 7 months, 18 days

## B. Facts of the complaint

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

I. That, the complainant was approached by the respondent no. 1, and he was looking for a property to invest in and the complainant was suggested by the respondent that the complainant should invest in one of their projects namely "Officer's Enclave (Hill Crest)" in

“Hill Town” situated at Sector-2, Sohna Road, Gurgaon, Haryana-122103 which comes under the subvention scheme

- II. That the complainant on the words and assurance of the respondent no.1, booked a residential floor/apartment bearing no. **R1450N378C/FLAT # N378C** in the Integrated residential colony/project named “**Officer’s Enclave (Hill Crest)**” in “**Hill Town**” situated at Sector-2, Sohna Road, Gurugram, Haryana-122103 and an allotment letter was issued by the respondent no.1 in the name of the complainant dated 13.04.2018.
- III. That a Memorandum of Understanding (MOU) was also made, agreed, and executed at the Noida office of the respondent no.1 dated 13.04.2018 between the respondent no.1 and the complainant stating that the tenure of the subvention scheme as approved by the PNB Housing Finance Limited is 21 Months and the developer is expected to deliver the possession of the booked unit to the buyer within the stipulated period of time. However, if due to any reason the possession of the booked unit gets delayed, then the developer undertakes to pay the pre-EMI’s only to the buyer even after 21 months. It is also pertinent to mention that payment of the pre-EMI’s shall continue till offer of the possession with regard to the booked flat/unit is issued to the buyer.

- IV. That the tri-partite agreement has been duly signed by and between the complainant and the respondents and it was portrayed that the loan was under the subvention scheme wherein the respondent no. 1 was responsible to pay Emi till the delivery of the possession.
- V. That respondent No. 1 has failed to pay the EMI's, respondent No. 2 started harassing the complainant to make the payment towards the EMI's wherein it was mentioned in the tri-partite agreement that the respondent no.1 was solely responsible to pay the Emi till the delivery of the possession which caused mental and physical harassment to the complainant.
- VI. That, the respondent no. 1 and 2 since the beginning had a malafide intention of causing financial loss and mental anguish to the complainant wherein the subvention scheme was a trap to convince the complainant to invest in the said residential flat to dupe the hard-earned money and tarnish the well-maintained reputation of the complainant.
- VII. That, the complainant has no other efficacious remedy with her but to file the present complaint against the respondent. That the conduct of the respondent is nothing but unfair trade practices. That, the respondent is not only guilty of deficiency in services by not fulfilling their promises under the contractual relationship with the complainant but also for mental torture and

harassment to the complainant by unnecessarily misguiding and delaying.

**C. Relief sought by the complainant**

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

(i) It is prayed that the respondent may very kindly be directed to handover the actual possession of the floor/apartment bearing no. R1450N378C/FLAT # N378C in the Officer's Enclave (Hill Crest)" in "Hill Town" situated at Sector-2, Sohna Road, Gurugram, Haryana-122103 along with the all the rights, title and interests without any delay or default in terms with the builder buyer agreement.

(ii) That, the respondent no.1 may very kindly be directed to pay the delayed possession charges as per the RERA Act in the name of the complainant for the property situated at "Hill Town" situated at Sector-2, Sohna Road, Gurugram, Haryana-122103, till the delivery of the actual, physical and vacant 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 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 R1450N378C/flat #N378C in the officer's enclave (hill crest) in hill town for total consideration of Rs.52,36,254/-.
- 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 13.04.2018. 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 Dec 2019, with an additional grace period of 6 months. , i.e. June 2020.
- 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 have booked their apartment under any special scheme such 'no Emi till offer of possession, under a subvention scheme.' Further it was also categorically stipulated that any delay in offering possession due 'force majeure' conditions would be excluded from the aforesaid possession period and as per clause 29 of agreement possession of the apartment would only be given to the allottees after payment of all dues.
- IV. That in interregnum, the pandemic of covid-19 has 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 authority vide registration no. 258 of 2017 dated 03.10.2017 and the completion date as per the said registration is 02.10.2020;
- 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 delay in construction was on account of reasons that cannot be attributed to it. It is most pertinent to state that the flat buyer agreement provides that in case the developer/respondent delays in delivery of unit for reasons not attributable to the developer/respondent, then the developer/respondent shall be entitled to proportionate extension of time for completion of the said project. The relevant clause which relates to the time for completion, offering possession extension to the said period are "clause 26 under the heading "possession of



allotted floor/apartment” of the “allotment agreement”.

The respondent seeks to rely on the relevant clause of the agreement at the time of arguments.

VIII. That 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.

IX. That the timeline stipulated under the flat buyer agreement was only tentative, subject to force majeure reasons which are beyond the control of the respondent. The respondent in an endeavor to finish the construction within the stipulated time, had from time to time obtained various licenses, approvals, sanctions, permits including extensions, as and when required. Evidently, the respondent had availed all the licenses and permits in time before starting the construction.

X. That apart from the defaults on the part of the allottee, like the complainant herein, the delay in completion of project was on account of the following reasons /circumstances that were above and beyond the control of the respondent:

- shortage of labour/ workforce in the real estate market as the available labour had to return to their respective states due to guaranteed employment by

the Central/ State Government under NREGA and JNNURM Schemes.

➤ that such acute shortage of labour, water and other raw materials or the additional permits, licenses, sanctions by different departments were not in control of the respondent and were not at all foreseeable at the time of launching of the project and commencement of construction of the complex. The respondent cannot be held solely responsible for things that are not in control of the respondent.

XI. That 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 the respondent may be granted reasonable extension in terms of the allotment letter.

- XII. That it was public knowledge, and several courts and quasi-judicial forums have taken cognisance of the devastating impact of the demonetisation of the Indian economy, on the real estate sector. The real estate sector is highly dependent on cash flow, especially with respect to payments made to labourers and contractors. The advent of demonetisation led to systemic operational hindrances in the real estate sector, whereby the respondent could not effectively undertake construction of the project for a period of 4-6 months. Unfortunately, the real estate sector is still reeling from the aftereffects of demonetisation, which caused a delay in the completion of the project. The said delay would be well within the definition of 'Force Majeure', thereby extending the time period for completion of the project.
- XIII. That the complainant has not come with clean hands before this authority and has suppressed the true and material facts from this hon'ble forum. 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 he has cited 'financial incapacity' as a reason, to seek a refund of the monies paid by him for the apartment. In view thereof, this complaint is liable to be dismissed at the threshold.
- XIV. That 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.

- XV. That the enactment of Real Estate (Regulation and Development) Act, 2016 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 market sector. The main intension of the respondent is just to complect the project within stipulated time submitted before the HARERA authority. According to the terms of the builder buyer 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.

XVI. 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.

XVII. That compounding all these extraneous considerations, the ***Hon'ble Supreme Court vide order dated 04.11.2019***, imposed a blanket stay on all construction activity in the Delhi- NCR region. It would be apposite to note that the 'Hill Crest/Officers Enclave' project of the respondent was under the ambit of the stay order, and accordingly, there was next to no construction activity for a considerable period. It is pertinent to note that similar stay orders have been passed during winter period in the preceding years as well, i.e., 2017-2018 and 2018-2019. Further, a complete ban on construction activity at site invariably results in a long-term halt in construction activities. As with a complete ban the concerned labour was let off and they traveled to their

native villages or look for work in other states, the resumption of work at site became a slow process and a steady pace of construction as realized after long period of time.

XVIII. 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 were 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. It is most humbly submitted 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 contested the complaint on the following grounds. The submissions made therein, in brief are as under: -

- i. That the PNB Housing Private Limited is one of the largest housing finance company duly registered with the National Housing Bank and is law abiding listed public company, primarily engaged in the business of rendering home loan/finance facility, predominantly against the security of immovable properties.
- ii. That a conjoint regarding of the provisions of the above sections of the entire scheme of Act shows that the authority is entrusted with the function to ensure the compliance of the obligation of promoter, real estate agents and allottee in the overall promotion of real estate industry and is adequately empowered to issue directions to promoter, real estate agents and allottee and to no other person. Further it is also clear that it lacks the jurisdiction to issue any directions or orders to any other person or entity, who or which is not a promoter, real estate agent or allottee.
- iii. That the promoter M/s Supertech Limited (respondent no. 1) in respect of the apartment/unit described in the

project "Officer Enclave (Hill Crest)" ibid for failure on the part of the promoter to deliver the unit within the prescribed time limit. The complainants had prayed for the possession of the unit.

- iv. That the complainant had booked a unit in the project of the respondent no. 1 of its own volition. As the complainant was falling short of finance for purchase of the unit, the complainant approached the respondent for loan, which after necessary assessment was duly sanctioned of an amount of Rs.45,55,000/- vide Loan Agreement dated 09.04.2018.
- v. That the respondent No.1 was granting an interest subvention on the loan availed by the complainant. The complainant, under the subvention scheme, was to receive the *pre-EMI* from the builder/promoter until possession of the unit was delivered/certain months. The complainant by their own volition opted for the subvention scheme being offered by the respondent no.1. That the complainant had duly read all the terms and conditions of the subvention scheme and agreed to the same and thereby the respondent no. 1 and the complainant approached the applicant, in furtherance to



which the tripartite agreement dated 13.04.2018 was entered in terms with the loan agreement.

- vi. That the complainant had booked a unit in respect of the respondent no. 1. As the complainant was falling short of finance for purchase of the unit, the complainants approached the answering respondent for loan, which after necessary assessment was duly sanctioned. However, as the respondent no. 1 was granting an interest subvention on the loan available whereunder the complainants will receive the Pre-EMI from the builder/promoter until possession of the unit was delivered/certain months. The complainants by their own volition opted for the subvention scheme being offered by the respondent no. 1. It is further submitted that the complainants had duly read all the terms and conditions of the subvention scheme and agreed to the same and the respondent no. 1 and the complainants approached the applicants, in furtherance to which the tripartite agreement was entered into, subject to terms and condition of the loan agreement.
- vii. That the complainant with their free consent had approached the answering respondent to avail loan facility in order to get financial assistance to purchase

the unit/ apartment in the project under the loan agreement read with the tripartite agreement, it is clear evident that it is the duty of the borrower/complainants to pay the dues EMIs to the respective loan amount.

- viii. That the respondent no. 2 is a financial institution and had advance a loan facility to the complainants for purchase of a unit/apartment after being approached by the complainants for the mentioned intention and on the representation made by the complainants that the builder/promoter (respondent no. 1) is of their choice and that they have satisfied themselves with regard to integrity, capability of the builder for quality construction and the builder's ability and efficiency in timely completion and delivery of the project.
- ix. That the complainants are bound by the terms and conditions of the loan agreement executed with the respondent no. 2 and the tripartite agreement dated 13.04.2018 entered into between the complainants and the respondents.
- x. That the perusal of the actual factual scenario and in the facts and circumstances of the instant complaint, it is evident that the complainant had wilfully agreed to the terms and conditions of the agreements and now at a

belated stage are attempting to wriggle out of their obligations towards the respondent by filing the instant complaint before the authority.

**E. Jurisdiction of the authority**

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

**F. Findings on the objections raised by the respondent**

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

9. From the bare reading of the possession clause of the buyer developer agreement, it becomes very clear that the possession of the apartment was to be delivered by **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 titled as M/S HALLIBURTON OFFSHORE SERVICES INC VS VEDANTA LIMITED & ANR. 29.05.2020* 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 complainant/allottee by the promised /committed time. The lockdown due to pandemic- 19 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 the 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.

**F.II. 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, he 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 observed that the respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if the promoter contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the apartment buyer's agreement, it is revealed that the complainants are buyer and they have paid total price of **Rs.50,39,189/-** to the promoter towards purchase of an apartment in the project of the promoter. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

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

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

**G. Findings on the relief sought by the complainant:**

**Relief sought by the complainant:** (a). To hand over the actual possession of the apartment and to pay the delayed possession charges as per the Act;

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

***"Section 18: - Return of amount and compensation***

*18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building, —*

.....

*Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."*

12. Clause L (26) of the allotment letter cum buyer's agreement (in short, agreement) provides for handing over of possession and is reproduced below: -

**L.POSSESSION OF ALLOTTED UNIT FLOOR /APARTMENT**

**"26.** The possession of the allotted floor/apartment shall be given by DEC 2019 subject to force majeure conditions with an extended grace period of 6 months. The Developers also agrees to compensate the allottee(s) @ Rs. 5.00/- (Five rupees only) per Sq. ft. of area of the floor/Apartment per month for any delay in handing over of possession of the Floor/Apartment beyond the given promised period plus the grace period of 6 months and upto the Offer Letter to possession or actual physical possession whichever is earlier."

13. The authority has gone through the possession clause of the agreement and observed that this is a matter very rare in

nature where builder has specifically mentioned the date of handing over possession rather than specifying period from some specific happening of an event such as signing of buyer developer agreement, commencement of construction, approval of building plan etc. This is a welcome step, and the authority appreciates such firm commitment by the promoter regarding handing over of possession but subject to observations of the authority given below.

14. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to force majeure condition and 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 buyer developer agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

15. **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 13.04.2018. 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.

16. **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.*

17. 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.
18. 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.

19. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., **18.08.2021** is 7.30%. Accordingly, the

prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

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

*"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.*

*Explanation. —For the purpose of this clause—*

- (i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*
- (ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"*

21. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., **9.30%** by the respondent/promoter which is the same as is being granted to the complainant in case of delayed possession charges.
22. 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 13.04.2018, 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 complainant as per the terms and conditions of the buyer's agreement dated 13.04.2018 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 allottee.

23. 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.

#### **H. Directions of the authority**

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

- i. The respondent is directed to pay interest at the prescribed rate of 9.30% p.a. for every month of delay from the due date of possession i.e. 31.12.2019 till the handing over of possession of the allotted unit;
- ii. The complainant is 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 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 10<sup>th</sup> of the subsequent month as per rule 16(2) of the rules;

- iv. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delayed possession charges as per section 2(z a) of the Act.
- v. The respondent shall not charge anything from the complainant which is not the part of the allotment letter. The respondent is not entitled to claim holding charges from the complainant/allottee at any point of time even after being part of buyer's agreement as per law settled by hon'ble Supreme Court in civil appeal no. 3864-3889/2020 decided on 14.12.2020.

25. Complaint stands disposed of.
26. File be consigned to registry.

**(Samir Kumar)**

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 18.08.2021

Judgement uploaded on 24.10.2021

**(Vijay Kumar Goyal)**

Member