

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

Complaint no. : 1149 of 2021
First date of hearing: 28.04.2021
Date of decision : 18.08.2021

1. Sh. Sandeep Kumar
2. Smt. Pushpanjali Gupta
Both RR/o: - House No. 236, Adhiwakta
Nagar, ward no. 14, Gopalganj, Bihar- 841428

Complainants

Versus

1. M/s Supertech Limited.
Office at: 1114, 11th floor
Hamkunt Chambers, 89,
Nehru Place, New Delhi- 110019
2. Indiabulls Housing Finance Limited.
Office at: - M-62&63, first floor, Connaught Place,
New Delhi- 110001

Respondents

CORAM:

Shri Samir Kumar
Shri Vijay Kumar Goyal

Member
Member

APPEARANCE:

Ms. Surbhi Garg Advocate
Sh. Bhrigu Dhami Advocate
Sh. Gaurav Dua & Ms. Shiwani Bhargav Advocate

Complainants
Respondent no 1
Respondent no 2

ORDER

1. The present complaint dated 02.03.2021 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 allottees 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	100.36875 acres [As per land schedule detail provided in the DTCP licence]
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. 97 of 2017 dated 24.08.2017
7.	RERA registration valid up to	30.06.2021
8.	Unit no.	R045T600506, 5 th floor, tower- T6 [Page no. 39 of complaint]



9.	Unit measuring	1275 sq. ft. [super area]
10.	Date of execution of allotment letter	18.03.2015 [Page no. 38 of complaint]
11.	Date of execution of memorandum of understanding	19.03.2015 [Page no. 54 of complaint]
12.	Date of execution of tripartite agreement	10.06.2015 [Page no. 29 of reply filed by the respondent no. 2]
13.	Payment plan	Possession linked payment plan [Page no. 39 of complaint]
14.	Total consideration	Rs.69,65,125/- [as per payment plan page no. 39 of complaint]
15.	Total amount paid by the complainants	Rs.74,01,339.63/- [as per statement of payment received dated 15.01.2021 page no. 71 of complaint]
16.	Due date of delivery of possession as per clause I (25) of the allotment letter by December 2018 plus 6 Months grace period for offer letter of possession or actual physical possession whichever is earlier. [Page 46 of complaint]	31.12.2018 [Note: - 6 months grace period is not allowed]
17.	Delay in handing over possession till the date of	2 years 7 months and 18 days

	order i.e. 18.08.2021	
18.	Status of the project	On going

B. Facts of the complaint

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

- I. That somewhere around 2013-2014, the respondent no.1 advertised about its new project namely "Hill Town" located in Sector-2, Sohna Road, District Gurugram. The said respondent painted a rosy picture of the project in their advertisement making tall claims and representing that the premium hill view residency are the perfect ode to nature inspired living. It was alleged that at hill town, space abounds everywhere and the supersized rooms with well-appointed windows provide uninterrupted views of the spectacular Aravali range. It was further advertised by the said respondent that in order to make the project affordable for the buyers, they have introduced Subvention Scheme (10:80:10) 'No EMI till possession' which will keep the buyers from additional financial burden.
- II. That they have specifically clarified from the respondent regarding the meaning of said subvention scheme to which the respondent vide mail dated 08.12.2014 had specified that under the subvention scheme, the buyer shall not have to pay any

instalment of the bank until possession and the said burden shall be borne by the builder and in the event of delay in handing over possession, delayed possession charges shall be paid to said buyer.

- III. That believing the false assurances and misleading representations of the respondent no. 1, to the complainants booked an apartment in the said project of the respondent company by paying an amount of Rs.50,000/- vide instrument no. 1440045742504 dated 09.12.2014 followed by other payments made towards said booking. It is pertinent to mention here that the booking was made under 'Subvention Payment Plan' which was 'instalment linked'.
- IV. That an allotment letter cum agreement dated 18.03.2015 was executed between the complainants and respondent no.1 wherein a residential apartment/flat (2BHK+2TOI) bearing no. R045T600506, 5th floor in block/tower no. T6 admeasuring super area of 1275 sq. ft. was allotted to the complainants. The said allotment letter entailed all the terms and conditions relevant to the sale. As per clause 25 of the said allotment letter the respondent undertook to handover possession by December 2018 + 6 months grace period, i.e. by June 2019.
- V. That on 19.03.2015, an MOU for subvention scheme was executed between the complainants and respondent no.1 wherein the said

respondent undertook to pay pre-EMIs till the handing over of possession. It is further submitted that the subvention payment plan, the complainants sought loan for the said unit and somewhere around June 2015, a loan amounting to Rs.57,67,000/- (later changed to Rs. 56,80,639/-) was approved by the respondent no.2, namely Indiabulls Housing Finance Limited (IHFL), which was the financial institution suggested by respondent no.1. Accordingly, an undated tripartite agreement was executed between the complainants, respondent no.1 and respondent no.2 for the said loan. It is imperative to mention here that the loan was sought specifically from respondent no. 2 i.e. Bank and not from any other bank only upon the respondent no.1, i.e. builder's persistence on the pretext that the said bank is on the panel of the builder and documentation and other necessary formalities will be hassle-free. The complainants will be nowhere involved in choosing the financial institution for the purpose of seeking said loan.

- VI. That it was represented to the complainants at the time of booking and execution of allotment letter by the respondent no. 1 that the payment plan shall be subvention scheme which shall be construction linked wherein only 10% of the total cost has to be paid by the former initially followed by 10% payment at the time of possession and remaining 80% payment shall be disbursed by

the Bank/financial institution as per the stage/construction wise demand raised by the builder i.e. respondent no.1 and the Pre-EMI payment shall be borne by the builder.

- VII. That thereafter, within 1 year of sanction of said loan, the respondent no. 2 disbursed the entire loan amounting to Rs.56,80,639/-, though the respondent no.1 never adhered to its commitments and obligations as per the allotment letter and abandoned the project several times thereby severely affecting the construction progress. This is evident from the fact that the respondent no.1 could not complete the construction in accordance with the schedule specified in the allotment letter. That till date, the complainants have made a payment of Rs.64,65,088/- (exclusive of pre-EMIs amounting to Rs.11,80,795/- paid by the complainants from August 2018 till April 2020) as against the total consideration of Rs.69,65,125/-.
- VIII. That to the utter shock of the complainants, when their family visited the project site in mid-2018, they were stunned to see that the project is not even 30% completed and not even a single worker was present at the project site. Rather, the project was still in the initial stage of construction despite almost four years being elapsed from the date of booking. Upon this, the complainants approached the respondent no.1 but they assured

them that construction shall be resumed at full pace soon and the project shall be handed over on time and as per schedule.

- IX. That the complainants were taken aback by the e-mail dated 29.11.2018 wherein the respondent no.1 offered an incentive scheme to the complainants thereby asking them to pay the pre-EMIs and offering an incentive for that which would be payable at the time of possession. The said respondent took the plea of monetizing the projects in order to expedite the construction and deliver units as per proposed timelines. The respondent no.1 specifically sought the co-operation and support of the complainants alleging that in return, they would reimburse the complainants at the time of handing over of possession. Believing the fake assurances and assertions of the respondent no.1, the complainants again fell into their clutches and ill motives and continued paying the pre-EMIs only in the hope that soon they shall be offered the possession of the unit booked by them, but all in vain.
- X. That the respondent no.1 defaulted in paying the Pre-EMI to the respondent no.2 from August 2018 till date. Further, by succumbing to the additional financial pressure by the respondent no.2 bank, the complainants had to pay the pre-EMIs for said months which were actually to be paid by the respondent

- no.1. The complainants have already paid an amount of Rs.11,80,795/- from August2018till April2020.
- XI. That the construction status displayed at the website of the respondent no.1 company as on 04.08.2020 clearly shows that **'17th floor level is in progress'** for the unit in question. Whereas, when the complainants inquired about the project status in 2021, they were taken aback by the fact that the project does not seem to be even 40% complete and its status is same as before. Rather, the structure is merely pillars without any concrete floor wise construction. This evidently leads one to an inference the project cannot be completed anywhere between 2-3 years and whatever construction has been done is deteriorating keeping view the stalled construction since long time.
- XII. That the present complaint has been filed in order to seek delayed possession charges on the principal amount of Rs.7,35,262/- paid along with a direction for reimbursement of amount of Rs.11,80,975/- paid by the complainants on account of pre-EMIs at the interest rate prescribed as per RERA, 2016 and HRERA Rules, 2017 from the due date of possession till the date of actual handing over, along with a direction to the Respondent no.1 to pay the Pre-EMIs till the offer of possession in accordance with the subvention scheme.

C. Relief sought by the complainants:

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

- (i) Direct the respondent no.1 to pay the pre-EMIs in accordance with the subvention scheme till the offer of possession;
- (ii) Direct the respondent no.1 to reimburse the Pre-EMI payment of Rs.11,80,795/- paid by the complainants from August 2018 till April 2020 along with interest at the prescribed rate as per RERA, 2016 and HARERA Rules,2017.
- (iii) Direct the respondent no.1 to pay the delayed interest on the amount paid by the complainants at the prescribed rate from due date of handing over possession, i.e. June 2019 till actual handing over of possession.

5. On the date of hearing, the authority explained to the respondent /promoter about the contravention as alleged to have been committed in relation to section 11(4)(a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent no. 1.

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

- I. That the complainants booked an apartment being number no. 0504 in tower T6, 5th floor, having a super area of 1275 sq. ft.

(approx.) for a total consideration of Rs.69,65,823/- vide a booking form;

- II. That consequentially, after fully understanding the various contractual stipulations and payment plans for the said apartment, the complainant executed the allotment letter dated 18.03.2015. Thereafter, further submitted that as per clause 25 of the terms and conditions of the agreement, the possession of the apartment was to be given by December 2018, with an additional grace period of 6 months, i.e. till June 2019.
- III. That as per clause 26 of the agreement, compensation for delay in giving possession of the apartment would not be given to allottees akin to the complainant who has booked their apartments under any special scheme such as 'No EMI till offer of possession, under a subvention scheme.' Further, it was also categorically stipulated that any delay in offering possession due to 'Force Majeure' conditions would be excluded from the aforesaid possession period.
- IV. That in interregnum, the pandemic of covid19 gripped the entire nation since March 2020. The Government of India has itself categorized the said event as a 'Force Majeure' condition, which automatically extends the timeline of handing over possession of the apartment to the complainant. Thereafter, it would be apposite to note that the construction of the Project is in full

swing, and the delay if at all, has been due to the government-imposed lockdowns which stalled any sort of construction activity. Till date, there are several embargos qua construction at full operational level.

- V. That the said project is registered with this authority vide registration no. 97 of 2017 dated 24.08.2017 and the completion date as per the said registration is 30.06.2021.
- VI. That the complainants entered into a memorandum of understanding dated 19.03.2015 with the respondent whereby new stipulations and liabilities were agreed to between both the parties. It is thus apposite that those stipulations that had been accorded be respected today and the complainants are bound by the terms and conditions of the memorandum of understanding entered into by them on their own volition and consent. The complainants cannot renege on their promise to stand by the stipulations.
- VII. That the delay if at all, has been beyond the control of the respondent and as such extraneous circumstances would be categorized as 'Force Majeure', and would extend the timeline of handing over the possession of the unit, and completion the project.
- VIII. The delay in construction was on account of reasons that cannot be attributed to it. It is most pertinent to state that the flat buyer

agreement provide that in case the developer/respondent delays in delivery of unit for reasons not attributable to the developer/respondent, then the developer/respondent shall be entitled to proportionate extension of time for completion of the said project. The relevant clause which relates to the time for completion, offering possession extension to the said period are "clause 25 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.

- IX. The force majeure clause, it is clear that the occurrence of delay in case of delay beyond the control of the respondent, including but not limited to the dispute with the construction agencies employed by it for completion of the project is not a delay on account of the respondent for completion of the project.
- X. That the timeline stipulated under the flat buyer agreement was only tentative, subject to force majeure reasons which are beyond the control of the respondent. The respondent in an endeavor to finish the construction within the stipulated time, had from time to time obtained various licenses, approvals, sanctions, permits including extensions, as and when required. Evidently, the respondent had availed all the licenses and permits in time before starting the construction;

XI. That apart from the defaults on the part of the allottees, 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.

XII. The respondent has further submitted that the intention of the force majeure clause is to save the performing party from the consequences of anything over which he has no control. It is no more *res integra* that force majeure is intended to include risks beyond the reasonable control of a party, incurred not as a product or result of the *negligence or malfeasance* of a party, which have a materially adverse effect on the ability of such party to perform its obligations, as where non-performance is caused

by the usual and natural consequences of external forces or where the intervening circumstances are specifically contemplated. Thus, in light of the aforementioned, it is most respectfully submitted that the delay in construction, if any, is attributable to reasons beyond the control of the respondent and as such it 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 cognizance 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 she has cited 'financial incapacity' as a reason, to seek a refund of the monies paid by her for the apartment. In view thereof, this complaint is liable to be dismissed at the threshold.

- XV. The respondent has submitted that the completion of the building is delayed by reason of non-availability of steel and/or cement or other building materials and/or water supply or electric power and/or slow down strike as well as insufficiency of labour force which is beyond the control of respondent and if non-delivery of possession is as a result of any act and in the aforesaid events, the respondent shall be liable for a reasonable extension of time for delivery of possession of the said premises as per terms of the agreement executed by the complainant and the respondent. The respondent and its officials are trying to complete the said project as soon as possible and there is no malafide intention of the respondent to get the delivery of project, delayed, to the allottees. It is also pertinent to mention here that due to orders also passed by the Environment Pollution (Prevention & Control) Authority, the construction was/has been stopped for a considerable period day due to high rise in pollution in Delhi NCR.

- XVI. That the enactment of 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.
- 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 'Hill View' project of the

respondent was under the ambit of the stay order, and accordingly, there was next to no construction activity for a considerable period. It is pertinent to note that similar stay orders have been passed during winter period in the preceding years as well, i.e. 2017-2018 and 2018-2019. Further, a complete ban on construction activity at site invariably results in a long-term halt in construction activities. As with a complete ban the concerned labour was let off and they travelled to their native villages or look for work in other states, the resumption of work at site became a slow process and a steady pace of construction as realized after long period of time.

XIX. The respondent has further submitted that graded response action plan targeting key sources of pollution has been implemented during the winters of 2017-18 and 2018-19, These short-term measures during smog episodes include shutting down power plant, industrial units, ban on construction, ban on brick kilns, action on waste burning and construction, mechanized cleaning of road dust, etc. This also includes limited application of odd and even scheme.

XX. That the pandemic of covid-19 has had devastating effect on the world-wide economy. However, unlike the agricultural and tertiary sector, the industrial sector has been severally hit by the pandemic. The real estate sector is primarily dependent on its

labour force and consequentially the speed of construction. Due to government-imposed lockdowns, there has been a complete stoppage on all construction activities in the NCR Area till July 2020. In fact, the entire labour force employed by the respondent was 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 authority, registration certificate date up to 6 months has been extended by invoking clause of force majeure due to spread of corona-virus pandemic in the country, which is beyond the control of respondent.

XXI. The respondent 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, and 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. Further that not accepting but for arguments sake if at all delay penalty compensation is made payable to the complainant then the period for the first and second Covid- 19 lockdown should be exempted from the said computation as no construction despite rigorous efforts could have been undertaken during the said period of time.

D.II. Reply by the respondent no. 2.

7. The respondent no. 2 has contested the complaint on the following grounds. The submissions made therein, in brief is as under: -
 - i. That the present complaint is an example of clever drafting and the complainants with mala fide intentions has falsely implicated the respondent no.2 without any reason and default of the respondent no. 2. The main dispute is only between the complainants and the respondent no. 1 regarding possession of the mortgaged residential unit in question and payment of Pre-

EMIs to the respondent no. 2 in respect of the loan facility availed by the complainants. Thus, the present complaint is not maintainable and the same is liable to be dismissed on this ground alone.

- ii. That the respondent no. 2 being the financial institution registered under the provision of the National Housing Bank Act, 1987 and presently governed by Reserve Bank of India and the authority has no jurisdiction to deal with any matter in respect of financial institutions. Thus, the present complaint is liable to be dismissed on this ground alone qua the respondent no. 2. The respondent no. 2 is not the developer of the project, nor a real estate agent and nor the promoter of the real estate project and therefore not liable for any real estate related liability arising under the Act.
- iii. That the respondent no. 2 disbursed the loan amount of Rs.56,80,639/- in total, hitherto, to the respondent no.1 on behalf of the complainants on 26.07.2016.
- iv. That the whole premise on which the complainants are claiming the relief of EMI payments from respondent no. 1, till actual possession is handed over, is based on the agreement executed between the complainant and the respondent no. 1 dated 19.03.2015 (hereinafter referred as 'MOU'). The respondent no. 1 is not privy to the said agreement and cannot be bound by the

terms and conditions. Hence, the complainants cannot enforce the said memorandum of understanding to the detriment of respondent No. 2 who was not signatory to the said memorandum of understanding.

- v. That the respondent no. 2 is being a non-banking financial institution and the debt being a secured debt, respondent no. 2 is entitled to recover its lawful dues and interest, if any as per law. It is settled law that recovery by non-banking financial institutions is of paramount interest. Furthermore, the respondent no. 1 has acted within the four corners of the loan agreement executed between the parties towards the lawful recovery of their dues, as per law.
 - vi. That the parties entered into tripartite agreement on 10.06.2015 whereby it has been agreed that there would be no repayment default of loan amount for any reason whatsoever including but not limited to any concern/ issues by and between the complainants and respondent no. 1. It is further agreed that the complainants obligation to repay the loan shall be distinct and independent of any issues/concern dispute of whatsoever nature between the buyer and the developer.
8. 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

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

F. Findings on the objections raised by the respondent

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

10. The respondent has taken a stand that the complainants are the investors and not consumers; therefore, they are not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority observes 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 it contravenes or violates any provisions of the Act or rules or regulations made there under. Upon careful perusal of all the terms and conditions of the apartment buyer's agreement, it is revealed that the complainant is buyer and paid total price of **Rs.74,01,339.63/-** 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;"

11. 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 complainants is an allottee(s) as the subject unit was allotted to her 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. 000600000010557 titled as ***M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr.*** has also held that the concept of investor is not defined

or referred in the Act. Thus, the contention of promoter that the allottees being investors is not entitled to protection of this Act also stands rejected.

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.

12. From the bare reading of the possession clause of the buyer developer agreement, it becomes very clear that the possession of the apartment was to be delivered by **December 2018**. The respondent in its contention pleaded the force majeure clause on the ground of Covid-19. The High Court of Delhi in case no. ***O.M.P (I) (COMM.) No. 88/2020 & IAs. 3696-3697/2020 title as M/S HALLIBURTON OFFSHORE SERVICES INC VS VEDANTA LIMITED & ANR. 29.05.2020*** held that *the past non-performance of the Contractor cannot be condoned due to the COVID-19 lockdown in March 2020 in India. The Contractor was in breach since September 2019. Opportunities were given to the Contractor to cure the same repeatedly. Despite the same, the Contractor could not complete the Project. The outbreak of a pandemic cannot be used as an excuse for non performance of a contract for which the deadlines were much before the outbreak itself.* Now this means that the respondent/promoter has to complete the construction of the apartment/building by December 2018. It is clearly mentioned by the respondent/ promoter for the same project, in complaint no. 3085 of

2020 (on page no. 28 of the reply) that only 42% 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 complainants/allottees by the promised/committed time. 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 wrongs"***. 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 its submissions that the project is completed upto 42% 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 complainants.

G.I Direct the respondent no.1 to pay the pre-EMIs in accordance with the subvention scheme till the offer of possession.

13. **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.

14. Under the subvention scheme, there is a tri-partite agreement dated 10.06.2015 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 7 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 until to the Borrower by the Builder, the Borrower shall be liable to pay to IHFL regularly each month the EMI as laid down in the loan Agreement to be signed by and between IHFL and the Borrower, subsequent to completion of the Liability Period. The Borrower shall execute such other documents as may be required by IHFL in favor of IHFL in this regard."

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 tripartite agreement is reproduced below: -

"The Borrower has informed IHFL about the scheme of arrangement between the Borrower and the Builder in terms whereof the Builder hereby assumes the liability on account of interest payable by the Borrower to IHFL during to the period referred to as the "Liability Period" in terms of_ months, from the date of first disbursement of loan facility i.e. till 30.06.2018 and/or any other period as agreed by and between the borrower and the Builder, more particularly referred under Schedule I annexure 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 release 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 arrangement between them. .

15. In the instant complaint, the allottee and the developer entered into a memorandum of understanding dated 19.03.2015 whereby the developer 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 provides that the scheme shall 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 of the Allotment Letter and company policies.”

16. 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.

17. 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".

18. 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.

19. 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."

20. A perusal of memorandum of understanding dated 19.03.2015 entered into between the buyer and developer shows that the subvention scheme was to be governed as per clause (b & c) of that document which have already been detailed in para 15 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 buyer paying 90% of the total sale price of the allotted unit to the developer though 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 dated 18.03.2015 is Rs.69,65,125/- and as per subvention payment plan, the allottee was required to pay a sum of Rs.62,68,612.50/- i.e. 90% of the total sale price. That amount was admittedly paid by her to the builder by 27.07.2016 as evident from statement of payment received dated 15.01.2021. It is evident from a

perusal of the status report of the project filed by the developer that the construction of the project is complete upto 42%. Though the tenure of subvention scheme is 36 months or offer of possession whichever is earlier but after passage of more than 6.5 years neither the construction is completed nor offer of possession of the allotted unit has been made to the allottee by the builder. Even, there is nothing on the record to show as agreed between the parties as per memorandum of understanding dated 19.03.2015 that the builder is paying any pre-Emi during the tenure of subvention scheme. So, on its failure to pay that amount to the financial institution being paid by the allottee, the builder is liable to paid that amount as per subvention scheme. So, as per the memorandum of understanding dated 19.03.2015, the respondent/developer is liable to pay the arrears of Pre-Emi from 27.07.2016 to 27.07.2019 i.e. for 36 months as per clause (b). During the above mentioned said period, the complainants/buyers have already paid Pre-Emi/Emi to the financial institution i.e. respondent no. 2. So, the respondent/developer is also liable to pay the arrears of Pre-Emi/Emi to the complainant.

21. 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 (25) of the allotment letter cum buyer's

agreement executed between the parties on 18.03.2015, the possession of the subject apartment was to be delivered within stipulated time i.e., by 31.12.2018. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over possession is 31.12.2018. 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 18.03.2015 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.

22. 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. 31.12.2018 till the handing over of possession as per provisions of section 18(1) of the Act read with rule 15 of the rules, 2017.

H. Directions of the authority

23. 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/builder is directed to pay arrears of Pre-Emi/Emi to the complainants/allottees from 27.07.2016 to 27.07.2019 as per memorandum of understanding.
- ii. The respondent/builder is further directed to pay delayed possession charges at the prescribed rate of 9.30% p.a. for every month of delay from the due date of possession i.e. 31.12.2018 till the handing over of possession of the allotted unit;
- iii. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period;
- iv. The arrears of such interest accrued from 31.12.2018 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;
- v. The rate of interest chargeable from the allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same

rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

- vi. The respondent shall not charge anything from the complainants which is not the part of the allotment letter cum buyer's agreement. The respondent/promoter is not entitled to charge holding charges from the complainants/allottees at any point of time even after being part of allotment letter cum buyer's agreement as per law settled by hon'ble apex court in civil appeal no. 3864-3889/2020 decided on 14.12.2020.

24. Complaint stands disposed of.

25. 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