

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

Complaint no. : 3109 of 2020
First date of hearing : 27.10.2020
Date of decision : 18.08.2021

1. Neeraj Kaswan
2. Ram Swarup Kaswan
Both RR/o: - House No. 1621, Sector- 32A,
Samrala Road, Ludhiana- 141010

Complainants

Versus

M/s Supertech Limited.
Office at: 1114, 11th floor
Hamkunt Chambers, 89,
Nehru Place, New Delhi- 110019

Respondent

CORAM:

Dr. K.K. Khandelwal
Shri Samir Kumar
Shri Vijay Kumar Goyal

Chairman
Member
Member

APPEARANCE:

Sh. Rajan Kumar Hans Advocate
Sh. Bhrigu Dhami Advocate

Complainants
Respondent

ORDER

1. The present complaint dated 01.10.2020 has been filed by the complainants/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of

the Act wherein it is *inter alia* prescribed that the promoter shall be responsible for all obligations, responsibilities and functions 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	"Supertech Hues", Sector- 68, Gurugram.
2.	Project area	32.83 acres (As per the RERA registration)
3.	Nature of the project	Group housing project
4.	DTCP license no. and validity status	106 of 2013 and 107 of 2013 dated 26.12.2013 valid till 25.12.2017
5.	Name of licensee	Sarv Realtors Private Limited
6.	RERA Registered/ not registered	Registered vide no. 182 of 2017 dated 04.09.2017 (Tower No. A to H, K, M to P and T, V, W)
7.	RERA registration valid up to	31.12.2021
8.	Unit no.	A/0904, 9 th floor, tower A [Page no. 57 of complaint]
9.	Unit measuring	1180 sq. ft. [super area]

10.	Date of execution of buyer developer agreement	22.07.2014 [Page no. 56 of complaint]
11.	Date of execution of memorandum of understanding	23.08.2016 [page no. 73 of complaint]
12.	Payment plan	Construction linked payment Plan [Page no. 58 of complaint]
13.	Total consideration	Rs.87,04,480/- [as per payment plan page no. 58 of complaint]
14.	Total amount paid by the complainant	Rs.87,83,253.15/- [as per statement of payment received dated 06.07.2020 page no. 83 of complaint]
15.	Due date of delivery of possession as per clause E (25) of the buyer's developer agreement: by April 2017 plus 6 Month grace period upto the Offer Letter or possession or actual physical possession whichever is earlier. [Page 64 of complaint]	30.04.2017 [Note: - 6 Months grace period is not allowed]
16.	Delay in handing over possession till the date of order i.e. 18.08.2021	4 year 3 months and 19 days
17.	Status of the project	Ongoing

B. Facts of the complaint

3. The complainants submitted that he has received a marketing call from the office of respondent/builder about investment in their upcoming project HUES, situated at Sector 68, Gurugram. Marketing

staff of the respondent shows rosy pictures of the project and allure with proposed specifications and invited for site visit.

4. That on date 13.10.2013 the complainants purchased the said property. The complainant(s) paid a sum of Rs.5,00,000/- towards the booking the unit vide issuing following cheque vide no. 275502, drawn on UCO Bank.
5. That on date 22.03.2014 a pre-printed one side, arbitrary and unilateral flat buyer agreement for unit no. 0904, tower-I, admeasuring 1130 sq. ft. was executed between both the parties. That as per agreement the respondent had to complete the construction of flat by April 2017 along with a 6 month grace period. Therefore the due date of possession becomes on or before October 2017. It is further submitted that from year 2014 to 2016, respondents kept raising the demand as per stage of construction and the complainants paid all demands on time.
6. The complainants submitted that on date 22.07.2014 another flat buyer agreement for unit no. 0904, tower-A, admeasuring 1180 sq. ft. was executed between the complainants and respondent. That as per agreement the respondent had to complete the construction of flat by April 2017 along with a 6-month grace period. Therefore the due date of possession becomes on or before October 2017. It is further submitted that the respondent changed the unit number from I-0904,



- to A-0904 and also increased the size of the apartment from 1130 sq. ft. to 1180 sq. ft.
7. The complainants submitted that on 04.08.2014 an addendum to the flat buyer's agreement dated 22.07.2014 was signed between the complainant and the respondent whereas the respondent agreed to share the 50% burden of increased area of the flat. So the cost of increase of 50 square feet was divided equally between the complainant and the respondent. As per calculation of flat cost given in the flat buyer's agreement the respondent took the responsibility to credit of Rs.1,84,417/- in the complainant account at the time of possession as the 50% bearing of the increased area cost.
 8. The complainants further submitted that on 23.08.2016 a Memorandum of Understanding was signed between the complainant and respondent whereas the respondent and complainant agreed on "No Pre Emi-Till Possession Scheme".
 9. The complainants further submitted that on 22.08.2016, India bulls issued the sanction letter of the loan for their allotted flat whereas approving the sanction of loan of Rs. 38,00,000/-.
 10. That till date the respondent had called Rs.77,88,630/- for payment and the complainants had paid Rs.87,83,253/- i.e. 113% of total money called including with interest and other allied charges of actual purchase price, but when complainant observed that there is no progress in construction of subject flat for a long time, they raised

their grievance to respondent through various emails. Through a mail dated 08.07.2020, the respondent cited “noncompliance of terms and conditions of MoU” and expressed its inability to reimburse the further Pre-Emi.

11. The complainants having paid more than 100% of the actual amounts of flats and ready and willing to pay the remaining amount if any, the respondent party has failed to deliver the possession of flat.
12. That the complainant had purchased the flat with intention that after the purchase, his family will live in their own flat. That it was promised by the respondent party at the time of receiving payment for the flat that the possession of fully constructed flat along like surface parking, landscaped lawns, club/pool, EWS etc. as shown in brochure at the time of sale would be handed over to the complainants as soon as construction work is complete i.e. by October 2017.
13. The complainants further submitted that the complainant visited the project site in March 2020 and found that the construction activity had stopped since the last 18-24 months and the tower is far from completion. It is pertinent to mention here that the current stage of the project shows that it will take more than 2-3 years to complete.

C. Relief sought by the complainants:

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

- (i) To pass an appropriate award directing the respondent party to pay delayed possession interest @ 18% compounding from due date possession i.e. October 2017 till actual date of possession.
- (ii) To pass an appropriate award directing the respondent party to continue paying Pre-EMI as per the term & conditions of the entered agreement.
- (iii) To pass an appropriate award directing the respondent party to give a final date of possession to the complainant.
- (iv) To pass an appropriate award to the direct respondent company to cancel the unit and refund the amount if the given date of possession is not adhered to.

15. 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

16. The respondent contested the complaint on the following grounds.

The submissions made therein, in brief are as under: -

- I. That complainant booked an apartment being number no. I-0904, on 9th floor, tower I, having a super area of 1130 sq. ft. (approx.) for a total consideration of Rs.84,14,180/- 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 flat buyer agreement dated 22.03.2014. Thereafter, as per clause 24 of the terms and conditions of the agreement, the possession of the apartment was to be given by April 2017, with an additional grace period of 6 months.
- III. That as per clause 24 of the agreement, compensation for delay in giving possession of the apartment was not given to allottee akin to the complainant who has booked its apartment under a 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 the complainants elected the 'Possession Linked' payment scheme whereby the construction of the apartment was premised on the timely payments made by the complainants as per the payment schedule provided in the agreement. Non-compliance with the payment schedule would consequentially cause a delay in handing over possession of the apartment.
- V. Thereafter on the request of the complainants, the respondents changed the booking of the apartment to unit bearing number A-

0904 in Tower A, 9th Floor, admeasuring 1180 sq ft. on the same terms and conditions as the erstwhile apartment. Accordingly, the complainants executed a fresh agreement on 22.07.2014 whereby possession was promised to be given by the respondent by April of 2017 with an additional grace period of 6 months. Since the area of the apartment stood enlarged, the complainant undertook to pay the additional monies amounting to Rs. 87,04,480/-.

- VI. That in interregnum, the pandemic of covid-19 has 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.
- VII. That as a priori the complainant has in one of its reliefs sought for cancellation for alleged delay in handing over possession of the apartment. It would be apposite to note that the Hon'ble Punjab and Haryana High Court in Experion Developers Pvt. Ltd. v. State of Haryana & Ors. (CWP No. 38144 of 2018 & connected

matters) has held that the jurisdiction of the adjudicating authority is different from the adjudicating officer. The present complaint has been made to the adjudicating authority seeking cancellation, which is beyond the jurisdiction of the adjudicating officer. As per the aforesaid judgement, the adjudicating officer has the jurisdiction to award cancellation /withdrawal, and not the adjudicating authority. Therefore the instant complaint is not maintainable, as the complaint is beyond the jurisdiction of this Hon'ble Tribunal and is accordingly liable to be dismissed at the threshold.

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

IX. The delay on 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.

- X. The force majeure clause, as 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.
- XI. That with respect to the present agreement, the time stipulated for delivering the possession of the unit was on or before April 2017. However, the buyer’s agreement duly provides for extension period of 6 months over and above the said date. Thus, the possession in strict terms of the buyer’s agreement was to be handed over in and around October 2017. It is a known fact that the delivery of a project is a dynamic process and heavily dependent on various circumstances and contingencies. In the present case also, the respondent had endeavoured to deliver the property within the stipulated time. The respondent earnestly has endeavoured to deliver the properties within the stipulated period but for reasons stated in the present reply could not complete the same.

XII. 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;

XIII. That apart from the defaults on the part of the allottee, like the complainant herein, the delay in completion of project was on account of the following reasons/circumstances that were above and beyond the control of the respondent:

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

XIV. 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.

XV. 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.

XVI. That the said project is registered with this authority vide registration no. 182 of 2017 dated 04.09.2017. The authority had issued the said certificate which is valid for a period coming from 04.09.2017 to 31.12.2021 vide the said registration certificate, the respondent hereby undertakes to complete the said project by December 2021;

XVII. 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.

XVIII. 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 intention of the Respondent is just to complete the project within stipulated time submitted before the HRERA Authority. According to the terms of Builder Buyers 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.

XIX. 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.

XX. That compounding all these extraneous considerations, the ***Hon'ble Supreme Court vide order dated 04.11.2019***, imposed a blanket stay on all construction activity in the Delhi- NCR region. It would be apposite to note that the 'Hues' project of the respondent was under the ambit of the stay order, and accordingly, there was next to no construction activity for a considerable period. It is pertinent to note that similar stay orders have been passed during winter period in the preceding years as well, i.e. 2017-2018 and 2018-2019. Further, a complete ban on construction activity at site invariably results in a long-term halt in construction activities. As with a complete ban the concerned labor was let off and they traveled to their native villages or look for work in other states, the resumption of work at site became a slow process and a steady pace of construction as realized after long period of time.

XXI. 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.

XXII. 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. It is most humbly submitted that the pandemic is clearly a 'Force Majeure' event, which automatically extends the timeline for handing over possession of the apartment.

17. 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

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.

E.I Territorial jurisdiction

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

E. II Subject matter jurisdiction

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

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

F. Findings on the objections raised by the respondent

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

20. 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 **April 2017**. The respondent in its contention pleaded the force majeure clause on the ground of Covid-19. The High Court of Delhi in case no. ***O.M.P (I) (COMM.) No. 88/2020 & I.As. 3696-3697/2020 titled 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 April 2017. It is clearly mentioned by the respondent/ promoter for the same project, in complaint no. 2916 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 complainant/allottee by the promised/committed time. The lockdown due to pandemic- 19 in the country began on 25.03.2020. So the contention of the respondent/promoter to invoke the force majeure clause is to be rejected as it is a well settled law that ***"No one can take benefit out of his own wrong"***. Moreover there is nothing on the record to show that the project is near completion, or the developer applied for obtaining occupation certificate. Rather it is evident from its submissions that the project is complete upto 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.

21. 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.

G. Findings on the relief sought by the complainant

- G.I The respondent to pay delay possession interest @ 18% compounding from the due date if possession i.e. October 2017 till actual date of possession.

22. 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.”

23. Clause E (25) of the buyer developer agreement (in short, agreement) provides for handing over of possession and is reproduced below: -

“E. POSSESSION OF UNIT: -

25. The possession of the unit shall in 42 months i.e. by April 2017 or extended period as permitted by the agreement. However, the company hereby agrees to compensate the Buyer(s) @ Rs. 5.00/- (five rupees only) per sq. ft. of super area of the unit per month for any delay in handing over possession of the unit beyond the given period plus the grace period of 6 months and up to the offer letter of possession or actual physical possession whichever is earlier to cover any unforeseen circumstances. Upon receiving the Offer Letter of possession, the Buyer(s) shall within time stipulated, take possession of the unit by executing sale deed, undertaking, maintenance agreement and any other documents as prescribed and required.....”

24. 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 signing of buyer developer agreement, commencement of construction, approval of building plan etc. 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.

25. 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 buyer developer agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused its 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.

26. **Admissibility of grace period:** As per clause E (25) of the buyer developer agreement, the possession of the allotted unit was supposed to be offered by the April 2017 with a grace period of 6(six) months i.e. October 2017. 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 April 2017. Rather, it is evident from the pleading of the respondent that the construction of the project is upto 42% complete and the entire project may take some time to get completed and thereafter make offer of possession to the allottees. So in view of these facts, the developer can't be allowed grace period of 6 months more beyond April 2017 as mentioned in clause E (25) in the buyer developer agreement.
27. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges at the rate of 18%. However, proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

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

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

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

28. 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.

29. Taking the case from another angle, the complainant-allottee was entitled to the delayed possession charges/interest only at the rate of Rs.5/- per sq. ft. per month as per relevant clauses of the buyer's agreement for the period of such delay; whereas, the promoter was entitled to interest @ 24% per annum compounded at the time of every succeeding installment for the delayed payments. The functions of the authority are to safeguard the interest of the aggrieved person, may be the allottee or the promoter. The rights of the parties are to be balanced and must be equitable. The promoter cannot be allowed to take undue advantage of his dominate position and to exploit the needs of the home buyers. This authority is duty bound to take into consideration the legislative intent i.e., to protect the interest of the consumers/allottees in the real estate sector. The clauses of the

buyer's agreement entered into between the parties are one-sided, unfair and unreasonable with respect to the grant of interest for delayed possession. There are various other clauses in the buyer's agreement which give sweeping powers to the promoter to cancel the allotment and forfeit the amount paid. Thus, the terms and conditions of the buyer's agreement are ex-facie one-sided, unfair and unreasonable, and the same shall constitute the unfair trade practice on the part of the promoter. These types of discriminatory terms and conditions of the buyer's agreement will not be final and binding.

30. 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%.
31. The definition of term 'interest' as defined under section 2(z a) 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;"

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

G.II The respondent to continue paying Pre-EMI as per the terms and condition of the agreement?

33. **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 as demanded at various stages of construction. Once a certain amount of payment is done, the buyer pays the remaining amount along with the bank equally at the time of possession or prior to that. The amount of interest is borne by the builder for a limited period and the buyer can repay the amount to the bank in the form of EMI later. In these type of cases despite an agreement of sale is executed inter-se between the builder and the buyer, sometimes there is execution of one or more contractual obligations in the form of memorandum of understanding (MoU) and tripartite agreement (TPA). In the builder buyer agreement, there are 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 period i.e. either upto the date of offer of possession or thereafter. In the third case, there is a tripartite 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 of delivery of possession. The MoU and tripartite agreements executed between the buyer, seller and the financial institution fall the definition of agreement of sale and can be enforced by the regulatory authority in view of the provisions of The Real Estate Regulation and Development Act, 2016 as 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 re-affirmed 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.

34. In the instant complaint, the allottee and the developer entered into a memorandum of understanding dated 23.08.2016 whereby the developer as per clause (b) the developer has agreed that the tenure of subvention scheme shall be 27 months and the developer expected to offer possession of the booked unit to the buyer within said time. However, if the possession gets delayed due to any reasons than the developer has agreed to pay the Pre EMI only to the buyer even after 27 months till offer of possession to the buyer. Further, 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 27 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 27 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.”

35. 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 tripartite 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.

36. 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".

37. 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.

38. 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 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 the Act 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."

39. A perusal of memorandum of understanding dated 23.08.2016 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 34 of the order. The tenure of that scheme is 27 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 buyer developer agreement dated 22.07.2014 is **Rs.87,04,480/-** and as per subvention payment plan, the allottee was required to pay a sum of **Rs.78,34,032/-** i.e. 90% of the total sale price. That amount was admittedly paid by her to the builder by 02.09.2016 as evident from statement of payment received dated 06.07.2020. 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 7.1 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 23.08.2016 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 23.08.2016, the respondent/ developer is liable to pay the arrears of Pre-Emi from 02.09.2016 to 02.12.2018 i.e. for 27 months as per clause (b). During the above mentioned said period, the complainant/buyer has already paid Pre-Emi/Emi to the financial institution. So, the respondent/developer is also liable to pay the arrears of Pre-Emi/Emi to the complainant.

40. 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 E (25) of the buyer developer agreement executed between the parties on 22.07.2014, the possession of the subject apartment was to be delivered within stipulated time i.e., by 30.04.2017. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over possession was 30.04.2017.

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 complainants as per the terms and conditions of the buyer developer agreement dated 22.07.2014 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.

41. 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. 30.04.2017 till the handing over of possession as per provisions of section 18(1) of the Act read with rule 15 of the rules, 2017.
42. 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 02.09.2016 to 02.12.2018 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. 30.04.2017 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 30.04.2017 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 allottees, 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 buyer developer agreement. The respondent is not entitled to charge holding charges from the complainants/allottees at any point of time even after being part of buyer developer agreement as per law settled by hon'ble Supreme Court in civil appeal no. 3864-3889/2020 decided on 14.12.2020.

43. Complaint stands disposed of.

44. File be consigned to registry.

(Samir Kumar)
Member

(Vijay Kumar Goyal)
Member


Dr. K.K. Khandelwal
(Chairman)

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 18.08.2021

Judgement uploaded on 10.11.2021