BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 4646 of 2020
Date of filing complaint: 15.12.2020
First date of hearing : 11.01.2021
Date of decision : 14.10.2021

1.	Mrs. Snehbala Sood	**Complainants**
2.	Mr. Munishwar Chander Sood Both R/o: 297, Deerwood chase, Nirvana country, South city II, Gurgaon 122018	
	Versus	
	M/s Spaze Towers Private Limited R/o: UG-39, Upper Ground floor, Somdutt chambers-II,9, Bikaji Cama Place, New Delhi 110066 C/o: Spazedge, Sector 47, Gurgaon Sohna Road, Gurgaon, Haryana	**Respondent**

CORAM:	
Shri Samir Kumar	**Member**
Shri Vijay Kumar Goyal	**Member**
APPEARANCE:	
Sh. Amarjeet Kumar (Advocate)	Complainants
Sh. J.K Dang (Advocate)	Respondent

ORDER

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

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

A. Unit and project related details

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

S.No.	Heads	Information
1.	Project name and location	"Spaze privy at 4" Sector-84, village sihi, Gurugram
2.	Project area	10.51 acres
3.	Nature of the project	Group housing complex
4.	DTCP license no. and validity status	26 of 2011 dated 25.03.2011valid up to 24.03.2019
5.	Name of licensee	Smt. Mohinder Kaur and Ashwini Kumar
6.	RERA Registered/ not registered	**Registered vide registration no. 385 of 2017 dated 14.12.2017**
	RERA Registration valid up to	**31.06.2019**
7.	Unit no.	073, 7th floor, tower B3 [Page 47of the complaint]
8.	Unit measuring (super area)	2070 sq. ft.

9.	Revised area	2275 sq. ft. [As per offer of possession at page no.117 of the complaint]
10.	Date of approval of building plan	06.06.2012 [Page 74 of the reply]
11.	Date of allotment letter	03.08.2011 [Page 38 of the complaint]
12.	Date of execution of builder buyer agreement	21.01.2014 [Page 44 of the complaint]
13.	Total sale consideration	Rs.86,89,906/- (As per payment plan on page 40 of the complaint)
14.	Total amount paid by the complainants	Rs.86,83,374/- (As per statement of accounts dated 31.03.2021 at page 81 of the reply)
15.	Payment plan	Construction linked payment plan [Page 40 of the complaint]
16.	Due date of delivery of possession *Clause 3(a): The developer proposes to hand over the possession of the apartment within a period of thirty six (36) months (excluding a grace period of 6 months) from the date of approval of building plans or date of signing of this agreement whichever is later*	21.07.2017 Calculated from the date agreement **Grace period is allowed**
17.	Offer of possession	01.12.2020 [Page 117of the complaint]
18.	Occupation Certificate	11.11.2020 [Page 116 of the reply]
19.	Delay in delivery of possession till the date of offer of possession plus two months i.e.01.02.2021	3 years 6 months 11 days

B. Facts of the complaint:

3. The complainants were induced into buying the said unit and accordingly applied for the unit vide application dated 30.03.2011 believing the promise of timely delivery of unit and upon assurance that the project shall be developed within a period of 3 years and the delivery/possession shall be given to each of the applicants by 2014.

4. That it is pertinent to mention here that the respondent was neither having the zonal plan approval or the building plan approval on the said date, however despite that had sold the unit to the complainants representing that they had all the requisite approvals for the said complex. That inviting application for the said project itself was illegal in nature since on the day of inviting application for the said project, the respondent was not having the building plan approval.

5. The complainants within 5 months of the booking were allotted a unit No. 073 on the floor 7, tower B-3 tentatively measuring 2070 sq.ft. in the project privy at 4. That the total consideration as per the allotment letter was Rs. 86, 89,906/- .

6. That it is pertinent to mention here that on the date of allotment made to the complainants, the respondent was neither having the zonal plan approval nor the building plan approval on the said date, however despite that had allotted the unit to the complainants representing that they had all the requisite approvals for the said complex.

7. The respondent, thereafter in the month of November, 2011 sent across the buyers agreement vide letter dated 19.11.2011 asking the complainants to send across the signed copy within a period of 1 month from the date of receipt of the same. That it was categorically mentioned in the said letter that upon failure to do the same, the allotment will be treated to be cancelled. The complainants accordingly signed the copy of the buyer's agreement and delivered the signed copy of the same at the Ops office within a period of 1 month and sometime in the month of December, 2011. Thus in the present case the date of execution of agreement is deemed to be 19th December, 2011 and not as fraudulently put across by the respondent in the agreement.

8. That it is pertinent to mention here that the respondent has fraudulently put across the date as 21/01/2014 as the date of signing of agreement which is categorically disputed and denied herein. That the respondent being aware that the date of agreement is necessary to determine the date of handing over the possession has fraudulently put across a date of January 2014 so as to save the liability of 2 years delay, which cannot be allowed. That the agreement was of year 2011 is also evident from the fact that the stamp embossed on the said agreement is of November 2011.

9. That as per clause no.3(a) of the builder buyer agreement, the respondent had agreed to deliver the possession of the flat within 36 months from the date of approval of the building plan or from the date of signing of the buyers agreement whichever is later. That in the present case since the BBA was of year 2011 and thus

the date of building plan becomes relevant for calculating the date the possession and 36 months has to be calculated from the date of building plan approval.

10. That as already stated in the present case the date of handing over the possession has to be taken from the date of approval of building plan i.e. 06.06.2012 and thus the respondent was supposed to handover the possession on or before 06.06.2015. Even considering the 6 months grace period, the respondent was supposed to handover the possession of the unit by 06.12.2015.

11. That one of the assurances given by the respondent which infact was the reason to buy this property was that the property shall be developed within the stipulated time and the delivery/possession shall be given to each of the applicants by **July 2014**. Though the buyer agreement confirms that the delivery schedule of the apartment would be within 36 months from signing the agreement or the date of building plan approval. That the respondent has failed to handover the possession even as per the buyer agreement and the same expired on 06.12.2015 (Including 6 Months grace period)

12. The complainants had opted for the construction linked plan. That the stages of payment that was fixed by the respondent was as follows:

Sl. No.	AMOUNT	STAGES
1	5,84,937/-	Registration
2	8,12,727/-	Within 60 days of the registration
3	6,98,832 /-	Within 120 from the date of booking or issue of Builder Buyer agreement whichever is later
4	8,69,958/-	Casting of Basement floor Slab

5	5,24,124 /-	Casting of ground floor Slab
6	8,69,960/-	Casting of 2th floor Slab
7	5,24,124/-	Casting of 4th floor Roof Slab
8	8,29,374/-	Casting of 8th floor Slab
9	5,24,124/-	Casting of 10th floor Roof Slab
10	6,54,666/-	On completion of brick work within the apartment
11	5,24,124/-	On completion of electrical and plumbing
12	3,49,416/-	On completion of internal plastering within the apartment
13	5,74,124/-	On completion of flooring within the apartment
14	3,49,416/-	On offer of possession

13. That the total consideration of the apartment as per the BBA was Rs. 86, 89, 906/-. That it is pertinent to mention here that the complainants have already made a payment of Rs 86,83,374/- as on date and has paid the installment of "On completion of flooring within the apartment" which was last raised in the year 2015 and the notice of possession (through denied) has been raised after a lapse of more than 5 years thereafter.

14. That several demands were raised by the respondent on account of stage wise construction of the project, though they were not entitled to the same and the complainants continued to pay as per the said demands taking that the construction must be in full swing as claimed by the respondent.

15. That from the demands raised by the OP, the complainants were under the bonafide belief that the construction was in full swing and the respondent will be able to handover the possession in time, since the payments were being made as per construction linked plan and the phone calls from the builder had always painted a very rosy picture, hence the complainants continued to make the payments. That the complainants have as on date made

a payment of Rs 86,83,374/- being almost 100% of the basic sale consideration amount.

16. That the complainants sometimes in January, 2016 out of curiosity visited the site of the respondent to check the development of the site and was taken aback and shocked to see the development stage therein and realized that the demands raised by the respondent were not as per the construction and the respondent had cheated the complainants by the raising such illegal demand intimations. The stage of the construction was much delayed as shown or claimed in the demand letters.

17. That it is pertinent to mention here that the timeline of July, 2015 for delivery and handing over of possession of the property in question was of prime importance and based on such representation and assurances, the complainants applied for allotment and upon allotment continued to make the payment in a timely manner, which the respondent continued to receive. The time thus was the essence in this agreement.

18. That despite several protests and objections, the Opposite Party being in a dominant position continued to collect payments from the complainants, by giving threats of cancellation and forfeiture, and threatening to levy heavy interest on all delayed payments. under duress and coercion, the complainants continued to make all payments.

19. That the complainants visited the site again in the first week of September 2019 i.e. after having paid almost 100 % of the total sale consideration. The complainants were shocked to see that the actual work for the construction of his apartment was far away

from completion even though possession was supposed to be handed over in 2015. That the flat that had been partly constructed by the respondent, was not in conformity to the standards and plans as provided in the brochure, various publicity material or the representations made by respondent at the time of collection of payment in 2011..

20. That despite the project not being complete in all respect, the respondent issued a Notice of possession vide email dated 05th December, 2020 whereby the respondent has now demanded an illegal demand of Rs.20,08,779/- in addition to Rs.2,42,500 as pre-serve demand bifurcation. That it is pertinent to mention here that the demands raised by the respondent as per said notice of possession is totally illegal and untenable in the eyes of Law. That as per the terms of the payment plan opted by the complainants, they were just supposed to Pay a sum of Rs. 3,49,416/- on the final notice of possession, however the respondent in order to extract more money is demanding exorbitant money which was never agreed upon by the complainants.

21. That the details of the illegal demand raised by the OP is extracted herein below which are as under:

Nature of charges as per Notice of possession	Amount	Comments
Previous Outstanding (including GST	Rs. 90180/-	The said demand is illegal since as per the demands raised by the OP, there was no due other than the demand at the time of Notice of possession. That the Complainants were not supposed to pay any VAT

		Charges since the liability of the same accrued upon the Complainants because of the delay in handing over the possession of the unit.
Basic With GST	11,66,476/-	This demand is totally again illegal since as per the payment plan the only demand which the Complainant was laible to make the payment was of Rs Rs. 3,49,416/- as the final Notice of Possession demand. The OP is charging the said also on the basis of the revised area of the unit from 2070 to 2275. That no justification has been provided by the OP as to the said increase in the area. That it is pertinent to mention here this has been done illegally and infact has been done just to extract more money from each of the allotees
Electric Electrification (including 33 KV), water, sewer & Meter charges with GST	3,25,151/-	This demand is also illegal and has been raised to overcharges the Complainants. It is humbly submitted that the cost of Electrification was included in the basic cost price and also in addition EDC AND IDC charges collected by the OP includes the cost under the said heads and thus the same is untenable and illegal.
Miscellaneous charges with GST	17,700/-	The said demand is also illegal and no justification has been given as to the nature of miscellaneous charges
Interest (as on 30.11.2020) with gst	313751	The said demand is again illegal since there was no delay in the payments and thus the question of interest does not arise.

22. The respondent did not have a sanctioned site plan and necessary permissions especially environmental approval etc. as on the date of allotment or at the time of signing of the agreement. That the complainants deposited his hard-earned money, in the hope that he will have a bigger house to live in. The respondent has failed to deliver possession to the (complainants) within stipulated period of 36 months. That the complainants visited the project site and marketing office of the respondent where the office bearers of developer represented the brochure, sitemap, payment plans, amenities, and specifications. They assured that the project will be delivered with specific features and amenities by October 2016

C. Relief sought by the complainants:

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

    i. Direct the respondent to pay the delayed possession charges with effect from 06.12.2015.

    ii. Direct the respondent to issues a fresh notice of possession as per the BBA and to consider the date of building plan approval as the date of calculating the delayed possession charges

    iii. Direct the respondent to handover the possession of the unit, after adjusting the delayed possession charges as per RERA.

D. Reply by respondent

24. That the complainants have been allotted apartment bearing no. 073 on 7th floor located in tower B3 having tentative super area measuring 2070 square feet (hereinafter referred to as "said unit") in the project being developed by the respondent in the

project known as privy at 4, sector 84,Gurugram (hereinafter referred to as "said project") as per terms and conditions of the buyer's agreement dated 21.01.2014

25. That the complainants have completely misinterpreted and misconstrued the terms and conditions of said agreement. So far as alleged non-delivery of physical possession of the apartment is concerned, it is submitted that in terms of clause 3(a) of the aforesaid contract the time period for delivery of possession was 36 months excluding a grace period of 6 months from the date of approval of building plans or date of execution of the buyer's agreement, whichever is later, subject to the allottee(s) having strictly complied with all terms and conditions of the buyer's agreement and not being in default of any provision of the buyer's agreement including remittance of all amounts due and payable by the allottee(s) under the agreement as per the schedule of payment incorporated in the buyer's agreement. It is pertinent to mention that the application for approval of building plans was submitted on 26.08.2011 and the approval for the same was granted on 06.06.2012. Therefore, the time period of 36 months and grace period of 6 months as stipulated in the contract has to be calculated from 06.06.2012 subject to the provisions of the buyer's agreement.

26. That it was further provided in clause 3 (b) of said agreement that in case any delay occurred on account of delay in sanction of the building/zoning plans by the concerned statutory authority or due to any reason beyond the control of the developer, the period taken by the concerned statutory authority would also be

excluded from the time period stipulated in the contract for delivery of physical possession and consequently, the period for delivery of physical possession would be extended accordingly. That for the purpose of promotion, construction and development of the project referred to above, a number of sanctions/permissions were required to be obtained from the concerned statutory authorities. It is respectfully submitted that once an application for grant of any permission/sanction or for that matter building plans/zoning plans etc. are submitted for approval in the office of any statutory authority, the developer ceases to have any control over the same. The grant of sanctions/approvals to any such application/plan is the prerogative of the concerned statutory authority over which the developer cannot exercise any influence. As far as respondent is concerned, it has diligently and sincerely pursued the matter with the concerned statutory authorities for obtaining of various permissions/sanctions.

27. That in accordance with contractual covenants incorporated in said agreement the span of time, which was consumed in obtaining the following approvals/sanctions deserves to be excluded from the period agreed between the parties for delivery of physical possession: -

S. no.	Nature of Permission/ Approval	Date of submission of application for grant of Approval/sanction	Date of Sanction of permission/grant of approval	Period of time consumed in obtaining permission/approval
1	Environment Clearance	30.05.2012	Re-submitted under ToR (Terms of	4 years 11 months

			reference) on 06.05.17	
2	Environment Clearance re-submitted under ToR	06.05.2017	04.02.2020	2 Years 9 months
3	Zoning Plans submitted with DGTCP	27-04-11	03.10.2011	5 months
4	Building Plans submitted with DTCP	26.08.2011	06.06.2012	9 months
5	Revised Building Plans submitted with DTCP	05.02.2019	25.02.2020	12 months
6	PWD Clearance	08.07.2013	16.08.2013	1 month
7	Approval from Deptt. of Mines & Geology	17.04.2012	22.05.2012	1 month
8	Approval granted by Assistant Divisional Fire Officer acting on behalf of commissioner	18.03.2016	01.07.2016	4 months
9	Clearance from Deputy Conservator of Forest	05.09.2011	15.05.2013	19 months
10	Aravali NOC from DC Gurgaon	05.09.2011	20.06.2013	20 months

28. That from the facts and circumstances mentioned above, it is comprehensively established that the time period mentioned hereinabove, was consumed in obtaining of requisite permissions/sanctions from the concerned statutory authorities. It is respectfully submitted that the said project could not have been constructed, developed and implemented by respondent without obtaining the sanctions referred to above. Thus, respondent has been prevented by circumstances beyond its power and control from undertaking the implementation of the said project during the time period indicated above and therefore the same is liable to be excluded and ought not to be taken into reckoning while computing the period of 36 months and grace period of 6 months as has been explicitly provided in said agreement.

29. That it is pertinent to mention that it was categorically provided in clause 3(b)(iii) of the said agreement that in case of any default/delay by the allottees in payment as per schedule of payment incorporated in the buyer's agreement, the date of handing over of possession would be extended accordingly, solely on the developer's discretion till the payment of all of the outstanding amounts to the satisfaction of the developer. Since the complainants have defaulted in timely remittance of payments as per schedule of payment, the date of delivery of possession is not liable to be determined in the manner alleged by the complainants.

In fact, the total outstanding amount including interest due to be paid by the complainants to the respondent on the date of dispatch of letter of offer of possession dated 01.12.2020 was Rs. 16,73,892/-. Although, there was no lapse on the part of the respondent, yet an amount of Rs. 2,83,137/- was credited to the account of the complainants.

It is submitted that the complainants consciously and maliciously chose to ignore the payment request letters and reminders issued by respondent. That it is pertinent to mention that respondent had submitted an application for grant of environment clearance to the concerned statutory authority in the year 2012. However, for one reason or the other arising out of circumstances beyond the power and control of respondent, the aforesaid clearance was granted by Ministry of Environment, Forest & Climate Change only on 04.02.2020 despite due diligence having been exercised by the respondent in this regard. The issuance of an environment clearance referred to above was a precondition for submission of application for grant of occupation certificate.

30. That it is further submitted that the respondent left no stones unturned to complete the construction activity at the project site but unfortunately due to the outbreak of COVID-19 pandemic and the various restrictions imposed by the governmental authorities, the construction activity and business of the company was significantly and adversely impacted and the functioning of almost all the government functionaries were also brought to a standstill.

31. That since the 3rd week of February 2020 the respondent has also suffered devastatingly because of outbreak, spread and

resurgence of COVID-19 in the year 2021. The concerned statutory authorities had earlier imposed a blanket ban on construction activities in Gurugram. Subsequently, the said embargo had been lifted to a limited extent. However, in the interregnum, large scale migration of labour had occurred and availability of raw material started becoming a major cause of concern. Despite all odds, the respondent was able to resume remaining construction/ development at the project site and obtain necessary approvals and sanctions for submitting the application for grant of occupation certificate.

32. That the Hon'ble authority was also considerate enough to acknowledge the devastating effect of the pandemic on the real estate industry and resultantly issued order/direction to extend the registration and completion date or the revised completion date or extended completion date by 6 months & also extended the timelines concurrently for all statutory compliances vide order dated 27.03.2020. It has further been reported that Haryana Government has decided to grant moratorium to the realty industry on compliances and interest payments for seven months to September 30, 2020 for all existing projects. It has also been mentioned extensively in press coverage that Moratorium period shall imply that such intervening period from 01.03.2020 to 30.09.2020 will be considered as "zero period".

33. It is submitted that the respondent amidst all the hurdles and difficulties striving hard has completed the construction at the project site and submitted the application for obtaining the

occupation certificate with the concerned statutory authority on 16.06.2020 and since then the matter was persistently pursued.

34. It is further submitted that occupation certificate bearing no.20100 dated 11.11.2020 has been issued by Directorate of Town and Country Planning, Haryana, Chandigarh. The respondent has already delivered physical possession to a large number of apartment owners. It needs to be emphasised that once an application for issuance of occupation certificate is submitted before the concerned competent authority the respondent ceases to have any control over the same.

35. That the complainants were offered possession of the unit in question through letter of offer of possession dated 01.12.2020.The complainants were called upon to remit balance payment including delayed payment charges and to complete the necessary formalities/documentation necessary for handover of the unit in question to them. However, the complainants intentionally refrained from completing their duties and obligations as enumerated in the buyer's agreement as well as the Act.

36. The complainants be put to strict proof of the allegations levelled by them. It is wrong and denied that in the present case the date of execution of buyer's agreement is to be presumed to be 19th of December 2011 and not 21st of January 2014.

    (i) That the duly executed buyer's agreement dated 21st of January 2014 had been sent back to the complainants by the respondent after execution. No objection in this regard was raised by the complainants.

(ii) That the period of delivery of physical possession in the present case was to commence from the date of approval of building plans, subject to other limitations clearly contained in the covenants forming part of the said agreement. The said period was not to commence from the date of execution of Said Agreement. Therefore, the respondent did not stand to derive any advantage by delaying the execution of Said Agreement.

(iii) That without prejudice to the rights of the respondent and without admitting/acknowledging the legality or correctness of the frivolous allegations levelled by the complainants , it is submitted that the limitation for challenging the legality of said agreement , including but not confined to date of its execution has expired long ago. The allegations levelled by the complainants are the result of afterthought. In any case the same are absolutely in consequential and irrelevant for determining the rights and obligations of the parties and for adjudication of present litigation.

37. The reply to the allegations levelled by the complainants in the corresponding paragraph of the complaint is as under: –

Previous Outstanding (Including GST): –

It was clearly provided in clause 6 (viii) of the said agreement that all taxes, levies, assessments, demands or charges levied or leviable in future on the land or the buildings or any part of the complex would be bored in and paid by the apartment allottee (s) in proportion to the super area of the apartment. That thus as per contractual covenants incorporated in the voluntarily and

consciously executed said agreement, it was incumbent upon the complainants to make payment of HVAT amount. The complainants are liable to pay Value Added Tax (VAT), under the Haryana Value Added Tax Act, 2003, as applicable to Said Unit agreed to be purchased by the complainants from the respondent. Actually, in the year 2003, the Government of Haryana enacted the Haryana Value Added Tax Act, 2003 (hereinafter referred to as the Act for short), with the object to provide for levy and collection of tax on the sale or purchase of goods in the State of Haryana and matters incidental thereto and connected therewith.

That accordingly, keeping in view of the interest of the apartment owners in all its projects, the respondent availed of the said scheme by filing its application and declaration under the same on 8.12.2016. The issue with regard to legitimacy of demand of the developer pertaining to VAT/GST has been examined threadbare several fora/tribunals at various times. It has been held that the terms and conditions incorporated in the apartment buyers' agreements are sacrosanct and the validity thereof with regard to payment of VAT/GST cannot be questioned by the apartment purchaser. It has further been held by this honourable authority that where the apartment buyers agreements has been executed prior to coming into force of Real Estate (Regulation and Development) Act, 2016 the parties are bound to fulfil their contractual obligations and cannot question the covenants in light of the aforesaid statute. It has been held in such cases that the developer is well within its right to seek payment of charges prescribed under the buyer's agreement from the apartment purchaser.

Electrification Charges, Vat, Water, Sewer And Meter Charges with GST: -

It was specifically mentioned in clause 5 (ii) of the said agreement that the complainants would be liable to pay charges for bulk supply of electrical energy, as well as any amount spent towards additional transformers, substations or any other transmission line as may be demanded by the respondent from time to time. Thus, the aforesaid demand was legitimately raised by the complainants.

Miscellaneous Charges with GST: -

It was specifically mentioned in clause 3 (c) (v) of the said agreement that the complainants would be liable to pay all dues towards stamp duty, charges, registration charges, incidental expenses for registration, legal expenses for registration and all other dues as may be demanded by the respondent. Thus, the aforesaid demand was legitimately raised by the respondent.

Interest (As on 30th of November 2020) GST: -

That even otherwise the allegations of the complainants are absolutely confused and self-destructive. On one hand, the complainants have relied upon the terms and conditions incorporated in the said agreement and at the same time inexplicably, the complainants have alleged that the notice offering possession ought to have been in conformity with the model agreement as provided in the Haryana Real Estate (Regulation and Development) Rules, 2017. The so-called model agreement is not binding and operative between the parties.

38. Copies of all the relevant documents have been filed and placed on 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:

39. The plea of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

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

Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

Section 11(4)(a)

> *Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of*

all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

So, in view of the provisions of the Act quoted above, 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 complainants at a later stage.

F. Findings regarding relief sought by the complainants:

Relief sought by the complainants: Direct the respondent to pay interest for delay possession charges at prevailing rate of interest.

F.1 Admissibility of delay possession charges:

40. In the present complaint, the complainants intends to continue with the project and is 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

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

41. 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 complainants not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even 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.

42. The buyer's agreement is a pivotal legal document which should ensure that the rights and liabilities of both builders/promoters and buyers/allottee are protected candidly. The apartment buyer's agreement lays down the terms that govern the sale of different kinds of properties like residentials, commercials etc. between the buyer and builder. It is in the interest of both the parties to have a well-drafted apartment buyer's agreement which would thereby protect the rights of both the builder and buyer in the unfortunate event of a dispute that may arise. It should be drafted in the simple and unambiguous language which may be understood by a common man with an ordinary educational background. It should contain a provision with regard to stipulated time of delivery of possession of the apartment, plot or building, as the case may be and the right of the buyer/allottee in case of delay in possession of the unit. In pre-RERA period it was a general practice among the promoters/developers to invariably

draft the terms of the apartment buyer's agreement in a manner that benefited only the promoters/developers. It had arbitrary, unilateral, and unclear clauses that either blatantly favoured the promoters/developers or gave them the benefit of doubt because of the total absence of clarity over the matter.

43. The authority has gone through the possession clause of the agreement. At the outset, it is relevant to comment on the pre-set possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and the complainants not being in default under any provisions of this agreements and in 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 apartment 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.

44. **Admissibility of grace period:** The respondent promoter has proposed to handover the possession of the unit within a period of 36 months (excluding a grace period of 6 months) from the date of approval and of building plans or date of signing of this agreement whichever is later. In the present case, the promoter is seeking 6 months' time as grace period. But the grace period is unqualified and does not prescribe any preconditions for the grant of grace period of 6 months. The said period of 6 months is allowed to the promoter for the exigencies beyond the control of the promoter. Therefore, the due date of possession comes out to be 21.07.2017.

45. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges 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.*

46. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.

47. 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., 14.10.2021 is @ 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

48. 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;"*

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

49. On consideration of the documents available on record and submissions made by both the parties, 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 3(a) of the unit buyer's agreement executed between the parties on 21.01.2014, The developer proposes to hand over the possession of the apartment within a period of thirty six (36) months (excluding a grace period of 6 months) from the date of approval of building plans or date of signing of this agreement whichever is later. The date of approval of building plan is on 06.06.2012+ six months of grace period is allowed so the possession of the booked unit was to be delivered on or before 21.07.2017. The respondent has been applied for the occupation certificate on 17.06.2020 and the same has been granted by the competent authority on 11.11.2020 and notice for offer of possession was made on 01.12.2020. 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 respondent to offer physical possession of the allotted unit to the complainants as per the terms and conditions of the buyer's agreement dated 21.01.2014 executed between the parties. It is the failure on part of the promoter to fulfil its obligations and responsibilities as per the flat buyer's agreement dated 21.01.2014 to hand over the possession within the stipulated period.

50. 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 11.11.2020 and notice for offer of possession was made on 01.12.2020, so it can be said that the complainants came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the complainants should be given 2 months' time from the date of offer of possession. This 2 months' of reasonable time is being given to the complainants keeping in mind that even after intimation of possession practically he has 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 + six months of grace period is allowed i.e. 21.07.2017 till the expiry of 2 months from the date of offer of possession (01.12.2020) which comes out to be 01.02.2021.

51. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainants are entitled to delay possession at prescribed rate of interest i.e. 9.30% p.a. w.e.f. 21.07.2017 till the expiry of 2 months from the date of offer of possession (01.12.2020) which comes out to be 01.02.2021 as per provisions of section 18(1) of the Act read with rule 15 of the rules and section 19(10) of the Act of 2016.

G. Directions of the authority:

52. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligation cast upon the promoter as per the function entrusted to the authority under section 34(f) of the Act of 2016:

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 complainants from due date of possession + six months of grace period is allowed i.e. 21.07.2017 till 01.02.2021 i.e. expiry of 2 months from the date of offer of possession (01.12.2020). The arrears of interest accrued so far shall be paid to the complainants within 90 days from the date of this order as per rule 16(2) of the rules.

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

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

iv. The respondent shall not charge anything from the complainants which is not the part of buyer's agreement. The respondent is not entitled to charge holding charges

from the complainants/allottees 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 on 14.12.2020

53. Complaint stands disposed of.

54. File be consigned to registry.

(Samir Kumar)
Member

(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 14.10.2021

JUDGEMENT UPLOADED ON 08.12.2021