BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 4923 of 2020
First date of hearing : 09.03.2021
Date of decision : 18.08.2021

1. Mrs. Neelam Rathour
2. Mr. Vinit Pratap Singh
Both RR/o: - Flat No. C-104, BPTP Park, Serene, Sector-37D, Gurugram- 122001 **Complainants**

Versus

M/s Supertech Limited.
Office at: B-28 & 29, Sector-58, Noida, Uttar Pradesh- 201301 **Respondent**

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

APPEARANCE:
Sh. Vinit Pratap Singh Husband of the complainant
Sh. Bhrigu Dhami Advocate for the respondent

ORDER

1. The present complaint dated 12.01.2021 has been filed by the complainants/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is *inter alia* prescribed that the promoter shall be responsible for all obligations, responsibilities and functions 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 complainants, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S.No.	Heads	Information
1.	Project name and location	"Hill Town", Sector 2, Sohna Road, Gurugram.
2.	Project area	18.37 acres [as per RERA registration]
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. 258 of 2017 dated 03.10.2017**
7.	RERA registration valid up to	02.10.2020
8.	Unit no.	L13D, 4th floor, tower/block- L13 [Page no. 32 of complaint]
9.	Unit measuring	1720 sq. ft. [super area]

10.	Date of execution of allotment letter	13.07.2018 [Page no. 31 of complaint]
11.	Payment plan	Special payment plan. [Page no. 32 of complaint]
12.	Total consideration	Rs.57,73,040 /- [as per payment plan page no. 32 of complaint]
13.	Total amount paid by the complainant	Rs.24,51,922 /- [as per receipt information page no. 57 of complaint]
14.	Due date of delivery of possession as per clause L (26) of the allotment letter: by December 2019 plus 6 months grace period. [Page 40 of complaint]	31.12.2019 [Note: - 6 month 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 and 18 days

B. Facts of the complaint

3. The complainants have made the following submissions in the complaint: -

I. That the real estate project named "Officer's Enclave (Hill Crest)" in Hill Town project, which is the subject matter of present complaint, is situated at sector-2, Sohna road, District Gurugram, with licence No. 124 of 2014 dated 23.08.2014 and drawing/memo No. ZP-1057-A/AD(RA)/2015/1470 dated 23.01.2015, therefore, the authority does have the jurisdiction to try and decide the present complaint. That the subject

matter of the present complaint is with respect to direct the respondent to handover the possession of the booked flat; therefore, it falls within the provisions of The Real Estate (Regulation & Development) Act, 2016 and The Haryana Real Estate (Regulation & Development) Rules, 2017.

II. The respondent had advertised itself as a very ethical business group that lives onto its commitments in delivering its housing projects as per promised quality standards and agreed timelines. That the respondent while launching and advertising any new housing project always commits and promises to the targeted consumer that their dream home will be completed and delivered to them within the time agreed initially in the agreement while selling the dwelling unit to them. They also assured to the consumers like complainants that they have secured all the necessary sanctions and approvals from the appropriate government authorities for the construction and completion of the real estate project advertised and sold by them to the consumers in general.

III. The respondent was very well aware of the fact that in today's scenario looking at the status of the construction of housing projects in India, especially in NCR, the key

factor to sell any dwelling unit is the delivery of completed house within the agreed and promised timelines and that is the prime factor which a consumer would consider while purchasing his/her dream home. Respondent, therefore, used this tool, which is directly connected to emotions of gullible consumers, in its marketing plan and always represented and warranted to the consumers that their dream home will be delivered within the agreed timelines and consumer will not go through the hardship of paying rent along-with the installments of home loan like in the case of other apartments in market.

IV. That in the month of February 2017, the respondent through its marketing executives and advertisement through various medium and means approached the complainant with an offer to invest and buy an apartment in the proposed project of respondent, which the respondent was going to launch the project namely "Hill Town" in the plotted residential colony situated in sector 2, Sohna, District Gurugram. The respondent represented to the complainant that the respondent is a very ethical business house in the field of construction of residential and commercial project and in case the

complainant would invest in the project of respondent then they would deliver the possession of proposed apartment on the assured delivery date as per the best quality assured by the respondent. The respondent had further assured to the complainant that the respondent has already secured all the necessary sanctions and approvals from the appropriate and concerned government authorities for the development and completion of said project on time with the promised quality and specification. The respondent had also shown the brochures and advertisement material of the said project to the complainant given by the respondent and assured that the allotment letter and apartment buyer agreement for the said project would be issued to the complainant within one week of booking to be made by the complainant. The complainant while relying on the representations and warranties of the respondent and believing those to be true had agreed to the proposal of the respondent to book the residential apartment in the project of respondent.

V. That relying upon those assurances and believing them to be true, the complainant booked a residential floor/apartment bearing no. R14500L13D/flat # L13D

on 4th Floor, admeasuring 1720 sq. ft., super area having basic sales price (BSP) Rs.57,73,040/- in the proposed project of the respondent on 06.11.2017 in the township to be developed by respondent vide customer ID-1113526. It was assured and represented to the complainant by the respondent that it had already taken the required necessary approvals and sanctions from the concerned authorities and departments to develop and complete the proposed project on the time as assured by the respondent. Accordingly the complainant had paid Rs.5,77,304/-, through cheque, and the same was received by the respondent towards the booking amount of the said unit and receipt thereof was issued by the respondent as booking amount.

VI. That the respondent assured the complainants that it would issue the allotment letter at the earliest and maximum within one week, the complainants will get the allotment as a confirmation of the allotment of said residential apartment in their names. However, the respondent in utter contravention of its own terms, despite repeated requests and reminders of the complainants to issue the allotment letter, the

respondent issued an allotment letter-cum-builder buyer agreement on 13.07.2018.

VII. That price of the said apartment was agreed at the basic sale price of Rs.56,23,071/- along with the other charges as mentioned in the said allotment letter. At the time of execution of the said allotment letter, it was agreed and promised by the respondent that there shall be no change, amendment or variation or modification in the area or sale price of the said apartment from the area or the price committed, assured, and promised by the respondent in the said application form or agreed otherwise.

VIII. That while executing the allotment letter in favour of the complainants giving them assurance that the possession of the allotted floor/apartment shall be given by the respondent to the complainant within the stipulated time period as given in the allotment letter cum-builder buyer's agreement. That the complainants had chosen the payment plan 40:60, as the complainants were required to pay the 40% of the sale consideration as per the demand of the respondent, whereas, remaining 60% amount out of consideration was agreed to be paid by the complainants at the time of handing over the

possession of the dwelling unit to the complainants. The respondent started raising the demand of money/installments from the complainants, which was duly paid and satisfied by the complainants as per agreed timelines. The complainants have paid made his part of payment, which workout to Rs.24,52,922/- to the respondent as on 27.07.2018.

IX. That the respondent assured and promised the complainants to handover the possession of the dwelling unit by December 2019 with a grace period of 6 months. Meaning to say that the respondent was under legal obligation to handover the possession of the dwelling flat to the complainants by May 2020.

X. The complainants routinely inquiring about the states of the project on phone and by visiting the office but every time new excuses were given and till date there is no sign of project on the earth. That the complainants also communicated to the respondent not limited up-to telephone, email and personal approach. In the correspondence made by the complainants to the respondent through E-mail, and in those E-mails, the respondent had categorically told to the complainants that the respondent would deliver the dwelling unit to

the complainants March 2021. It is paramount important to mention here that the assurance and promise given by the respondent are also fake and vague, because there is no sign of construction, and it is impossible for the respondent to handover the possession of the dwelling unit to the complainants within stipulated time period.

XI. That the complainants thereafter had tried their level best to reach the representatives of the respondent to seek a satisfactory reply in respect of the said apartment but all in vain. The complainants had requested the respondent to deliver their apartment citing the extreme financial and mental pressure they were going through, but the respondent never cared to listen to their grievances and left them with the suffering and pain on account of its default and negligence.

XII. That due to the failure on part of respondent to deliver the said flat on time as agreed in the builder buyer agreement and consequently in the E-mails, the complainants were constrained to stay in the rented accommodation by paying monthly rent. The complainants have therefore been paying Rs.20,000/- as rentals per month for the rented accommodation for the period of delay i.e. 13 months from December 2019 to

December 2020. The complainants were constrained to pay the aforesaid rental amount solely due to the deficiency in services and negligence on part of respondent in delivering said unit within the timelines as agreed in the flat buyer's agreement. The complainants have suffered this monetary loss just because of the unfair trade practices adopted by the respondent in their business practices with respect to the said flat.

XIII. The complainants further submitted that relying upon respondent representation and believing them to be true, the complainants were induced to pay Rs.24,52,922/- as sale consideration of the aforesaid apartment as on today.

XIV. The respondent is guilty of deficiency in service, unfair trade practice, giving incorrect and false statement while selling the said apartment to the complainants within the purview of the Act, 2016 and applicable rules. The complainants have suffered losses on account deficiency in service, unfair trade practice, giving incorrect and false statement. As such the respondent is fully liable to pay/reimburse the payment claimed by the complainants by returning their entire investment

along-with the applicable interest along-with the compensation and damages for the losses incurred by the complainants due to the wrongful and fraudulent acts of the respondent. The cause of action accrued in favour of the complainants and against the respondent on 06.11.2017, when the complainants had booked the said apartment and it further arose when respondent failed/neglected to deliver the said apartment. The cause of action is continuing and is still subsisting on day-to-day basis.

C. Relief sought by the complainants:

4. The complainants have sought following relief(s):

(i) To pass an order to direct the respondent to handover the possession of the said flat to the complainant;

(ii) To pass an order to direct the respondent to pay an amount of Rs.2,60,000/- to the complainant, being paid by her towards rent on account of non-delivery of possession of the said flat within stipulated time period.

(iii) To pass an order to pay the penalty of Rs.1,11,800/- to the complainant on account of delay in delivering possession of the flat.

5. On the date of hearing, the authority explained to the respondent/promoter about the contravention as alleged to

have been committed in relation to section 11(4)(a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent

6. The respondent 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. R14500L13D/flat#L13D having a super area of 1720 sq. ft. (approx.) for a total consideration of Rs.57,73,040/- vide a booking form dated 06.11.2017.

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 13.07.2018. Thereafter, further submitted that as per Clause 26 of the terms and conditions of the agreement, the possession of the apartment was to be given by December 2019 with an additional grace period of 6 months.

III. That as per clause 23 of the agreement, compensation for delay in giving possession of the apartment would not be given to allottee akin to the complainant who has booked their apartment under any special scheme such as 'No EMI till offer of possession, under a subvention scheme.' Further, it was also categorically stipulated that

any delay in offering possession due to 'Force Majeure' conditions would be excluded from the aforesaid possession period.

IV. That 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. 258 of 2017 dated 03.10.2017 and the completion date as per the said registration is December 2020;

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

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 provide 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. 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 the respondent for completion of the project is not a delay on account of the respondent for completion of the project.

IX. That the present agreement, the time stipulated for delivering the possession of the unit was on or before December 2019. However, the buyer's agreements duly

provide for extension period of 6 months over and above the said date. Thus, the possession in strict terms of the buyer's agreement was to be handed over in and around June 2020. It is a known fact that the delivery of a project is a dynamic process and heavily dependent on various circumstances and contingencies. In the present case also, the respondent had endeavoured to deliver the property within the stipulated time. The respondent earnestly has endeavoured to deliver the properties within the stipulated period but for reasons stated in the present reply could not complete the same.

X. 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;

XI. 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.

XII. 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.

XIII. It is 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.

XIV. That the complainant has not come with clean hands before this hon'ble form and have 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.

XV. 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.

XVI. 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.

XVII. 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.

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

XIX. 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.

XX. 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. 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 Nation, which is beyond the control of respondent.

XXI. The respondent has 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, end 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.

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

E. Jurisdiction of the authority

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 complainant 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 title 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. It is clearly mentioned by the respondent/promoter for the same project, in complaint no. 2815 of 2020 (on page no. 37 of the reply) that only 45% 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- 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 complete upto 45% 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 complainants being an investor.

10. The respondent has taken a stand that the complainants are the investors and not consumers, therefore, they are not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority observed that the respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if the promoter

contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the apartment buyer's agreement, it is revealed that the complainants are buyer and they have paid total price of **Rs.24,51,922/-** to the promoter towards purchase of an apartment in the project of the promoter. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

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

In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment buyer's agreement executed between promoter and complainants, it is crystal clear that the complainants are allottee(s) as the subject unit was allotted to them by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no.

0006000000010557 titled as ***M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr.*** has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottees being investors is not entitled to protection of this Act also stands rejected.

G. Findings of the authority on the relief sought by the complainant:

Relief sought by the complainant: (a). To pass an order to direct the respondent to pay an amount of Rs.2,60,000/- to the complainant, being paid by her towards rent on account of non-delivery of possession of the said flat within stipulated time period.

11. The complainant is claiming compensation in the present relief. The authority is of the view that it is important to understand that the Act has clearly provided interest and compensation as separate entitlement/rights which the allottee can claim. For claiming compensation under sections 12, 14, 18 and section 19 of the Act, the complainant may file a separate complaint before adjudicating officer under section 31 read with section 71 and rule 29 of the rules. For adjudging the quantum of compensation, the adjudicating officer shall have due regard to the factors mentioned in section 72.

(b). To pass an order to pay the penalty of Rs.1,11,80/- to the complainant on account of delay in delivering possession of the apartment as per the terms of the agreement.

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

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

13. Clause L (26) of the allotment letter provides for handing over of possession and is reproduced below: -

> ***"L. POSSESSION OF ALLOTTED FLOOR/APARTMENT: -***
>
> *26. The possession of the allotted floor/apartment shall be given by **DEC, 2018** 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."*

14. The authority has gone through the possession clause of the agreement and observed that this is a matter very rare in nature where builder has specifically mentioned the date of handing over possession rather than specifying period from some specific happening of an event such as offer letter of possession or actual physical possession whichever is earlier.

This is a welcome step, and the authority appreciates such firm commitment by the promoter regarding handing over of possession but subject to observations of the authority given below.

15. 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 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.

16. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the floor/apartment by December 2019. The allotment letter cum buyer's agreement was executed on 13.07.2018. 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. Moreover, the respondent in his reply has himself submitted that the said project is only 42% completed. 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

17. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are 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.*

18. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.

19. Taking the case from another angle, the complainant-allottee was entitled to the delayed possession charges/interest only at the rate of Rs.5/- per sq. ft. per month as per relevant clauses of the allotment letter 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 allotment letter entered into between the parties are one-sided, unfair and unreasonable with respect to the grant of interest for delayed possession. There are various other clauses in the buyer's agreement which give sweeping powers to the promoter to cancel the allotment and forfeit the amount paid. Thus, the terms and conditions of the buyer's agreement are ex-facie one-sided, unfair, and unreasonable, and the same shall constitute the unfair trade practice on the part of the promoter. These types of discriminatory terms and conditions of the buyer's agreement will not be final and binding.

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

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

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

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

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

23. 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 agreement executed between the parties on 13.07.2018, 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 13.07.2018 executed between the parties. Further no OC/part OC has been granted to the project. Hence, this project is to be treated as on-going project and the provisions of the Act shall be applicable equally to the builder as well as allottees.

24. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the

complainants are entitled to delay possession charges at rate of the prescribed interest @ 930% 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

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

i. The respondent is directed to pay interest at the prescribed rate of 9.30% p.a. for every month of delay from the due date of possession i.e. 31.12.2019 till the handing over of possession of the allotted unit though a valid offer of possession after obtaining the occupation certificate from the competent authority;

ii. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period;

iii. The arrears of such interest accrued from 31.12.2019 till the date of order by the authority shall be paid by the promoter to the allottees within a period of 90 days from date of this order and interest for every month of delay shall be paid by the promoter to the allottees

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

iv. The rate of interest chargeable from the allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

v. The respondent shall not charge anything from the complainants which is not the part of the buyer developer agreement. The respondent is debarred from claiming holding charges from the complainants/ allottees 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. 3864-3899/2020 decided on 14.12.2020.

26. Complaint stands disposed of.

27. File be consigned to registry.

(Samir Kumar)
Member

(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 18.08.2021

Judgement uploaded on 29.10.2021