BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	:	**1639 of 2019**
First date of hearing	:	**18.09.2019**
Date of decision	:	**13.08.2021**

Mr. Shahzad Shamshi s/o Mr. Javed Shamshi
Address: - L 20 C, I[st] Floor, L Block, Saket, New Delhi -110020. **Complainant**

Versus

1. Magnum International Trading Company Private Limited
Office address:- 48/12, Commercial Centre, Malcha Marg, Chanakyapuri, New Delhi - 110021.

2. Alpha G-Corp Development Private Limited
Office address:- 806 Meghdoot, 94 Nehru Place, New Delhi.

3. Alpha G-Corp Management service Private Limited
Office address:- Golf View Corporate Towers, Wing A, Golf Course Road, Sector 42, Gurugram - 122002. **Respondents**

CORAM:

Shri Samir Kumar	**Member**
Shri Vijay Kumar Goyal	**Member**

APPEARANCE:

Shri Nilotpal Shyam	Advocate for the complainant
Shri Praveen Kumar	AR for the respondent no. 1

ORDER

1. The present complaint dated 16.04.2019 has been filed by the complainant/allottee 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 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 them.

A. Unit and project related details

2. The particulars of the project, the details of sale consideration, the amount paid by the complainant, 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	Gurgaon One at Sector - 84, Gurugram
2.	Project area	12.15 acres
3.	Nature of the project	Group Housing Colony
4.	DTCP license no. and validity status	61 of 2009 dated 28.10.2009 valid upto 27.10.2019

5.	Name of licensee	Magnum International Trading Company Private Limited
6.	RERA Registered/ not registered	Not Registered
7.	Unit no.	C 305, IIIrd floor, Tower No. C
8.	Unit measuring	1427 sq. ft. **(Initial super area)** 1534 sq. ft. **(Final super area)** (Page 71 of the complaint)
9.	Date of execution of Buyers Agreement	17.06.2011 (Page 34 of the complaint)
10.	Payment plan	Construction linked payment plan (Page 59 of the complaint)
11.	Total Sale consideration	Rs. 59,90,823/- (As per the schedule of payment dated 04.03.2021 on page 59 of the complaint)
12.	Total amount paid by the complainant	Rs. 58,30,103/- (As per the sales customer ledger dated 17.04.2017 on page 63 and payment receipts on pages 64-65 of the complaint)
13.	Date of start of ground floor roof slab of tower C	08.11.2012 (As per demand letter on page 74 of the complaint)
14.	Due date of delivery of possession as per (As per clause 12.1- 36 months plus 6 months grace period from the date of start of ground floor roof slab of the particular tower in	08.05.2016 (Grace period is given)

	which the booking is made)	
15.	Occupation Certificate received on	09.10.2017 (Page 66, annexure 3 of the complaint)
16.	Offer of possession	13.10.2017 (Page 69, annexure 5 of the complaint)
17.	Delay in handing over possession till date of offer of possession i.e., 13.10.2017 plus 2 months i.e., 13.12.2017	1 year 7 months and 5 days

B. Facts of the complainant

3. The complainant has made the following submissions:

i. That he has booked an apartment bearing no. 305 of 1427 sq. ft. in block C in the project 'Gurgaon ONE', sector 84, Gurugram of the respondent in 2011 for Rs. 59,90,823/- and paid the advance amount of Rs. 7,32,051/-.

ii. That the respondent no. 2 is the development manager and the legal attorney for the purpose of development, construction, marketing and sale of the impugned project. Accordingly, all the payments were made by the complainant through respondent no.2 only (hereinafter respondent no. 1 and respondent no. 2 are jointly referred to as "respondents" and respondent no. 3 to be referred as "maintenance agency").

iii. That pursuant to the payment of booking amount to the respondents, the application no. 281 of the allottee was accepted by the respondents wherein the total consideration for the impugned unit no. C 305 was fixed at Rs. 48, 80,344/-plus EDC, IDC, PLC and other charges.

iv. That the complainant entered into the agreement for sale/apartment buyer agreement (hereinafter referred as ABA) with the respondents for a unit no. C 305 in the impugned project located at sector 84, Gurugram. The said agreement was executed on 17.06.2011 between M/s Magnum International Trading Company Private Limited and the complainant.

v. That the said ABA is a pre-printed standard form of contract with utterly one sided and biased terms and condition. Since, the complainant has already paid substantial amount by then, therefore, he had no option but to sign the said ABA.

vi. That as per ABA, the respondent(s) agreed to sell/ convey/ transfer the unit no. C-305, Tower - C in the complex with the right to exclusive use of parking space for an amount of Rs. 48, 80, 344/- calculated at Rs. 3,420/- per sq.ft. super area, which includes basic sale price, car parking charges, external development charges, infrastructure development charges and in addition to, electricity connection and water connection charges,

as per payment plan in accordance with the agreement and in accordance with law in force, plus applicable taxes. The total consideration as per the payment plan including all the charges is Rs. 59,90,823/-.

vii. That the complainant has already paid an amount of Rs.58,30,103/- till now towards the payment of consideration of the impugned unit. Pertinently, the complainant has paid more than 97% of the sale consideration towards the cost of the apartment unit C-305 in the impugned project. That the complainant had duly paid all the installments as and when issued and demanded by the respondents from time to time, without any intermittent delay before the offer of possession to be given by the respondents.

viii. That the respondents had committed under the ABA to handover the possession of the impugned unit no. C- 305 to the complainant by 08.11.2015, calculated in respect of the demand letter dated 08.11.2012 for start of ground floor roof slab. Additionally, the respondent company no. 1 was entitled to a grace period of six months, for applying and obtaining the occupation certificate is respect of the group housing complex.

ix. That the ABA also stipulates under clause 8.1 that on failure/delay in payment of installments, the

purchaser/complainant shall have to discharge simple interest @15 % per annum, till the date on which such installment is paid by the allottee/complainant, from the due date of installment as per the demand letter issued. Further, the ABA stipulates under clause 12.4 that if the respondents failed to complete construction of the said unit within 36 months of the start of ground floor roof slab of tower C plus the grace period of six months for the purpose of applying and obtaining the occupation certificate, subject to the force majeure conditions shall pay compensation @ Rs.5/- per sq.ft. of the super area per month for the entire period of such delay. Further, the respondent company is afforded a grace period of 6 months which may be further extended for an indefinite period, subject to the force majeure conditions, before it becomes liable to pay compensation. The same was offered to the complainant in the letter of offer of possession dated 13.10.2017. However, the said compensation is discriminatory and amounts to unfair trade practices and is also in direct conflict with the Act of 2016 and rules made there -under.

x. That the respondents have failed to handover the possession to the complainant on the agreed date of 08.11.2015 or even after the elapse of the grace period of six months as provided under clause 12.4 of ABA. The reason for the delay in handing over the

possession despite payment of 90% of total consideration was never told to the complainant. Henceforth, the respondents are liable to pay interest for delayed period of handing over the possession till the actual date of handing over the possession in accordance with section 18 of the Act.

xi. That after a delay of almost 2 years, the respondents obtained the occupancy certificate (hereinafter referred to as "OC") dated 09.10.2017, the said OC was granted subject to the fulfillment of terms and condition mentioned therein which inter alia includes the full compliance of provisional fire NOC dated 18.09.2017 issued by the competent authority.

xii. That to the utter dismay and in complete disregard to the interests of the complainant, the respondent(s) vide a letter of offer of possession dated 13.10.2017 offered possession of flat in the impugned project, after an unexplained delay of around two years. However, the joy of the complainant with regard to the grant of possession was short-lived as the respondents through the said letter dated 13.10.2017 inter alia demanded an escalation cost of Rs. 3,32,973/ -(including GST) Rs,4,09,853/- for increase in saleable area, Rs.18,393 as increased PLC charges and Rs.8,025/- as increase in IFMS charges. The respondents not only raised these illegal demands, but also made the acceptance of

such demands as condition precedent for handing over the possession of the impugned unit to the complainant.

xiii. That the complainant has paid further amount time to time and has paid Rs. 58,98,136/- to the respondent as per the sales customer ledger dated 17.04.2017.

xiv. That based on the representation, the complainant impugned project under installment payment plan by paying a booking amount of Rs. 7,32,051/- and agreed to pay the balance consideration as per the payment plan annexed to the agreement for sale which was to be made at the earliest.

xv. That without prejudice to the submission regarding refund, levy of GST as per the demand letter dated 13.10.2017 are completely baseless and doesn't hold any ground, especially when it's a fresh tax being introduced in 2017. Had the possession been granted by the due date or even with some justified period of delay, the incidence of GST would not have fallen the complainant. The amount of GST which is being demanded is not leviable on the apartments purchased by way of construction linked payment. It is wrongful act on the part of the respondents in not delivering the project in time due to which the additional tax burden has arisen.

xvi. That the respondents have raised huge demand in the garb of increasing the saleable area wherein they have claimed that the said area has been increased by 7.5% and therefore, putting an additional demand of Rs. 4,36,817/- under the head BSP, PLC and IFMS. The said demand was protested by similarly situated home buyers, the respondents vide email dated 24.10.2017 gave an astonishing explanation to the increase in saleable area claiming that they have inadvertently omitted to include huge areas at the time of original calculations and accordingly furnished calculation tables in their attempt to justify the increase.

xvii. That there is an unexplained delay in handing over the possession by the respondents with additional demands being made under the garb of escalation costs, increase in super area etc. Therefore, the complainant has genuine grievance which require the intervention of the authority to do justice with them.

C. Relief sought by the complainant:

4. The complainant has sought the following reliefs:

i. To direct the respondent to handover the possession of the flat to the complainant with registered conveyance deed without raising illegal demands and along with interest for

the delayed period in accordance with the provisions of the Act.

ii. To direct the respondent to revoke illegal demands raised on the pretext of alleged increased in saleable area, cost escalation.

iii. To direct the respondent(s) to revoke the demand of GST made to the complainant.

iv. To direct the respondent(s) not to compel the complainant for signing of 10 year maintenance agreement as condition precedent for handing over the physical possession of the impugned unit.

D. Reply by the respondent:-

5. The reply has been received only on the behalf of respondent no. 1. The respondent no. 1 has raised certain preliminary objections and has contested the present complaint on the following grounds:

i. That before the enforcement of the provisions contained under sections 3 to 9, the towers within the said project I were completed and the development works/ infrastructure was also complete. Consequently, M/s Magnum applied for grant of occupation certificate in respect of the said project vide its

application dated 27.10.2016 which was much prior to the issuance of the notification dated 19.04.2017, whereby, section 3 to 9 etc. were enforced.

ii. That in pursuance to the Act of 2016 and the Rules, 2017, all projects wherein a license was issued under the 1975 Act on or before 01.05.2017 and where the development works were yet to be completed on the said date (i.e. 01.05.2017), were covered under the definition of "ongoing project" and the same were required to be registered with the Real Estate Regulatory Authority as per Section 3 of the 2016 Act. A further perusal of rule 2(o) would further indicate that no project would require registration under 2016 Act for which after completion of development works, an application under rule 16 of the said rules or under sub code 4.10 of the Haryana Building Code, 2017 (hereinafter, 'the Code'), as the case may be, is made to the competent authority on or before the publication of the rules i.e. dated 28.07.2017. Still further, even those projects/ part of projects, would not require registration under 2016 Act for which part completion/ completion, occupation certificate or part thereof has been granted on or before publication of the Rules of 2017.

iii. That the present complaint is not maintainable in law or facts as being an un-registered project, the project was not covered within the definition of an 'ongoing project' as defined under rule 2(1)(o) of the rules. That M/s Magnum had already submitted occupation certificate on 27.10.2016 and the same was granted by the competent authority on 09.10.2017 vide memo no. ZP-573/SD(BS)/2017/ 25404. Further, the competent authority on 13.12.2019 vide memo no. LC-1485 Vol-III-Astt. 9AK-2019/30678 has also issued completion certificate in respect of the entire project dated 13.12.2019.

iv. That as per the provisions of rule 4 (5) of the rules that only if the occupation certificate or part thereof has been refused by the competent authority, before or after 31.07.2017, the promoter shall have to make an application to the Haryana Real Estate Regulatory Authority within thirty days of receipt of communication of such refusal by the applicant.

v. That the complaint pertaining to compensation and interest for a grievance under sections 12, 14, 18 and 19 of the Act of 2016 is required to be filed before the adjudicating officer under rule-29 of the rules read with sections 31 and 71 of the said Act and not before the authority under rule 28.

vi. That the respondents have never demanded any amount from the complainant, which is outside the scope of the ABA between the parties.

E. Jurisdiction of the authority

6. The preliminary objections raised by the respondent regarding jurisdiction of the authority to entertain the present complaint stands rejected. The authority observed that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I Territorial jurisdiction

7. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana 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

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

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

F. Findings of the authority on the objections raised by the respondent:

9. With regards to the above contentions raised by the promoter/developer, it is worthwhile to examine following issues:

F.I. Objection regarding registration of project as it is not covered under the definition of 'ongoing project'

10. The respondent-builder has taken the plea that the project does not come under the purview of 'on-going' project and is not liable to be registered under Haryana Real Estate Regulatory Authority. The first proviso to section 3(1) of the Act provides that the projects which were 'ongoing' on the date of commencement of the Act and for which the completion certificate has not been issued, the promoter shall make an application to the authority for registration of the said project within a period of three months from the date of commencement of the Act.

11. The position further becomes clear from section 3(2)(b) of the Act that the registration of the real estate project shall not be required where the promoter had received the completion certificate for the said project prior to the commencement of the Act. Thus, if we read section 3 of the Act, between the lines, it is evident that only that project shall be excluded from the purview

of the 'ongoing project' which had received the completion certificate prior to the commencement of the Act and such project will not require registration. The clause 3 (1) (2) of the Act is reproduced below:

> *"Section (3) (1).... Provided that projects that are ongoing on the date of commencement of this Act and for which the completion certificate has not been issued, the promoter shall make an application to the Authority for registration of the said project within a period of three months from the date of commencement of this Act.*
>
> *(2) Notwithstanding anything contained in sub-section (1), no registration of the real estate project shall be required—*
>
> *(a) where the area of land proposed to be developed does not exceed five hundred square meters or the number of apartments proposed to be developed does not exceed eight inclusive of all phases:*
>
> *Provided that, if the appropriate Government considers it necessary, it may, reduce the threshold below five hundred square meters or eight apartments, as the case may be, inclusive of all phases, for exemption from registration under this Act;*
>
> *(b) where the promoter has received completion certificate for a real estate project prior to commencement of this Act;*
>
> *(c) for the purpose of renovation or repair or re-development which does not involve marketing, advertising selling or new allotment of any apartment, plot or building, as the case may be, under the real estate project.*
>
> *Explanation.—For the purpose of this section, where the real estate project is to be developed in phases, every such phase shall be considered a stand alone real estate project, and the promoter shall obtain registration under this Act for each phase separately."*

12. It has been provided in explanation (i) of rule 2(1)(o) that those projects for which after completion of development works an

application under rule 16 of Rules of 1976 or under sub-code 4.10 of the Code of 2010 was made to the competent authority on or before publication of the rules will not be 'ongoing project'. Rule 2(1)(o)(ii) of the rules further provides that the 'ongoing project' does not include any part of any project for which part completion/completion, occupancy certificate or part thereof had been granted on or before publication of these rules. Rules 2(1)(o)(i) and 2(1)(o)(ii) are apparently inconsistent with section 3 of the Act. Rule 2(1)(o) clauses (i) and (ii) are reproduced below:

> ***Rule 2(1)(o) "on going project"*** *means a project for which a license was issued for the development under the Haryana Development and Regulation of Urban Area Act, 1975 on or before the 1st May, 2017 and where development works were yet to be completed on the said date, but does not include:*
>
> *(i) any project for which after completion of development works, an application under Rule 16 of the Haryana Development and Regulation of Urban Area Rules, 1976 or under sub code 4.10 of the Haryana Building Code 2017, as the case may be, is made to the Competent Authority on or before publication of these rules and*
>
> *(ii) that part of any project for which part completion/completion, occupation certificate or part thereof has been granted on or before publication of these rules."*

13. Section 3(2) of the Act provides that no registration shall be required for the projects mentioned therein. This is the only provision regarding exemption of real estate projects from the requirement of registration but under the rule 2(1)(o)(i) and 2(1)(o)(ii) two additional categories have been provided to be taken out of purview of on-going projects and accordingly

attempted to exempt these categories of projects from the requirement of registration.

14. The authority is of the view that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. The Act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of ***Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)*** which provides as under:

> *"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter...*
>
> *122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to*

some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."

15. Also, in appeal no. 173 of 2019 titled as ***Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya***, in order dated 17.12.2019 the Haryana Real Estate Appellate Tribunal has observed-

"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."

16. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the

plans/permissions approved by the respective departments/competent authorities and are not in contravention of any other Act, rules and regulations made thereunder and are not unreasonable or exorbitant in nature.

17. Only those projects which had got the completion certificate before the commencement of the Act will not require registration and will certainly fall beyond the purview of the 'ongoing project'. Thus, the High Court has categorically laid down that as per section 3(2)(b) of the Act, the registration of a project will not be required where the promoter has already received the completion certificate for the project prior to the commencement of the Act. It is pertinent to mention here that completion certificate as defined in section 2(q) and occupancy certificate as defined in section 2(zf) of the Act are entirely for different purposes. The above-mentioned sections are reproduced below:

> "***Section 2(1) (q) "completion certificate"*** *means the completion certificate, or such other certificate, by whatever name called, issued by the competent authority certifying that the real estate project has been developed according to the sanctioned plan, layout plan and specifications, as approved by the competent authority under the local laws;"*
>
> "***Section 2 (1) (zf) "occupancy certificate"*** *means the occupancy certificate, or such other certificate by whatever name called, issued by the competent authority permitting occupation of any building, as provided under local laws, which has provision for civic infrastructure such as water, sanitation and electricity;"*

18. Only those projects which had got the completion certificate before the commencement of the Act will not require registration

and will certainly fall beyond the purview of the 'ongoing project'. All other projects will require registration and will be squarely covered by the definition of the 'ongoing project'. Hence, it is held that the mandate contained in section 3 of the Act will have supremacy over the rule 2(1)(o) of the rules so far as the same is inconsistent with section 3. It is a well settled principle of law that the Act is always the creator of the rules i.e. rules are always framed by virtue of there being a provision in the Act with regard to framing of rules. Since this project has not been completed within the parameters of law, it falls within the category of on-going project for which registration as per the requirement of section 3 (1) is required and proceedings for non-registration under section 59 of the Act may be initiated.

F.II. Mere applying for grant of occupation certificate to the competent authority does not exempts the project from the category of 'on-going projects'.

19. The application for issuance of occupancy certificate shall be moved in the prescribed form and accompanied by the documents mentioned in sub-code 4.10(1) of the the Code(hereinafter, the Code). The said section is reproduced below:

> ***Section 4.10: Occupation Certificate***
>
> *"(1) Every person who intends to occupy such a building or part thereof shall apply for the occupation certificate in Form BR-IV(A) or BR-IV(B), which shall be accompanied by certificates in relevant Form BR-V (1) or BR-V(2) duly signed by the Architect and/ or the Engineer and along with following documents:*

(i) Detail of sanctionable violations from the approved building plans, if any in the building, jointly signed by the owner, Architect and Engineer. (ii) Complete Completion drawings or as-built drawings along with completion certificate from Architect as per Form BR-VI. (iii) Photographs of front, side, rear setbacks, front and rear elevation of the building shall be submitted along with photographs of essential areas like cut outs and shafts from the roof top. An un-editable compact disc/ DVD/ any other electronic media containing all photographs shall also be submitted. (iv) Completion certificate from Bureau of Energy Efficiency (BEE) Certified Energy Auditor for installation of Rooftop Solar Photo Voltaic Power Plant in accordance to orders/ policies issued by the Renewable Energy Department from time to time. (v) Completion Certificate from HAREDA or Bureau of Energy Efficiency (BEE) Certified Energy Auditor for constructing building in accordance to the provision of ECBC, wherever applicable. (vi) No Objection Certificate (NOC) of fire safety of building from concerned Chief Fire Officer or an officer authorized for the purpose.

(2) No owner/ applicant shall occupy or allow any other person to occupy new building or part of a new building or any portion whatsoever, until such building or part thereof has been certified by the Competent Authority or by any officer authorized by him in this behalf as having been completed in accordance with the permission granted and an 'Occupation Certificate' has been issued in Form BRVII. However, Competent Authority may also seek composition charges of compoundable violations which are compoundable before issuance of Form BRVII. Further, the water, sewer and electricity connection be released only after issuance of said occupation certificate by the Competent Authority.

(3) The 'Occupation Certificate' shall be issued on the basis of parameters mentioned below:

(i) Minimum 25% of total permissible ground coverage, excluding ancillary zone, shall be essential for issue of occupation certificate (except for industrial buildings) for the first time or as specified by the Government:

Provided, in case of residential plotted, minimum 50% of the total permissible ground coverage shall be essential to be constructed to obtain occupation certificate, where one

habitable room, a kitchen and a toilet forming a part of submitted building is completed.

(ii) The debris and rubbish consequent upon the construction has been cleared from the site and its surroundings.

(4) After receipt of application, the Competent Authority shall communicate in writing within 60 days, his decision for grant/ refusal of such permission for occupation of the building in Form BR-VII. The E-register shall be maintained as specified in Code-4.8 for maintaining record in respect of Occupation Certificate.

(5) If no communication is received from the Competent Authority within 60 days of submitting the application for "Occupation Certificate", the owner is permitted to occupy building, considering deemed issuance of "Occupation certificate" and the application Form BR-IV (A) or BR-IV(B) shall act as "Occupation Certificate". However, the competent authority may check the violations made by the owner and take suitable action."

34. As per the provisions of above-mentioned section 4.10 of the Code, there are certain statutory formalities that are to be complied with before the submission of application for grant of occupation certificate. The utmost significance is given to the 'no-objection certificate' from the fire department (clause vi of section 4.10 of the Code). Though the application for the grant of occupation certificate/ completion certificate has been made by the respondent on 27.10.2016 itself. However, the NOC from the fire department was obtained by the promoter on 18.09.2017. Thereafter, the occupation certificate was received on 9.10.2017 and the completion certificate was granted on 13.12.2019. Thus, as the requisite document (NOC of the fire department) was not submitted along with application, the application for issuance of occupation certificate cannot be said to be complete. There is no applicability of deemed occupation certificate (clause 5 of section 4.10 of the Code) in case of deficient application, application not being in prescribed form, application not accompanied by prescribed documents or without meeting the prerequisite for applying for occupation certificate. Incomplete application is no application in eyes of law.

20. Rule 4 (5) of the rules had been referred by the respondent that the obligation to register the project with the Haryana Real estate Regulatory Authority would only fall on the promoter if the grant of occupation certificate or part thereof is refused by the competent authority, whether on or after 31.07.2017. The said rule is reproduced below:

> *"**Rule 4: Additional disclosure by promoters for on-going projects***
> *(5) A Project where an application under rule 16 of the Haryana Development and Regulation of Urban Area Rules, 1976 or under sub-code 4.10 of the Haryana Building Code 2017, as the case may be, is made to the competent Authority on or before publication of these rules but the grant of part completion/ completion under the Haryana Development and Regulation of Urban Area Rules, 1976 or occupation certificate, part thereof, under sub code 4.10 of the Haryana Building Code 2017, as the case may be, is refused by the Competent Authority, whether before, on or after 31.07.2017,the promoter shall have to make an application to the Haryana Real Estates Regulatory Authority for registration of the project 5 within thirty days of receipt of communication of such refusal by the applicant."*

21. The application of occupation certificate for the builders was not rejected on or after 31.07.2017, however, it was only granted on 27.10.2016. The authority is of the view that merely applying for occupation certificate or part thereof will not absolve the respondent/ builder from his obligations under the RERA provisions. As stated above, the NOC of the fire department was received only on 18.09.2017 and this delayed the grant of occupation certificate. Thus, mere applying for occupation certificate will not absolve the promoter from his obligations.

G. Findings on the relief sought by the complainant

G.I. Regarding DPC and interest

22. In the present complaint, the complainant intend to continue with the project and are seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under.

> ***"Section 18: - Return of amount and compensation***
>
> *18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building, —*
>
> *..........................*
>
> *Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."*

23. Clause 12.1 of the apartment buyer agreement provides time period for handing over of possession and the same is reproduced below:

> ***Clause 12. Completion and Construction and Possession***
>
> *"**12.1** The construction of the Apartment is proposed to be completed by the Owners/ Company within 36 (thirty six) months (plus 6 months grace period) from the date of start of ground floor roof slab of the particular tower (building) in which the booking is made, subject to timely payment by the Allottee(s) of sale price, stamp duty and other charges due and payable according to Payment Plan applicable to him/ her/ them and/ or as demanded by the Owners/ Company, and subject to force majure provisions. The possession of the Apartment shall however, be offered only after the grant of completion/ occupation certificate from the Competent Authority. In the event of failure on the part of the Allottee(s) to take over the possession of the*

Apartment allotted to him/ he/ them within 90 (ninety) days from the date of offer of possession by the Owners/ Company, the Allottee(s) shall be liable to pay holding charges @ Rs. 5 per sq ft. (Rs. 54/ sq. Mts) of the Saleable Area per month for the entire period of such delay. The Allottee(s) shall have to pay the Maintenance Charges (along with interest on delayed payment) from the due date before taking over possession."

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 the complainant not being in default under any provisions of these agreements 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 favor 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's 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.

25. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within period of 36 months from the date of start of construction of the ground floor roof slab of that particular tower. In the present complaint, the date of start of construction of the ground floor roof slab of tower C, in which the apartment unit is located has been taken from the demand notice dated 08.11.2012 as the demand was raised on start of construction of ground floor roof slab. It is further provided in agreement that promoter shall be entitled to a grace period of six months. Since the grace period asked is for unqualified reason, thus, this period shall be granted to the respondents. Therefore, the due date of handing over possession comes out to be 08.05.2016. Accordingly, this grace period of six months be allowed to the promoter at this stage.

26. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges at simple interest. However, proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. The same 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]***
> *"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 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. 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., 13.08.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

29. **Rate of interest to be paid by complainant for delay in making payments**: 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;"*

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

G.II. Whether the respondent is justified for charging GST charges?

31. The complainant has sought the relief that the demand qua GST shall be revoked. As per the documents put on record, the final demand notice dated 13.10.2017, the respondent has raised a demand of Rs. 35,574/- at the rate of Rs. 23.19 per sq. ft. as VAT charges. No demand as per GST has been raised. Thus, the authority can only adjudicate on the incidence of levying of VAT charges.

32. Clause 3.1 of the BBA, wherein the complainant agreed to pay any tax/charges including any fresh incidence of tax as may be levied by the Government of Haryana/Competent Authority/Central Government, even if it is retrospective in effect as and when demanded by the respondent on the super area of the flat without any demur and protest. The clause 3.1 of the ABA is reproduced below:

> ***"Clause 3 - Taxes***
>
> *3.1 The Total Sale Price is exclusive of all taxes. The Allottee(s) shall pay all government charges, rates, taxes etc., including but not limited to Value Added Tax (VAT), Service Tax, Levies, Cess etc. Whether levied now, or in future and made effective from or after the date of allotment in proportion to the area of the said apartment. In the event of any increase in such charges or in the event of introduction of any other/ fresh levy/ charges by the Government/ Competent Authorities, payable whether prospective or retrospective even after the Conveyance/ Sale Deed has been executed, then these charges/ levies shall be treated as unpaid sale price on the apartment , and the Owners/ Company shall have a lien on the Apartment of the allottee(s) for recovery of such charges. The allottee(s) understand and confirm that service tax shall be levied on every installment as per the Schedule of Payments and in accordance with the applicable laws."*

33. A clear reading of the buyer's agreement states that taxes shall be payable as per the government rules as applicable from time to time. Taxes are levied as per government norms and rules and is leviable in respect of real estate projects as per the government policies from time to time. The liability to pay VAT by the builder as works contractor has clearly been settled by the apex court **in M/s Larsen and Toubro Limited Vs State of Karnataka (2013) 46 PHT 269 (SC)** wherein it was held that the builders/developers etc. engaged in the activities of the construction of building, flat and commercial properties are covered under the definition of "works contract" and are liable to pay sales tax as per applicable laws of the state. The provisions of Haryana VAT Act, 2003 (herein after referred as HVAT Act) r/w Haryana Value Added Tax Rules further clarified

that the agreements entered with prospective buyers for sale of constructed flats, apartments, or other buildings by builders and/or developers amount to transfer of property of goods involved in the execution of a works contract and thus liable to be subjected to VAT.

34. There is no set percentage of consideration that can be charged as HVAT from the prospective buyer. However, the issue of paying HVAT was settled by the authority in the judgement dated 04.09.2018 in complaint no. 49/2018, titled as **Parkash Chand Arohi vs. M/s Pivotal Infrastructure Pvt. Ltd.** of the Haryana Real Estate Regulatory Authority, Panchkula where in it has been observed that the possession of the flat in term of buyer's agreement was required to be delivered on 1.10.2013 and the incidence of GST came into operation thereafter on 01.07.2017. So, the complainant cannot be burdened to discharge a liability which had accrued solely due to respondent's own fault in delivering timely possession of the flat. The relevant portion of the judgement is reproduced below:

> *"8. The complainant has then argued that the respondent's demand for GST/VAT charges is unjustified for two reason. (i) the GST liability has accrued because of respondent's own failure to handover the possession on time and (ii) the actual VAT rate is 1.05% instead of 4% being claimed by the respondent. The authority on this point will observe that the possession of the flat in term of buyer's agreement was required to be delivered on 1.10.2013 and the incidence of GST came into operation thereafter on 01.07.2017. So, the complainant cannot be burdened to discharge a liability which had accrued solely due to respondent's own fault in delivering timely possession of the flat. Regarding VAT, the Authority would advise that the respondent shall consult a*

service tax expert and will convey to the complainant the amount which he is liable to pay as per the actual rate of VAT fixed by the Government for the period extending upto the deemed date of offer of possession i.e., 10.10.2013."

35. The authority is of the view that HVAT can be charged up-to the deemed date of possession i.e., 08.05.2016 and the defaulter cannot take advantage of his own wrong by charging the complainant of taxes for the period after 08.05.2016 till actual offer of possession was given (13.10.2017).

G.III. Whether the respondent in justified in taking maintenance charges from the complainant/ allottee from the date of offer of possession and can the respondent compel the complainant/ allottee to sign a 10-year maintenance agreement as condition precedent for handing over of the possession.

36. Maintenance charges essentially encompass all the basic infrastructure and amenities like parks, elevators, emergency exits, fire and safety, parking facilities, common areas, and centrally controlled services like electricity and water among others. Initially, the upkeep of these facilities is the responsibility of the builder who collects the maintenance fee from the residents. Once a resident's association takes shape, this duty falls upon them, and they are allowed to change or introduce new rules for consistently improving maintenance. In the absence of an association or a society, the builder continues to be in charge of maintenance. Usually, maintenance fees are charged on per flat or per square feet basis. Common area maintenance charges on the other hand accounts for the maintenance charges that builder

incurs while maintaining the project before the liability gets shifted to association of owners.

37. A quick glance at the provisions of the Act may be taken in this respect to the responsibility of the promoter or project developer for providing and maintaining essential and common services at a reasonable charge payable by the flat purchasers till the time the co-operative housing society or RWA is formed.

Sect 11: Functions and Duties of the Promoter	Sect 19: Rights and Duties of the Allottees
Section 11(4)(d) states that the promoter shall be responsible for providing and maintaining the essential services, on reasonable charges, till the taking over of the maintenance of the project by the association of the allottees.	Section 19(6) states that every allottee, who has entered into an agreement for sale to take an apartment, plot or building as the case may be, under section 13[1], shall be responsible to make necessary payments in the manner and within the time as specified in the said agreement for sale and shall pay at the proper time and place, the share of the registration charges, municipal taxes, water and electricity charges, maintenance charges, ground rent, and other charges, if any.
Section 11(4)(g) states that the promoter shall pay all outgoings	Section 19(7) states that the allottee shall be liable to pay interest, at such

until he transfers the physical possession of the real estate project to the allottee or the associations of allottees, as the case may be, which he has collected from the allottees, for the payment of outgoings (including land cost, ground rent municipal or other local taxes, charges for water or electricity, maintenance charges, including mortgage loan and interest on mortgages or other encumbrances and such other liabilities payable to competent authorities, banks and financial institutions, which are related to the project):	rate as may be prescribed, for any delay in payment towards any amount or charges to be paid under sub-section (6)
Proviso to Section 11(4)(g) states provided that where any promoter fails to pay all or any of the outgoings collected by him from the allottees or any liability, mortgage loan and interest thereon before transferring the real estate project to such allottees, or the association of the allottees, as the case may be, the promoter shall continue to be liable, even after the transfer of the property, to pay such outgoings and	Section 19(8) states that the obligations of the allottee under sub-section (6) and the liability towards interest under sub-section (7) may be reduced when mutually agreed to between the promoter and such allottee.

penal charges, if any, to the authority or person to whom they are payable and be liable for the cost of any legal proceedings which may be taken therefor by such authority or person.

38. The relevant clause of maintenance charges reproduced below:-

> ***Clause 19. Maintenance***
> *"**19.1** The project so developed shall be maintained by the Owners/ Company either by themselves or through a Maintenance Agency appointed by the Owners/ Company until the same is transferred/ assigned to the Association of Apartment Owners as hereinafter mentioned. The Allottee(s) agree to execute the Maintenance Agreement or pay the maintenance charges to the Owners/ Company/ Maintenance Agency from the date of issue of letter of offer for possession by the Owners/ Company."*

The reading of the above clause shows that the amount towards maintenance charges being demanded by the promoter shall be utilized towards the upkeep and maintenance of the project, its common areas, utilities, equipment installed in the building and such other facilities forming part of the project. The maintenance of the project is essential to enjoy the basic facilities provided in the project by the promoter. Therefore, while providing these essential services, the promoter would be required to maintain sufficient funds with him. In order to meet these expenses, the

demand of the promoter raised on the allottee to pay maintenance charges cannot be said to be unreasonable, however, the period cannot be unreasonable or unjustified.

39. Thus, the authority is of the view that the respondent is entitled to collect maintenance charges as per the buyer's agreement executed between the parties. However, the period for which maintenance charges is levied should not be arbitrary and unjustified. Keeping in view the facts above, the authority deems fit that the respondent is right in demanding common area maintenance charges at the rate prescribed therein at the time of offer of possession in view of the judgments (supra). However, the respondent shall not demand the maintenance charges for more than one (1) year from the allottee.

40. On consideration of the documents available on record and submissions made by the parties regarding contravention as per provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 12.1 of the ABA that was executed

between the parties on 08.11.2012, possession of the said unit was to be delivered within a period of 36 months from the date of start of ground roof slab of the particular tower in which the booking is made, which is tower C in this case. The date of start of ground roof slab of the construction has been taken from the demand notice/ letter on page 74 of the complaint i.e., 08.11.2012. Thus, the due date of possession is calculated from the date of demand of notice. The respondent-builder had claimed a grace period of 6 months for unqualified reasons. It is further provided in agreement that promoter shall be entitled to a grace period of six months. Since the grace period asked is for unqualified reason, thus, this period shall be granted to the respondents. Therefore, the due date of handing over possession comes out to be 08.05.2016. Accordingly, this grace period of six months be allowed to the promoter at this stage. Thus, as far as grace period is concerned, the same is allowed for the reasons quoted above. Therefore the due date of possession comes out be 08.05.2016. In the present case, the complainant was offered possession by the respondent on 13.10.2017. The authority is of the considered

view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the complainant as per the terms and conditions of the ABA dated 17.06.2011 executed between the parties.

41. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 09.10.2017. However, the respondent offered the possession of the unit in question to the complainant only on 13.10.2017, so it can be said that the complainant came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, he should be given 2 months' time from the date of offer of possession. These 2 months' of reasonable time is being given to the complainant keeping in mind that even after intimation of possession practically they have to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the

time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e. 08.05.2016 till the expiry of 2 months from the date of offer of possession (13.10.2017) which comes out to be 13.12.2017.

42. 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 complainant is entitled to delay possession charges at prescribed rate of the interest @ 9.30 % p.a. w.e.f. 08.05.2016 till 13.12.2017 as per provisions of section 18(1) of the Act read with rule 15 of the rules.

H. Directions of the authority

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

i. The respondent is directed to pay the interest at the prescribed rate i.e. 9.30 % per annum for every month of delay on the amount paid by the complainant from due date of possession i.e.

08.05.2016 till13.12.2017 i.e. expiry of 2 months from the date of offer of possession (13.10.2017).

ii. The arrears of such interest accrued from 08.05.2016 till 13.12.2017 shall be paid by the promoter to the allottee within a period of 90 days from date of this order as per rule 16(2) of the rules.

iii. The complainant is directed to make the outstanding payments including VAT charges till 08.05.2016, if any, to the respondent alongwith prescribed rate of interest i.e., equitable interest which has to be paid by both the parties in case of failure on their respective parts.

iv. The respondent is right in demanding maintenance charges at the rates' prescribed in the buyer's agreement at the time of offer of possession. However, the respondent shall not demand the maintenance charges for more than one year from the allottee.

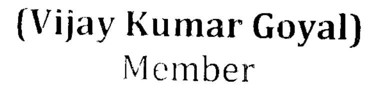
v. The respondent shall not charge anything from the complainant which is not the part of the buyer's agreement. The respondent shall not claim holding charges from the complainant/allottee at any point of time even after being part of the builder buyer's

agreement as per law settled by Hon'ble Supreme Court in **civil appeal nos. 3864-3889/2020 decided on 14.12.2020.**

44. Complaint stands disposed of.

45. File be consigned to registry.

(Samir Kumar)
Member



(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 13.08.2021

Judgement uploaded on 30.11.2021.