BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 3978 of 2020
First date of hearing : 02.12.2020
Date of decision : 18.08.2021

1. Mrs. Sushil Dahiya
2. Col. Sanjay Dahiya

Both RR/o: - House No. C 404, Sujjan Vihar,
Sector-43, Gurugram, Haryana **Complainant**

Versus

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

CORAM:
Shri K.K. Khandelwal **Chairman**
Shri Samir Kumar **Member**
Shri Vijay Kumar Goyal **Member**

APPEARANCE:
Sh. Sushila Dahiya Complainant in person
Sh. Bhrigu Dhami Advocate for the respondent

ORDER

1. The present complaint dated 03.11.2020 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.	1701, 17th floor, tower F [Page no. 36 of complaint]
9.	Unit measuring	1180 sq. ft. [super area]
10.	Date of execution of buyer developer agreement	08.06.2015 [Page no. 35 of complaint]
11.	Payment plan	Construction linked payment plan [Page no. 37 of complaint]
12.	Total consideration as per payment plan	Rs.87,25,720/- [Page no. 37 of complaint]
13.	Total amount paid by the complainants	Rs.76,93,952/- [as per statement of payment received dated 06.08.2020 page no. 53 of complaint]
14.	Due date of delivery of possession as per clause E (24) of the buyer developer agreement: by July 2018 plus 6 months grace period for offer of possession and actual physical possession whichever is earlier. [Page 43 of complaint]	31.07.2018 [Note: - 6 month grace period is not allowed]
15.	Delay in handing over possession till the date of order i.e. 18.08.2021	3 year and 18 days

B. Facts of the complaint

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

i. That the complainants to the representation made through an agent made a booking in the project named HUES, Sector 68, Gurgaon by the M/s Supertech Ltd, and booked a 2 BHK apartment. The complainants deposited an amount of Rs.700,000/- in favour of M/s Supertech Ltd as advance for booking. Customer ID 7003149 was allocated with registration/ booking date 16.10.2013. That M/s Supertech Ltd vide their email dated 18.03.2014 allocated 2 BHK+ 2 TOIL (1130 sq. ft.) apartment in tower G at 17th floor captioned as G1701, at BSP of Rs.70,10,520/- and total cost of Rs.83,78,020/- to the complainants. The application duly signed by the complainants was deposited with the respondent company.

ii. That the respondent unilaterally increased super area from 1130 sq. ft to 1180 sq. ft and shifted the allocated apartment to tower F. This unilateral change of super area and resultant increased in cost was objected by the complainants and repeatedly represented against the undesired change. The respondent did not agree, in order to save major loss to the booking amount, the complainants were constrained by the respondent to

accept their unilateral reallocation with increased super area and cost.

iii. That the buyer developer agreement was executed on 08.06.2015 for unilaterally allocated 2BHK+ 2TOIL (1180 sq. ft.) in tower F at 17th floor, captioned as F1701 at BSP of Rs.73,20,720/- and total cost of Rs.87,25,720/- as per the statement of payment received dated 06.08.2020, downloaded from customer portal of the respondent company.

iv. That the complainants till date have paid an amount of Rs.76,93,952/- to the respondent towards purchase cost. A amount of Rs.18,81,424/- has been funded from the complainants savings and Rs.58,12,528/- has been funded by ICICI bank through a loan disbursed on a tripartite agreement between M/s Supertech Ltd, ICICI bank Ltd and the complainants executed on 24.11.2016. The loan was disbursed on 26.12.2016 and was credited directly in favour of M/s Supertech Ltd, another general agreement related to the bank loan was executed between buyer and developer for "no EMI till possession scheme" termed as subvention scheme. The MoU mandates M/s Supertech to pay PreEMI for the subject loan till possession. However, M/s Supertech Ltd did not

pay Pre EMI regularly from Jan 2019 to Jun 2019 and did not pay at all from Jul 2019; inspite of our perseverance and their false promises to pay. The response to telephonic communications and personal meetings with officials at M/s Supertech office ended in assurances and failed commitments by the developer. Resultantly, the Pre EMIs due to the ICICI Bank Ltd. had to be borne by the complainants, and assurance from M/s Supertech Ltd. to reimburse the Pre EMI amount has since not been materialized.

v. The complainants submitted that violation of clause 24 of buyer developer agreement by M/s Supertech Ltd, for not handing over possession by the due date which is an obligation of the promoter under section 11(4)(a) of the Act ibid.

vi. That the respondent has discontinued paying Pre EMI and violated the agreed terms of the No EMI till possession under the subvention scheme agreed for funding. The possession has not yet been delivered even after significant delay with respect to the agreed terms.

C. Relief sought by the complainants:

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

(i) To direct the respondent to pay delay in delivery of possession at prescribed rate of interest @ 10.70% p.a. as per the provisions of section 18(1) of the Act ibid.

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

6. The respondent has contested the complaint on the following grounds. The submission made therein, in brief is as under: -

I. That complainant booked an apartment being number no. R0380F01701 in tower F, 17th floor having a super area of 1180 sq. ft. (approx.) for a total consideration of Rs.87,25,720/- 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 08.06.2015. Thereafter, further submitted that as per clause 24 of the terms and conditions of the agreement, the possession of the apartment was to be given by July 2018, 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 would not be given to allottee akin to the complainant who has booked their apartment under any special scheme such as 'No EMI till offer of possession, under a subvention scheme.' Further, it was also categorically stipulated that any delay in offering possession due to 'Force Majeure' conditions would be excluded from the aforesaid possession period.

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 Hon'ble authority vide registration no. 182 of 2017 dated

04.09.2017 and the completion date as per the said registration is December 2021;

VI. That the complainant is not maintainable before this authority. This is because the relief claimed by the complainant is for compensation in delay in handing over possession, and as such this relief can only be given by the adjudicating officer and not this authority. A perusal of rule 29 and 30 of the Haryana RERA rules, would drive home the submission of the respondent. Further the Punjab and Haryana High Court in M/s Pioneer Urban Land and Development Limited & Others v Union of India and others has categorically held that a claim for compensation is under the sole ambit the adjudicating officer and not the authority. Therefore, in view of the fact that the relief claimed by the complainant is beyond the jurisdiction of this authority, the complaint is liable to be dismissed.

VII. 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.

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 the respondent 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 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.

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 the respondent may be granted reasonable extension in terms of the allotment letter.

XIII. It is public knowledge, and several courts and quasi-judicial forums have taken cognisance of the devastating impact of the demonetisation of the Indian economy, on the real estate sector. The real estate sector is highly

dependent on cash flow, especially with respect to payments made to labourers and contractors. The advent of demonetisation led to systemic operational hindrances in the real estate sector, whereby the respondent could not effectively undertake construction of the project for a period of 4-6 months. Unfortunately, the real estate sector is still reeling from the aftereffects of demonetisation, which caused a delay in the completion of the project. The said delay would be well within the definition of 'Force Majeure', thereby extending the time period for completion of the project.

XIV. That the complainant has not come with clean hands before this hon'ble form and have suppressed the true and material facts from this hon'ble forum. It would be apposite to note that the complainant is a mere speculative investor who has no interest in taking possession of the apartment. In fact a bare perusal of the complaint would reflect that he has cited 'financial incapacity' as a reason, to seek a refund of the monies paid by him for the apartment. In view thereof, this complaint is liable to be dismissed at the threshold.

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 respondent further submitted that the Central Government has also decided to help bonafide builders to complete the stalled projects which are not constructed due to scarcity of funds. The Central Government announced Rs.25,000 Crore to help the bonafide builders for completing the stalled/

unconstructed projects and deliver the homes to the homebuyers. It is submitted that the respondent/ promoter, being a bonafide builder, has also applied for realty stress funds for its Gurgaon based projects.

XVII. That compounding all these extraneous considerations, the Hon'ble Supreme Court vide order dated 04.11.2019, imposed a blanket stay on all construction activity in the Delhi- NCR region. It would be apposite to note that the '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.

XVIII. The respondent has further submitted that graded response action plan targeting key sources of pollution

has been implemented during the winters of 2017-18 and 2018-19, These short-term measures during smog episodes include shutting down power plant, industrial units, ban on construction, ban on brick kilns, action on waste burning and construction, mechanized cleaning of road dust, etc. This also includes limited application of odd and even scheme.

XIX. That the pandemic of covid-19 has had devastating effect on the world-wide economy. However, unlike the agricultural and tertiary sector, the industrial sector has been severally hit by the pandemic. The real estate sector is primarily dependent on its labour force and consequentially the speed of construction. Due to government-imposed lockdowns, there has been a complete stoppage on all construction activities in the NCR Area till July 2020. In fact, the entire labour force employed by the respondent were forced to return to their hometowns, leaving a severe paucity of labour. Till date, there is shortage of labour, and as such the respondent has not been able to employ the requisite labour necessary for completion of its projects. The Hon'ble Supreme Court in the seminal case of ***Gajendra Sharma v. UOI & Ors, as well Credai MCHI & Anr. V.***

UOI & Ors, has taken cognizance of the devastating conditions of the real estate sector, and has directed the UOI to come up with a comprehensive sector specific policy for the real estate sector. According to Notification no. ***9/3-2020 HARERA/GGM (Admn) dated 26.5.2020,*** passed by this hon'ble authority, registration certificate date upto 6 months has been extended by invoking clause of force majeure due to spread of corona-virus pandemic in Nation, which is beyond the control of respondent.

XX. The respondent has further submitted that the authority vide its Order dated 26.05.2020 had acknowledged the covid-19 as a force majeure event and had granted extension of six months period to ongoing projects. Furthermore, it is of utmost importance to point out that vide notification dated 28.05.2020, the Ministry of Housing and Urban Affairs has allowed an extension of 9 months vis-à-vis all licenses, approvals, end completion dates of housing projects under construction which were expiring post 25.03.2020 in light of the force majeure nature of the covid pandemic that has severely disrupted the workings of the real estate industry.

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

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

E. Jurisdiction of the authority

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

8. 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

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. That hon'ble Real Estate Appellate Tribunal vide order dated Appeal No. 74 of 2018 titled as ***"Ramprastha Promoters and Developers Pvt. Ltd. Vs. Ishwer Chand Garg"*** decided on 29.07.2019, has categorically held that the hon'ble regulatory authority has the jurisdiction to deal with the complaints with respect to the grant of interest for delayed possession" and consequently the same legal analogy covers this complaint as well.

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.

10. From the bare reading of the possession clause of the buyer developer agreement, it becomes very clear that the possession of the apartment was to be delivered by **July 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 & I.As. 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 July 2018 It is clearly submitted by the respondent/promoter in its reply (on page no. 37 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.

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

11. The respondent has taken a stand that the complainants are the investors and not consumers, therefore, they are not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority observed that the respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if the promoter contravenes or violates any provisions of the Act or rules or

regulations made thereunder. Upon careful perusal of all the terms and conditions of the apartment buyer's agreement, it is revealed that the complainants are buyer and they have paid total price of Rs.76,93,952/- 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;"*

In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment buyer's agreement executed between promoter and complainants, it is crystal clear that the complainants are allottee(s) as the subject unit was allotted to them by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled as ***M/s Srushti Sangam***

Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr. has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottees being investors is not entitled to protection of this Act also stands rejected.

G. Findings on the relief sought by the complainant

Relief sought by the complainant: To direct the respondent to pay the delivery in possession at prescribed rate of interest @10.70% p.a. as per the provisions of section 18(1) of the Act.

12. 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."*

13. Clause E (24) of the buyer developer agreement (in short, agreement) provides for handing over of possession and is reproduced below: -

> **"E. POSSESSION OF UNIT: -**

24. The possession of the unit shall be given by JULY 2018 or extended period as permitted by the agreement. However, the company hereby agrees to compensate the Allottee/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. However, any delay in project execution or its possession caused due to force majeure conditions and/or any judicial pronouncement shall be excluded from the aforesaid possession period. The compensation amount will be calculated after the lapse of the grace period and shall be adjusted or paid, if the adjustment is not possible because of the complete payment made by the Allottee till such date, at the time of final account statement before possession of the unit. The penalty clause will be applicable to only those Allottees who have not boked their unit under any special / beneficial scheme of the company i.e. No EMI till offer of possession, Subvention scheme, Assured return etc and who honour their agreed payment schedule and make timely payment of due installments and additional charges as per the payment given in Allotment Letter."

14. The authority has gone through the possession clause of the agreement and observes 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.

15. 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 doted lines.

16. **Admissibility of grace period:** As per clause E (24) of the buyer developer agreement, the possession of the allotted unit was supposed to be offered by the July 2018 with a grace

period of 6(six) months i.e. January 2019. There is nothing on record to show that the respondent has completed the project in which the allotted unit is situated and has applied for occupation certificate by July 2018. Rather, it is evident from the pleadings of the respondent that the construction of the project is upto 42% complete and the entire project may take some time to get it completed and thereafter make offer of possession to the allottee. So in view of these facts, the developer can't be allowed grace period of 6 months more beyond July 2018 as mentioned in clause E (24) in the buyer developer agreement.

17. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges at the rate of 10.70% p.a. however, proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

> ***Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]***
>
> *(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest*

at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.:

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

18. 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.

19. 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.

20. 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%.

21. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be

liable to pay the allottee, in case of default. The relevant section is reproduced below:

> *"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.*
> *Explanation. —For the purpose of this clause—*
> *(i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*
> *(ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"*

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

23. 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 (24) of the agreement executed between the parties on 08.06.2015, the possession of the subject apartment was to be delivered within stipulated time i.e., by 31.07.2018. 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 31.07.2018. 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 buyer developer agreement dated 08.06.2015 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.

24. 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 @ 930% p.a. w.e.f. 31.07.2018 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

25. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

    i. The respondent is directed to pay interest at the prescribed rate of 9.30% p.a. for every month of delay from the due date of possession i.e. 31.07.2018 till the handing over of possession of the allotted unit;

    ii. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period;

    iii. The arrears of such interest accrued from 31.07.2018 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;

    iv. 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.,

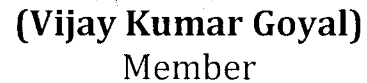
the delayed possession charges as per section 2(za) of the Act.

v. The respondent shall not charge anything from the complainants which is not the part of the buyer developer agreement. The respondent is debarred from claiming holding charges from the complainants/allottees at any point of time even after being part of buyer's agreement as per law settled by hon'ble Supreme Court in civil appeal no. 3864-3889/2020 decided on 14.12.2020.

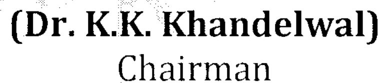
26. Complaint stands disposed of.

27. 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