BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 3305 of 2021
First date of hearing: 30.09.2021
Date of decision : 30.09.2021

1. Neha Bansal
2. Mohit Garg
   Both RR/o: - GH-9, Flat-11, MDC-5
   Panchkula,134114

Complainants

Versus

1. M/s Tashee Land Developers.
2. M/s KNS Infracon Private Limited .
   Both having Regd. office at: 517, A
   Narain Manzil, 23 Barakhamba Road,
   Cannuaght Place, New Delhi- 110001

Respondents

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

APPEARANCE:
Sh. Rajan Gupta — Advocate for the complainants
Sh. Gaurav Srivastava — Advocate for the respondents

ORDER

1. The present complaint dated 31.08.2021 has been filed by the complainants/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is *inter alia* prescribed that the promoter shall be responsible for all

obligations, responsibilities and functions as provided under the provision of the Act or the Rules and regulations made there under or to the allottee as per the agreement for sale executed *inter se*.

A. Unit and project related details

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

S.No.	Heads	Information
1.	Project name and location	"Capital Gateway", Sector-111, Gurugram.
2.	Project area	10.462 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no. and validity status	34 of 2011 dated 16.04.2011 valid till 15.04.2024
5.	Name of licensee	KNS Infracon Pvt Ltd & 3 others
6.	RERA Registered/ not registered	**Registered vide no. 12 of 2018 dated 10.01.2018**
7.	RERA registration valid up to	31.12.2020 for phase-I (tower A to G) and 31.12.2021 for phase- II (tower H to J)
8.	Unit no.	Flat No. 804, 8th Floor, Tower–E [Page no. 37of complaint]
9.	Unit measuring	1760 sq. ft. (super area)

		[Page no. 37 of the complaint]
10.	Increase in super area	2049 sq. ft. [as per annexure C-9, page 75 of complaint]
11.	Date of execution of Flat buyer agreement	21.11.2012 [Page no. 35 of complaint]
12.	Allotment letter	21.11.2012 [Page no. 30 of complaint]
13.	Payment plan	Construction linked payment plan [Page no.69 of complaint]
14.	Total consideration	Rs.71,94,842/- [As per demand note dated 29.12.2020 page no.76 of the complaint]
15.	Total amount paid by the complainant	Rs.67,19,785/- [As per demand note dated 29.12.2020 page no.76 of the complaint]
16.	Due date of delivery of possession as per clause 2.1 of the flat buyer agreement 36 months from the date of sanction of building plan & a grace period of 180 days, after the expiry of 36 month, for applying and obtaining the occupation certificate. [Page 43 of complaint]	07.06.2015 As per information obtained by planning branch building plan approved i.e. 07.06.2012. [Note- Grace period not allowed]
17.	Delay in handing over possession till the date of order i.e. 30.09.2021	6 years 3 months and 23 days
18.	Occupation certificate	Not obtained
19.	Status of the project	On going

B. Facts of the complaint

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

I. That the respondents company issued the transfer of rights of right of the unit no. E-804, already booked in the name of Mr. Gaurav Sain through M/s Punj Realtors broker of the company in the name of the complainants. The unit no. E-804 was booked by the old purchaser with 1695 sq. ft, but area of the same unit no. E-804 shown in the transfer of all rights of the complainants dated 06.11.2012 was 1760 sq.mt. The allotment letter was issued in the name complainants on dated 21.11.2012 and the flat buyer agreement dated 21.11.2012 entered between the complainant and respondent's company. The total payment deposited by the complainants till date is Rs.75,95,602/-through cheques & RTGS /- against the payable base price amount of Rs.51,04,000/- with regard to said apartment and further the complainants also paid amount of Rs.20,75,367/- at the time of entering into buyer's agreement.

II. That as per modified/amended condition no. 2 of the buyer's agreement at page 34 the offer of possession of the said unit was to be given within 24 months from the date of start of construction i.e. 12.07.2014, but the

respondents company failed to deliver the possession as promised.

III. They have already made a payment of Rs.75,95,602/- till date i.e. more than the basic price but respondent failed to deliver the possession in time. That complainants also suffered huge losses because of not delivering the possession in time.

IV. That on 21.01.2013, the respondent company issued notice to the complainants demanded a sum of Rs. 48,337/- as service tax pertaining to old purchaser. The respondent company further has issued a demand notice on 09.02.2013 showing Rs 48,628/- as service tax and Rs 169,570/- (Total Rs 2,17,907/-) pending delay interest pertaining to old purchaser. The respondent company has sent another demand notice on 12.03.2013 to deposit the above said amount of Rs.2,20,924/-. Thereafter the respondent company has threatened on cell phone to cancel the unit if above payment will not be deposit within 15 days. The complainants deposited the service tax amount Rs.48,628/- on 26.03.2013 and attended their office for settlement the pending interest pertaining to old purchaser. After three months on dated 19.07.2013 the opposite party has sent a notice of cancellation of unit and threatened/pressurized to

deposit pending payment within 15 days. The complainants attended their office and finally it was decided to deposit a sum of Rs.1,00,000/- through bank to settle the pending interest. The complainants had deposited Rs.1,00,000/- through RTGS on 21.09.2013 and thereafter respondents cleared the pending interest. Thus a sum of Rs 1,48,628/- charged extra as pending interest & service tax pertaining to old purchaser. It was the duty of the respondents to clear pending payment for the period of old purchaser before allotment to the complainants. As per modified condition of buyer's agreement, there is no liability on the part of complainants pertaining to old payment before agreement. Thus above said payment of Rs.1,48,628/- charged from the complainants is illegal and unjustified.

V. The respondent company has charged Rs.2,75,000/- on account of car parking and Rs.3,52,000/- on account of 1st & 2nd PLC contrary to the amended condition of buyer's agreement. The above said payment had to be deposited by the complainants due to threatening of 24% interest and cancellation of residential unit.

VI. The respondent company has demanded Rs.9,07,461/- through demand notice dated 06.03.2017 on account of increase in super area while there is no increase in

carpet area, as per modified condition of the buyer's agreement, this amount charged is wrong and illegal, but complainants had to deposit above said amount due to threatening of 24% Interest and cancellation of residential unit.

VII. That work was started on 12.07.2012 end the complainants head deposited 85% payment up to 30.04.2015. That complainant further payment of Rs.75,95,602/- till date i.e. more than the basic price but respondents failed to deliver the possession in time.

VIII. That the respondent company demanded 5% balance payment vide demand letter dated 29.12.2020, is wrong and illegal add the same is payable only at the time of offer of possession as per construction link payment plan. The respondents again charged delayed payment interest in the above said amount which is earlier settled on 21.09.2013 is also illegal.

IX. That respondence company failed to supply the satisfactory response or any concrete information or the reasons of this hug delay of numerous letters issued by the complainants. Further, respondent company has charged pending payment of interest and service tax pertaining to old purchaser, charge of car parking, charge of extra super area without increase of carpet area

charges of 1st and 2nd PLC charges in the increase area beyond the modified condition of the buyer's agreement is totally wrong and illegal.

X. That since the respondent's company failed to fulfil its promise to deliver the project in time i.e. 12.07.2014 as per the amended terms and condition of the buyer's agreement, the respondent's companies liable to pay 24% per annum delayed possession interest and further complainants also are entitled for refund of the illegal amount charged contrary to amended condition of buyer's agreement along with interest @ 24% per annum from the date of payment till realization and return the original agreement of the complainants. The respondents are also liable to compensate the complainants for the cheating and harassment done by them.

C. Relief sought by the complainants

4. The complainant has sought following relief(s):

I. Directed to pay interest for every month of delay (Delay possession charges) @ 24% p.a. w.e.f. 12.07.2014 till the occupation certificate of the said apartment is issued by the competent authority and actual possession is delivered to the complainants by the

respondents company and to supply the original copy of buyer's agreement meant for complainants.

II. Directed to refund the payment made to the respondents i.e. Rs.1,48,628/- (against receipt no. 3123 dated 30.05.2013 & no. 3326 dated 21.09.2013) along with interest @ 24 % p.a. from the date of deposit of the amounts till the date of its refund on account of service tax and delay payment interest pertaining to old allottee.

III. Directed to refund the payment of Rs.2,75,000/- charged on account of car parking contrary to the decision of Hon'ble Apex Court titled Nahal chand Laloochand Pvt Ltd v/s Panchali co-operative housing society Ltd. along with interest @ 24 % p.a. from the date of deposit of the amounts till the date of its refund.

IV. Directed to refund payment of Rs.9,07,461/- charged extra on account of extra super area wherein carpet area has not been increased. The respondents are liable to refund along with interest @ 24 % p.a. from the date of deposit of the amounts till the date of its refund as per amended condition of agreement.

V. Directed to refund payment of Rs.3,52,000/- charged on account of 1st & 2nd PLC along with interest @ 24 % p.a. from the date of deposit of the amounts till the date of

its refund as the respondent's company has not deposited above amount to Director town and planning as confirmed from their office.

VI. Directed to withdraw the demand letter dated 29.12.2000 of amount Rs.5,43,665/- wherein last payment of 5% of the total cost which includes interest already finalized demanded is illegal due to the reason that this amount will be due only at the time of offer of possession as per construction linked plan.

5. On the date of hearing, the authority explained to the respondent/promoter about the contravention as alleged to have been committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.

D. Reply by respondent

6. The respondent contested the complaint on the following grounds. The submission made therein, in brief is as under: -

i. That the respondent is a leading and distinguished name in the real estate sector, is developing a residential group housing society by name "Capital Gateway" at sector 111, Gurugram, Haryana. The company KNS Infracon Private Limited is the land-owning company. It is developing the present project in furtherance of the license obtained vide license no. 34 of 2011 and all other requisite permits and approvals from the Directorate of

Town and Country Planning Haryana and other regulatory authorities. The company Tashee Land Developers Private Limited is doing the marketing and sale of the aforesaid project. All the responsibilities relating to sell, issue of demand and collection of the project.

ii. That the complainant had booked the unit in the said project and made payment towards their said bookings which are duly acknowledged by the complainant vide receipts issued against the said payments. The project was launched by the respondent herein with a bonafide intention to complete the construction within the stipulated time frame and hand over the flats of good quality and facilities as advertised and committed to the respective allottees. It would be relevant to state that the construction at the project site is going on in full swing. The project is 90% complete and is nearing completion and ready for possession. The filing of present complaint at this belated stage for the relief sought is not maintainable and entertainable by this learned Tribunal/Authority and the respondent has already formally applied for the completion certificate and occupancy certificate (OC) with the Director Town and Country Planning (DTCP), Chandigarh, Haryana.

iii. That the sub-structure (including the excavation, laying of foundation, basement, waterproofing of sub structure) and superstructure of the building (including the stilt, walls on floor, staircases, lift wells and lobbies) has been completed 100% far back. Further, the lifts have been now installed in all towers of phase 1. Further the mechanical work, electricity including the wiring and plumbing work, internal plastering/painting of walls, external and internal wall tiling has also been finished for more than 90% and is nearing completion. Now, the doors and window panels are being installed and the internal entrance lobby is about to be finished.

iv. The complaint has made complaint before the authority on allegation of some delay in completion of project. It is submitted that the respondent company was faced with the unprecedented events which lead to the delay in the completion of the construction of this project. The respondent submits that any delays in the execution of works have been largely on account of force majeure/ reasons beyond the respondent's control which could not have been avoided or prevented by exercise of reasonable diligence or despite the adoption of reasonable precautions and/ or alternative measures. In the performance of the terms in the agreement, i.e., the

possession of the respective properties, the opposite parties were faced with the below listed unprecedented events which lead to the delay in the completion of the construction of this project.

v. The company had applied for environment clearance on 20.10.2011 but due to the unfortunate demise of the Chairman of Environmental Impact Assessment Committee in an unfortunate road accident. The post of chairman of EIA had been vacant for long time owing to which the decision and issuance of certificate to the company remained in abeyance The company finally got the environment clearance on 17.06.2013. Owing to this, the construction work of the project itself started late.

vi. That the respondent company had applied for the revised building plan before the appropriate authority. However, for no fault of the respondent, the plans were approved by the department only after a delay of 2 years. Owing to this the construction of project could not be started in a timely manner.

vii. The Indian real estate sector had already been going through a bad phase. The nation's real estate scenario had been rife with a large number of unsold units as well as unfinished projects. The reason being that unlike the period of 2006-2010, when there was massive

investment activity, the phase of 2017-2020 has been sluggish. Due this ongoing slow-down in the real estate industry, the sale and collection of the project heated very badly. The respondent company had not been able to sell its inventory and the cost of construction has increased many times which make it difficult to construct the project at fast pace.

viii. There are very frequent and massive changes in the policies of Government like demonetization, etc. which has very much impacted the pace of Real Estate Development across the country.

ix. When on 08.11.2016, the Government of India announced the demonetization of all Rs. 500 and INR 1,000 Bank currencies, the same directly affected the liquidity to pay the construction workers. The unforeseen step adversely hit the productivity and brought the construction work at the site at a complete halt. This disabled the payments to the construction workers and discouraged the availability of materials and machinery for the continuation of the work at the site. When the work started again, there was acute shortage of workforce, which compounded the delay to the present situation.

x. The Government has introduced rate of 12% on sale of under construction property, which are very high as compared to approx. 5% during the pre-GST period. This will badly impact the saleability of under construction project as 0% GST is in the Constructed property. So, people have started to prefer ready-to move property.

xi. Each year, in the winter season, the construction work gets marred by the directions of the Government so as to contain pollution in Gurgaon and neighbouring States owing to the alarming and unprecedented rise in the level of air pollution post Diwali. The demobilizing and remobilizing activity leads to a few months delay in the construction work. This disabled the payments to the construction workers and discouraged the availability of materials and machinery for the continuation of the work at the site. The unforeseen step brings the construction work at the site at a complete halt. When the work started again, there was acute shortage of workforce and many times, due to non-availability of supply of construction water the construction work at site got held up which cause delay in the construction of the project.

xii. In year 2020, when the project was ready and final touches were given to the apartments and towers, before

the offer of possession was to be made, the work was obstructed by Covid-19 pandemic. Not only was the lockdown was put in force by the government, but there has also been a large-scale immigration of labours and workers back to their home states and towns. The supply of raw materials, machinery etc. was completely stopped from the source itself owing to non-plying of trucks and vehicles. This disabled the payments to the construction workers and discouraged the availability of materials and machinery for the continuation of the work at the site. When the work started again, there was acute shortage of workforce, which compounded the delay to the present situation.

xiii. That it is germane to state that there is no deficiency in the services as rendered by the answering company and hence no occasion has occurred deeming the indulgence of this Hon'ble Tribunal, hence the present complainant is liable to be dismissed.

xiv. That the completion of the project is going on in full swing and it is nearing completion. Further, even though the delay in the project has been for reasons beyond the control of the developer, it is humbly submitted that whatever damages the petitioner/complainants are entitled to would have to be calculated and paid/

adjusted at the time of offer of possession since the same cannot be determined at any stage prior to that.

xv. That the answering opposite party vehemently denies and rebuts the contents of the list of dates as contained in the present complaint under reply, with defenses and submissions as contained herein under.

E. Jurisdiction of the authority

The authority has complete territorial and subject matter jurisdiction to adjudicate the present complaint for the reasons given below:

E. I Territorial jurisdiction

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

E. II Subject matter jurisdiction

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

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

F. Findings on the objections raised by the respondent.

F1. Objection raised by the respondent regarding force majeure condition: -

9. The obligation to handover possession within a period of thirty-six months was not fulfilled. There is delay on the part of the respondent the actual date to handover the possession in the year 2015 and various reasons given by the respondent is totally null and void as the due date of possession was in the year 2015 and the NGT Order refereed by the respondent pertaining to year 2015/2016 therefore the respondent cannot be allowed to take advantage of the delay on his part by claiming the delay in statutory approvals. The following reasons are given by the respondent: - (1) delay in approval by the state government (2) the slow down in the real estate industry (3) Increase in cost of construction (4) change in Government polices (5) Impact of higher rate of GST on sale and collection (6) Stay on the construction work due to the orders of NGT (7) delay in construction work due to problem of construction water (8) Covid -19.

10. The due date of possession in the present case as per clause 2.1 is 07.06.2015, therefore any situation or circumstances which could have a reason prior to this date due to which the respondent could not carry out the construction activities in

the project are allowing to be taken into consideration. While considering whether the said situation or circumstances was in fact beyond the control of the respondent and hence the respondent is entitled to force majeure clause 9, however all the pleas taken by the respondent to plead the force majeure condition happened after 07.06.2015. The respondent has not given any specific details with regard to delay in payment of installments by many allottees or regarding the dispute with contractor or about the ban an extracting ground water by the High Court in Haryana. Even no date of any such order has been given. Similar is the position with regard to the alleged lack of infrastructure support by the state government. So far as Covid-19, NGT order and demonetization of Rs. 500/- and Rs. 1000/- currency notes are concerned these events are stated to have taken pleas in the year 2015 and 2016 i.e., the post due delivery of possession of the apartment to the complainants.

F. Findings on the relief sought by the complainants

F.I Direct the respondents to hand over the possession along with prescribed interest per annum from the promissory date of delivery of the flat in question till actual delivery of the flat.

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

*"**Section 18: - Return of amount and compensation***

18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building, ---

.....

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."

12. Clause (2.1) of the flat buyer agreement (in short, agreement) provides for handing over of possession and is reproduced below: -

2. POSSESSION OF UNIT: -

2.1. Subject to Clause 9 herein or any other circumstances not anticipated and beyond control of the first party/confirming party and any restraints/restrictions from any courts/authorities and subject to the purchaser having complied with all the terms and conditions of this agreement and not being in default under any of the provisions of this agreement including but not limited timely payment of total sale consideration and stamp duty and other charges and having complied with all provisions. Formalities, document., as prescribed by the first party/confirming party, whether under this agreement or otherwise, from time to time, the first party/confirming party proposes to hand over the possession of the flat to the purchaser within approximate period of 36 months from the date of sanction of the building plan of the said colony. The purchaser agrees and understands that the first Party/confirming party shall be entitled to a grace period of 180 (one hundred and eighty) days, after the expiry of 36 months, for applying and obtaining the occupation certificate in respect of the colony from the concerned authority. The first party/confirming party shall give notice of possession, and in the event the purchaser fails to accept and take the possession of the said flat within 30 days of, the purchaser shall be deemed to be custodian of the said flat from the date indicated in the notice of possession and the said flat shall remain at the risk and cost of the purchasers.

13. At the outset it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and application, and the complainant not being in

default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoters. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoters and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoters 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 flat buyer agreement by the promoters are 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.

14. **Admissibility of grace period:** The promoters have proposed to hand over the possession of the apartment within a period of 36 months from date of sanction of building plans and further provided in agreement that promoter shall be entitled to a grace period of 180 days for applying and obtaining occupation certificate in respect of group housing

complex. As a matter of fact, the promoters have not applied for occupation certificate within the time limit prescribed in the flat buyer agreement. As per the settled law, one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 180 days cannot be allowed to the promoters at this stage.

15. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges. Proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoters, 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.*

16. 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.

17. 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., **30.09.2021** is7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

18. 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;"*

19. Therefore, interest on the delay payments from the complainants 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.

20. On consideration of the documents available on record and submissions made regarding contravention of provisions of the Act, 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 clause 2.1 of the agreement executed between the parties on 21.11.2012, the possession of the subject apartment was to be delivered within 36 months from the date of sanction of building plans i.e. 07.06.2012. 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 07.06.2015. The respondents have failed to handover possession of the subject apartment till date of this order. Accordingly, it is the failure of the respondents /promoters to fulfil their obligations and responsibilities as per the agreement to hand over the possession within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with proviso to section 18(1) of the Act on the part of the respondents is established. As such, the allottee shall, be paid, by the promoters, interest for every month of delay from due date of possession i.e., 07.06.2015 till the handing over of the

possession, at prescribed rate i.e., 9.30 % p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules.

F.II Direct the respondents to refund the amount on account of service tax and delayed payment interest pertaining to old allottee.

21. The complainants have sought the relief that the respondents have to refund the amount on account of service tax and delayed payment interest pertaining to old allottee. The authority has observed that the service tax and delayed payment interest had been levied strictly in accordance with the terms and conditions of the buyer's agreement.

22. The relevant clause from the agreement is reproduced as under: -

> 6. ***Statutory Taxes, Maintenance Charges, and other Dues:***
>
> *6.1 The Purchaser shall from the date of execution of this agreement, always be responsible and liability for the payment of all External Development Work, Municipal Taxes, Property Tax, Infrastructure Development Tax, VAT, Service Tax, any fresh Incidence of tax to be levied by the competent authority, and any other statutory charges etc. including enhancement of such taxes by the government, even if they are retrospective in effect as may be levied on the said colony/land in the share proportionate to the super area of the said flat. in case ant tax, charges cess, etc. is levied after the execution of the sale/Conveyance deed, the sane shall be payable by the purchaser on pro rate basis."*
>
> ***10. Timely payment is the essence of this agreement, Termination and Forfeiture:***
>
> ***10.4** without prejudice to the first party/confirming party's aforesaid rights, in the said agreement, the first party/confirming party may as its sole discretion waived the breach by the purchaser(s) in not making payment as per payment plan as opted by the Purchaser(s) on the conditions as may be consider appropriate by the First party/ confirming party including the payment of interest on amount due @ 18% p.a. the decision of the first party/*

confirming party in this regard shall be final and binding upon the parties....."

23. As per the flat buyer's agreement, taxes shall be payable as per the government rules as applicable from time to time. Taxes are levied as per government norms and rules and are leviable in respect of real estate projects as per the government policies from time to time. Therefore, there is no substance in the plea of the complainants in regard to the illegality of the levying of the said taxes.

24. The authority has also perused the judgement dated 04.09.2018 in complaint no. 49/2018, titled as **Parkash Chand Arohi Vs. M/s Pivotal Infrastructure Pvt. Ltd.** of the Haryana Real Estate Regulatory Authority, Panchkula wherein it has been observed that the possession of the flat in term of buyer's agreement was required to be delivered on 1.10.2013 and the incidence of GST came into operation thereafter on 01.07.2017. So, the complainant cannot be burdened to discharge a liability which had accrued solely due to respondent's own fault in delivering timely possession of the flat. The relevant portion of the judgement is reproduced below:

"8. The complainant has then argued that the respondent's demand for GST/VAT charges is unjustified for two reason: (i) the GST liability has accrued because of respondent's own failure to handover the possession on time and (ii) the actual VAT rate is 1.05% instead of 4% being claimed by the respondent. The authority on this point will observe that the possession of the flat in term

of buyer's agreement was required to be delivered on 1.10.2013 and the incidence of GST came into operation thereafter on 01.07.2017. So, the complainant cannot be burdened to discharge a liability which had accrued solely due to respondent's own fault in delivering timely possession of the flat. Regarding VAT, the Authority would advise that the respondent shall consult a service tax expert and will convey to the complainant the amount which he is liable to pay as per the actual rate of VAT fixed by the Government for the period extending upto the deemed date of offer of possession i.e., 10.10.2013."

25. The authority after hearing the parties at length is of the view that admittedly, the due date of possession of the unit was 07.06.2015. No doubt as per clause 6.1 of the flat buyer's agreement, the complainants/allottees has agreed to pay all the Government rates, tax on land, municipal property taxes and other taxes levied or leviable now or in future by Government, municipal authority, or any other government authority, but this liability shall be confined only up to the due date of possession i.e. 07.06.2015. With respect to the relief of service tax, advice of service tax expert should be taken about the quantum of service tax payable in given circumstances of the allottees up to the due date of offering of possession of the apartments. Accordingly, whatever service tax is payable up to the due date of offer of possession shall be demanded by the promoters and will be paid by the allottees. The respondents shall not charge anything from the complainants which is not the part of the flat buyer agreement.

F.III Directed to refund the payment of Rs.2,75,000/- charged on account of car parking contrary to the decision of Hon'ble Apex Court titled Nahal chand Laloochand Pvt Ltd v/s Panchali co-operative housing society Ltd. along with interest @ 24 % p.a. from the date of deposit of the amounts till the date of its refund.

26. In the instant matter, the subject unit was allotted to the complainants vide allotment letter dated 21.11.2012 and as per the said allotment, the respondent had charged a sum of Rs.2,75,000/- on account of car parking charges. As per clause 1.2(g) and annexure c-4 of the builder buyer's agreement 21.11.2012, the allottees have agreed to pay the cost of covered car parking charges over and above the basic sale price. The cost of parking of Rs.2,75,000/- has been charged exclusive to the basic price of the unit as per the terms of the agreement. Accordingly, the promoter is justified in charging the same.

27. in case titled as **DLF Home Developers Ltd. (Earlier known as DLF Universal Ltd.) and another Vs. Capital Greens Flat Buyers Association etc. [civil appeal nos. 3864-3889 of 2020]** vide order dated 14.12.2020, the Hon'ble Supreme Court while dismissing the appeal arising out of the NCDRC matters wherein one of the issues which arose before the Hon'ble Supreme Court was whether a promoter can charge car parking from an allottee in pursuance to *a stipulation made in the builder buyer's agreement executed between the promoter and allottee in respect of a unit in a project before the*

coming into force of the RERA Act, the Hon'ble NCDRC had in its judgement dated 03.01.2020 held that the promoter was not entitled to demand car parking charges from allottee. However, in the appeal, the Hon'ble Supreme Court while setting aside the NCDRC order in this regard held that the promoter in such a case was entitled to raise a demand in respect of car parking charges being justifiable.

F. IV. **Directed to refund payment of Rs.9,07,461/- charged extra on account of extra super area wherein carpet area has not been increased. The respondents are liable to refund along with interest @ 24 % p.a. from the date of deposit of the amounts till the date of its refund as per amended condition of agreement.**

28. Therefore, facts of said complaint are being taken into consideration wherein the allottee booked a unit admeasuring 1760 sq. ft. in the project "Capital Gateway", Sector 111, Gurugram. The area of the said unit was increased to 2049 sq. ft. vide letter of intimation of due amount against the unit no. E-804, of the said project dated 06.03.2017 without giving any prior intimation to, or by taking any written consent from the allottee. The allottees in the said complaint prayed inter alia for directing the respondent to refund the excess amount charged on account of increase in the area by 289 sq. ft. without the consent of the complainant. Clause 1.5 is reproduced hereunder: -

1.5. The final super area of the said flat shall be determined after completion of construction of the said colony and after according for changes, if any, on the date of

possession. The final and confirmed areas shall be incorporated in the sale deed.

i) Any increase or decrease in the Super area of the said flat shall be payable or refunded as the case may be without any interest thereon and at the same rate as agreed above. No other claim, whatsoever monetary or otherwise shall lie against the first party/confirming party or be made by the purchaser. In case there is a variation greater than +_ 15% in the agreed super area as contained in para 1.2 above and the purchaser is un-willing to accept the changed area, then the allotment shall be treated as terminated and the payments received against the consideration of the said flat shall be refunded with simple interest at the of 6% per annum after due execution of the documents as required by the First Party/Confirming Party and in this regard no other compensation of any nature whatsoever shall be demanded by the purchaser from the first party/confirming party.

ii) the case of absolute deletion of the said Flat/Tower/Floor on account of reduction in the overall number of flat(s), floor(s) or tower(s) in the said Group Housing Colony due to any reason whatsoever, no claim, monetary or otherwise, shall be raised by the purchaser or shall be accepted by the first party/confirming party but however, the actual amounts, received against the same will be refunded to the Purchaser in full, and no other compensation of any nature whatsoever shall be paid by the first party/confirming party to the purchaser."

29. From the bare perusal of clause (1.5) of the flat buyer's agreement, there is evidence on the record to show that the respondent had allotted an approximate super area of 1760 sq. ft and the areas were tentative and were subject to change till the time of construction of the group housing complex. Clause 1.5 provides description of the property which mentions about sale of super area and the buyer has signed the agreement. Also, by virtue of annexure IV of the said agreement dated 21.11.2012, the complainants have been

made to understand and had agreed that the super area mentioned in the agreement was only a tentative area which was subject to the alteration till the time of construction of the complex. The respondent in its defence submitted that as per the terms and conditions of the flat buyer's agreement, the builder was not bound to inform the allottees with regards to the increase in super area.

30. Before deciding whether the builder is entitled to charge the cost for increase in super area, it will be pertinent to examine whether the above clause regarding super area is arbitrary and unreasonable. As per the said clause 1.5 of the flat buyer's agreement, the super area of the flat shall be finally determined after completion of the construction of the colony. It is interesting to note that only after the approval of building plans, construction can be started and at the time of approval of the building plan, the area/super area of the unit is known. If the building plan have been approved before the builder buyer's agreement, then there is no justification of such clause and the area/super area of the unit should have been mentioned in the builder buyer's agreement, rather than leaving it to some future remote date after completion of the construction. Arguably, it can be said that even if the building plans were approved after the signing of the builder buyer's agreement, then unit area/super area should have been

intimated to the allottees within reasonable time. The super area once defined in the agreement will not undergo any change if there is no change in the building plan. If there was a revision in the building plan, then also allottee should have been informed about the increase/ decrease in the super area on account of revision of building plans supported with due justification in writing.

31. The authority vehemently arraigns that drafting of such clause is extremely arbitrary, contentious, and uncertain as it is left to be decided on completion of the project. It is to be noted that the completion certificate of project is not obtained by the promoter for years together as the necessary infrastructural works are not completed and as soon as building/apartment becomes habitable after meeting parameter as provided in the Haryana Building Code, 2017; occupation certificate in respect of some of the buildings is obtained and possession is offered. At this stage of offering possession, additional demand for excess super area is made although the project is not complete. There is a difference between occupation certificate and completion certificate. Occupation certificate is for buildings/towers/phases of a project whereas completion certificate is for the project in entirety.

32. In case, there is a variation of more than 15 percent in the agreed super area (although from promoter side, it was always tentative) and the purchaser is unwilling to accept the changed super area by way of refusing to pay the enhanced sale consideration.

33. Therefore, the authority is of the opinion that unless and until, the allottees are informed about the increase/decrease of the super area either in the flat buyer's agreement itself or if building plans were not already approved, immediately after the receipt of approval of building plans from the competent authority, the promoter is not entitled to burden the allottees with the liability to pay for the increase in the super area. The authority is of the opinion that each and every minute detail must be apprised, schooled and provided to the allottee regarding the increase/decrease in the super area and he should never be kept in dark or made to remain oblivious about such an important fact i.e. the exact super area till the receipt of the offer of possession letter in respect of the unit.

34. In a recent judgement of National Consumer Disputes Redressal Commission, New Delhi, consumer case no. 285 of 2018 titled as Pawan Gupta Vs. Experion Developers Pvt. Ltd. (Decided on 26.08.2020) which has been upheld by the Hon'ble Supreme Court of India in civil appeal nos. 3703-

3704 of 2020 decided on 12th January 2021, the NCDRC in this case observed as under:

> *"17. The complaints have been filed mainly for two reasons. The first is that the opposite party has demanded extra money for excess area and second is the delay in handing over the possession. In respect of excess area, the complainant has made a point that without any basis the opposite party sent the demand for excess area and the certificate of the architect was sent to the complainant, which is of a later date. The justification given by the opposite party that on the basis of the internal report of the architect the demand was made for excess area is not acceptable because no such report or any other document has been filed by the opposite party to prove the excess area. Once the original plan is approved by the competent authority, the areas of residential unit as well as of the common spaces and common buildings are specified and super area cannot change until there is change in either the area of the flat or in the area of any of the common buildings or the total area of the project (plot area) is changed The real test for excess area would be that the opposite party should provide a comparison of the areas of the original approved common spaces and the flats with finally approved common spaces/ buildings and the flats. This has not been done. In fact, this is a common practice adopted by majority of builders/developers which is basically an unfair trade practice. This has become a means to extract extra money from the allottees at the time when allottee cannot leave the project as his substantial amount is locked in the project and he is about to take possession. There is no prevailing system when the competent authority which approves the plan issues some kind of certificate in respect of the extra super area at the final stage. There is no harm in communicating and charging for the extra area at the final stage but for the sake of transparency the opposite party must share the actual reason for increase in the super area based on the comparison of the originally approved buildings and finally approved buildings. Basically, the idea is that the allottee must know the change in the finally approved lay-out and areas of common spaces and the originally approved lay-out and areas. In my view, until this is done, the opposite party is not entitled to payment of any excess area. Though the Real Estate Regulation Act (RERA) 2016 has made it compulsory for the builders/developers to indicate the*

carpet area of the flat, however the problem of super area is not yet fully solved and further reforms are required."

35. Keeping in view of the above discussions and the judgements, the authority reckons that it is basically an unfair trade practice, commonly adopted by majority of builders /developers which has become a means to extract illegally extra money from the allottees at the time when allottees cannot leave the project since their substantial amount is already locked in the project and he is about to take possession. If at this stage allottees decides to walk out from the project, they will suffer huge monetary losses apart from mental agony, frustration, disappointment, stress and strain which they have gone through in waiting for getting possession of the unit which is ready to move now but only for the reason of extra illegal demand, he may not be in a position to take possession and the developer is eager to cancel the unit under the garb of one-sided clauses in the agreement. Therefore, the authority after going through the facts and circumstances of the case, deduces that without giving any justification for increase in super area, there is no case made out for charging it. There was a need to put system in place so that at the time of the approval of building plans, the promoter was obligated to disclose all the relevant details of super area and whenever there was a revision of building

plans, the approval of the competent authority should have been taken before hand prior to raising any demands.

36. Further, in a recent judgement passed by the Hon'ble NCDRC in **Capital Greens Flat Buyer Association Vs. DLF Universal Limited & Anr.** along with connected matters wherein vide judgement dated 03.01.2020, the Commission held as under:

> *"13. In terms of Annexure-II of the Agreements executed between the developer and the allottees, the price of the apartments was to be calculated on the basis of its super area. It was also noted in the above referred clause that the super area mentioned in clause 1.1 was only tentative and could change. The allottees had agreed not to object to the change of the super area. However, if the super area was to increase/decrease by more than 15% on account of any alteration/modification/change, the allottees were required to be intimated in writing before carrying out the proposed change and had an option to take refund of the payment which they had made to the developer alongwith interest.*
>
> *The super area in terms of Annexure-II of the Agreements was to consist of the apartment area, pro-rata share of the common areas of the building and pro-rata share of other common areas outside the building, as defined therein.*
>
> *14. In the project subject matter of these complaints, the developer has not sought additional payment for increase in the super area beyond 15%. Therefore, no prior notice to the allottees was required before increasing the super area and to the extent there has been actual increase in the super area, as defined in Annexure-II of the Agreements, the allottees are required to pay for such an increase. The allottees had also agreed that not only the super area but even the percentage of the apartment area to the super area could change and they would have no objection to change of the said ratio, though the case of the OP is that the ratio has not changed and the same continues to be 78.5% of the super area.....Therefore, I have no hesitation in holding that the additional demand on account of increase in the super area, which has been restricted to 15% of the super area stated in the*

agreements, is justified. Though, the ratio of the apartment area to the super area could also change, it is stated in the affidavit of Mr. Mukul Gupta that the final percentage of the apartment area to the super area of the apartment is not less than 78.5% and there is no material to the contrary filed by the allottees. Therefore, I find no justification in the grievance with respect to the demand on account of increase in the super area of the apartments.

.....

37. For the reasons stated hereinabove, the complaints are disposed of with the following directions:

(i) The OP is entitled to the additional demand on account of increase in the super area of the apartments....."

The said judgement of Hon'ble NCDRC has been upheld by the **Hon'ble Supreme Court vide order dated 14.12.2020 in a civil appeal filed by DLF Home Developers Ltd. Vs. Capital Greens Flat Buyers Association.**

37. There is no harm in charging for the extra area, if justifiable, at the final stage but for the sake of transparency, the respondents/promoters must share the calculations for increase in the super area based on the comparison of the originally approved building plans and finally approved building plans. The premise behind this is that the allottees must know the change in the finally approved lay-out and areas of common spaces viz-a-viz the originally approved lay-out plans and common areas.

38. The authority therefore opines that until this is done, the promoter is not entitled to payment of any excess super area over and above what has been initially mentioned in the flat

buyer's agreement, least in the circumstances where such demand has been raised by the builder without giving supporting documents and justification. The Act has made it compulsory for the builders/developers to indicate the carpet area of the flat, and the problem of super area has been addressed. But regarding on-going projects where builder buyer's agreements were entered into prior to coming into force the Act, matter is to be examined on case-to-case basis.

39. The approximate super area of the unit at the time of signing of the agreement was shown as 1760 sq. ft. and has now been revised to 2049 sq. ft. Accordingly, as per provisions of the agreement herein above, the super area could be changed to the extent of 15%, therefore the change in super area and demand made in accordance with that is covered by the flat buyer agreement.

40. The respondent, therefore, is entitled to charge for the same at the agreed rates since, the increase in super area is far less than 15%; this, however, will remain subject to the conditions that the flats and other components of the super area in the project have been constructed in accordance with the plans approved by the department/competent authorities. In view of the above discussion, the authority holds that the demand for extra payment on account of increase in the super area from 1760 sq. ft. to 2049 sq. ft. by the promoter from the

complainant is illegal but subject to condition that before raising such demand, details have to be given to the allottee and without justification of increase in super area, any demand raised is quashed.

F.V **Directed to refund payment of Rs.3,52,000/- charged on account of 1st & 2nd PLC along with interest @ 24 % p.a. from the date of deposit of the amounts till the date of its refund as the respondent's company has not deposited above amount to Director town and planning as confirmed from their office.**

41. The complainants have raised the question about the justification of preferential location charges raised by the promoter. As per clause 1.2(d)(i) of the builder buyer's agreement, following provision has been made regarding PLC:

> **1. Consideration and other condition**
> **1.2(c) 1st PLC @ RS.125 per sq. ft. (Landscape facing)**
> **d. 2nd PLC @ Rs.75/- per sq. ft. (corner), 3rd PLC Rs. Not applicable (Floor)**

42. It is held that the amount levied towards the preferential location charges is justified as per the contractual obligations contained in the flat buyer's agreement. The authority further observes that in such cases where the apartment/unit has ceased to be preferentially located, the amount charged for preferential location shall be refunded/adjusted. The same should be refunded to the allottees along with interest at the prescribed rate w.e.f. the date of payment made by the allottee till the amount is repaid/adjusted.

F.VI **Directed to withdraw the demand letter dated 29.12.2000 of amount Rs.5,43,665/- wherein last payment of 5% of the**

total cost which includes interest already finalized demanded is illegal due to the reason that this amount will be due only at the time of offer of possession as per construction linked plan.

43. The authority observes that there is no demanded letter dated 29.12.2000, is available on record. The respondent shall not charge anything from the complainants which is not the part of the flat buyer's agreement. Therefore, the complainants is advised to approach the authority as and when cause of action arises.

H. **Directions of the authority**

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

i. The respondent is directed to pay interest at the prescribed rate of 9.30% p.a. for every month of delay from the due date of possession i.e. 07.06.2015 till the handing over of possession of the allotted unit after obtaining the occupation certificate from the competent authority.

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

iii. The arrears of such interest accrued from 07.06.2015 till the date of order by the authority shall be paid by the promoter to the allottee within a period of 90 days from

date of this order and interest for every month of delay shall be paid by the promoters to the allottees before 10th of the subsequent month as per rule 16(2) of the rules;

iv. The rate of interest chargeable from the allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.30% by the respondents/promoter 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 complainants which is not the part of the agreement to sell.

45. Complaint stands disposed of.

46. File be consigned to registry.

(Samir Kumar)
Member

(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 30.09.2021
Judgement uploaded on 14.12.2021