BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 1756 of 2021
First date of hearing : 28.04.2021
Date of decision : 18.08.2021

1. Savita Yadav
2. Ashwani Yadav

Both RR/o: - RZ-58, Roshan Mandi, Najafgarh, New Delhi- 110058 **Complainants**

Versus

M/s Supertech Limited.
Office at: Supertech House B-28&29, Sector-58, Noida- 201307 (U.P)
Also 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. Uma Shankar Advocate for the complainants
Sh. Bhrigu Dhami Advocate for the respondent

ORDER

1. The present complaint dated 01.04.2021 has been filed by the complainants/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation

and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is *inter alia* prescribed that the promoter shall be responsible for all obligations, responsibilities and functions as provided under the provision of the Act or the Rules and regulations made there under or to the allottee as per the agreement for sale executed *inter se*.

A. Unit and project related details

2. The particulars of unit details, sale consideration, the amount paid by the complainants, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S.No.	Heads	Information
1.	Project name and location	"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.	1404, 14th floor, tower- A [Page no. 48 of complaint]
9.	Unit measuring	1180 sq. ft. [super area]
10.	Date of execution of buyer developer agreement	13.09.2016 [page no. 47 of complaint]
11.	Payment plan	Construction linked payment plan [Page no. 49 of complaint]
12.	Total consideration	Rs.85,48,720/- [as per payment plan page no. 49 of complaint]
13.	Total amount paid by the complainants	Rs.47,52,005/- [as per receipt information page no. 77 to 91 of complaint]
14.	Due date of delivery of possession as per clause E (24) of the buyer developer agreement: by September 2018 plus 6 months grace period for offer of possession and actual physical possession whichever is earlier. [Page 55 of complaint]	30.09.2018 [Note: - 6 month grace period is not allowed]
15.	Delay in handing over possession till the date of order i.e. 18.08.2021	2 years 10 months and 19 days
16.	Status of the project	On going

B. Facts of the complaint

3. The complainants submitted that the respondent through its marketing representatives somewhere in the month of October 2013 allured and approached the complainants in

order to book a unit in the proposed project namely "Supertech Hues" to be developed by the respondent in Sector 68, Gurgaon. The respondent had claimed that the project shall be one of the finest one and the complainants will not have to face any form of hindrances if they book any unit/flat in the project of the respondent. The respondent represented that there shall be direct access to the project from Sohna road. The same claims were made under the brochure provided to the complainants.

4. That believing on the representations, assurances, brochures, and the rosy pictures shown by the marketing representatives of the respondent, they have deposited an amount of Rs.6,00,000/- with the respondent vide cheque no. 792851 dated 12.10.2013 drawn on State Bank of Patiala. The same was acknowledged by the respondent vide acknowledgment dated 13.10.2013. The complainants shocked to see that neither there was any serial number nor reference of project and flat number in receipt issued by the respondent. On enquiry the complainants were told by the marketing representatives of the respondent that project is at pre-launch stage and the same will be formally launched after obtaining approvals from the concerned competent authorities positively within a short span of time. The

complainants were allotted a 2BHK+study Unit bearing no. 202 on 2nd floor, in tower V of the project namely "Supertech Hues" admeasuring super area of 1430 sq. ft. for an agreed total sale consideration of Rs.1,03,21,220/-. The complainant opted for construction link payment plan.

5. The complainants submitted that on 07.06.2014 a preprinted, arbitrary, and unilateral buyer developer agreement was executed between both the parties. As the terms and conditions of the said buyer developer agreement was one sided, arbitrary, and unilateral the complainant objected to the terms and conditions of the agreement then they were told by the respondent that this is standard format of agreement which is to be signed by all the buyers and for each buyer there cannot be separate form of agreement. Ultimately the complainants had to sign the same agreement which was provided by the respondent. It is worthwhile to mention here that as per clause 1 of the said agreement the respondent agreed to deliver the possession of the unit in 42 months i.e. by April 2017. It was further agreed that period can be extended due to unforeseen circumstances for a further grace period of 6 months.

6. The complainants further submitted that in the month of August 2016 the respondent asked and offered the

complainants to shift their allotment from tower V to tower A as the construction work in tower V was standstill. The offer of the respondent was accepted by the complaints as they want their dream home at the earliest and there was no construction work of tower V. Thereafter a fresh buyer developer agreement was signed and executed between both the parties on 13.09.2016. It is worthwhile to state here that as per new agreement a 2BHK+2 TOI unit bearing no. 1404 on 14th floor in tower A, having super area 1180 sq. ft was allotted in favour of complainants for total sale consideration of Rs.85,48,720/-. The period for delivery of possession was further extended in revised agreement. As per Clause 1 of the revised agreement the possession of the unit was to be delivered by the respondents by September 2018 with a grace period of 6 months i.e. by March 2019, while as per the original agreement the possession was to be delivered by April 2017. It is worthwhile to state here that terms and conditions of the revised agreement were also in favour of the respondents and unilateral. It is pivotal to state here that till the allotment of subsequent unit, the complainants have already paid Rs.51,64,604/- which was adjusted by the respondent in the payment toward subsequent unit.

7. That the respondent at the time of allotment of subsequent unit in tower A, has offered for a subvention scheme while the payment plan under original allotment was construction link. It was agreed by the respondent at the time of subsequent allotment that till the flat is offered for possession to the complainant, the respondent shall make payment of Pre EMI toward loan. It was bad luck of the complainants that once again they fall in the trap of the respondent and agreed for subvention scheme. A tripartite agreement was executed between the complainant, respondent and the ICICI Bank. Against the sanctioned loan of Rs.35,26,250/- toward balance sale consideration, the banker ICICI Bank has disbursed an amount of Rs.23,42,252/-. The respondent has again failed to fulfill its commitment for payment of EMI to Bank under subvention scheme. The respondent made the payment toward EMI till February 2019. As the respondent failed to meet out its obligations under the subvention scheme, the complainant started making the payment toward bank dues. The fact of payment of EMI by the complainant has been acknowledged by the respondent vide its letter dated 04.05.2020.

8. That on 08.07.2020 the complainant received an email from respondent, which shocked the complainants. The

respondent informed the complainant by the said email that they shall have no obligations toward the complainant with respect to payment of Pre EMI-vis-a-vis the said MOU and the complainant were requested to continue making payment of EMI to the Bank. It is pivotal to mention here that vide the said email the respondent has alleged that complainant have not paid their contribution of certain percentage of payment of the total sale consideration of the said unit through bank loan as well through complainants own contribution. The complainant would like to mention here that complainant have already paid an amount of Rs.51,64,604/- toward sale consideration. Then there were no obligations on the part of the complainant to pay any amount other than. Thus the Act of the respondent is illegal. There was no occasion on the part of the respondent to stop the payment of Pre EMIs to the Bank.

9. That the complainants in the month of January 2019 visited the site of the project to see the status of the project and were shocked to see that the claims and assurances made by the respondent for timely delivery of possession are falsified and incorrect and also the project was way behind than the agreed construction schedule. Whereas the complainants after visiting the site of the project and after making approx.

85% of the payment has realized that the respondent had made false promises and misrepresented. That to the utter shock and startled by the unlawful, dishonest and malafide act of the respondent, the complainants visited the office of the respondent and raised his concern over the false claim and delay in development work. The complainants also asked the respondent to pay interest as the project is delayed. Thereafter, the complainants raised consistent alarms by visiting the office of the respondent and through telephonic conversations. However, the respondent never paid any heed to various requests of the complainants.

10. That the main grievance of the complainants is that in spite of the complainants paid Rs.75,06,856/- out of agreed sale consideration Rs.85,48,720/-, the respondent has measurably failed to deliver the possession of flat. More importantly since, February 2019 the respondent has stopped paying the EMI as per agreed terms and conditions. The respondent failed to honor the obligations under the buyer developer agreement as well as the tripartite agreement for subvention scheme. It is pivotal to state here that respondent has used the amount paid by the complainants for unjustified and illegal enrichment.

11. The complainants submitted that it had investing a huge amount of money in the project of the respondent, came to realize about the fraudulent commitment of the respondent sand seeing no tenable progress at the work site which had caused mental agony to the complainant as the unprofessional work ethics of the respondent had broken the complainants to the stage of financial turmoil. That it is abundantly clear by the act and conduct of the respondent that it has not only defrauded the complainant but also violated the terms and conditions of the buyer developer agreement by not offering the possession as per commitment. That only rough structure is standing there, and no more progress has been done till date.

12. The complainants further submitted that keeping in view the present status of the project and circumstances we do not intend to withdraw from the project. As per obligations on the respondent is obligated to pay interest at the prescribed rate for every month delay till the handing over the possession. The respondent has not fulfilled his obligations. We reserve my right to seek compensation from the respondent for which we shall make separate application to the adjudicating office, if required. Thus, the respondent is liable to make payment of interest toward delay penalty as

per section 18 of Real Estate (Regulation and Development) Act, 2016.

C. Relief sought by the complainants:

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

I. To direct the respondent to deliver the physical possession of the unit bearing no. 1404 on 14th floor in tower A, having super area 1180 sq. ft. in sector 68, Gurgaon at the earliest;

II. To direct the respondent to pay monthly interest toward penalty for delay in delivery in possession of aforesaid unit till the delivery of possession from the date of prescribed under the previous agreement;

III. The respondent be directed to comply with the provisions of the buyer developer agreement and the provisions of the RERA Act, 2016 and rules made there under;

14. 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

15. The respondent has raised certain preliminary objections and contested the complaint on the following grounds:

I. That the insistence of the complainant the unit was changed to a lesser priced unit being number no. 1404, 14th floor, tower A, having a super area of 1180 sq. ft. (approx.) for a total consideration of Rs.85,48,720/- and a fresh buyer developer agreement dated 13.09.2016 was executed.

II. Thereafter, as per clause 24 of the terms and conditions of the agreement, the possession of the apartment was to be given by December 2019, 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 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.

V. That the said project is registered with this authority vide registration no. 182 of 2017 dated 04.09.2017 and the completion date as per the said registration is 30.12.2021.

VI. 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.

VII. The delay in construction was on account of reasons that cannot be attributed to it. It is most pertinent to state that the flat buyer agreement 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 24 under the heading "possession of allotted floor/apartment" of the "allotment agreement". The respondent seeks to rely on the relevant clause of the agreement at the time of arguments.

VIII. The force majeure clause, 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 it for completion of the project is not a delay on account of the respondent for completion of the project.

IX. That the timeline stipulated under the flat buyer agreement was only tentative, subject to force majeure reasons which are beyond the control of the respondent. The respondent in an endeavor to finish the construction within the stipulated time, had from time to time obtained various licenses, approvals, sanctions, permits including extensions, as and when required. Evidently, the respondent had availed all the licenses and permits in time before starting the construction;

X. That apart from the defaults on the part of the allottee, like the 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.

XI. The respondent has further submitted that the intention of the force majeure clause is to save the performing party from the consequences of anything over which he has no control. It is no more res integra that force majeure is intended to include risks beyond the reasonable control of a party, incurred not as a product or result of the *negligence or malfeasance* of a party, which have a materially adverse affect 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.

XII. It is public knowledge, and several courts and quasi-judicial forums have taken cognisance of the devastating impact of the demonetisation of the Indian economy, on the real estate sector. The real estate sector is highly dependent on cash flow, especially with respect to payments made to labourers and contractors. The advent of demonetisation led to systemic operational hindrances in the real estate sector, whereby the respondent could not effectively undertake construction of the project for a period of 4-6 months. Unfortunately, the real estate sector is still reeling from the aftereffects of demonetisation, which caused a delay in the completion of the project. The said delay would be well

within the definition of 'Force Majeure', thereby extending the time period for completion of the project.

XIII. That the complainant has not come with clean hands before this authority and has 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 it has cited 'financial incapacity' as a reason, to seek a refund of the monies paid by it for the apartment. In view thereof, this complaint is liable to be dismissed at the threshold.

XIV. The respondent has submitted that the completion of the building is delayed by reason of non-availability of steel and/or cement or other building materials and/ or water supply or electric power and/ or slow down strike as well as insufficiency of labour force which is beyond the control of respondent and if non-delivery of possession is as a result of any act and in the aforesaid events, the respondent shall be liable for a reasonable extension of time for delivery of possession of the said premises as per terms of the agreement executed by the complainant and the respondent. The respondent and its officials are

trying to complete the said project as soon as possible and there is no malafide intention of the respondent to get the delivery of project, delayed, to the allottees. It is also pertinent to mention here that due to orders also passed by the Environment Pollution (Prevention & Control) Authority, the construction was/has been stopped for a considerable period day due to high rise in pollution in Delhi NCR.

XV. That the enactment of Real Estate (Regulation and Development) Act, 2016 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 market sector. The main intension of the respondent is just to complect the project within stipulated time submitted before the HARERA authority. According to the terms of the builder buyer agreement also it is mentioned that all the amount of delay possession will be completely paid/adjusted to the complainant at the time final settlement on slab of offer of possession. The project is ongoing project and construction is going on.

XVI. That the respondent further submitted that the Central Government has also decided to help bonafide builders

to complete the stalled projects which are not constructed due to scarcity of funds. The Central Government announced Rs.25,000 Crore to help the bonafide builders for completing the stalled/ unconstructed projects and deliver the homes to the homebuyers. It is submitted that the respondent/ promoter, being a bonafide builder, has also applied for realty stress funds for its Gurgaon based projects.

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

16. 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 application of the respondent regarding rejection of complaint on ground of jurisdiction 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

17. 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

18. 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 the project being delayed because of force majeure circumstances and contending to invoke the force majeure clause.

19. 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 **September 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 September. 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.

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

20. 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, the 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 thereunder. Upon careful perusal of all the terms and conditions of the buyer developer agreement, it is revealed that the complainant is a buyer, and it has paid total price of **Rs.47,52,005/-**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;"*

ln view of above-mentioned definition of "allottee" as well as all the terms and conditions of the buyer developer agreement executed between promoter and complainant, it is crystal clear that the complainant is an allottee(s) as the subject unit was allotted to it 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) Ltd. 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 complainants

Relief sought by the complainants: To direct the respondent to deliver the physical possession of the unit and to pay monthly interest toward penalty for delay in delivery in possession of aforesaid unit till the delivery of possession from the date of prescribed under the previous agreement.

21. In the present complaint, the complainants intends to continue with the project and are seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Section 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."*

22. 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 September 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."*

23. 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.

24. 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 complainants 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.

25. **Admissibility of grace period: A**s per clause E (24) of the buyer developer agreement, the possession of the allotted unit was supposed to be offered by the September 2018 with a grace period of 6(six) months i.e. March 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 September 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 September 2018 as mentioned in clause E (24) in the buyer developer agreement.

26. **Payment of delay possession charges at prescribed rate of interest:** 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.

27. 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.

28. 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.

29. 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%.

30. 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;"*

31. 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.

32. 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 13.09.2016, the possession of the subject apartment was to be delivered within stipulated time i.e., by 30.09.2018. 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 30.09.2018. 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 13.09.2016 executed between the parties. Further no OC/part OC has been granted to the project. Hence, this project is to be treated as on-going project and the provisions of the Act shall be applicable equally to the builder as well as allottee.

33. 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. 30.09.2018 till the actual offer 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

34. Hence, the Authority hereby pass this order and issue the following directions under section 34(f) of the Act:

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. 30.09.2018 till the actual offer 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 30.06.2019 till the date of order by the authority shall be paid by the promoter to the allottees within a period of 90 days from date of this order and interest for every month of delay shall be paid by the promoter to the allottees before 10th of the subsequent month as per rule 16(2) of the rules;

iv. The rate of interest chargeable from the 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.

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. 3864-3899/2020 decided on 14.12.2020.

35. Complaint stands disposed of.

36. 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 11.11.2021