BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 618 of 2021
First date of hearing: 09.03.2021
Date of decision : 25.08.2021

Prashant Ahlawat
R/o: -House No. 1120, Ward No.29,
Sector- 4, Gurugram Haryana- 122001 **Complainant**

Versus

1. M/s Revital Reality Private Limited.
2. M/s Supertech Limited.
Both having Regd. Office at: 1114, 11th floor, Hamkunt Chambers, 89, Nehru Place, New Delhi- 110019 **Respondents**

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

APPEARANCE:
Sh. Jagdeep Kumar Advocate for the complainant
Ms. Ratan Diwedi Advocate for the respondent

ORDER

1. The present complaint dated 12.02.2021 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 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	"Basera", Sector- 79, 79B, Gurugram.
2.	Project area	12.10 acres
3.	Nature of the project	Affordable Group Housing Project
4.	DTCP license no. and validity status	I. 163 of 2014 dated 12.09.2014 valid upto 11.09.2019 II. 164 of 2014 dated 12.09.2014 valid till 11.09.2019
5.	Name of licensee	Revital Realty Pvt. Ltd.& others
6.	RERA Registered/ not registered	**Registered vide no. 108 of 2017 dated 24.08.2017.**
7.	RERA registration valid up to	31.01.2020
8.	RERA Extension no.	14 of 2020 dated 22.06.2020
9.	RERA Extension valid upto	31.01.2021
10.	Unit no.	701, 7thfloor, Tower 2 [Page no. 41of complaint]
11.	Unit measuring	473 sq. ft. [carpet area] 73 sq. ft. [balcony area]

12.	Date of offer of allotment letter	14.01.2016 [Page no. 38 of complaint]
13.	Date of execution of flat buyer agreement	19.04.2016 [Page no. 40of complaint]
14.	Payment plan	Time linkedpayment Plan [Page no. 42of complaint]
15.	Total consideration	Rs.19,28,500/- [As per payment plan page no. 43 of complaint]
16.	Total amount paid by the complainant	Rs.17,23,889/- [As per pre-possession outstanding statement dated 29.10.2020 page no. 71 of complaint]
17.	Environment clearance	22.01.2016 [page 46 of reply]
18.	Status of the project	Ongoing
19.	Due date of delivery of possession as per clause 3.1 of the flat buyer's agreement: with in a period of 4 years from the date of approvals of building plans or grant of environment clearance, whichever is later. [Page 44 of complaint]	22.01.2020 [Note: - the due date of possession can be calculated by the receipt of environment clearance dated 22.01.2016]
20.	Delay in handing over possession till the date of order i.e. 25.08.2021	1 year 7 months and 3 days

B. Facts of the complaint

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

I. That the respondents have advertised themselves 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 no. 2 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 complainant that they have secured all the necessary sanctions and approvals from the appropriate authorities for the construction and completion of the real estate project sold by them to the consumers in general.That the respondents, 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 builders in market.

II. That in the end of 2014, the respondent no. 1 through its business development associate approached the complainant with an offer to invest and buy a flat in the proposed project of respondents which the respondents were going to launch the project namely "BASERA" in the Sectors-79 & 79B, Gurugram. On 26.02.2015 complainant had a meeting with respondent no. 2 at the respondents branch office at M/s Supertech Limited, 702-703, 7th floor, tower– A, signature tower, South City- 1, Gurgaon 122001 where the respondent no. 2 explain the project "BASERA" and

highlighted the said project and allotment of apartment shall be done through draw of lots as per procedure defined under Affordable Housing Policy 2013 notified vide No. PF-27/48921 dated 19.08.2013, respondent no. 2 represented to the complainant that the respondent no. 2 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 respondentsthen they would deliver the possession of proposed flat on the assured delivery date as per the best quality assured by the respondents. The respondent no. 2 had further assured to the complainant that the respondent no. 2 has already processed the file for all the necessary sanctions and approvals form the appropriate and concerned authorities for the development and completion of said project on time with the promised quality and specification. The complainant while relying upon those assurances and believing them to be true, complainant submit application with respondents for 2 BHK Flat measuring 592 sq. ft. under draw of lots in the aforesaid project of the developer and made payment of application amount of Rs.101425/- vide cheque no 000002 dated 26.02.2016.

III. That in the said application form, the price of the said flat was agreed at the rate of Rs.4000/- per sq. ft. mentioned in the said application form. At the time of execution of the said application form, it was agreed and promised by the respondent no. 2 that

there shall be no change, amendment or variation in the area or sale price of the said flat from the area or the price committed by the respondent no. 1 in the said application form or agreed otherwise.

IV. That on 14.01.2016 the respondents issued an offer of allotment through letter dated 14.01.2016 in the name of complainant, respondents offered a residential unit no.701, tower -2 (area 546 sq. ft.) "BASERA" Sectors 79, 79b, Gurugram, Haryana at price of Rs. 19,95,998/-. (Inclusive of taxes). The said offer of respondents were accepted by complainant and made the requisite payment of Rs.3,97,575/- to respondent no. 2 through cheque no. 000020 dated 21.01.2016, and cheque no. 000021 dated 12.03.2016 and cheque no. 000022 dated 04.04.2016.

V. That the building plan for the said Project "BASERA" was approved by the office of DGTCP on 19.12.2014 and Environment clearance by respective office on 22.01.2016 as per the information provided by the respondent company.

VI. That on 25.09.2015 the respondents issued a flat buyers agreement which consisting very stringent and biased contractual terms which are illegal, arbitrary, unilateral and discriminatory in nature, because every clause of agreement is drafting in a one-sided way and a single breach of unilateral terms of flat buyers agreement by complainant, will cost him forfeiting of earnest money and about the delay payment charges of 15% they said

this is standard rule of company and company will also compensate at the rate of Rs.5 per sq. ft. per month in case of delay in possession of flat by company. Complainant opposed these illegal, arbitrary, unilateral, and discriminatory terms of flat buyers' agreement and did not sign the flat buyer agreement in pretext of illegal and unilateral terms of buyer's agreement. Complainant repeatedly requested Respondent to prepare buyer agreement as per the terms and condition mention under the Haryana Affordable Policy 2013, but respondent did not pay any heed to repeated requests of complainant.

VII. That in the said unsigned flat buyer's agreement dated 25.09.2015, the respondents formulate a possession clause - 3.1 contrary to the clause 5 (III) (B) of Haryana Affordable Housing Policy 2013, where respondent had agreed and promise to complete the construction of the said flat and deliver its possession within a period of 4 Years with a 6 months of grace period thereon from the date of approval of building plans or grant of environment clearance, which is contrary to the possession clause (Clause 5(III)(B)) mention in Haryana Affordable Housing Policy 2013. The relevant portion of Clause 5(III)(B) of Haryana Affordable Housing Policy 2013 is reproduced herein for the kind perusal of the authority.

> *"All flats in a specific project shall be allotted in one go within four months of sanction of building plan or receipt of environment*

clearance whichever is later, and possession of flats shall be offered within the validity period of 4 years of such sanction/clearance."

VIII. The respondent has breached the terms of said clause 5(III)(B) of Haryana Affordable Housing Policy 2013 and failed to fulfill its obligations and has not delivered possession of said flat within the agreed time frame of the Haryana Affordable Housing Policy 2013. The proposed possession date as per Haryana Affordable Housing Policy 2013 was due on 22.01.2020.

IX. That on 06.01.2018 complainant returns the unsigned copy of apartment buyers' agreement to respondent office with a request to amend the buyer's agreement as per the guidelines of RERA Act 2016 and complainant also requested respondents for furnishing tax invoices for the demand raised by respondent.

X. That through letter dated 12.06.2018 and subsequent interaction with project officials of respondents company, complainant specifically mention to respondents that they should provide the copy of revised agreement as per the Haryana RERA laws otherwise complainant will exercise his right to hold the final installment towards the sale consideration and also hold the GST payments till respondents did not provide the tax invoices for the demand raised towards the installments of sale consideration.

XI. That as per Clause 2 of buyer's agreement the sales consideration for said flat was Rs.1928500/- exclusive of service tax and GST. The complainant further submitted that he had paid the substantial sale consideration along with applicable taxes to the

respondents for the said flat. As per the statement dated 29.10.2020, issued by the respondent no. 1, the complainant has already paid Rs.17,23,889/- towards total sale consideration and applicable taxes as on today to the respondent no. 2 as demanded time to time and now only last installment is pending to be paid on the part of complainant.

XII. That on 30.10.2020 respondent have sent an intimation regarding pre-possession formalities letter through e-mail without obtaining occupation certificate from appropriate authority, the said pre-possession formalities letter of respondent comprises various unilateral, illegal and arbitrary demands which are contrary to the guidelines and Policy terms and conditions of Haryana Affordable Policy 2013. Respondents have raised a demand of delay payment charges at the rate of 24% and also demanded unilateral charges for electricity connection, power backup, usage charges for operational cost of utility services, water connection charges, interest free security and above all respondent also demanded for covered car parking charges which is illegal and clear violation of Haryana Affordable Policy 2013. Respondent did not earmark the specific parking space for two-wheeler, which is a gross violation of Haryana Affordable Housing Policy 2013.

C. Relief sought by the complainant

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

I. To direct the respondents to pay interest at the applicable rate of 15% on account of delay in offering possession on Rs.17,23,889/- paid by the complainant as sale consideration of the said flat from the date of payment till the date of delivery of possession;

II. To direct the respondents to show the actual records of paying EDC to government and return the excess amount collected from complainant in account of EDC charges;

III. To restrain respondents from selling and allocation of covered car parking in affordable housing society;

IV. To restrain respondents to charge electricity charges of Rs.59000/- from complainant;

V. To restrain respondents to charge water connection charges of Rs.41300/- from complainant;

VI. To restrain respondents to charge for maintenance or operational cost of utility services from complainant;

VII. To restrain respondents to charge for interest free security deposit from complainant;

VIII. To direct respondents to earmarked a two-wheeler parking for complainant in the said project "Basera";

IX. To direct respondents to earmarked balance available parking space, if any, beyond the allocated two-wheeler parking sites, can be earmarked as free visitor car parking space;

X. To direct respondents to construct community sites as per the guidelines of Haryana Affordable Housing Policy 2013;

XI. To direct the respondents to provide tax invoice to complainant;

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 respondents

6. The respondents 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. R034T200701/flat no. 701, tower- 2, on 12thfloor having a super area of 473 sq. ft. (approx.) for a total consideration of Rs.19,28,500/-.

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 19.04.2016. The project is completed within 4 years from the date of approval of building plans or grant of environment clearance, which ever is later. The environment clearance for the project was received on 12.07.2016. However, the said date is to be extended due to Covid -19 and other force majeure events.

III. 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.

IV. That the said project is registered with this Hon'ble authority vide registration no. 108 of 2017 dated 24.08.2017.

V. That the complaint filed by the complainant is not maintainable in the present form and is filed on the false and frivolous grounds.The bare reading of the complaint does not disclose any cause of action in favor of the complainant and the present complaint has been filed with malafide intention to blackmail the respondent with this frivolous complaint.

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 the respondents. It is most pertinent to state that the flat buyers'agreements provide that in case the developers /respondents delays in delivery of unit for reasons not

attributable to the developers/respondents, then the developers /respondents shall be entitled to proportionate extension of time for completion of said project. The relevant clauses which relate to the time for completion, offering possession extension to the said period are "clause 3.1 under the heading "Possession" of the "flat buyers' agreement". The respondents seek to rely on the relevant clauses 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 respondents for completion of the project.

IX. That with respect to the present agreement, the time stipulated for delivering the possession of the unit was on or before 11.07.2020. However, the buyer's agreement duly provides for extension period owing to force majeure events. The respondents earnestly have 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 respondents. The respondents 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 respondents have 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 respondents:

- 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 respondents cannot be held solely responsible for things that are not in control of the respondents.

XII. The respondents have 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 respondents 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 authority and have suppressed the true and material facts from

this authority. It would be apposite to note that the complainant is a mere speculative investor who has no interest in taking possession of the apartment. In fact a bare perusal of the complaint would reflect that 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 respondents have 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 respondents 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 respondents. The respondents and its officials are trying to complete the said project as soon as possible and there is no malafide intention of the respondents 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 the Act is to provide housing facilities with modern development infrastructure and amenities to the allottees and to protect the interest of allottees in the real estate sector market. The main intention of the respondent is just to complete the project within stipulated time submitted before the authority. According to the terms of buyer's 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 'Basera' 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 respondents were forced to return to their hometowns, leaving a severe paucity of labour. Till date, there is shortage of labour, and as such the respondents have 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 respondents have 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.

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

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 entitlement of DPC on ground of complainant being investor.

9. The respondents have taken a stand that the complainant is 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 respondents 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 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 complainant is buyer and they have paid total price of **Rs.17,23,889/-**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;"*

10. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment buyer's agreement executed between promoter and complainant, it is crystal clear that the complainant is allottee 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 allottee being an investor is not entitled to protection of this Act also stands rejected.

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

11. From the bare reading of the possession clause of the flat buyer agreement, it becomes very clear that the possession of the apartment was to be delivered by **22.01.2020.** The respondent in his contribution pleaded the force majeure clause on the ground of Covid-19. That in the High Court of Delhi in case no. ***O.M.P (I) (COMM.) No. 88/2020 & I.As. 3696-3697/2020 title as M/S HALLIBURTON OFFSHORE SERVICES INC VS VEDANTA LIMITED & ANR. 29.05.2020*** it was held that *the past non-performance of the Contractor cannot be condoned due to the COVID-19 lockdown in March 2020 in India. The Contractor was in breach since September 2019. Opportunities were given to the Contractor to cure the same repeatedly. Despite the same, the Contractor could not complete the Project. The outbreak of a*

pandemic cannot be used as an excuse for non-performance of a contract for which the deadlines were much before the outbreak itself.

Now this means that the respondents/promoters have to complete the construction of the apartment/building by 22.01.2020. The respondents/promoters have 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. That the lockdown due to pandemic in the country began on 25.03.2020. So the contention of the respondents /promoters to invoke the force majeure clause is to be rejected as it is a well settled law that ***"No one can take benefit out of his own wrong"***. Moreover there is nothing on record to show that the project is near completion, or the developer applied for obtaining occupation certificate. Thus, in such a situation the plea with regard to force majeure on ground of Covid- 19 is not sustainable.

G. Findings on the relief sought by the complainant

G.I to direct the respondents to pay interest at the applicable rate of 15% on account of delay in offering possession on Rs.17,23,889/- paid by the complainant as sale consideration of the said flat from the date of payment till the date of delivery of possession.

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

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

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

.....

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

13. Clause 3.1of the flat buyer's agreement provides for handing over of possession and is reproduced below: -

3. POSSESSION

3.1 *Subject to Force Majeure circumstances, intervention of Statutory Authority, receipt of occupation certificate and Allottee/Buyer having timely complied with all its obligations, formalities or documentation, as prescribed by Developer and not being in default under any part hereof and Flat Buyer's Agreement, including but not limited to the timely payment of installments of the other charges as per payment plan; Stamp Duty and registration charges, the Developer proposes to offer possession of the Said Flat to the Allottee/Buyer within a period of 4 (four) years from the date of approvals of building plans or grant of environment clearance (hereinafter referred to as the **"Commencement Date")** whichever is later.*

14. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to timely payment of installment of the other charges as per payment plan stamp duty, registration charges the developer proposes to offer possession of the said flat to the allottee/buyer within a period of 4 years from the date of approvals of building plans or grant of environment clearance, whichever is later. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoters and against the allottee that even a single default by the allottee in making timely payment as per the plan 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 flat 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.

15. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges at the rate of 15% 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.*

16. 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.

17. 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%.

18. 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;"*

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

20. The authority observes that the respondent/builder has not yet obtained occupation certificate of the project in which the allotted unit of the complainant is located. So, without getting occupation

certificate, the builders/respondents are not competent to issue any intimation regarding prepossession. It is well settled that for a valid offer of possession there are three pre-requisites Firstly, it should be after receiving occupation certificate; Secondly, the subject unit should be in habitable condition and thirdly, the offer must not be accompanied with any unreasonable demand. But while issuing intimation regarding prepossession on 29.10.2020, the builder has neither obtained occupation certificate. Hence, the intimation regarding prepossession offered by respondents/promoters on 29.10.2020 is not a valid or lawful offer of possession.

21. **Validity of intimation of prepossession:** At this stage, the authority would express its views regarding the concept of 'valid offer of possession'. It is necessary to clarify this concept because after valid and lawful offer of possession the liability of promoters for delayed offer of possession comes to an end. On the other hand, if the possession is not valid and lawful, liability of promoters continues till a valid offer is made and the allottee remains entitled to receive interest for the delay caused in handing over valid possession. The authority after detailed consideration of the matter has arrived at the conclusion that a valid offer of possession must have following components:

    i. **Possession must be offered after obtaining occupation certificate-** The subject unit after its completion should have

received occupation certificate from the department concerned certifying that all basic infrastructural facilities have been laid and are operational. Such infrastructural facilities include water supply, sewerage system, storm water drainage, electricity supply, roads, and street lighting.

ii. **The subject unit should be in habitable condition-** The test of habitability is that the allottee should be able to live in the subject unit within 30 days of the offer of possession after carrying out basic cleaning works and getting electricity, water, and sewer connections etc. from the relevant authorities. In a habitable unit all the common facilities like lifts, stairs, lobbies, etc. should be functional or capable of being made functional within 30 days after completing prescribed formalities. The authority is further of the view that minor defects like little gaps in the windows or minor cracks in some of the tiles, or chipping plaster or chipping paint at some places or improper functioning of drawers of kitchen or cupboards etc. are minor defects which do not render unit uninhabitable. Such minor defects can be rectified later at the cost of the developers. The allottee should accept possession of the subject unit with such minor defects under protest. This authority will award suitable relief for rectification of minor defects after taking over of possession under protest.

However, if the subject unit is not habitable at all because the plastering work is yet to be done, flooring works is yet to be done,

common services like lift etc. are non-operational, infrastructural facilities are non-operational then the subject unit shall be deemed as uninhabitable and offer of possession of an uninhabitable unit would not be considered a legally valid offer of possession.

iii. **Possession should not be accompanied by unreasonable additional demands-** In several cases, additional demands are made and sent along with the offer of possession. Such additional demands could be unreasonable which puts heavy burden upon the allottee. An offer accompanied with unreasonable demands beyond the scope of provisions of agreement should be termed as invalid offer of possession. Unreasonable demands itself would make an offer unsustainable in the eyes of law. The authority is of the view that if respondent has raised additional demands, the allottee should accept possession under protest.

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 respondents are in contravention of the provisions of the Act. By virtue of clause 3.1 of the agreement executed between the parties on 19.04.2016, the possession of the subject apartment was to be delivered within stipulated time within 4 years from the date of approval of building plan i.e. (19.12.2014) or grant of environment clearance i.e. (22.01.2016) whichever is later. Therefore, the due date

of handing over possession is calculated by the receipt of environment clearance dated 22.01.2016 which comes out to be 22.01.2020. The respondents have failed to handover possession of the subject apartment till date of this order. Accordingly, it is the failure of the respondents/promoters to fulfil their 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 respondents to offer of possession of the allotted unit to the complainant as per the terms and conditions of the flat buyer agreement dated 19.04.2016 executed between the parties. Further no OC/part OC has been granted to the project. Hence, this project is to be treated as on-going project and the provisions of the Act shall be applicable equally to the builder as well as allottee.

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 respondents 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. 22.01.2020 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., 22.01.2020 till the handing over possession of the allotted unit after obtaining the occupation certificate from the competent authority;

II. The arrears of such interest accrued from 22.01.2020 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 promoters to the allottee before 10th of the subsequent month as per rule 16(2) of the rules.

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

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 respondents/promoters which are 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 is directed to quash all illegal demands in the form of car parking are against the provisions of the affordable policy i.e. builder cannot charge more than 5% of the total sale consideration of the flat.

VI. The respondent shall not charge anything from the complainant, which is not the part of the flat buyer agreement, and further, the respondent is debarred from levied holding/maintenance charges. Since no, occupation certificate has been obtained till date and no lawful possession had been offered till date.

25. Complaint stands disposed of.

26. File be consigned to registry.

(Samir Kumar)
Member

(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 25.08.2021

Judgement uploaded on 10.11.2021