

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

Complaint no. : 3480 of 2020
First date of hearing : 12.01.2021
Date of decision : 25.08.2021

1. Alok Jain
 2. Shubhi Jain
- Both R/o** C 38, L.G.F., Panchsheel Enclave,
New Delhi

Complainants

Versus

1. M3M India Pvt. Ltd.
 2. Martial Buildcon Pvt. Ltd.
- Address:** - Office No. 1221A, Devika
Tower, 12th floor, 6, Nehru Place, New
Delhi-110019

Respondents

CORAM:

Shri Samir Kumar
Shri Vijay Kumar Goyal

**Member
Member**

APPEARANCE:

Shri Anshul Gupta
Ms. Shriya Takkar

Advocate for the complainants
Advocate for the respondents

ORDER

1. The present complaint dated 29.10.2020 has been filed by the complainants/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed

that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the rules and regulations made there under or to the allottees as per the agreement for sale executed inter se them.

A. Unit and project related details

2. The particulars of the project, the details of sale consideration, the amount paid by the complainants, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S.No.	Heads	Information
1.	Project name and location	M3M One-Key Resi-ments a part of the commercial complex, Urbana, Sector-67
2.	Project area	8.2125 acres
3.	Nature of the project	Commercial complex
4.	DTCP license no. and validity status	(1) 100 of 2010 dated 26.11.2010 valid upto 25.11.2022 (2) 101 of 2010 dated 26.11.2010 valid upto 25.11.2022 (3) 11 of 2011 dated 28.01.2011 valid upto 27.01.2023
5.	Name of licensee	Martial Buildcon Pvt. Ltd. and 2 others
6.	RERA Registered/ not registered	Registered vide no. 35 of 2019 dated 18.06.2019 valid upto 31.12.2021

		(Area of phase for registration 2.81875 acres)
7.	Unit no.	SB/SA/5L/05, 5th level
8.	Unit measuring	824.91 sq. ft.
9.	Date of provisional allotment letter	22.08.2014 (Page 56 of the complaint)
10.	Date of execution of Buyers Agreement	01.10.2014 (Page 65 of the complaint)
11.	Payment plan	Installment plan
12.	Total Sale consideration	Rs. 96,05,952/- (As per statement of account on page 117 of the complaint)
13.	Total amount paid by the complainants	Rs. 60,13,517/- (As per statement of account on page 117 of the complaint)
14.	Due date of delivery of possession as per clause 16.1- 36 months from the date of execution of this agreement plus 180 days grace period	01.10.2017 (Due date of possession is calculated from the date of execution of this agreement) [Note:- Grace period not allowed]
15.	Offer of possession	08.07.2020 (Page 118 of the complaint)
16.	Delay in handing over possession till 08.07.2020 i.e. date of offer of possession i.e. + 2 months (08.09.2020)	2 years 11 months 7 days
17.	Occupation Certificate received on	03.07.2020 (Page 120 of the complaint)

B. Facts of the complaint

3. The complainants have made the following submissions in the complaint:
- i. That based on various luring advertisements, assurances and promises of the opposite party, the complainants had, in July 2014, booked a commercial unit in the project named "M3M One-Key Resiments, M3M Urbana" of the respondents at sector 67 by making a payment of Rs. 5,00,000/- as booking amount. That the builder's buyer's agreement (hereinafter referred as BBA) executed on 01.10.2014. That the agreement contained various one-sided and arbitrary clauses, yet the complainants could not negotiate on any of the terms, since the opposite party had already collected significant amount of money from the complainants.
 - ii. That as per clause 16.1 of the BBA the respondents were supposed to complete the development/construction of the unit within 36 months of date of agreement with 6 months grace period i.e. 01st April 2018. That the complainants did not get offered the possession of the unit on this date. That the complainants had made a total payment of Rs. 60,13,517/- to the opposite party as on 08.07.2020 as per the payment plan even though possession was not offered on time. That the letter of

possession also shows that all the dues have been cleared by the complainants.

- iii. That the respondents sent a letter of possession dated 08.07.2020 including an unexplained electricity & other utility infrastructure & connection charge, Labour Cess, reimbursement of FTTH security deposit, service tax, Swachh Bharat cess & Krishi Kalyan cess, calculations of GST which were not mentioned anywhere in the agreement. That the letter of possession was also accompanied by a one-sided indemnity undertaking with M3M & a maintenance agency, to execute before possession wherein the respondents stands indemnified of any future claims including delayed compensation. That the complainants further sent an e-mail to the representatives dated 23.07.2020 stating that the respondents had via phone call had promised to look into the discrepancies in the letter of possession and further promised to provide the updated statement of accounts to no avail as no satisfactory response was ever provided by the respondents despite repeated requests.
- iv. That the complainants further sent e-mails dated 03.08.2020 and 07.08.2020 regarding the arbitrary demands raised in the letter of possession and also

regarding the absence of delay penalty compensation from the respondents and the lack of response to the legal notice dated 27.07.2020 to no avail as no response was ever provided despite repeated communications by the complainants. That the respondents issued the Pre-cancellation notice dated 12.08.2020 for the unit to the complainants stating that the pending payments are incomplete whereas it is the respondents who have not provided a response to the various communications and legal notice regarding the discrepancies in demands raised through the letter of possession nor have they adjusted the delay compensation due for the delay in offering possession. Therefore, this Pre-cancellation notice is not valid and cannot be enforced. That the complainants sent an e-mail dated 16.08.2020 to the respondents regarding the same but no response was provided.

- v. That the complainants sent a reply dated 07.09.2020 to the notice issued by the respondents suggesting arbitrators dated 31.08.2020 wherein the complainants have requested that an impartial and neutral party should be appointed as the arbitrator for the settlement of the disputes between the parties as per the mandate of

arbitration proceedings. The complainants further protested against the constant harassment and pressuring of the respondents which was continuously issuing cancellation notices despite the fact that the delay penalty amount has not been adjusted till date.

C. Relief sought by the complainants:

4. The complainants have filed the present complaint for seeking following relief:

(i) To direct the respondents to remove all unnecessary charges and provide immediate possession of the commercial unit to the complainants and pay a delay penalty @ 18% per annum on amount deposited by the complainants.

5. On the date of hearing, the authority explained to the respondents/promoters 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 has contested the complaint on the following grounds.

i. That the complainants have approached this hon'ble authority with unclean hands and have tried to mislead this hon'ble authority by making incorrect and false

avermments and stating untrue and/or incomplete facts and, as such, is guilty of *suppressio very suggestion falsi*. The complainants have suppressed and/or mis-stated the facts and, as such, the complaint apart from being wholly misconceived is rather the abuse of the process of law. On this short ground alone, the complaint is liable to be dismissed.

- ii. The respondent provisionally allotted the unit bearing no. "SB/SA/5L/05" in favour of the complainants vide provisional allotment letter dated 22.08.2014. It is submitted that the cost of the commercial unit was Rs. 87,68,898/- exclusive of IFMS and other charges. The complainants as per their own decision and after fully understanding their obligations opted for the construction linked payment plan. The buyer's agreement was executed between the parties on 01.10.2014. It is pertinent to mention that the buyer's agreement duly covers all the liabilities and rights of both the parties. That all the demands were raised as per the payment plan opted by the complainant on the achievement of the

relevant construction milestone. That the present construction and development of the present segment/ phase was completed within the agreed time limit and the respondent applied to the competent authority for the grant of occupancy certificate on 12.05.2017 after complying with all the requisite formalities.

- iii. That the respondent pursuant to a definitive agreement with M/s. Martial Buildcon Pvt. Ltd undertook the development on 11.375 Acres is being undertaken through M3M India Pvt. Ltd. in various phases and a commercial complex under the name and style of 'M3M Urbana' and another commercial complex under the name and style of 'M3M Urbana Premium'. That it would also be pertinent to state here that the said commercial complex on land admeasuring 8.2125 acres consists of 9 Nos. of blocks/towers and after the completion of the construction and development of block/tower Nos. 1 (G+6), No. 2 (G+1), No. 3 (G+2), No. 4 (G+2), No. 5 (G+6), No. 6 (G+2), No. 9 (G+1) with two level basements application for the grant of occupancy

certificate for the said developments was made to the competent authority. That upon completion of construction, the occupation certificate was grant/ issued by competent authority in respect of block/tower nos. 1 (G+6), No. 2 (G+1), No. 3 (G+2), No. 4 (G+2), No. 5 (G+6), No. 6 (G+2), No. 9 (G+1) with two level Basements vide memo ZP-693/SD(BS)/2017/3590 dated 23.02.2017.

- iv. That pursuant to the said application there were no deficiency(ies) communicated by the competent authority i.e. DTCP, however despite, all compliances having been made the occupation certificate so applied for and requested for was not granted/received. That occupation certificate as stated hereinabove with respect to certain towers [i.e. block/tower Nos. 7 (G+16) & 8 (G+1) and part of block/tower No. 2 (2nd floor)] had already been applied for, which also includes the unit of the complainants, as the said block/towers were completely constructed and ready for possession and can be put to use/occupied. That the matter for grant of occupation certificate was followed up from time to time at various levels in the

office of competent authority i.e. DTCP and since no action was forthcoming, a civil writ petition bearing No. CWP No. 23839 of 2018 titled as: **Martial Buildcon Pvt. Ltd. vs. State of Haryana and Ors.** was filed in the hon'ble high court for the states of punjab and Haryana on the grounds as stated therein. Further, some of the allottees having learnt and having assessed the state of development of the blocks/towers wherein the respective units were situated and on being satisfied that the same was ready for possession and in an habitable condition, were constrained to approach the hon'ble high court for the states of Punjab and Haryana by filing a writ petition being CWP No. 6801 of 2019 titled as **Varinder Pal Singh and others Vs. state of Haryana** and others, inter alia, praying for issuance of appropriate direction to state of Haryana to consider the case of the allottees for grant of occupation certificate, possession certificate and other statutory permissions, as may be required, on the same pattern as has been considered and granted to other similarly placed colonies in terms of order dated June 17,

2016 passed in CWP No. 10770 of 2016: **M/s R P Estates Pvt. Ltd. Vs State of Haryana And ors.** and order dated March 23, 2017, passed in CWP No. 20902 of 2016: **Frontier home developers Pvt. Ltd. Vs. State of Haryana and Ors.** by the hon'ble high court.

- v. That both the civil writ petitions bearing Nos. CWP No. 23839 of 2018 and CWP no.6801 of 2019 have been decided by the hon'ble high court vide order dated May 29, 2019 whereby the state authorities were directed to grant the occupancy certificates as expeditiously as possible, preferably within a period of 6 weeks from the date of receipt of the certified copy of the order.
- vi. It needs to be highlighted here that the applicant/respondent suffered a state of complete helplessness at the hands of the statutory authorities, who despite the construction having been completed in all respects, without any shortcoming whatsoever in the construction, failed to grant the occupation certificate in compliance of their statutory duties. The said fact that there were no shortcomings/infirmity in the application

for grant of the OC is apparent from the OC dated 03.07.2020, released for Tower 7 and 8. That the OC was also delayed due to national lockdown announced by the government of India due to COVID 19 pandemic on 24.03.2020 to be effective from the following day. That this delay of the competent authorities in granting the OC cannot be attributed in considering the delay in delivering the possession of the flat, since on the day the answering respondent applied for OC, the flat was complete in all respects. That immediately after the receipt of the occupation certificate on 03.07.2020, the respondent company sent the offer of possession dated 11.07.2020 to the complainants herein.

- vii. That the buyer's agreement was entered into between the parties and, as such, the parties are bound by the terms and conditions mentioned in the said agreement. The said agreement was duly signed by complainants after properly understanding each and every clause contained in the agreement. The complainants were neither forced nor influenced by the opposite parties to

sign the said agreement. it was complainants who after understanding the clauses signed the said agreement in his complete senses. That it is trite law that the terms of the agreement are binding between the parties.

viii. That in accordance with clause 16.1 of the buyer's agreement possession of the unit was agreed to be handed over within a period of 36 months from the date of execution of the buyer's agreement, plus 180 days grace period. The construction of the project was affected on account of unforeseen circumstances beyond the control of the respondent. In the year, 2012 on the directions of the hon'ble supreme court of India, the mining activities of minor minerals (which includes sand) was regulated. The hon'ble supreme court directed framing of modern mineral concession rules. Reference in this regard may be had to the judgment of "*Deepak Kumar v. State of Haryana, (2012) 4 SCC 629*". The competent authorities took substantial time in framing the rules and in the process the availability of building materials including sand which was an important raw

material for development of the said project became scarce. Further, the respondent was faced with certain other force majeure events including but not limited to non-availability of raw material due to various orders of hon'ble Punjab & Haryana High Court and National Green Tribunal thereby regulating the mining activities, brick kilns, regulation of the construction and development activities by the judicial authorities in NCR on account of the environmental conditions, restrictions on usage of water, etc.

- ix. Despite force majeure conditions the respondent has completed the construction of the construction within the agreed time limit and occupancy permission from the competent authority was duly applied for on 12.05.2017. That despite all compliances from the side of the respondent, the OC was not being released by the authorities until 03.07.2020. It is submitted that the delay in grant of occupation certificate by the competent authority is beyond the control of the respondent and the same is squarely covered under clause 16.4 of the buyer

agreement. It is submitted that the under clause 16.4, parties have agreed that if the delay is on account of force majeure conditions, the time for delivery of possession will be appropriately extended beyond the grace period.

- x. Further the parties have agreed in clause 16.6 that in in the event of delay for reason other than 'force majeure', the allottee shall be entitled to compensation of equal to simple interest @ 9% per annum on the amounts paid by the allottee, which shall be adjusted at the time of handing over of possession/execution of conveyance deed subject to the allottee not being in default under any of the terms of the agreement. Thus, the delay compensation, if any, to be remitted/credited to the complainants can only be until the date on which the application for the OC was applied for. It is submitted that the complainants in the present case defaulted in making timely payments and thus are not entitled to any relief whatsoever.
- xi. That the complainants are not a consumer and an end user since they had booked the unit in question purely for commercial purpose as a speculative investor and to

make profits and gains. Further, the complainants have invested in many projects of different companies which prove that the complainants are not a consumer but only an investor. Thus, it is clear that the complainant has invested in the unit in question for commercial gains, i.e. to earn income by way of rent and/or re-sale of the property at an appreciated value and to earn premium thereon. Since the investment has been made for the aforesaid purpose, it is for commercial purpose and as such the complainants are not a consumer/end user. The complaint is liable to be dismissed on this ground alone. Under these circumstances, it is all the more necessary for the complainants, on whom the burden lies, to show how the complainants are a consumer.

- xii. The relationship of the complainants and the respondent is defined and decided by the buyer's agreement executed between both parties. It is submitted that a specific clause for referring disputes to arbitration is included in the said agreement vide clause 48 of the agreement which is extracted hereunder;

"48.1- Any dispute connected or arising out of this Agreement or touching upon or in relation to terms of this Agreement including the interpretation and validity of the terms thereof and the respective rights and obligations of the Parties hereto shall be resolved through the process of arbitration....."

Hence, both the parties are contractually bound by the above condition. In view of clause 47.1 of the agreement, the captioned complaint is barred. The complainants ought to have resorted to arbitration instead of having approached this hon'ble authority with the captioned complaint. It is respectfully submitted that in light of the arbitration clause in the agreement, this hon'ble authority does not have the jurisdiction to adjudicate upon the instant complaint and ought to dismiss the same. That vide the instant complaint, the complainants have sought for interest on delayed possession qua subject unit. It is stated that the dispute and differences, if any, between the parties involves various questions of facts and law. The issues raised by the complainants cannot be addressed before this hon'ble authority and the subject matter cannot be adjudicated without going into the facts of the case which requires elaborate evidence to be led and which cannot

be adjudicated upon under the summary jurisdiction of this hon'ble authority.

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

E. Jurisdiction of the authority

8. The authority observed that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I Territorial jurisdiction

9. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram District, therefore this authority has complete territorial jurisdiction to deal with the present complaint.

E.II Subject matter jurisdiction

10. The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as per provisions of section 11(4)(a) of the Act leaving aside

compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

F. Findings on the objections raised by the respondent:-

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

11. 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 respondents are 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 the 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 buyer's agreement, it is revealed that the complainants are buyers and they have paid

a total price of Rs. 60,13,517/- to the promoter towards purchase of a plot 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 promoters and complainants, it is crystal clear that the complainants are allottee(s) as the subject unit was allotted to them by the promoters. 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 are not entitled to protection of this Act also stands rejected.

F.II Objection regarding exclusion of time taken by the competent authority in processing the application and issuance of occupation certificate

12. As far as contention of the respondent with respect to the exclusion of time taken by the competent authority in processing the application and issuance of occupation certificate is concerned, the authority observed that the respondent had applied for grant of occupation certificate on 12.05.2017 and thereafter the occupation certificate has been granted by the competent authority under the prevailing law. The authority cannot be a silent spectator to the deficiency in the application submitted by the promoter for issuance of occupancy certificate. It is evident from the occupation certificate dated 03.07.2020 that an incomplete application for grant of OC was applied on 12.05.2017 as fire NOC from the competent authority was granted only on 02.07.2018 which is subsequent to the filing of application for occupation certificate. Also, the Chief Engineer-I, HSVP, Panchkula has submitted his requisite report in respect of the said project on 18.01.2018. The District Town Planner, Gurugram and Senior Town Planner, Gurugram has submitted requisite report about

this project on 26.03.2018 and 27.03.2018 respectively. As such, the application submitted on 12.05.2017 was incomplete and an incomplete application is no application in the eyes of law.

13. The application for issuance of occupancy certificate shall be moved in the prescribed forms and accompanied by the documents mentioned in sub-code 4.10.1 of the Haryana Building Code, 2017. As per sub-code 4.10.4 of the said Code, after receipt of application for grant of occupation certificate, the competent authority shall communicate in writing within 60 days, its decision for grant/ refusal of such permission for occupation of the building in Form BR-VII. Therefore, in view of the deficiency in the said application dated 12.05.2017 and aforesaid reasons, no delay in granting occupation certificate can be attributed to the concerned statutory authority.
14. In the present case, the counsel for the respondent on dated 28.05.2021 had produced a copy of order dated 03.03.2021 and tried to convince the hon'ble authority that the unreasonable delay in offer of possession is attributable to the zero period from 01.11.2017 to 11.05.2020 granted by the DTCP as per the office orders conveyed by the DTCP vide endorsement no. CC-1185-JE (VA)/2021/5226-29 dated 03.03.2021. As per terms and conditions of BBA, the

possession was to be given to the complainant on 01.10.2017 which is much more before the zero period came into effect and the zero period has been accorded only in relation to license renewal, validity of license and interest on EDC/IDC and not for the delay in obtaining OC. As such the respondent is not eligible to grant benefit of the above zero period

H. Findings on the relief sought by the complainants

15. Relief sought by the complainants:

(i) To direct the respondent to remove all unnecessary charges and provide immediate possession of the commercial unit to the complainants and pay a delay penalty @ 18% per annum on amount deposited by the complainants.

16. In the present complaint, the complainants 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."

17. Clause 16.1 of the apartment buyer agreement (in short, agreement) provides for time period for handing over of possession and is reproduced below:

"16.1 POSSESSION OF THE UNIT

The company based upon its present plans and estimates, and subject to all exceptions proposes to handover possession of the unit within a period of 36 months from the date of execution of agreement (committed period). Should the possession of the unit not be given within the committed period., the allottee agrees to an extension of one hundred and eighty days(Grace Period) after expiry of the committed period. In case of failure of the Allottee to make timely payments of any of the installments as per the Payment Plan, along with other charges and dues as applicable or otherwise payable in accordance with payment plan or as per the demands raised by the company from time to time in this respect, despite acceptance of delayed payment alongwith interest or any failure on part of the Allottee to abide by any of the terms and conditions of this agreement, the time periods mentioned in this clause shall not be binding upon the company with respect to the handing over of the possession of the unit.

18. 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. 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's 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.

19. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the unit within 36 months from the date of this agreement and further provided in agreement that promoter shall be entitled to a grace period of 180 days after expiry of committed period. The period of 36 months expired on 01.10.2017. As a matter of fact, the promoter has not given the valid reason for delay to complete the project within the time limit prescribed by the promoter in the apartment buyer's agreement. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace periods of 180 days cannot be allowed to the promoter at this stage.

20. **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.

21. 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.

22. Taking the case from another angle, the complainants-allottees were entitled to the delayed possession charges/interest only at the rate of Rs.9% per annum on the amount paid by the allottee as per clause 16.6 of the buyer's agreement for the period of such delay; whereas, as per clause 8.5 of the buyer's agreement, the promoter was entitled to interest @ 24% per annum at the time of each outstanding payment till the date the payment is realized by the company. 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.

23. 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., 25.08.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

24. **Rate of interest equally chargeable to the allottee in case of default in payment:-** 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;"*

25. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 9.30% by the respondents/promoters which is the same as is being granted to the complainants in case of delayed possession charges.
26. On consideration of the documents available on record and submissions made by both the parties it is the failure of the promoter to fulfil its obligations and responsibilities as per the buyer's agreement dated 01.10.2014 to hand over the possession within the stipulated period. 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. By virtue of clause 16.1 of the buyer's agreement executed between the parties on 01.10.2014, possession of the said unit to be delivered within a period of 36 months from the date of execution of buyer's agreement. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over of possession comes out to be 01.10.2017. In the present case, the complainants were offered possession by the respondent on 08.7.2020 after receipt of occupation certificate dated 03.07.2020. The authority is of the considered view that there is delay on the part of the respondent to offer physical



possession of the allotted unit to the complainants as per the terms and conditions of the buyers agreement dated 01.10.2014 executed between the parties.

27. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 03.07.2020. However, the respondent offered the possession of the unit on 08.07.2020, so it can be said that the complainants came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, they should be given 2 months' time from the date of offer of possession. This 2 month of reasonable time is being given to the complainants keeping in mind that even after intimation of possession practically they have to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit, but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e. 01.10.2017 till the expiry of 2 months from the date of offer of possession (08.07.2020) which comes out to be 08.09.2020.



Furthermore, the complainants are directed to take possession within two weeks from the date of this order.

28. In the present case, the counsel for the respondent on dated 28.05.2021 had produced a copy of order dated 03.03.2021 and tried to convince the hon'ble authority that the unreasonable delay in offer of possession is attributable to the zero period from 01.11.2017 to 11.05.2020 granted by the DTCP as per the office orders conveyed by the DTCP vide endorsement no. CC-1185-JE (VA)/2021/5226-29 dated 03.03.2021. As per terms and conditions of BBA, the possession was to be given to the complainant on 01.10.2017 which is much more before the zero period came into effect and the zero period has been accorded only in relation to license renewal, validity of license and interest on EDC/IDC and not for the delay in obtaining OC. As such the respondent is not eligible to grant benefit of the above zero period.

29. 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 respondents are established. As such, the complainants are entitled to delay possession charges at prescribed rate of the interest @ 9.30% p.a. w.e.f. 01.10.2017 till 08.09.2020 as per provisions of section 18(1) of the Act read with rule 15 of the rules.

G. Directions of the authority

30. 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 respondents are directed to pay interest at the prescribed rate of 9.30% p.a. for every month of delay on the amount paid by the complainants from the due date of possession i.e., 01.10.2017 till 08.09.2020 i.e. expiry of 2 months from the date of offer of possession (08.07.2020).
- ii. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period. The arrears of interest accrued so far shall be paid to the complainants within 90 days from the date of this order as per rule 16(2) of the rules and section 19(10) of the Act.
- iii. 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 respondents/promoters which is the same rate of interest which the promoter shall be liable to pay the allottees, in case of default i.e.,

the delayed possession charges as per section 2(za) of the Act.

- iv. The respondents shall not charge anything from the complainants which is not the part of the agreement, however, holding charges shall not be charged by the promoter at any point of time even after being part of agreement as per law settled by Hon'ble Supreme Court in civil appeal no. 3864-3889/2020 decided on 14.12.2020.

31. Complaint stands disposed of.

32. File be consigned to registry.


(Samir Kumar)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 25.08.2021


(Vijay Kumar Goyal)

Member

Judgement uploaded on 12.11.2021.