BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 449 of 2021
First date of hearing: 06.04.2021
Date of decision : 10.08.2021

Mr. Anubhav Jain
R/O: - G-01, Tower H, Mahindra Aura Apartments, Sector 110A, Gurgaon, Haryana - 122017 **Complainant**

Versus

1. M/s Countrywide Promoters Private Limited
2. M/s BPTP Limited
Both Having Regd. Office at: - OT-14, 3rd Floor, Next Door, Parklands Sector-76, Faridabad, Haryana-121001 **Respondents**

CORAM:
Shri Samir Kumar **Member**
Shri Vijay Kumar Goyal **Member**

APPEARANCE:
Sh. Manoj Yadav Advocate for the complainant
Sh. Venket Rao Advocate for the respondents

ORDER

1. The present complaint dated 27.01.2021 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 allottees 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 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.	Unit no.	D-143-SF, Second Floor
2.	Unit super area admeasuring	1770 sq. ft.
3.	Revised super area [As per offer of possession]	1938 sq. ft. (Page no. 151 of reply)
4.	Date of Booking	03.02.2011 (vide payment receipt on page no. 67 of complaint)
5.	Date of execution of floor buyer's agreement	09.05.2012 (Page no. 86 of reply)
6.	Date of sanction of building plan	19.09.2012
7.	Total consideration	Rs. 87,49,982.14/- (vide statement of accounts on page no. 153 of reply)
8.	Total amount paid by the complainant	Rs. 62,36,938.00/- (vide statement of accounts on page no. 153 of reply)
9.	Due date of delivery of possession	**19.09.2014**

	[**As per clause 5.1:** - 24 months from the date of sanction of building plan or execution of FBA, whichever is later]	(Calculated from date of sanction of building plan being later)
10.	Date of occupation certificate	22.01.2020 (Page no. 150 of reply)
11.	Offer of possession	07.02.2020 (Page no. 151 of reply)
12.	Delay in handing over possession till offer of possession plus 2 months i.e., 07.04.2020	5 years 6 months 19 days

3. The particulars of the project namely, "Amstoria" as provided by the registration branch of the authority are as under:

Project related details		
The License no. 58 of 2010 and 45 of 2011 comprising of total land area 126.674 Acres were previously sold by the promoter by the project name i.e., Amstoria and was not registered. As such, the promoter has registered with the authority vide registration no.31of 2020 valid till 30.04.2024 on the same land comprising of license no. 58 of 2010 and 45 of 2011. Now, the Name of the said project is 102, Eden Estate and is registered with the Authority.		
1.	Name of the promoter	M/s Countrywide Promoters Private Limited
2.	Name of the project	102 Eden Estate
3.	Location of the project	Sector-102 & 102A, Gurugram, Haryana.
4.	Nature of the project	Residential Plotted Colony
5.	Whether project is new or ongoing	Ongoing

6.	Registered as whole/phase	Whole	
7.	If developed in phase, then phase no.	N/A	
8.	Total no. of phases in which it is proposed to be developed, if any	N/A	
9.	HARERA registration no.	31 of 2020	
10.	Registration certificate	Date	Validity
		09.10.2020	30.04.2024
11.	Area registered	126.674 acres	
	Total Plots 1028 (Out of which 28 plots for villas and 155 plots for the floors (G+3))		
12.	Extension applied on	N/A	
13.	Extension certificate no.	Date	Validity
		N/A	N/A
Licence related details of the project			
1.	DTCP license no.	58 of 2010 dated 03.08.2010 and 45 of 2011 dated 17.05.2011	
2.	License validity/ renewal period	02.08.2025 and 16.05.2017	
3.	Licensed area	108.068 acres and 18.606 acres	
4.	Name of the license holder	M/s Shivanand Real Estate Pvt. Ltd. and others.	
5.	Name of the collaborator	NA	
6.	Name of the developer/s in case of development agreement and/or marketing agreement	NA	

	entered into after obtaining license.		
7.	Whether BIP permission has been obtained from DTCP	NA	
Date of commencement of the project			
1.	Date of commencement of the project	N/A	
Details of statutory approvals obtained			
S.N.	**Particulars**	**Approval no and date**	**Validity**
1.	Environment Clearance	12.12.2013	11.12.2020
	Revised Environment Clearance	22.07.2016	21.07.2023
2.	Occupation Certificate Date	Provided individually for the floors	
3.	Part Completion certificate date	03.10.2017	
	Area	66.50 acres	

B. Facts of the complaint

The complainant has submitted as under: -

4. That the respondent no.1 is a company having its registered office at OT-14, 3rd floor, next door parklands, sector-76, Faridabad, Haryana-1210004. The said company is incorporated under the Companies Act, 1956 and is mainly dealing in the business of real estate. The respondent no.2 is a company having its registered office at OT-14, 3rd floor, next door parklands, sector-76, Faridabad, Haryana-1210004 and

is the landowner of the project on which the project launched by the respondent no 1 is situated.

5. That the project launched by the respondents in which the complainant had booked his floor/apartment is in Gurgaon which lies within the territorial jurisdiction of this hon'ble authority and hence the hon'ble authority has the jurisdiction to adjudicate the instant consumer complaint.

6. That the complainant being aggrieved by the acts, neglects, or/and omissions constituting offending misconduct, injurious activities and fraudulent undue charges, causing various threats of coercing for illegal and illegitimate undertakings from them by the respondents which amount to deficiency in service, failure in service, unfair trade practices, restrictive trade practice etc., is filing the present complaint before this before this hon'ble authority for redressal of his respective grievances.

7. That the respondent no.2 and its associate companies purported to have acquired and purchased lands admeasuring 108.068 acres situated in the revenue estate of villages Kherki Majra and Dhankot, Tehsil and District Gurgaon, Haryana and also purported to have obtained license bearing number 58 of 2010 from the Department of Town and Country Planning, Haryana, Chandigarh ("DTCP") for the development of residential floors on the aforesaid licensed land. The respondent no. 1 with a view to set up and develop independent residential floors over the land marketed the same as "Amstoria", Gurgaon, Haryana.

8. That the project was advertised widely by the respondents and on seeing the lucrative advertisements, the buyers/allotees including the present complainant approached the desk office and sale office of the respondents to inquiries about the project. The officials and brokers of the respondents made various lucrative representations and made a promise that the floors/apartments in the project will be delivered within 24 months from the date of booking. Based on this representation and the promises, the buyers/allotees including the present complainant applied for their respective floors/apartments in the above project vide an application and paid application money. That after few days the complainant was allotted a floor/apartment in the said project. That after some further time lapse, each of the buyers/allotees was sent a builder buyer's agreement which was to be signed by the buyers/allotees/purchasers and returned to the respondents. The total consideration of the respective floors/apartments was fixed by the respondents and was to be paid in accordance with a fixed payment schedule. The consideration and payment terms were accepted by the buyers/allotees/purchasers. Vide individual buyer's agreement the respondents changed the date of possession from 24 months of the date of booking which was committed at the time of booking to within 24 months from the date of sanctioning of building plans or execution of the buyer agreement whichever is later.

9. That along with the buyer's agreement the respondents provided payment schedule in which number of instalments to be paid by the complainant towards the discharge of the consideration of the respective floors/apartments was provided. Based on the down payment plan, the complainant the amount as demanded. The above amount included extra charges like service tax and interest on delayed payment @18% per annum.
10. That the complainant is an original allottee and had booked the floor/apartment with the respondents vide booking application dated 03.02.2011.
11. The complainant was allotted floor/apartment No D-143-SF, second floor, admeasuring 1770 sq. ft (Hereinafter referred as 'the said unit'). The total BSP of the said unit was fixed at Rs 61,44,001/-. The complainant has made a total payment of Rs 62,36,938/- to the respondent no. 1 towards the said unit sale consideration. That the complainant had booked the present floor under the subvention scheme launched by the respondents in collaboration with HDFC (Housing Development Finance Corporation Limited) and most of the payment towards floor/apartment sale consideration was made to the respondents by the end of 2012.That complainant had taken a loan of Rs 4800000/- from HDFC (Housing Development Finance Corporation Limited) at an interest rate of 10.75% p.a.
12. That the buyer's agreement was signed by each of the allotees/purchasers including the present complainant. That

some of the terms in the agreement, that the complainant was made to sign by the respondents, were/are one sided. The complainant had to sign already prepared documents and that some of the clause contained therein were totally unreasonable and were in favour of the respondents, only. That at the time of applying for the apartment/floor and payment of application money, the agreement/buyer's agreement was not shown to the allotees. It may be noted that there was a gap of substantial period between the date of application and signing of agreement. The agreement was shown and sent for signatures to the allotees after paying the application money. The buyer's agreement was a fixed set of papers, and which was asked to be signed by the complainant and no modification was entertained by the respondents. On request to change the one-sided clauses, it was told that the buyer's agreement has to be signed as it is and in case it is not acceptable than the allotment will stand cancelled and earnest money will be forfeited. Seeing no option, the complainant had to sign the agreement containing the one-sided clauses favouring the respondents only.

13. That as per clause 5.1 of the buyer's agreement, the respondents were bound to give possession of the said unit to the complainant within 24 months from date of sanctioning of building plans or execution of the buyer agreement whichever is later. The buyer agreement was executed on 09.05.2012 therefore, the possession of the said unit was due on 09.05.2014. The complainant has paid the entire sum as

demanded by the respondent towards the said unit, but they did not fulfill promise to handover the possession of the flat within the promised time.

14. That despite a delay of many years, the construction of the said unit was not completed within the promised time. That the respondents are deficient in renderings services and after extracting most of the money from the buyers including the present complainant have deliberately not completed the construction of the said unit within the promised time.

15. That despite an on-time payment of the entire demand of the respondents and despite repeated requests and reminders over letters, email, phone calls and personal visits by the complainant the respondents have failed to deliver the possession of the said unit to the complainant within the promised time.

16. That as per the clause 6 of the terms of buyer's agreement, it was agreed by the respondents that in case of any delay, the respondents shall pay to the complainant, compensation at the rate of Rs.10/- per sq. ft. per month for the period of the delay. That the respondents have incorporated the clause 6 in the one-sided agreement and have offered to pay a meagre sum of Rs.10/- per square feet for every month of delay. If one calculates the amount in terms of financial charges, it comes to approximate @ 2% per annum rate of interest. Even these charges are to be paid after 24 months of period which is taken by the respondents to construct the floors/apartments as per the buyer's agreement. This shows that the respondents have

found a cheap source of funding the commercial projects from the hard-earned savings and borrowed money of innocent floors/apartments buyers like the complainant. The respondents are raising funds at the interest rate of mere 2% per annum and that too with initial 24 months of interest free duration. The respondent's act of incorporating such one sided patently unjust clause in the buyer's agreement amounts to unfair trade practice.

17. That the complainant has made an on-time payment of all the demands of the respondents, but the possession has not been handed over despite the delay of many months. Despite communications, the respondents have not given any reason for the delay. The respondents have been keeping the money of the buyers with them and are utilizing the same for their own purpose. It can hence be seen that the respondents have been illegally using the money of the complainant for their own use and hence, should be made to pay interest on the same. The money paid by the buyers was for the purchase of their respective floors/apartments. It is a known building/construction practice that firstly the estimated cost of the fixed structures common areas, parks, roads, boundary wall of the complex, security gates, generator sets, parking area and all other amenities are calculated. The total of this cost is appropriated in a systematic manner to the number of floors/apartments. The cost of construction of each floor/apartment is then added to this attributed cost. Then after adding the profit and statutory costs like registration,

stamp duty etc., the total consideration is arrived at. This total consideration was payable in 10-12 instalments. In the present project, the buyers have paid all demands of the respondents. The respondents have not only collected the cost of the said unit but amounts towards the fixed cost, for which the work has not even started yet as the same is done only after the entire towers are ready and further the respondents has also realized their profits. Hence, the respondents have collected a substantial amount from the buyer's which is not even due yet. This amount is being used by the respondents for their own use. On the other hand, the buyers/purchasers after paying entire demands of the respondents are still empty handed. Moreover, the respondents are not even explaining as to what has caused the delay. Such actions of the respondents amount to gross deficiency of service. The act and omission of the respondents falls under the definition of unfair trade practices and restrictive trade practices for which the buyers should be adequately compensated. The amount paid by the complainant should be treated as deposits with the respondents and should carry interest. As per clause 12.1 of the agreement, the respondents' charges interest @ 18% p.a. from the buyers/allotees/purchasers on any amount due. On the grounds of parity and equity, the respondents should also be subjected to pay the same rate of interest. Further, the respondents should also pay delay compensation, on the entire amount paid by the complainant to the respondents so far, @18% p.a. from the committed date of possession till the

possession is handed over to the complainant. The respondents are still in the process of selling the floors/apartments to innocent buyers even through they have failed to construct the floor/apartment in time.

18. That the complainant repeatedly tried to contact the respondents to enquire about the construction status of the project and the said unit but could not get any satisfactory reply. The complainant also made repeated telephonic enquiries from the respondents between 2013 and 2019 as well as made personal visits to check the status of the said unit which was booked by them. However, the respondents used to make false claims that the construction was going on at the construction site and always avoided any plausible reply and kept on delaying the matter on one pretext or the other.

19. That the respondents had offered possession of the unit on in 07.02.2020 without offering any delay compensation for the years of delay on their part in handing over possession to the complainant. That in the aforesaid offer of possession, the respondents increased the area of the floor from 1770 sq. ft to 1938 sq. ft without any justification. It is further submitted that no justification for that increase in area has been provided by the respondents. It is also pertinent to mention here that there is no increase in the actual usable carpet area of the aforesaid floor.

20. That the complainant is seeking directions for respondents to build and handover the possession of said unit. It may be seen that in a recent amendment in service tax law, there has been

an increase in the tax rate. The respondents were bound to give possession before the increase in tax rate occurred. There has also been a sharp increase in circle rates of property in the area where the present project is located which is further burdened by increase in the cost and rate of stamp duty and registration cost of houses. The buyers cannot be subjected to pay this hike as it is solely due to the conduct of the respondents. The buyers should also be granted immunity from other cost escalations that the respondents might subject them to as the delay has been wilful, and any detriments caused to the buyers/purchasers because of the delay should stand illegal.

21. That due to the default of the respondents in handing over possession of the apartment booked by the complainant within the promised time, the complainant has been forced to reside in rented accommodation all these years thereby causing financial losses to the complainant and denying him the mental satisfaction of residing in his own home/house.

22. That the respondents are liable to pay delay compensation to complainant for many years starting from 09.05.2014 till the date on which the possession is handed over to him at the prescribed rate in accordance with section 18 of the Real Estate (Regulation and Development) Act, 2016.

C. Relief sought by the complainant.

23. The complainant has filed the present complaint for seeking following reliefs [The complainant has prayed for the relief of

delayed possession charges and other reliefs including increase in area, enhanced service tax/GST. But, vide application filed on 11.08.2021, the counsel for the complainant prayed for pursuing only the relief of delayed possession charges, and to handover the possession of the said unit]

(i) Direct the respondents to pay interest at the prescribed rate for every month of delay from the due date of possession till the actual handing over of the possession of the subject apartment to the complainant.

D. Reply by the respondents.

24. That the present complaint filed by the complainant is frivolous, baseless and lacks merits and as such same is liable to be dismissed as the respondents have received the occupation certificate for the unit in question on 22.01.2020 and accordingly, the offer of possession was sent to the complainant on 07.02.2020. However, the complainant has failed to make the requisite payment as per the offer of possession and has also failed to complete the documentation work required to take over possession of the unit in question. The respondents have also offered delay possession penalty to the complainant in form of 'loyalty bonus' to the tune of Rs. 3,87,600/- in accordance with the terms of agreement.

25. That the complainant is a defaulter under section 19 (6), 19 (7) and 19 (10) of the Real Estate (Regulation and Development) Act, 2016 and did not comply these sections. The complainant

cannot seek any relief under the provisions of the Real Estate (Regulation and Development) Act, 2016 or rules frame thereunder. Upon completion of construction and upon/securing occupancy certificate from the competent authority, the respondents issued the offer of possession letter on 07.02.2020. However, the complaint failed to clear the pending dues. Despite issuance of repeated reminder letters by the respondents and a last and final opportunity letter dated 10.08.2020, the complainant failed to clear the demand raised vide offer of possession letter. It is submitted that the respondents are entitled to levy the holding charges upon the complainant as the it is he who has not come forth to take the possession even after lapse of 2 months, which is mandate in the Act of 2016.

26. The complainant has approached the hon'ble authority for redressal of his alleged grievances with unclean hands, i.e., by not disclosing material facts pertaining to the case at hand and, by distorting and/or misrepresenting the actual factual situation with regard to several aspects. It is further submitted that the hon'ble apex court in plethora of decisions had laid down strictly, that a party approaching the court for any relief, must come with clean hands, without concealment and/or misrepresentation of material facts, as the same amounts to fraud not only against the respondents but also against the court and in such situation, the complaint is liable to be dismissed at the threshold without any further adjudication.

27. A reference may be made to the following instances which establish concealment/suppression/ misrepresentation on the part of the complainant:

- The complainant has concealed from this hon'ble authority that the respondents at the stage of booking offered an inaugural discount on the basic sale price amounting to Rs. 2,56,000.06/- Thus, the net BSP charged was less than the original amount of the said unit.
- The complaint falsely stated in the present complaint that the timely payments were made by the complainant as and when demanded by the respondents, however, as detailed in the reply of list of dates, it is submitted that the complainant made several defaults in making timely payments as a result thereof, the unit in question stands terminated vide termination letter dated 14.09.2020. The complainant failed to clear demand to the tune of Rs. 29,77,043 raised by the respondents vide the offer of possession, therefore the respondents issued several reminder letters and a last and final opportunity vide letter dated 10.08.2020. However, despite issuance of the same, the complainant was adamant on not clearing the pending dues, as a result of that, the allotment of the unit in question is terminated.
- That out of the total payment of Rs. 62,36,938/-, the complainant has paid Rs. 20,90,355.00/-, the HDFC bank has paid Rs.38,66,470/- and Rs. 2,80,113.00/- has been paid by the respondents as pre-EMI interest to the bank.

- The complainant has concealed that fact that he has committed defaults in making timely payments of various instalments within the stipulated time despite having clearly agreeing that timely payment is the essence of the agreement between the parties, and it is evident from clause 7.1 of the FBA. It is pertinent to point out that till date, the complainant made inordinate delays in making timely payments of instalments and the delay is continuing further since the complainant has still not cleared the pending dues. This act of not making payments is in breach of the agreement which also affects the cash flow for projects and hence, impacts the projected timelines for possession. Hence, the proposed timelines for possession got diluted due to the defaults committed by various allottees including he complainant in making timely payments.
- That the complainant has further concealed from this hon'ble authority that the respondents being a customer centric organization vide demand letters as well as numerous emails has kept updated and informed the complainant about the milestone achieved and progress in the developmental aspects of the project. The respondents vide various emails has shared photographs of the project in question. However, it is evident to say that the respondents have always acted bonafidely towards its customers including the complainant, and thus, has always maintained a transparency in reference to the project. In addition to updating the complainant, the respondents on numerous occasions, on each and every

issue/s and/or query/s upraised in respect of the unit in question has always provided steady and efficient assistance. However, notwithstanding the several efforts made by the respondents to attend to the queries of the complainant to his complete satisfaction, he erroneously proceeded to file the present vexatious complaint before this hon'ble authority against the respondents.

28. From the above, it is very well established, that the complainant has approached this hon'ble authority with unclean hands by distorting/ concealing/ misrepresenting the relevant facts pertaining to the case at hand. It is further submitted that the sole intention of the complainant is to unjustly enrich himself at the expense of the respondents by filing this frivolous complaint which is nothing but gross abuse of the due process of law. It is further submitted that in light of the law laid down by the Hon'ble Apex Court, the present complaint warrants dismissal without any further adjudication.

29. It is submitted that the relief(s) sought by the complainant is unjustified, baseless and beyond the scope/ambit of the agreement duly executed between the parties, which forms a basis for the subsisting relationship between the parties. The complainant entered into the said agreement with the respondents with open eyes and is bound by the same. The relief(s) sought by the complainant travel way beyond the four walls of the agreement duly executed between the parties. The complainant while entering into the agreement has accepted

and is bound by each and every clause of the said agreement. That the detailed relief claimed by the complainant goes beyond the jurisdiction of this hon'ble authority under the Real Estate (Regulation and Development) Act, 2016 and therefore the present complaint is not maintainable qua the reliefs claimed by him.

30. That having agreed to the above, at the stage of entering into the agreement, and raising vague allegations and seeking baseless reliefs beyond the ambit of the agreement, the complainant is blowing hot and cold at the same time which is not permissible under law as the same is in violation of the *'Doctrine of Aprobate & Reprobate'*. Therefore, in light of the settled law, the reliefs sought by the complainant in the complaint under reply cannot be granted by this hon'ble authority.

31. That agreements that were executed prior to implementation of the Act of 2016 and rules shall be binding on the parties and cannot be reopened. Thus, both the parties being signatory to a duly documented FBA dated 09.05.2012 executed by the complainant out of his own free will and without any undue influence or coercion is bound by the terms and conditions so agreed between them.

32. That it is clarified in the rules published by the state of Haryana, the explanation given at the end of the prescribed agreement for sale in 'Annexure A' of the rules, it has been clarified that the developer shall disclose the existing agreement for sale in respect of ongoing project and further

that such disclosure shall not affect the validity of such existing agreement executed with its customers. The explanation is extracted herein below for ready reference:

> *"Explanation: (a) The promoter shall disclose the existing Agreement for Sale entered between Promoter and the Allottee in respect of ongoing project along with the application for registration of such ongoing project. However, such disclosure shall not affect the validity of such existing agreement (s) for sale between Promoter and Allottee in respect of apartment, building or plot, as the case may be, executed prior to the stipulated date of due registration under Section 3(1) of the Act."*

33. **Issues And Reliefs Qua Super Area and Cost Escalation are beyond the agreed clauses of the agreement – Untenable and cannot be granted: -**

a. **Super Area**

The relief sought by the complainant regarding super area is untenable as it has been duly agreed upon between the parties that the super area of the flat shall be determined after completion of the construction in this context the clause 2.13 of the FBA is noteworthy.

b. **Demand qua Cost Escalation**

- That the parties had duly agreed regarding cost escalation at the stage of entering into the transaction vide clause 20.12 of the duly executed FBA.
- It is clarified that while offering possession, the respondents vide annexure "F" attached to the offer of possession dated 07.02.2020 duly explained the basis for

calculation of the cost escalation. The respondents have considered the cost escalation for the period ending till April 2015, on the basis of clause 20.12 of the FBA and no further escalation has been charged beyond April 2015.

34. That the complainant duly executed the FBA on 09.05.2012 out of his own free will and without any undue influence or coercion. As per the FBA, it has been agreed that subject to force majeure, the possession of the said unit to the complainant will be handed over 24 months from the date of sanctioning of the building plan or execution of the floor buyer's agreement (whichever is later) with an additional grace period of 180 days. The remedy in case of delay in offering possession of the unit was also agreed to between the parties as also extension of time for offering possession of the unit. The building plan was sanctioned on 19.09.2012 and the FBA was executed on 09.05.2012. Hence, the possession was to be handed over within 24 months of the sanction of the building plan along with 180 days grace period.

35. That the complainant is not entitled to reciprocal compensation in the form of interest from the respondents which is in utter breach of the agreed and accepted terms by the complainant at the time of booking as also reiterated in the duly executed FBA wherein it application was clearly agreed between the parties that the payment of delay payment penalty @ Rs. 10/-, 20/- and/or 30/- per sq. ft. per month for the period of delay depending upon the period of delay would

be a reasonable estimate of the damages that the complainant may suffer, and that he shall have no other right or claims whatsoever.

36. That vide clause 6 of the FBA it was further duly agreed upon between the parties that subject to the conditions mentioned therein, in case the respondents failed to hand over possession within 24 months from the date of sanction of building plan or execution of FBA, whichever is later along with 180 days as grace period, they shall be liable to pay to the complainant, compensation calculated @ Rs. 10/- per sq. ft. for every month of delay for the first six months of delay, Rs. 20/- per sq. ft. for every month of delay for the next six months of delay and Rs. 30/- per sq. ft. for the built-up area of the floor per month for any delay.

37. That vide clause 5.6 of the FBA, the parties had further agreed that if the respondents fail to complete the construction of the unit due to force majeure circumstances or circumstances beyond the control of the respondents, then they shall be entitled to reasonable extension of time for completion of construction. It is pertinent to mention that on 16.03.2010, DTCP, Haryana issued self- certification policy vide notification dated 16.03.2010. The respondents in accordance with the policy and other prevailing laws submitted detailed drawings and designs plans for relevant buildings along with requisite charges and fees. In terms of the said policy, any person could construct building in licensed colony by applying for approval of building plans to the Director or officers of the

department delegated with the powers for approval of building plans and in case of non-receipt of any objection within the stipulated time, the construction could be started. The building plans were withheld by the DTCP, Haryana despite the fact that these building plans were well within the ambit of building norms and policies. That the respondents applied for approval of building plans under the self-certification scheme. Although the department did not object to the building plans however, to ensure that there are no legal issues/ complications at a later date, the respondents also applied for approval of building plans under the regular scheme, which were subsequently approved.

38. That while the respondents were granted license bearing no. 58 of 2010 for setting up a residential plotted colony on land admeasuring 108.068 acres at Village Kherki Majra and Dhankot, sector 102, 102-A, Tehsil and District, Gurgaon for which the layout was also approved, subsequently additional license bearing no. 45 of 2011 was issued by DTCP for setting up plotted colony on land admeasuring 18.606 acres and at the stage of grant of additional license bearing no. 45 of 2011 for Amstoria, layout for the entire colony was also revised vide drg. no. DTCP-5618 dated 16.09.2016, by DTCP. The revised planning of the entire colony submitted to the DTCP has affected the infrastructure development of the entire colony including 'Amstoria Floors'. The said revision in demarcation was necessary considering the safety of the allottees and to meet the area requirement for community facilities in the area.

In view of the said major changes, it is imperative that the said approvals are in place before the floors are offered for possession to the various allottees. Hence, the delay if any, in completing construction of the unit in question and offering possession to the various allottees was due to factors beyond the control of the respondents. Without prejudice to the facts mentioned in the preceding paragraphs, possession of the said unit in question, if delayed, has been on account of reasons beyond the control of the respondents.

39. That the construction was affected on account of the NGT order prohibiting construction (structural) activity of any kind in the entire NCR by any person, private or government authority. That vide its order NGT placed sudden ban on the entry of diesel trucks more than ten years old and said that no vehicle from outside or within Delhi was permitted to transport any construction material. Since the construction activity was suddenly stopped, after the lifting of the ban it took some time for mobilization of the work by various agencies employed with the respondents.

40. That the construction of project has been completed and the occupation certificate for the same has also been received where after, the respondents have already offered possession to the complainant vide letter dated 07.02.2020, however despite repeated requests made by the respondents, the complainant failed to clear the outstanding dues, as a result the unit in question stands terminated vide termination letter dated 14.09.2020. The complainant, being an investor does not

wish to take possession as the real estate market is down and there are no sales in secondary market and thus has initiated the present frivolous litigation.

41. Copies of all the relevant do 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

42. The respondents have raised objection regarding jurisdiction of authority to entertain the present complaint and the said objection stands rejected. The authority observed that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint.

E. I Territorial jurisdiction

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

E. II Subject matter jurisdiction

44. The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided

by the adjudicating officer if pursued by the complainant at a later stage.

F. Findings on the objections raised by the respondents.

F.I Objection regarding jurisdiction of authority w.r.t. buyer's agreement executed prior to coming into force of the Act.

45. The respondents have raised a contention that the agreements that were executed prior to the implementation of the Act and rules shall be binding on the parties and cannot be reopened. Thus, both the parties being signatory to a duly documented FBA and the same was executed by the complainant out of his/her own free will and without any undue influence or coercion, the terms of FBA are bound by the terms and conditions so agreed between them.

46. The authority is of the view that 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."

47. 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."

48. 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, statutes, instructions, directions issued thereunder and are not unreasonable or exorbitant in nature.

G. Findings on the relief sought by the complainant.

G.I Delay possession charges: - Direct the respondents to pay interest at the prescribed rate for every month of delay from the due date of possession till the actual handing over of the possession of the subject apartment to the complainant. [As amended by the complainant vide application dated 11.08.2021]

49. In the present complaint, the complainant intends 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."

50. Clause 5.1 of the floor buyer's agreement provides time period for handing over of possession and the same is reproduced below:

"5.1. POSSESSION

"Subject to force majeure, as defined in clause 14 and further subject to the Purchaser(s) having complied with all its obligations under the terms and conditions of this Agreement and the Purchaser(s) not being in default under any part of this Agreement including but not limited to the timely payment of each and every instalment of the total sale consideration including DC, Stamp duty and other charges and also subject to the Purchaser(s) having complied with all formalities or documentation as prescribed by the Seller/Confirming Party, the seller/confirming party proposes to handover the physical possession of the said unit to the purchaser (s) within a period of 24 months from the date of sanctioning of the building plan or execution of the FBA, whichever is later. The purchaser (s) further agrees and understands that the seller/confirming party shall additionally be entitled to a period of 180 days (Grace period) after the expiry of the said commitment period to allow for filing and pursing the Occupancy Certificate etc. from DTCP under the Act in respect of the entire colony"

51. 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 this agreement and compliance with all provisions, formalities and documentation as prescribed by

the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the buyer'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.

52. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within period of 24 months from the date of sanction of building plan or execution of the FBA, whichever is later. In the present complaint, the date of sanction of building plan i.e., 19.09.2012 is later than the date of execution of the FBA i.e., 09.05.2012. Therefore, the due date of handing over possession comes out to be 19.09.2014. It is further provided in agreement that promoter shall be entitled to a grace period of 180 days for filing and pursuing the occupancy certificate etc. from DTCP. As a matter of fact, from the perusal of occupation certificate dated 22.01.2020 it is implied that the promoter applied for

occupation certificate only on 06.12.2019 which is later than 180 days from the due date of possession i.e., 19.09.2014. The clause clearly implies that the grace period is asked for filing and pursuing occupation certificate, therefore as the promoter applied for the occupation certificate much later than the statutory period of 180 days, he does not fulfil the criteria for grant of the grace period., As per the settled law one cannot be allowed to take advantage of his own wrongs. Accordingly, this grace period of 180 days cannot be allowed to the promoter. Relevant clause regarding grace period is reproduced below: -

> "Clause5.1 *.....The Purchaser(s) agrees and understands that the Seller/Confirming Party shall additionally be entitled to a grace period of 180 days, after expiry of the said commitment period to allow, for filing and pursuing the Occupation Certificate, etc from DTCP under the Act in respect of the entire colony."*

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

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

Bank of India highest marginal cost of lending rate +2%.:
Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.

54. 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.

55. 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., 10.08.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

56. **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;"

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

58. On consideration of the documents available on record and submissions made by both the parties, the authority is satisfied that the respondents are 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 5.1 of the floor buyer's agreement executed between the parties on 09.05.2012, the possession of the subject unit was to be delivered within 24 months from the date of sanction of building plan or execution of the floor buyer's agreement, whichever is later. The date of sanction of building plan i.e., 19.09.2012 is later than the date of execution of the FBA i.e., 09.05.2012. Therefore, the due date of handing over possession is 19.09.2014. 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

19.09.2014. The possession of the subject unit was offered to the complainant on 07.02.2020. Copies of the same have been placed on record. The authority is of the considered view that there is delay on the part of the respondents to offer physical possession of the allotted unit to the complainant as per the terms and conditions of the floor buyer's agreement dated 09.05.2012 executed between the parties. It is the failure on part of the promoter to fulfil its obligations and responsibilities as per the floor buyer's agreement dated 09.05.2012 to hand over the possession within the stipulated period.

59. 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 22.01.2020. The respondent offered the possession of the unit in question to the complainant only on 07.02.2020, 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, the complainant should be given 2 months' time from the date of offer of possession. This 2 month 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., 19.09.2014 till the expiry of 2 months from the date of offer of possession (07.02.2020) which comes out to be 07.04.2020.

60. 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 respondents is established. As such the complainant is entitled to delay possession at prescribed rate of interest i.e., 9.30% p.a. w.e.f. 19.09.2014 till 07.04.2020 as per provisions of section 18(1) of the Act read with rule 15 of the rules and as per section 19 (10) of the Act.

H. Directions of the authority

61. 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 respondents are 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., 19.09.2014 till the date of offer of possession i.e., 07.02.2020 + 2 months i.e., 07.04.2020 to the complainant as per section 19 (10) of the Act.

ii. The arrears of such interest accrued from 19.09.2014 till 07.04.2020 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 and section 19(10) of the Act, 2016.

iii. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.

iv. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.30% by the respondents/promoters which is the same rate of interest which the promoter shall be liable to pay the allottees, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

v. The respondents shall not charge anything from the complainant which is not the part of the agreement. However, holding charges shall also not be charged by the promoter at any point of time even after being part of agreement as per law settled by the Hon'ble Supreme Court in civil appeal no. 3864-3889/2020 dated 14.12.2020.

62. Complaint stands disposed of.

63. File be consigned to registry.

(Samir Kumar)
Member

(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 10.08.2021

Judgement uploaded on 08.12.2021.