

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

Complaint no. : 551 of 2021
First date of hearing: 09.03.2021
Date of decision : 18.08.2021

Priyanka Ahuja
R/o: - Unit 508A, 3 Broughton Street,
Parramatta Sydney- 2150, Australia
Through his Power of attorney holder

Kiran Ahuja

R/o: -D-118, Ajay Enclave, Tilak Nagar, New
Delhi- 110018

Complainant

Versus

1. M/s Supertech Limited.

Office at: 1114, 11th floor
Hamkunt Chambers, 89,
Nehru Place, New Delhi- 110019

2. India Bulls Housing Finance Limited.

Office at: M-62 & 63, Connaught Place,
New Delhi- 110001

Respondents

CORAM:

Shri Samir Kumar

Shri Vijay Kumar Goel

Member

Member

APPEARANCE:

Sh. Yogesh Gupta

Sh. Bhrigu Dhani

Sh. Gaurav Dua

Ms. Shiwani Bhargav

Advocate for the complainant

Advocate for the respondent no. 1

Advocate for the respondent no. 2

ORDER

1. The present complaint dated 29.01.2021 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. (as per the allotment letter)	R058LR0]69C, 3 rd floor, Tower- J69 [page no. 43 of complaint]
9.	Unit measuring	1375 sq. ft.

		[super area]
10.	Date of execution of allotment letter	13.06.2016 [Page no43of complaint]
11.	Date of execution of memorandum of understanding	30.08.2016 [Page no. 59 of complaint]
12.	Date of execution of tripartite agreement	31.08.2016 [Page no. 39 of reply filed by the respondent no. 2]
13.	Payment plan	Subvention Payment Plan [Page no.44of complaint]
14.	Total consideration	Rs.52,93,750/- [as per payment plan page no. 44 of complaint]
15.	Total amount paid by the complainant	Rs.44,64,484/- [as per customer statement, page no. 68 of complaint]
16.	Due date of delivery of possession as per clause I (26) of the allotment letter by June 2019 plus 6 Month grace period upto the offer letter of possession or actual physical possession whichever is earlier. [Page 15of complaint]	30.06.2019 [Note: - 6 months grace period is not allowed]
17.	Delay in handing over possession till the date of order i.e. 18.08.2021	2 years 1 months and 19 days

B. Facts of the complaints

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

- I. That the complainants are law abiding citizen of India. The complainant no. 1 is presently residing in Australia and authorized the complainant no. 1 vide special power of attorney

- dated 16.11.2020 to file and pursue the present complaint against the respondents no.2 on her behalf.
- II. That the respondent no.1 'Supertech limited' is the developer and respondent no. 2 'India bulls Housing Finance Limited" is a financial institution which has provided the loan facilities to the buyers of the respondent no.1.
- III. That during the year 2015-2016, the respondent no. 1 i.e. Supertech Limited, was marketing its residential unit scheme by offering residential units of various sizes etc. in the name of Officer's Enclave/Hill Crest/ Hilltown at Sector-2, Sohna Road, Gurgaon, Haryana-122103. As per the claims of the respondent no. 1 through its authorized representative and directors, the respondent no. 1 was in full possession of the requisite land, all statutory approvals were obtained, and the entire project was free from all encumbrances.
- IV. That, in order to mitigate the doubts, the complainant visited the office of respondent no. 1 at Officer's Enclave/HillCrest/ Hilltown at Sector-2, Sohna Road, Gurgaon, Haryana-122103, and meet Ms. Mandeepa Joshi Singh, Mr. Gulshan Lal Khera, Mr. Anil Kumar Sharma, Mr. Pradeep Kumar Goel, Mr. Anil Kumar Jain, Mr. Ram Kishor Arora, Mr. Vikas Kansal, being directors of Supertech limited along with other representatives of the respondent no.1 and was assured by them that their company was indeed in full possession of the land and have requisite approvals from

concerned authorities. The respondent persons also personated themselves as one of best builders in India and has reputation of delivering the project on or before the agreed time.

- V. That, the respondent no.1 also introduced the loan scheme to the complainants and told the undersigned to seek loan from respondent no.2 for the reason best known to the respondent no.1. The respondent no.1 and its representatives assured the complainants that under subvention schemes, the home buyer, banker and the developer would enter into a tripartite agreement where the buyer pays some amount of the money upfront. The rest is paid by the bank in the form of a loan which is disbursed to the developer to continue the construction work.
- VI. That all the above-mentioned respondent persons assured that in subvention scheme, the respondent no. 1 pays interest of the loan till the complainants take possession of the property or till such time as mentioned in the buyer-developer agreement. Home buyers can benefit from such schemes because their EMI only begins after the possession of the property has been handed over to them.
- VII. That thereafter on 23.05.2016, without suspecting any foul play on the part of the respondents, and the complainants booked a unit no. J-69C, admeasuring 1375 sq. ft. in the above said project. Consequently, a tripartite agreement was duly executed between the complainants, respondent no.1 and respondent no.2 through

their authorized representatives. The loan amount which was sanctioned to the complainants was a sum of Rs.44,20,000/- and the EMI was fixed at Rs.36,844/- for 360 months.

- VIII. That an allotment letter dated 13.06.2016 was duly executed between the complainants and respondent no.1 through its authorized signatory stating all the terms and conditions of builder buyer transaction. In the allotment letter dated 13.06.2016 it was categorically mentioned that the possession of the above-mentioned units should be given in June 2019 with a grace period of 6 months and in case of delay the respondent persons should pay the compensation @ Rs.5/- per square feet per month till the possession of the said unit.
- IX. That a Memorandum of Understanding dated 30.08.2016 was also agreed and executed between the complainants and respondent no.1 through its authorized signatory wherein it was declared that the complainants were eligible for the sanction of loan for the said unit under the subvention scheme as being assured by the respondent no.1.
- X. That trusting the same, the complainants agreed to book below mention unit in the project namely Officer's Enclave/Hill Crest/Hilltown at Sector-2, Sohna Road, Gurgaon, Haryana-122103, for a total sale consideration of for a total sale consideration of Rs.52,93,750/- and out of which a sum of Rs.48,49,218/- has been paid including the advance payments and the loan amount and

the same has duly been received and acknowledged by the respondent no.1.

- XI. That the complainants, vide email dated 13.06.2019, when the stipulated time of handing over the possession of said unit elapsed, duly requested the representative of the respondent no. 1 that respondent no.2 was threatening the complainants for pre-EMIs and further requested the respondent no.1 to kindly proceed with the payment be made to the respondent no.2, as being assured by the respondents under subvention scheme.
- XII. That when, with malafide intentions, no response was given by the respondent no.1 to the above said mail, the complainants vide emails dated 15.06.2019, 17.06.2019, 21.06.2019, 26.06.2019 and 27.06.2019, further requested respondent No.1 to pay the pre-EMIs to the respondent no. 2, as being assured under subvention scheme. To which the representative of respondent no.1 assured that respondent No.1 was working on the same and the pre-EMIs should be paid at the earliest. Thereafter the complainants waited for 3-4 days and when no heed was given by the respondent no.1 to the repeated requests made by the complainants, the complainants, vide emails dated 01.07.2019, 03.07.2019, 05.07.2019, 10.07.2019, 11.07.2019, 13.07.2019, 15.07.2019, 16.07.2019 again requested to proceed with the payment be made to respondent no. 2 as assured by the respondents under the subvention scheme.

- XIII. That on 06.08.2019, to utter shock and surprise, the respondent no.1 vide email informed the complainants that the outstanding and forthcoming instalments of Pre-EMI as payable by respondent no.1 to the complainants, shall be adjusted against possession demand with an additional incentive. It is very important to bring to this authority notice that the above said mail is a proof that there is a willful contractual and criminal breach of trust on the part of both the respondents as there is no mention of the same in the MOU, allotment letter and tripartite agreement.
- XIV. That in the present scenario is this that the representatives of respondent no.2 have been illegally raising a demand of Rs.1,13,031/- excluding the loan amount disbursed. This includes overdue charges without GST, instalments not paid by the respondent no.1 during subvention scheme. The respondent no.2 has sent multiple legal letters to the complainant, sent goons, and called multiple times for payments and forcing the complainant to pay which the complainants are not at all liable to pay.
- XV. That few days back, the complainant visited the project site and was shocked and surprise to see that the respondent no.1 have been blatantly lying to the complainant and other buyers in as much as the construction of the above said project has been stopped and it seems that the completion of building would take around 5 years. The complainant has also learnt that there are

numerous FIRs/complaints have been lodged against the above-mentioned respondent no.1 & 2 for offences of cheating, cheating by personation, misappropriation of funds, criminal breach of trust etc.

- XVI. That finding no other way, the complainant got issued a legal notice dated 07.10.2020 to the respondents through their counsel thereby calling upon the respondents to clear the pending within 15 days from the date of receipt of said legal notice.
- XVII. The complainant also discovered later that this is an organized crime committed by the respondents wherein they have cheated not one or two but around hundreds or thousands of investors/home buyers who are now also running from pillar to post to get their money back. That neither have the complainant was received any refund of their money nor the possession of the booked plots/units. The hard-earned money i.e. a sum of Rs.48,49,218/- along with interest @ 24 % p.a. from the date of investment and compensation @ Rs.5/- per sq. ft. per month (from January 2020 to October 2020), is being illegally held by the respondents.
- XVIII. That after being heavily duped by the respondent no. 1 i.e. Supertech Limited through its directors and other representatives in connivance with India bulls Housing Finance Limited i.e. respondent no. 2, the complainant with folded hands, approaching before this authority to take stringent action against

the perpetrators of the aforesaid crime of mass cheating, thug, fraud, forgery, looting innocent people and usurp crores of rupees of public money under the garb of false assurances for handing over the possession of above residential unit. That an illegal profit-making business is being run by the said respondents and its directors, in order to usurp the public money at a large scale which if not stopped, shall lead to a large-scale economic fraud.

C. Relief(s) sought by the complainants:

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

- i. To directing the respondent no.1 to deliver the possession of the apartment J-69C, admeasuring 1375 sq. ft. Officer's Enclave/Hill Crest/Hilltown at Sector-2, Sohna Road, Gurgaon, Haryana-122103 as per the quality promised by it through its marketing brochure and flat buyer agreement.
- ii. To direct the respondent no.1 to pay a sum of Rs. 1,13,031/- and further payments to respondent no. 2, as assured under subvention scheme.
- iii. To direct the respondent no.1 to pay interest @ Rs.5/- per sq. ft. per month (from January 2020 to October 2020) as assured vide allotment letter.

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

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

D. Reply by the respondent no.1

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

- I. That the complainant booked an apartment bearing number no. R058LR0J69C having a super area of 1375 sq. ft. (approx.) for a total consideration of Rs.52,93,750/- vide a booking form dated 23.05.2016.
- 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 13.06.2016. 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 June 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. That as per clause 27 of the of agreement, possession of

the apartment would only be given to the allottees, after payment of all dues.

- IV. That in interregnum, the pandemic of covid -19 gripped the entire nation since March 2020. The Government of India has itself categorized the said event as a 'Force Majeure' condition, which automatically extends the timeline of handing over possession of the apartment to the complainant. Thereafter, it would be apposite to note that the construction of the Project is in full swing, and the delay if at all, has been due to the government-imposed lockdowns which stalled any sort of construction activity. Till date, there are several embargos qua construction at full operational level.
- V. That the said project is registered with this authority vide registration no. 97of 2017 dated 24.08.2017 and the completion date as per the said registration is 30.06.2021.
- VI. That the delay if at all, has been beyond the control of the answering 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 provides that in case the developer/respondent delays in delivery of unit for reasons not attributable to the

developer/respondent, then the developer/respondent shall be entitled to proportionate extension of time for completion of the said project. The relevant clause which relates to the time for completion, offering possession extension to the said period are “clause 26 under the heading “possession of allotted floor/apartment” of the “allotment agreement”. The respondent seeks to rely on the relevant clause of the agreement at the time of arguments.

- VIII. 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 timeline stipulated under the flat buyer agreement was only tentative, subject to force majeure reasons which are beyond the control of the respondent. The respondent in an endeavor to finish the construction within the stipulated time, had from time to time obtained various licenses, approvals, sanctions, permits including extensions, as and when required. Evidently, the respondent had availed all the licenses and permits in time before starting the construction.
- X. That apart from the defaults on the part of the allottee, like the complainants herein, the delay in completion of project was on

account of the following reasons /circumstances that were above and beyond the control of the respondent:

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

XI. The respondent has further submitted that the intention of the force majeure clause is to save the performing party from the consequences of anything over which he has no control. It is no more res integra that force majeure is intended to include risks beyond the reasonable control of a party, incurred not as a product or result of the *negligence or malfeasance* of a party, which have a materially adverse effect on the ability of such party to perform its obligations, as where non-performance is caused by the usual and natural consequences of external forces or where the intervening circumstances are specifically contemplated. Thus, in light of the aforementioned it is most

respectfully submitted that the delay in construction, if any, is attributable to reasons beyond the control of the respondent and as such the respondent may be granted reasonable extension in terms of the allotment letter.

XII. 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.

XIII. That the complainant has not come with clean hands before this hon'ble forum 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.

- XIV. The respondent has submitted that the completion of the building is delayed by reason of non-availability of steel and/or cement or other building materials and/ or water supply or electric power and/ or slow down strike as well as insufficiency of labour force which is beyond the control of respondent and if non-delivery of possession is as a result of any act and in the aforesaid events, the respondent shall be liable for a reasonable extension of time for delivery of possession of the said premises as per terms of the agreement executed by the complainant and the respondent. The respondent and its officials are trying to complete the said project as soon as possible and there is no malafide intention of the respondent to get the delivery of project, delayed, to the allottees. It is also pertinent to mention here that due to orders also passed by the Environment Pollution (Prevention & Control) Authority, the construction was/has been stopped for a considerable period day due to high rise in pollution in Delhi NCR.
- XV. That the enactment of RERA Act is to provide housing facilities with modern development infrastructure and amenities to the allottees and to protect the interest of allottees in the real estate sector market. The main intension of the respondent is just to complete the project within stipulated time submitted before the authority. According to the terms of the agreement also it is

mentioned that all the amount of delay possession will be completely paid/adjusted to the complainant at the time final settlement on slab of offer of possession. The project is ongoing project and construction is going on.

- XVI. That the respondent further submitted that the Central Government has also decided to help bonafide builders to complete the stalled projects which are not constructed due to scarcity of funds. The Central Government announced Rs.25,000 Crore to help the bonafide builders for completing the stalled/unconstructed projects and deliver the homes to the homebuyers. It is submitted that the respondent/ promoter, being a bonafide builder, has also applied for realty stress funds for its Gurgaon based projects.
- XVII. That compounding all these extraneous considerations, the ***Hon'ble Supreme Court vide order dated 04.11.2019***, imposed a blanket stay on all construction activity in the Delhi- NCR region. It would be apposite to note that the 'Hill town' 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.

XVIII. 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.

XIX. 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.

- XX. The respondent no. 1 further submitted that the authority vide its Order dated 26.05.2020 had acknowledged the covid-19 as a force majeure event and had granted extension of six months period to ongoing projects. Furthermore, it is of utmost importance to point out that vide notification dated 28.05.2020, the Ministry of Housing and Urban Affairs has allowed an extension of 9 months vis-a-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.

E. Jurisdiction of the authority

7. The respondent has raised objection regarding jurisdiction of authority to entertain the present complaint and the said objection

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

F. Findings on the objections raised by the respondent

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

8. The respondent has taken a stand that the complainant is the investor and not consumer, 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 complainant is buyer and they have paid total price of **Rs.44,64,484/-** 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;"

9. 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 complainant is 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 investor is not entitled to protection of this Act also stands rejected.

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

10. 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 **June 2019**. 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 respondent/promoter has to complete the construction of the apartment/building by June 2019. It is clearly mentioned by the respondent/promoter for the same project, in complaint no. 4603 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. That the lockdown due to pandemic in the country began on 25.03.2020. So the contention of the respondent/promoter to invoke



the force majeure clause is to be rejected as it is a well settled law that ***"No one can take benefit out of his own wrong"***. Moreover there is nothing on record to show that the project is near completion, or the developer applied for obtaining occupation certificate rather it is evident from his submission that the project is completed 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.

G. Findings on the relief sought by the complainant

G.I To direct the respondent/developer to deliver the possession of the apartment along with delayed possession interest.

11. 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."

12. 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 JUNE, 2019 with an extended grace period of 6'(six) months. The Developer also agrees to compensate the Allottee/s @ Rs. 5.00/-(five rupees only) per sq. ft. of area of the Floor/Apartment beyond the given

promised period plus the grace period of 6(Six) months and upto the Offer Letter of possession or actual physical possession whichever is earlier."

13. The authority has gone through the possession clause of the agreement and observed that this is a matter very rare in nature where builder has specifically mentioned the date of handing over possession rather than specifying period from some specific happening of an event such as 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.
14. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and application, and the complainant not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the allotment letter by

the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

15. **Admissibility of grace period:** As per clause L(26) of the buyer developer agreement, the possession of the allotted unit was supposed to be offered by the June 2019 with a grace period of 6(six) months i.e. December 2019. There is nothing on record to show that the respondent has completed the project in which the allotted unit is situated and has applied for occupation certificate by June 2019. Rather, it is evident from the pleadings of the respondent that the construction of the project is upto 45% complete and the entire project may take some time to get it completed and thereafter make offer of possession to the allottee. So in view of these facts, the developer can't be allowed grace period of 6 months more beyond June 2019 as mentioned in clause I (26) in the allotment letter cum buyer's agreement.

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

be prescribed and it has been prescribed under rule 15 of the rules.

Rule 15 has been reproduced as under:

Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]

(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.

Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.

17. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.
18. 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%.
19. 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;"*

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

G. II. To direct the respondent no. 1 to pay a sum of Rs.1,13,031/- and further payment to respondent no. 2 as assured under subvention scheme.

21. **Subvention Scheme:** - A subvention scheme is a financial plan wherein the buyer pays some value of the total property at the time of booking the property. This amount includes registration fee, stamp duty, GST etc. After the initial payment or a couple of payments, the bank or the financial institute pay the remaining amount of the property at various stages of construction making it a construction linked plan. Once a certain amount of payment is done, the buyer pays the remaining amount along with the bank equally at the time of possession. The cost of interest is borne by the builder for a limited period and the buyer can repay the amount to the bank in EMI later. In these type of cases despite an agreement for sale entered into between the builder and the buyer, sometimes there is execution of two or more documents in the shape of memorandum of understanding

(MoU) and tripartite agreement (TPA). In the builder buyer agreement, there are as usual terms and conditions of sale of allotted unit, payment of its price, delivery of possession by certain dates and the payment schedule etc. In the second document i.e. MoU, there are certain conditions with regard to payment of the price of the allotted unit by the buyer to the builder and payment of interest of that amount by the builder to the financial institution for a limited i.e. either upto the date of offer possession or thereafter. In the third case there is a triparty agreement between the buyer, builder, and the financial institution to pay the remaining amount of the allotted unit to the builder on behalf of the buyer by the financial institution and payment of interest on that amount by the builder to the financial institution for a certain period i.e. either upto date offer of possession or till the time or delivery of possession the MoU and tripartite agreements fall within the definition of the agreement fall within the definition of agreement of sale and can be enforced by the regulatory authority in view of the provisions of Real Estate Regulation and Development Act, 2016 and held by the National Consumer Dispute Redressal Commission in case of IDBI Bank Limited Vs Parkash Chand Sharma and Anr, 2018(iii) National Consumer Protection Judgement, 45 and formed by the hon'ble Apex court of land in Bikram Chatterji Vs Union of India and Ors. In writ petition no. 940 of 2017 decided on 23.07.2019 and wherein it was held that when the builder fails with the obligations under the subvention scheme thereby causing a double

loss to the allottee then, the court can intervene, and the builder has to comply with the same in case it is proved that there was a diversion of funds.

22. The subvention scheme there is a tri-partite agreement dated 31.08.2016 between the allottee, financial institution and developer wherein the financial institution is required to release the loan amount sanctioned in favour of the allottee to the builder as per the schedule of construction. The para 6 of the tripartite agreement is reproduced as below: -

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

23. It is an obligation on the part of the builder to pay the pre-EMI interest till the date of offer of possession to the financial institution on behalf of the allottee. The clause 4 of the triparty agreement is reproduced below: -

"The Borrower has informed IHFL about the scheme of agreement between the Borrower and the Builder in terms of the Builder hereby assumed the liability on account of interest payable by the Borrower to IHFL during the period to be referred as to the "Liability Period" in terms of 36 months, from the date of first disbursement of loan facility i.e. till August 2019 and/or any other period as agreed by and between the borrower and the Builder, more particularly referred under schedule I annexed herein (the liability period is referred to as "Assumed Liability for the Builder"). It is however agreed that during the liability period the payment of assumed liability is joint and several by and between the borrower and the Builder. The Assumption of liability by the Builder, in no manner whatsoever releases, relinquishes and/or reduces the liability of the Borrower and that same shall not be affected in any

manner on account of any difference and/or dispute between the Borrower and the Builder under the agreement between them."

24. In the instant complaint, the allottee and the developer entered into a memorandum of understanding dated 30.08.2016 whereby as per clause (b) the developer has agreed that the tenure of subvention scheme shall be 36 months and the developer propose to offer possession of the booked unit to the buyer within said time frame. However, if the possession gets delayed due to any reason, then the developer has agreed to pay the pre-Emi only to the buyer even after 36 months. Further, as per clause (c) of the memorandum of understanding, the scheme will become operative and effective when the buyer shall pay 90% of the total sale consideration of the said unit to the developer and the balance 10% will be paid at time of possession. The said clause is reproduced as under: -

"(b) That the tenure of this subvention scheme, as approved by Indiabulls Housing Finance Limited is 36 months. The developer expects to offer of possession of the booked unit to the buyer by that time. However, if due to any reason, the possession offer of the booked unit gets delayed, then the Developer undertakes to pay the pre-EMI only to the Buyer even after 36 months. The payment of Pre EMI shall continue till offer of possession with regards to the booked flat is issued to the buyer".

"(c) That the present scheme shall become operative and effective when the Buyer shall pay 90% of the Total Sale Price of the said Flat to the Developer through the bank loan as well as through his/her own contribution. The balance 10% will be paid at the time of possession."

Further, clause (e) of the memorandum of understanding provides that from the date of offer of possession letter, the subvention scheme shall be treated as closed and the buyer shall be solely liable to pay the entire EMI of her bank. Also, clause (f) of the said MoU states as under:

“(e) Possession & Closer of Scheme: - That the Buyer shall take the possession of the flat within 30 days of having received the Offer of Possession Letter by the Developer. From the date of Offer of Possession Letter, the present scheme shall be treated as closed and buyer shall be solely liable to pay the entire EMI of his bank loan.”

“(f) That the present Memorandum of Understanding is in addition to the Allotment Letter executed between the parties and all other conditions/situations not covered under this MOU shall be governed by the terms and conditions of the Allotment Letter and company policies.”

25. The authority observes that no doubt, it is the duty of the allottee to make necessary payments in the manner and within the time specified in the agreement for sale as per the obligations u/s 19(6) and 19(7) of the Act reduced into writing or as mutually agreed to between the promoter and allottee and are covered under section 19(8) of the Act. But the memorandum of understanding and tri-partite agreement both stipulate that the payments are subject to handing over of the possession of the unit within stipulated period as per the agreement to sell. So, the said documents being supplementary or incidental thereto are legally enforceable against the promoter. Hence, it cannot absolve himself from its liability from paying the pre-EMI's.

26. The ***National Consumer Disputes Redressal Forum, New Delhi in the case of IDBI Bank Ltd. Vs. Prakash Chand Sharma & Ors., (Supra)*** observed that the complainants drew our attention to the special payment plan, the terms and conditions whereof are detailed as follows: -

"This special plan has been designed through a special arrangement with IDBI Bank Ltd. In order to avail of this plan the buyer shall have to take Home Loan only through IDBI Bank Ltd.

Under this special payment plan the buyer shall have no liability whatever towards paying any interest or Pre EMI till the time of possession of the apartment. All interest accrued during the period till the time of possession shall stand waived off with respect to the buyer.

The obligation of the buyer to pay his EMIs shall be applicable after the possession of the apartment as per the standard terms of IDBI Bank Ltd. (or as specifically agreed between the buyer and the bank through the loan agreement) In the event the buyer wishes to terminate the Apartment Buyers Agreement for any reason whatsoever prior to taking over possession and registration of the property in his/her favour, then he/she shall be liable to pay to 'M/s. Amy HomeServices Ltd. the entire interest amount (with the prescribed 18% penal interest) that has been paid off during the period till the date”.

27. Under the special payment plan, the buyer has no liability whatsoever towards paying any interest or pre EMIs till the offer of possession and all interest amount accrued during the period till the time of possession would stand waived off with respect to the buyer if it is proved that the builder violated the terms and conditions of contractual obligations contained in the builder buyer agreement/tripartite agreement/memorandum of understanding respectively.
28. Therefore, the terms and conditions of allotment and/or the buyer's agreement, memorandum of understanding and tri-partite agreement clearly shows that the developer is under liability to pay the pre- EMIs or interest part of the loan amount received, and any non-compliance shall be in violation of section 11(4) of the Act in the event promoter fails to keep its obligations under subvention scheme. In such cases, the allottee has all the right to seek relief under the RERA Act under section 31 which states that any aggrieved person may file a complaint with the authority or adjudicating officer for any violation or



contravention of the provisions of RERA or the rules and regulations framed thereunder against any promoter or real estate agent and the authority may give a direction to the respondent/builder to pay EMI so that the home buyer does not get any notice from the bank or financial institution. A similar direction in this regard was issued by the hon'ble Apex court in ***Supertech Limited VS Emerald Court owner Resident Welfare Association & Others*** in SLP(C) no.11595/2014 dated 31.08.2021. "The Amicus Curiae submitted that if the buildings are ordered to be demolished, the appellant may close the home loans and refund the amounts contributed by the homebuyers with such interest as this Court may determine. On the other hand, if the buildings stand, the appellant may be directed to clear the outstanding EMIs and continue paying them until possession. Since the buildings have been ordered to be demolished under the directions of this Court in the present judgment, the appellant shall close the home loans and refund the amounts contributed by each of the above home buyers with interest at the rate of twelve per cent per annum within two months."

29. A perusal of memorandum of understanding dated 30.08.2016 entered into between the buyer and developer shows that the subvention scheme was to be governed as per clause (b & c) of the same which have already been detailed in para 24 of the order. The tenure of that scheme as approved by India Bulls Housing Finance Limited is 36 months or offer of possession whichever is earlier. Secondly the said scheme was to be operative and effective on the event of buyer paying

90% of the total sale price of the allotted unit to the developer through the bank loan as well as through his/her own contribution. The total sale consideration of the allotted unit as per allotment letter cum buyer's agreement is Rs.52,93,750/- and as per memorandum of understanding, the allottee is required to pay 90% of the total sale price to avail the benefit of the subvention scheme. Even as on date, the complainant has failed to pay the required amount. That amount was admittedly not paid by the complainant to the builder till date. Though the tenure of subvention scheme is 36 months or offer of possession whichever is earlier. The subvention scheme was to be operative and effective on the buyer's paying 90% of the total sale price of the allotted unit to the developer through the bank loan as well as through his/her contribution. But the complainant has clearly mentioned in the complaint that he has paid an amount of Rs.44,64,484/- against the total sale consideration of Rs.52,93,750/- which comes out to be 84.33% and has violated the clause (c) of the memorandum of understanding dated 30.08.2016. An MoU can be considered as an agreement for sale interpreting the definition of the "agreement for sale" under Section 2(c) of the Act and broadly by taking into consideration the objects of RERA. Therefore, the promoter and allottee would be bound by the obligations contained in the memorandum of understanding and the promoter shall be responsible for all obligations, responsibilities, and functions to the allottee as per the agreement for sale executed inter se them under



section 11(4)(a) of the Act. But the allottee has also failed to fulfil those obligations as per these documents within the stipulated period.

So no benefit can be claimed by him under the subvention scheme.

30. On consideration of the circumstances, the documents, submissions made by the parties and based on the findings of the authority regarding contravention as per provisions of rule 28(2), the authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of clause L (26) of the allotment letter executed between the parties on 13.06.2016, the possession of the subject apartment was to be delivered within stipulated time i.e., by 30.06.2019. 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 30.06.2019. 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 allotment letter cum buyer's agreement dated 13.06.2016 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.

31. 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 @ 9.30% p.a. w.e.f. 30.06.2019 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

32. 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/promoter 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. 30.06.2019 till the handing over of possession of the allotted;
- 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 30.06.2019 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 allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottees, 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 allotment letter cum buyer's agreement.
33. Complaint stands disposed of.
34. File be consigned to registry.

(Samir Kumar)

Member

Haryana Real Estate Regulatory Authority, Gurugram

(Vijay Kumar Goyal)

Member

Dated: 18.08.2021

Judgement uploaded on 10.11.2021