BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 4291 of 2020
First date of hearing : 06.01.2021
Date of decision : 18.08.2021

1. Mr. Dinesh Kumar Bajranglal Bothra
2. Mrs. Jyoti Dinesh Kumar Jain
Both RR/o: - House No. 196, Sector-22A,
2nd floor, Palam vihar Road, Gurugram- 122022 **Complainants**

Versus

1. M/s Supertech Limited.
Office at: 1114, 11th floor
Hamkunt Chambers, 89,
Nehru Place, New Delhi- 110019
2. PNB Housing Finance Limited
Office at: 9th floor, Antriksh Bhawan,
22 KG Marg, New Delhi- 110001 **Respondents**

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

APPEARANCE:
Sh. Naveen Suri Advocate for the complainants
Sh. Bhrigu Dhami Advocate for the respondent no. 1
Sh. Pankaj Chandola Advocate for the respondent no. 2

ORDER

1. The present complaint dated 23.11.2020 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 Azalia", Sector- 68, Golf course extension road, 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	i. 106 of 2013 and 107 of 2013 dated 26.12.2013 valid till 25.12.2017. ii. 89 of 2014 dated 08.08.2014 valid up to 07.08.2019. iii. 134-136 of 2014 dated 26.08.2014 valid till 25.08.2019.
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: - T-1, T-2, T-3, T-4, T-5, T-6 & T-7)**
7.	RERA registration valid up to	31.12.2021

8.	Unit no. (Studio)	2606, 26th floor, tower T1 [Page no. 17 of complaint]
9.	Unit measuring	600 sq. ft. [super area]
10.	Date of execution of buyer developer agreement	20.10.2016 [Page no. 13 of complaint]
11.	Date of execution of memorandum of understanding	22.10.2016 [as per annexure - C of complaint]
12.	Payment plan	Subvention payment plan [page no. 14 of complaint]
13.	Total consideration	Rs.32,13,423/- [as per payment plan page 14 of complaint]
14.	Total amount paid by the complainants	Rs.28,50,300/- [as per receipt information 65 of complaint]
15.	Due date of delivery of possession as per clause E (23) of the buyer developer agreement by December 2019 plus 6 months grace period upto the offer letter of possession and actual physical possession whichever is earlier. [Page 22 of complaint]	31.12.2019 [Note: - 6 Months grace period is not allowed]
16.	Delay in handing over possession till the date of order i.e. 18.08.2021	1 year 7 months and 18 days
17.	Status of the project	Ongoing

B. Facts of the complaint

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

I. That the assurances given by the respondent/developer to the complainants booked a flat/unit bearing no. R0550T12606 dated 13.10.2016 in the project namely **"Supertech Azalia"** situated at Sector 68, Golf Course Extension Road, Gurgaon-122101 and a builder buyer agreement was also signed and executed between the complainants and the respondent no.1 for the flat bearing flat no. R0550T12606 dated 20.10.2016.

II. That, the complainants based upon the assurances of the respondent no.1 had given the consent to take a loan from the respondent no.2 wherein the respondents portrayed that the loan will be sanctioned in the name of the complainants but the EMI's of the loan will be paid by the respondent no.1 till the delivery of the possession is handed over to the complainants under the subvention scheme and a memorandum of understanding dated 22.10.2016 followed by a Tripartite agreement dated 04.11.2016 was signed and executed between the complainant no.1 and the respondents.

III. That as per the Tripartite agreement the respondent no. 2 sanctioned a loan amount of Rs. 25,00,000/- (Which was also disbursed absolutely) for the property in the project namely **"Supertech Azalia"** situated at Sector 68, Golf Course Extension Road, Gurgaon-122101, however the respondent/developer was neither able to complete the said project and handover the

possession of the flat till date nor has paid EMI's towards the loan amount to the respondent no.2.

IV. That, the respondent no.1 has not only failed to deliver the possession of the residential unit booked by the complainants within the prescribed period of time duly mentioned in the buyer developer agreement dated 20.10.2016 and also did not pay the EMI's as provided via the Tripartite agreement, despite incessant intimations by the complainants to clear the same. It is further submitted that the complainants made a payment of Rs.28,50,300/- including the initial booking amount towards the purchase of the flat/unit booked.

V. That, the respondent no.2 on being unable to recover the due EMI's from the respondent/developer started harassing the complainants to make the payments towards the EMI's despite it being explicitly provided through the tripartite agreement as well as the memorandum of understanding that the respondent no.1 was solely responsible to pay the EMI's till the delivery of the possession is handed over to the complainants.

VI. That several e-mails were sent by the complainants to the respondent/developer to either pay the pre-Emi as per the terms of the tripartite agreement as well as memorandum of understanding or hand over the possession of the flat booked by the complainants but to the utter dismay of the complainants no

constructive reply was given by the respondent no.1 instead the respondent/developer stated that after verifying with its account team it was found that the complainants were not eligible under the criteria mentioned under the subvention memorandum of understanding. It is also pertinent to mention that the respondent no.1 tried to shift the blame on the complainants for non-compliance of the MOU.

C. Relief sought by the complainants:

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

   i. Direct to handover the actual possession of the residential unit/apartment bearing no. R0550T12606, along with all the rights, title and interests without any delay or default in terms with the builder buyer agreement dated 20.10.2016.

   ii. To the respondent no. 1 may kindly be directed to pay the Pre EMI's of the loan amount of Rs. 25,50,000/- disbursed by the respondent no. 2 in the name of the complainants for the property in the project "Supertech Azalia" situated at Sector 68, Golf Course Extension Road, Gurgaon-122101, till the delivery of the actual, physical, and vacant possession as per the tripartite agreement which was duly executed by and between the complainants and the respondents.

5. On the date of hearing, the authority explained to the respondents/promoters about the contravention as alleged to have

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

D. Reply by the respondent no. 1

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

I. That the complainants booked an apartment being number no. R055T12606 having a super area of 1530 sq. ft. (approx.) for a total consideration of Rs.32,13,423/- vide a booking form.

II. That consequentially, after fully understanding the various contractual stipulations and payment plans for the said apartment, the complainants executed the flat buyer agreement dated 20.10.2016. Thereafter, further submitted that as per clause 23 of the terms and conditions of the agreement, the possession of the apartment was to be given by November 2014, with an additional grace period of 6 months.

III. That as per agreement, compensation for delay in giving possession of the apartment would not be given to allottees akin to the complainants who have 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 complainants. 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 December 2021;

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

VII. The 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.

VIII. 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.

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

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

X. 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.

XI. 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.

XII. That the complainants have 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.

XIII. 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.

XIV. 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.

XV. 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.

XVI. 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.

XVII. 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.

XVIII. The respondent/developer 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.

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

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

7. The respondent no. 2 has contested the complaint on the following grounds. The submissions made therein, in brief are as under: -

i. That the PNB Housing Private Limited is one of the largest housing finance company duly registered with the National Housing Bank and is law abiding listed public company, primarily engaged in the business of rendering home loan/finance facility, predominantly against the security of immovable properties.

ii. The respondent no. 2 submitted that a conjoint regarding of the provisions of the above sections of the entire scheme of Act shows that the authority is entrusted with the function to ensure the compliance of the obligation of promoter, real estate agents and allottee in the overall promotion of real estate industry and is adequately empowered to issue directions to promoter, real estate agents and allottee and to no other person. Further it is also clear that it lacks the jurisdiction to issue any directions or

orders to any other person or entity, who or which is not a promoter, real estate agent or allottee.

iii. That the promoter M/s Supertech Limited (respondent no. 1) in respect of the apartment/unit described in the project "Supertech Azalia" ibid for failure on the part of the promoter to deliver the unit within the prescribed time limit. The complainants had prayed for the possession of the unit.

iv. That the complainants have booked a unit in respect of the respondent/developer. As the complainants were falling short of finance for purchase of the unit, the complainants approached the answering respondent for loan, which after necessary assessment was duly sanctioned. However, as the respondent/developer was granting an interest subvention on the loan available whereunder the complainants will receive the pre-Emi from the builder/ promoter until possession of the unit was delivered/certain months. The complainants by their own volition opted for the subvention scheme being offered by the respondent/developer. It is further submitted that the complainants have duly read all the terms and conditions of the subvention scheme and agreed to the same and the respondent no. 1 and the complainants approached the applicants, in furtherance to which the tripartite agreement was entered into, subject to terms and condition of the loan agreement.

v. The respondent no. 2 has further submitted that the complainants with their free consent had approached the answering respondent to avail loan facility in order to get financial assistance to purchase the unit/ apartment in the project under the loan agreement read with the tripartite agreement, it is clear evident that it is the duty of the borrowers/complainants to pay the dues Emi's to the respective loan amount.

vi. That the respondent no. 2 is a financial institution and has advance a loan facility to the complainants for purchase of a unit/apartment after being approached by the complainants for the mentioned intention and on the representation made by the complainants that the builder/promoter (respondent no. 1) is of their choice and that they have satisfied themselves with regard to integrity, capability of the builder for quality construction and the builder's ability and efficiency in timely completion and delivery of the project.

vii. That the complainants are bound by the terms and conditions of the loan agreement executed with the respondent no. 2 dated 04.12.2014and the tripartite agreement dated 04.11.2016 entered into between the complainants and the respondents.

8. The respondent no. 2 has filed a separate application for deletion of its name from the array of parties in the compliant.

9. The respondent no. 2 has moved an application for deletion of its name in the array of parties in the complaint. It is alleged that the complaint under section 31 of the Act is primarily against the promoter M/s Supertech limited, i.e. respondent no. 1 for failure on its part to deliver the possession of the booked apartment/unit within the prescribed time limit. It is contended that other than availing the loan facility, there subsists no other relation or contract of applicant/ respondent no. 2. All the allegations have been leveled by complainants against respondent no. 1 who have utterly failed to fulfil its obligation of delivering the possession of the unit to the complainants within the prescribed time limit. It is further contended that the present complaint arises from the buyer's agreement entered into between the complainants and the respondent no. 1 and as per the doctrine of privity of contract, only the parties to a contract are allowed to sue each other in order to enforce their rights and liabilities. Moreover, no stranger is allowed to confer obligations upon any person who is not party to the contract even though the contract has been entered into for his benefit. Further, as there is no grievance of the complainants against the applicant/respondent no. 2 so, the same is not a necessary party in the present complaint.

Furthermore, this authority has no jurisdiction to entertain the present complaint against the applicant as the applicant has not contravened or violated any of the provision of the Act in which

duties/obligations of only three entities mentioned as promoter, allottee and, real estate agents. The definitions of these people are given in the Act which clearly shows that the applicant does not fall under any of the aforementioned category and cannot be held liable for committing any violation or contravention of the provision of the Act. Any other person other than the aforesaid three entities cannot be made a party to the proceedings of the authority. Therefore, the applicant has prayed for deletion of its name from the array of the parties in the complaint.

10. 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

11. 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 no. 1

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

12. From the bare reading of the possession clause of the buyer developer agreement, it becomes very clear that the possession of the apartment

was to be delivered by **December 2019.** The respondent in his contribution pleaded the force majeure clause on the ground of Covid-19. That in the High Court of Delhi in case no. ***O.M.P (I) (COMM.) No. 88/2020 & I.As. 3696-3697/2020 title as M/S HALLIBURTON OFFSHORE SERVICES INC VS VEDANTA LIMITED & ANR. 29.05.2020*** it was held that *The past non-performance of the Contractor cannot be condoned due to the COVID-19 lockdown in March 2020 in India. The Contractor was in breach since September 2019. Opportunities were given to the Contractor to cure the same repeatedly. Despite the same, the Contractor could not complete the Project. The outbreak of a pandemic cannot be used as an excuse for non performance of a contract for which the deadlines were much before the outbreak itself.* Now this means that the respondent/promoter has to complete the construction of the apartment/building by December 2019. It is very clearly submitted by the respondent/promoter in his reply (on page no. 37 of the complaint) that only 42% of the physical progress has been completed in the project. The respondent/promoter has not given any reasonable explanation as to why the construction of the project is being delayed and why the possession has not been offered to the complainants/allottees by the promised/committed time. That the lockdown due to pandemic in the country began on 25.03.2020. So the contention of the respondent/promoter to invoke the force majeure clause is to be rejected as it is a well settled law that ***"No one***

can take benefit out of his own wrong". Moreover there is nothing on record to show that the project is near completion, or the developer applied for obtaining occupation certificate rather it is evident from his submission that the project is completed upto 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.

13. From the bare reading of the possession clause of the buyer developer agreement, it becomes very clear that the possession of the apartment was to be delivered by **December 2019.** The respondent in his contribution pleaded the force majeure clause on the ground of Covid-19. That in the High Court of Delhi in case no. ***O.M.P (I) (COMM.) No. 88/2020 & I.As. 3696-3697/2020 title as M/S HALLIBURTON OFFSHORE SERVICES INC VS VEDANTA LIMITED & ANR. 29.05.2020*** it was held that *the past non-performance of the Contractor cannot be condoned due to the COVID-19 lockdown in March 2020 in India. The Contractor was in breach since September 2019. Opportunities were given to the Contractor to cure the same repeatedly. Despite the same, the Contractor could not complete the Project. The outbreak of a pandemic cannot be used as an excuse for non-performance of a contract for which the deadlines were much before the outbreak itself.* Now this means that the respondent/promoter has to complete the construction of the apartment/building by December 2019. 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 complainants/allottees by the promised/committed time. That the lockdown due to pandemic in the country began on 25.03.2020. So the contention of the respondent /promoter to invoke the force majeure clause is to be rejected as it is a well settled law that ***"No one can take benefit out of his own wrong"***. Moreover there is nothing on record to show that the project is near completion, or the developer applied for obtaining occupation certificate rather it is evident from his submission that the project is completed upto 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 an investors.

14. The respondent has taken a stand that the complainants are the investor and not consumer, therefore, they are not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority observed

that the respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if the promoter contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the apartment buyer's agreement, it is revealed that the complainants are buyers and they have paid total price of **Rs.28,50,300/-** 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.

F(a). Findings with regard to joining of respondent no. 2 as one of the respondents.

15. While filing a written statement, the respondent no. 2 took a plea that the complaint being mis joinder of the party. It is pleaded as neither it is an allottee, promoter or, real estate agent. So, it can't be sued and added as a party. But the plea advanced in this regard is devoid of merits. It is not disputed that the respondent no. 2 advanced a loan against mortgage of the allotted unit to the allottee. There is also, a tripartite agreement between the allottee, builder and financial institution entered into between the parties. So, in view of that document it can't be said that respondent no. 2 is not a necessary party and the complainant against it can't be dismissed in view of the provision of order 6 rule 9 of the Civil Procedure Code, 1908.

G. Findings on the relief sought by the complainants

G.I **Direct the respondent/developer to handover the actual possession of the residential unit/apartment, along with all the rights, title and interests without any delay or default in terms with the builder buyer agreement.**

16. 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."*

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

> **"E. POSSESSION OF UNIT: -**
>
> *23. The possession of the unit shall be given by DEC 2019 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."

18. 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.

19. 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(s) that even a single default by the allottee(s) in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee(s) 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 his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

20. **Admissibility of grace period:** As per clause E (23) of the buyer developer agreement, the possession of the allotted unit was supposed to be offered by the December 2019 with a grace period of 6(six) months i.e. June 2020. 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 December 2019. 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 allottees. So in view of these facts, the developer can't be allowed grace period of 6 months more beyond December 2019 as mentioned in clause E (23) in the buyer developer agreement.

21. **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.*

22. 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.

23. 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%.

24. 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 allottees, 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;"

25. 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.

b). **Whether the respondent no. 1 may kindly be directed to pay the Pre EMI's of the loan amount of Rs. 25,50,000/- disbursed by the respondent no. 2 in the name of the complainants?**

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

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

23.07.2019 and wherein it was held that when the builder fails with the obligations under the subvention scheme thereby causing a double loss to the allottee then, the court can intervene, and the builder has to comply with the same in case it is proved that there was a diversion of funds.

27. The subvention scheme there is a tri-partite agreement between the allottee(s), financial institution and developer wherein the financial institution is required to release the loan amount sanctioned in favour of the allottee to the builder as per the schedule of construction. The para 5 of the tripartite agreement is reproduced as below: -

> *"That irrespective of the stage of construction of the Project and irrespective of the date of handing over the possession of the property to the Borrower by the builder shall be liable to pay to PNBHFL regularly each month, the pre-EMIs/EMIs as laid down in the disbursement letter signed by and between PBNHFL and the Borrower. The Borrower shall execute an indemnity each other documents as may be required by PNBHFL in favour of PNBHFL in this regard."*

28. It is an obligation on the part of the builder to pay the pre-EMI interest till the date of offer of possession to the financial institution on behalf of the allottees. The clause 6 of the triparty agreement is reproduce below: -

> *"The Pre-EMI interest (PEMII) payable under the Loan Documents shall be serviced and borne by the Builder/Developer during the Subvention Period as primary obligor as per MOU entered b/w Builder/PNBHFL. The said PEMII shall be paid by the Developer of the Loan amount Disbursed as per the MOU."*

29. In the instant complaint, the allottees and the developer entered into a memorandum of understanding dated 22.10.2016 whereby as per clause (b) the developer has agreed that the tenure of subvention

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

> *"(b) That the tenure of this subvention scheme, as approved by PNB Housing Finance Limited is 36 months. The developer expects to offer of possession of the booked unit to the buyer by that time. However, if due to any reason, the possession offer of the booked unit gets delayed, then the Developer undertakes to pay the pre-EMI only to the Buyer even after 36 months. The payment of Pre EMI shall continue till offer of possession with regards to the booked flat is issued to the buyer".*
>
> *"(c) That the present scheme shall become operative and effective when the Buyer shall pay 90% of the Total Sale Price of the said Flat to the Developer through the bank loan as well as through his/her own contribution. The balance 10% will be paid at the time of possession."*

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

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

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

30. The authority observes that no doubt, it is the duty of the allottees 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 allottees and are covered under section 19(8) of the Act. But the memorandum of understanding and tri-partite agreement both stipulate that the payments are subject to handing over of the possession of the unit within stipulated period as per the agreement to sell. So, the said documents being supplementary or incidental thereto are legally enforceable against the promoter. Hence, it cannot absolve himself from its liability from paying the pre-EMI's.

31. 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".

32. 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.

33. 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, 2016 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."*

34. A perusal of memorandum of understanding dated 22.10.2016 entered into between the buyer and developer shows that the subvention scheme was to be governed as per clause (b & c) of the same which have already been detailed in para 27 of the order. The tenure of that scheme as approved by PNB Housing Finance Limited is 36 months or offer of possession whichever is earlier. Secondly the said scheme was to be *operative and effective* on the event of buyer paying 90% of the total sale price of the allotted unit to the developer 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 is Rs.32,13,423/- and as per memorandum of understanding, the allottee is required to pay 90% of the total sale price to avail the benefit of the subvention scheme. Even as on date, the complainants have failed to pay the required amount. That amount was admittedly not paid by the complainants to the builder till date. Though the tenure of subvention scheme is 36 months or offer of possession whichever is earlier. The subvention scheme was to be operative and effective on the buyer's paying 90% of the total sale price of the allotted unit to the developer through the bank loan as well as through his/her contribution. But as per receipt information annexed with complaint has clearly mentioned in the complaint that he has paid an amount of Rs.28,50,300/- against the total sale consideration of Rs.32,13,423/- which comes out to be 88.69% and has violated the clause (c) of the memorandum of understanding dated 22.10.2016. An MoU can be considered as an agreement for sale interpreting the definition of the "agreement for sale" under Section 2(*c*) of the Act and broadly by taking into consideration the objects of the Act. Therefore, the promoter and allottee would be bound by the obligations contained in the memorandum of understanding and the promoter shall be responsible for all obligations, responsibilities, and functions to the allottee as per the agreement for sale executed inter se them under

section 11(4)(a) of the Act. But the allottee has also failed to fulfil those obligations as per these documents within the stipulated period. So no benefit can be claimed by him under the subvention scheme.

35. 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 (23) of the buyer developer agreement executed between the parties on 20.10.2016, the possession of the subject apartment was to be delivered within stipulated time i.e., by 31.12.2019. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over possession is 31.12.2019. The respondent has failed to handover possession of the subject apartment till date of this order. Accordingly, it is the failure of the respondent/promoter to fulfil its obligations and responsibilities as per the agreement to hand over the possession within the stipulated period. The authority is of the considered view that there is delay on the part of the respondent to offer of possession of the allotted unit to the complainants as per the terms and conditions of the buyer developer agreement dated 20.10.2016 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 allottees.

36. 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 delayed possession charges at rate of the prescribed interest @ 9.30% p.a. w.e.f. 31.12.2019 till the handing over of possession as per provisions of section 18(1) of the Act read with rule 15 of the rules.

H. Directions of the authority

37. 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):

iii. The respondent/developer 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. 31.12.2019 till the handing over of possession of the allotted unit;

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

v. The arrears of such interest accrued from 31.12.2019 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;

vi. 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.

vii. The respondent shall not charge anything from the complainants which is not the part of the buyer developer agreement.

38. Complaint stands disposed of.

39. 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 18.11.2021