BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 1567 of 2019
First date of hearing: 05.11.2019
Date of decision : 04.08.2021

1.Mrs. Shruti Chopra
2.Mr. Ashish Chopra
Both RR/o: - K-34, Jangpura Extension, New Delhi **Complainants**

Versus

Anjali Promoters and Developers Pvt. Ltd.
Address: - 7, Barakhamba Road, New Delhi-110001 **Respondent**

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

APPEARANCE:
Smt. Priyanka Agarwal Advocate for the Complainants
Shri Venket Rao Advocate for the Respondent

ORDER

The present complaint dated 24.04.2019 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 them.

A. Unit and project related details

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1. The particulars of the project, the details of 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	"CENTRA ONE", Sector-61, Gurugram
2.	Project area	3.675 acres
3.	Nature of the project	Commercial Complex
4.	DTCP license no. and validity status	277 of 2007 dated 17.12.2007 Valid up to 16.12.2019
5.	Name of licensee	Saiexpo Overseas Pvt. Ltd.
6.	HRERA registered/ not registered	Not Registered
7.	Provisional allotment letter dated	21.12.2007 [As per page 88 of complaint]
8.	Unit no. [As per space buyer's agreement]	Unit no. 1213, 12th floor [As per page 23 of complaint]
9.	Unit measuring [As per space buyer's agreement]	1000 sq. ft. [As per page 23 of complaint]
10.	Changed Unit no. [As per offer of possession letter]	Unit no. O-1405, 14th floor, tower- O [As per page 54 of complaint]
11.	Unit measuring [As per offer of possession letter]	1030 sq. ft. [As per page 54 of complaint]
12.	Percentage increase in Super Area	3 % Increase
13.	Date of execution of buyer's agreement	15.06.2009 [As per page 21 of complaint]
14.	Date of nomination letter	10.12.2020 [As per page 43 of complaint]
15.	Payment plan	Construction linked plan [As per page 51 of complaint]
16.	Total consideration as per statement of account	Rs.78,68,680.70/- [As per page 56 of complaint]

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17.	Total amount paid by the complainants as per statement of account dated 15.12.2020	Rs.68,71,139.80/- [As per page 56 of complaint]
18.	Due date of delivery of possession as per clause 2.1 of the said agreement i.e. The possession of the said premises shall be endeavoured to be delivered to the intending purchaser by 31st December 2011.	31.12.2011 [Grace period is not given]
19.	**Occupation certificate** granted on	09.10.2018 [As per page 51 of reply]
20.	**Date of offer of possession to the complainants**	19.11.2018 [As per page 54 of complaint]
21.	Delay in handing over possession till 19.01.2019 i.e. date of offer of possession (19.11.2018) + 2 months	7 year 19 days

B. Facts of the complaint

2. That the respondent company under the guise of being a reputed builder and developer has perfected a system through organized tools and techniques to cheat and defraud the unsuspecting, innocent and gullible public at large. The respondent advertised its projects extensively through advertisements. Complainants were allured by an enamoured advertisement of the respondent and believing the plain words of respondent in utter good faith the complainants were duped of their hard-earned monies which they saved from bonafide resources.

3. That due to the malafide intentions of the respondent and non-delivery of the commercial unit, the complainants have accrued huge losses on account of the career plans of their children and themselves. The future of the complainants and their family are rendered dark as the planning with which

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the complainants invested their hard-earned monies have resulted in sub-zero results and borne thorns instead of bearing fruits.

4. That the complainants bought a commercial unit which was previously booked in 15.02.2007. They approached the previous allottee, Mr. Mickey Sibal & Mr Aman Sethi (primarily this unit was allotted in name of Mr Sudhir Bhushan & Mrs Parveen Bhushan same endorsed in the name of Mr. Mickey Sibal & Mr Aman Sethi) who were willing to sell the Unit 012-1213, admeasuring 1000 sq. ft. on 12th floor in project "BPTP CENTRA ONE" Sector-61, Gurugram and hence, sold the commercial space to the complainant subject to endorsement formalities. The respondent endorsed the same space buyer's agreement which was executed between M/S Anjali Promoters & Developers Pvt Ltd and Mr Sudhir Bhushan & Mrs Parveen Bhushan on dated 15.06.2009. By this endorsement, Mrs Vibha Chadha & Mrs Shruti Chopra became legal allottees and purchasers of the said property on dated 06.12.2010.

5. That the complainant Mrs. Vibha requested to respondent for replace her name from allotment by new applicant Mr Ashish Chopra. On 28.03.2014 in same manner respondent confirmed the request of change of applicant.

6. That the total cost of the said unit was Rs.69,01,000/- inclusive BSP, EDC IDC, parking and PLC out of this, a sum of Rs.49,58,975/- was demanded and paid by previous allottees, Mr. Mickey Sibal & Mr Aman Sethi before 06.12.2010. This amount was initially paid by the previous allottees and the same was endorsed by the respondent in the name of complainants. The amount of

Rs.19,12,164.80/- has been paid by complainants & total paid amount is Rs.68,71,139.80/-.

7. That the complainants have paid all the demanded instalments by respondent on time and deposited Rs.68,71,139.80/- before execution of space buyer's agreement (hereinafter, "SBA"). Builder extracted more than 55 % amount which is unilateral, arbitrary and illegal. That respondent in endeavour to extract money from allottees, devised a payment plan under which respondent linked 90 % amount for raising the super structure only. After taking the same respondent has not bothered to initiate any development of the project till 2018. That after taking 90 % amount in 2011, builder has taken 8 years for project development and offer of possession. So, the project is extremely delayed.

8. That respondent was liable to hand over the possession of a developed commercial unit before 31.12.2011 as per clause no. 2.1 of SBA, which is produced as under

> *The possession of the said premises shall be endeavoured to be delivered to the intending Purchaser by 31st December 2011, however, subject to clause 9 herein and strict adherence to the term and conditions of the Agreement by the Intending Purchaser.*

9. That the complainants visited project site many times and found that builder had not carried out development work except super structure completion, even during year 2011 to 2017 (6 year). The project was abandoned, and development work was not carried out by the builder. That the complainants tried to approach the builder for knowing the reason for inordinate delay, but no reply was given by the respondent. The complainants sent an email to builder on dated 06.04.2017 about penalty on delay in completion of unit

and requesting for date of possession. In reply dated 21.04.2017, respondent didn't disclose the date of possession but assured the complainants that delay penalty shall be paid at the time of offer of possession.

10. That the complainants were shocked when respondent sent offer of possession on dated 19.11.2018 and did not adjust any delay penalty for the delay in handing over the possession, which was committed by builder in earlier email. The complainants sent regular email to the respondents about payment of penalty for delayed possession. Again, complainants sent email to respondent on dated 15.02.2019 & 30.03.2019 regarding issue of payment of delay penalty which was previously committed by builder in earlier emails. Builder has not honoured his commitment at the time of possession regarding payment for delay penalty for late possession.
11. That the complainants visited the project after getting offer of possession. The unit was not in habitable condition even walls of unit, construction of fire emergency, and fitting of toilets and finishing of building still pending and project is not in habitable condition.
12. That the respondent has changed the unit and customer id many times without any discretion of complainants. The unit earlier allotted was unit 012-1213 than change to 013-1305 and then again changed to unit no. 014-1405 at the time of offer for possession.
13. That the respondent charged the PLC of Rs.3,09,000/- for unit no. 014-1405 however unit doesn't meet the any criteria set by the builder for PLC therefore charges of PLC is unilateral illegal and arbitrary.

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14. That complainants had paid complete EDC & IDC in 2011 as per original payment plan of space buyer agreement still builder has raised extra demand of EDC/IDC of Rs.1,51,680/- which is unilateral illegal and arbitrary. It is abundantly clear that the respondent sold the unit in 2006, extracted more than 90% before 2011 from innocent buyer by giving false millstone by executing illegal, unilateral, one-sided SBA Agreement. In similar case Judgment passed by ***Neelkamal Realtors Suburban Pvt. Ltd. and anr. vs UOI and Ors (W.P 2737 of 2017)*** wherein the Bombay HC bench held that:

> *Para 181. ..... There was no accountability as to entity or persons responsible and/or liable for delivering on several projects that were advertised and in respect of which amounts had been collected from individual purchasers. What was promised in advertisements/broachers, such as amenities, specifications of premises etc. was without any basis, often without plans having been sanctioned, and was far from what was finally delivered. Amounts collected from purchasers were either being diverted to other projects, or were not used towards development at all, and the developer would often be left with no funds to finish the project despite having collected funds from the purchasers. For a variety of reasons including lack of funds, projects were stalled and never completed and individual purchasers who had invested their lifesavings or had borrowed money on interest, were left in the lurch on account of these stalled projects. Individual purchasers were often left with no choice but to take illegal. os-wp-2737-17 & ors RERA-JT*
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> *Para 181....*
> *"Agreements entered into with individual purchasers were invariably one sided, standard-format agreements prepared by the builders/developers and which were overwhelmingly in their favour with unjust clauses on delayed delivery, time for conveyance to the society, obligations to obtain occupation/completion certificate etc. Individual purchasers had no scope or power to negotiate and had to accept these one-sided agreements".*

15. That as per section 19 (6) the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as the Act) complainants have fulfilled his responsibility in regard to making the necessary payments in the manner and within the time specified in the said agreement. Therefore, the complainants herein are not in breach of any of its terms of the agreement.

16. That keeping in view the complainants who have spent his entire hard-earned savings in order to buy this unit, stands at a crossroad to nowhere. The inconsistent and lethargic manner, in which the respondent conducted its business and their lack of commitment in completing the project on time, has caused the complainants great financial (Interest on money, Lease value, increase in taxes, opportunity loss etc.) and emotional loss.

17. That such an inordinate delay in the delivery of possession to the allottee is an outright violation of the rights of the allottees under the provisions of Act as well as the agreement executed between complainants and respondent. The complainant's demands delay penalty in terms of section 18(1) read with section 18(3) of the Act, along with principles of justice, equity and good conscience.

18. That the cause of action to file the instant complaint has occurred within the jurisdiction of this authority as the apartment which is the subject matter of this complaint is situated in Sector 61, Gurugram which is within the jurisdiction of this authority.

C. Relief sought by the complainants: -

i. Direct the respondent to pay delay interest on paid amount of Rs. 68,71,139.80/- from 31.12.2011 along with pendente lite and future interest till actual possession thereon at the prescribed rate.

ii. Direct the respondent to quash the demand of PLC of Rs.3,09,000/-.

iii. Direct the respondent to quash the demand of increased charges of EDC of Rs.1,51,680/-.

iv. Direct the respondent to immediately hand over the possession of unit in habitable condition.

v. Direction be made to the respondent for restraining from raising any fresh demand an increased liability.

19. 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 the respondent

20. The respondent has contested the complaint on the following grounds:

(i) That the complainants have approached this authority for redressal of his alleged grievances with unclean hands, i.e. by not disclosing material facts pertaining to the case at hand and also, by distorting and/or misrepresenting the actual factual situation with regard to several aspects. The complaint is liable to be dismissed at the threshold without any further adjudication.

(ii) That one of the complainants namely Mrs. Shruti Chopra along with her mother namely Mrs. Vidha Chadha i.e. the third applicant, purchased the unit no. 012-1213, admeasuring about 1,000 sq. ft. from the second applicant i.e., Mr. Mickey Sibal and Mr. Aman Sethi, in the year 2010. The third applicant after conducting due diligence and out of their own volition, within best knowledge of development and progress and other related aspects, voluntarily and willingly after reading, understanding, agreeing and accepting terms of the application form, approached the respondent along with the second applicant for transfer of said booking/allotment in favour of

the third applicant. The respondent vide its letter dated 10.12.2010 nominated the third applicant as allottees of the unit no. 012-1213.

(iii) That one of the complainants namely Mrs. Shruti Chopra, duly requested for deletion of Mrs. Vidha Chadha as co-applicant and addition of Mr. Ashish Chopra as co-applicant in regard to unit no. 012-1213. The same was intimated to the Mrs. Shruti Chopra vide letters dated 25.03.2014 and 03.04.2014.

(iv) That the complainants have concealed from this authority that with the motive to encourage the complainants to make payment of the dues within the stipulated time, the respondent also gave additional incentive in the form of Timely Payment Discount (TPD) to the complainants and in fact. Till date, the complainants have availed TPD of Rs. 1,83,476.30/-.

(v) That the respondent after receiving OC from the concerned authorities on 09.10.2018, duly served offer of possession letter dated 19.11.2018. After issuance of offer of possession, the respondent has duly granted special credit amounting to Rs.7,72,500/- towards E_STP.

(vi) That the complainants have also concealed from this authority that the respondent being a customer centric company has always addressed the concerns of the complainants and had requested the complainants time and again to visit the office of the respondent in order to amicably resolve the concerns of the complainants. However, notwithstanding the several efforts made by the respondent to attend to the queries of the complainants to his complete satisfaction, the complainants erroneously proceeded to file the

present vexatious complaint before this hon'ble authority against the respondent.

(vii) That as contemplated in section 13 of the Act, subsequent to the commencement of the rules, a promoter has to enter into an agreement for sale with the allottees and get the same registered prior to receipt of more than 10 percent of the cost of the plot, or building. Form of such agreement for sale has to be prescribed by the relevant state government and such agreement for sale shall specify amongst various other things, the particulars of development, specifications, charges, possession timeline, provisions of default etc.

(viii) By a notification in the Gazette of India dated 19.04.2017, the Central Government, in terms of section 1 (3) of the Act prescribed 01.05.2017 as the date on which the operative part of the Act became applicable. In terms of the Act, the Government of Haryana, under the provisions of section 84 of the Act notified the rules on 28.07.2017.

(ix) In terms of the rules, the government prescribed the agreement for sale and specified the same in annexure A of the rule 8(1) of the, it is very important to note that the rule 8 deals with documents executed by and between promoter and allottee after registration of the project by the promoter, however with respect to the documents including agreement for sale/ flat buyers agreement/plot buyers agreement executed prior to the registration of the project which falls within the definition of "Ongoing Projects" explained herein below and where the promoter has already collected an amount in excess of 10 percent of the total price rule 8 is not applicable.

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(x) The aforesaid view stated in the preceding para is clarified in the rules published by the state of Haryana, the explanation given at the end of the prescribed agreement for sale in annexure A of the rules, it has been clarified that the developer shall disclose the existing agreement for sale in respect of ongoing project and further that such disclosure shall not affect the validity of such existing agreement executed with its customers. The explanation is extracted herein below for ready reference:

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

Thus, what has not been saved under the Act and Rules are sales where mere booking has been made and no legal and valid contract has been executed and is subsisting.

(xi) The parties had agreed under the space buyer agreement (SBA) to attempt at amicably settling the matter and if the matter is not settled amicably, to refer the matter for arbitration. Clause 20 of the SBA is reproduced below for ready reference

> *"20 Arbitration: Any disputes, differences or disagreement arising out of this Agreement, which cannot be settled amicably, shall be referred to Arbitration in accordance with the provisions of the Arbitration and conciliation Act, 1996 (as amended from time to time). The Intending Purchaser agrees that the Intending Seller shall appoint a sole Arbitrator and the decision of the said arbitrator shall be final and binding on the Parties. The venue of the arbitration shall be New Delhi,"*

Admittedly, the complainants have raised dispute but did not take any steps to invoke arbitration. Hence, is in breach of the agreement between the parties. The allegations made requires proper adjudication by tendering

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evidence, cross examination etc and therefore cannot be adjudicated in summary proceedings.

(xii) That the complainants have alleged that the respondent has delayed the project and even terms the SBA whereby the respondent had agreed to handover possession by 31.12.2011, there has been a huge delay. In this context, the respondent submits that with a view to create a world class commercial space, engaged renowned architects Cervera and Pioz of Spain for the said project. The Respondent also engaged renowned contactor M/s. Ahluwalia Contracts (P) Ltd. for the said project. The respondent launched the project with a vision of creating an iconic building and hence, engaged the best professionals in the field for the same who are well known for their timely commitment as well.

(xiii) That the respondent had conceived that the project would be deliverable by 31.12.2011 based on the assumed cash flows from the allottees of the project. However, it was not in the contemplation of the respondent that the allottees including the complainants herein would hugely default in making payments and hence, cause cash flow crunch in the project. The complainants also knew that as per the SBA, timely payment of the installments was the essence of the contract.

(xiv) That the complainants relied upon clause 2.1 of the SBA for the timelines, it is submitted that the said timelines for possession till 31.12.2011 were subject to compliance of all terms and conditions of the agreement, including but not limited to timely payment of all the dues. A further grace period of 6 months was also agreed to between the parties. As stated timely payments

of the various installments and despite grant of numerous above, other allottees including the complainants hugely defaulted in making timely payments of various installments and despite grant of numerous opportunities, failed to clear dues. Hence, the timelines for possession stood diluted because of the acts/defaults of the various allottees.

(xv) That the project 'Centra One' is a Greenfield project, located at Sector 61, Gurgaon. All customers including the complainants were well informed and conscious of the fact that timely payment of all the demands was of essence to the contract. Majority of customers opted for construction linked payment plan after clearly understanding that and agreed upon to tender the payment as per the construction milestones. It is pertinent to mention here that, given the choice of payment plan and terms of the agreement, all the customers including the complainants specifically understood that a default in tendering timely payment by significant number of customers, would delay the construction activity. It is a matter of fact and record that the space/unit holders as a group have defaulted in making timely payment which has caused major set-back to the development work.

(xvi) That in the 1st year (FY 07) demands amounting to Rs.20.84 Crores were raised by the respondent in accordance with the payment plans chosen by customers, and only Rs.15.83 Crores was paid by the customers. Over 43% customers defaulted in making timely payment in FY 2007, and percentage of defaulting customers swelled to 56%, 40% and 68% in the FY 09, 10 and 11 respectively. Default in payment by various customers is provided as follows-

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Particulars	FY 06-07	FY 07-08	FY 08-09	FY 09-10	FY 10-11	FY 11-12	FY 12-13
Demand sent to total customers in INR lacs	97	93	119	30	146	118	132
Default by customers in INR lacs	42	10	67	12	100	13	37
Percentage of default	43%	11%	56%	40%	68%	11%	28%

(xvii) That it is noteworthy to mention here that, with the sole intention of completing the project within reasonable time, the respondent offered additional benefit of Timely Payment Discount (TPD) which was not in the contemplation of the respondent while launching the project and hence, caused further outflow of funds, just to seek the following discounts and incentives to its customers, in excess of the terms and timely payments from the customers. In fact, in May 2009, the respondent offered conditions of the agreement, in huge favour of the customers. The respondent offered an additional Timely Payment Discount (TPD) of 10% in Basic Sale Price (BSP) to those customers who would make the payments of the various installments within the stipulated time stated in the said demand letters. This amounted to a substantial discount of Rs.257/- per sq. ft. had the customers made all their remaining payments within time. Unfortunately, this scheme did not have a favourable result as only few customers availed this benefit. The customers who availed this scheme and paid their

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installments on time were given the TPD amounting to Rs.1.42 Crores. Following is the summary regarding the TPD benefit enjoyed by the customers:

Particulars	FY 06-07	FY 07-08	FY 08-09	FY 09-10	FY 10-11	FY 11-12	FY 12-13
TPD amount INR in lacs	0	0	0	0	52.94	88.99	0
No. of customers availed	0	0	0	0	66	13	0

Thus, it is evident that most of the customers defaulted in making timely payments.

(xviii) That the respondent also offered an additional discount of 10% on net inflow of uncalled BSP in case any customer decided to opt for pre/ upfront payment. The aim of this scheme was that the project to get adequate cash flow for construction. Unfortunately, this significant discount didn't produced fruits as it attracted only few customers. Further in order to express seriousness of its commitment to complete the project, the respondent doubled the delayed possession penalty from the agreed amount of Rs. 15/- sq. ft. per month to Rs. 30/- sq. ft. per month, for the eligible customers t of the terms and conditions of the SBA.

(xix) The above-mentioned attempts of respondent failed to persuade a significant number of customers to make timely payment, which is the

principal reason for the delay of the completion of the project. In fact, on the one hand, the respondent suffered further cash crunch by granting TPD benefits for making timely payments and on the other hand did not receive payments due to huge defaults by the various allottees in adhering to the timelines for payment. Hence, the delay was occasioned due to acts and omissions of the various allottees of the project.

(xx) Thus, it is further evident that the customers as a group defaulted in making timely payments, which obviously had a rippling effect on the development of the project and hence, the possession timelines also stood diluted accordingly. Further, in view of the same, the complainants are not liable to demand any delay penalty when he himself has hugely defaulted in making timely payment. It is further submitted that in case the complainants want to withdraw the booking of the unit in question, the same shall be governed by the duly agreed clauses of the agreement executed between both the parties.

(xxi) That it is pertinent to point out that the construction of the project as well as the unit in question is complete. The respondent from the competent authorities after appropriate site inspection has received occupation certificate on 09.10.2018, in accordance to which the respondent vide its letter dated 19.11.2018 has already served offer of possession letter to the complainants thereby requesting them to clear the outstanding dues and complete documentary facilities in order to initiate process of physical delivery of unit in question. As a goodwill gesture, the respondent further after issuance of offer of possession letter, has also granted special credit

discount amounting to Rs.7,72,500/- towards E_STP in regard to unit no. 014 -1405.

E. Note on force majeure by respondent

43. That the complainants are the allottees of a shop bearing no. 014-1405 in the commercial project of the respondent company, Centra One, situated in Gurugram, Haryana. The complainants in the present complaint are inter alia seeking interest on account of delay in handing over possession. The project, Centra One, is a business complex situated in Gurugram's sector 61, spread over an area of 3.675 acres. The said commercial complex has been developed by M/s Anjali Promoters Pvt. Ltd. in collaboration with M/s Saiexpo Overseas Pvt. Ltd. and M/s Countrywide Promoters Pvt. Ltd (collectively referred to as 'Company'). Subsequently, Department of Town and Country Planning, Haryana ("DTCP") has issued a license bearing no. 277 of 2007 to M/s Countrywide Promoters Pvt. Ltd. for developing a commercial complex on the said land.

44. That the that timelines for possession as per the space buyer's agreement, was proposed to be by 31st December 2011 with a further grace period of 6 months. Thus, possession of the unit in question was proposed to be handed over by 30th June 2012. It is further submitted that the said timeline for possession was subject to force majeure and timely payment of installments by the complainants.

45. That it is pertinent to point out that both the parties as per the application form duly agreed that the respondent shall not be held responsible or liable for any failure or delay in performing any of its obligations or undertakings

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as provided for in the agreement, if such performance is prevented, delayed or hindered by delay on part of or intervention of statutory authorities like DTCP or the local authorities or any other cause not within the reasonable control of the Respondent. In such cases, the period in question shall automatically stand extended for the period of disruption caused by such operation, occurrence or continuation of force majeure circumstance(s).

46. The Force Majeure clause is reproduced herein below for ready reference:

> *"The Intending Seller shall not be held responsible or liable for failure or delay in performing any of its obligations or undertakings as provided for in this Agreement, if such performance is prevented, delayed or hindered by any act of God, fire, flood, civil commutation, war, riot explosion, terrorist acts, sabotage, or general storage of energy, labour, equipment, facilities, material or supplies, failure of transportation, strike, lock-outs, action of labour union, change of law, action/change of policies of Government, delay on part of or intervention of Statutory Authorities like DTCP or the local authorities or any other cause not within the reasonable control of the Intending Seller. In such cases, the period in question shall automatically stand extended for the period of disruption caused by such operation, occurrence or continuance of Force Majeure circumstance(s)."*

47. The possession timelines for the said project were subject to force majeure circumstances and timely payment of called installments by the allottees. "Force Majeure", a French term equivalent to "Vis majeure", in Latin, means "superior force". A force majeure clause is defined under the Black's Law Dictionary as 'A contractual provision allocating the risk if performance becomes impossible or impracticable, especially as a result of an event or effect that the parties could not have anticipated or controlled.'

48. That delay, if any, in handing over of possession of the units of the said project is due to reasons beyond the control of the company. In this regard

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it is pertinent to point out that on 29.05.2008, the company applied for grant of approval of building plans from the DTCP.

49. That on 21.07.2008, in the meeting of the building plan approval committee, the committee members concurred with the report of Superintending Engineer (HQ), HUDA and STP, Gurgaon who had reported that the building plans were in order. The said members also took note of the report of the STP (E&V)'s observation on the building plans. The members stated that the said observations were "minor in nature" and hence approved the building plans subject to corrections.

50. That DTCP vide letter dated 30.07.2008 approved the building plans of the company subject to certain rectification of deficiencies. There were in total 3 deficiencies which were asked to be corrected by the company, namely, NOC from AAI to be submitted, covered area not correct and lastly fire safety measures were not provided.

51. That in compliance with the directions issued by DTCP vide office memo no. ZP-345/6351 dated 30.07.2008, the company submitted revised building plans on 27.08.2008 vide letter dated 25.08.2008. It is pertinent to point out that since there were no further objections conveyed to the company for the release of the building plans it was assumed that the building plans would be released automatically. Since no communication was received by the company for almost 5 months, the company on its own volition enquired the reasons for delay in release of the building plans by DTCP. To its astonishment, it came to the company's knowledge that the same was being withheld by DTCP on account of EDC dues. However, no formal

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communication qua the same was received by the company. Nonetheless, the company on 15.01.2009 and 16.01.2009 requested DTCP to release its building plans while submitting an undertaking to clear the EDC dues within a specified time period. It is pertinent to point out that there were no provisions in the Haryana Development and Regulation of Urban Areas Act, 1975 or the Haryana Development and Regulation of Urban Areas Rules, 1976 or any law prevalent at that time which permitted DTCP to withhold release of a building plan on account of dues towards EDC.

52. That DTCP on 27.02.2009 after a lapse of almost six months from the date of submission of the revised building plans, conveyed the company to clear EDC/IDC dues while clearly overlooking the undertakings given by the company.

53. That it is stated that the company, on 03.08.2010 deposited full EDC/IDC with the department. It is pertinent to mention herein that in terms of the license granted and the conditional approval of the building plans, the company had started developing the project. That to its surprise, the company received a notice by DTCP dated 19.03.2013 directing the company to deposit composition charges of Rs.7,37,15,792/- on account of alleged unauthorized construction of over an area of 34238.64 sq. mtr. The said demand was questioned by the company officials in various meetings with DTCP officials. Various representations were made by the company on 04.09.2013, 22.10.2013, 11.11.2013, 02.12.2013, 14.03.2014, 15.04.2014, 07.07.2014, 13.11.2014, 09.02.2015, 07.04.2015. The company in its

representation dated 05.06.2015 pointed out all the illegalities in the demand of composition charges of Rs.7.37 crores.

54. That instead of clarifying the issue, DTCP further issued a demand letter on 31.12.2015 directing the company to deposit Rs. 7.37 crores as composition charges, Rs. 54,72,889 as labour cess and Rs. 55,282 on account of administrative charges.

55. That the company succumbed to the undue pressure and on 13.01.2016 deposited Rs. 7.37 crores with DTCP as composition charges and further requested for release of its building plans. The company on 13.01.2016 further deposited an amount of Rs.41,68,171/- towards the balance labour cess.

56. That even after clearing the dues of EDC/IDC and payment of composition charges, building plan was not released by DTCP, instead, the company was asked to apply for sanction of building plan again as per the new format. The same was duly done by the company on 16.06.2017. Further, the company, on completion of construction applied for grant of occupation certificate on 29.07.2017.

57. That the company on the very next day i.e., 25.10.2017 replied to the DTCP justifying the concern while submitting the building plan again for approval. In the meantime, the company also paid composition charges to the tune of Rs.43,63,127/- for regularization of construction of the project.

58. That, finally on 12.01.2018 the building plan was approved for the Centra One, post approval of the same, the company on 21.05.2018, in continuation

to its application dated 31.07.2017, again requested DTCP for grant of occupation certificate for its project. It is stated that occupation certificate was duly granted by DTCP on 09.10.2018. Thus, even after having paid the entire EDC dues in the year 2010 the building plans for the project in question was not released by DTCP. It is reiterated that release/approval of building plan at that point in time was not linked with payment of EDC.

59. It is pertinent to mention that in 2013 the company received a surprise demand of Rs.7.37 crores for composition towards unauthorized construction without considering the fact that construction at the project site was carried out by the company on the basis of approval of building plan in the meeting of the building plan approval committee on 21.07.2008.

60. Even after payment of the composition charges, the building plan was not released by DTCP instead, the company was asked to apply for sanction of building plan again as per the new format. The same was duly done by the company on 16.06.2017. However, it is after almost a lapse of 10 years from the date of first application that the building plan was finally approved on 12.01.2018. Thus, the circumstances as mentioned hereinabove falls squarely into the definition and applicability of the concept of 'force majeure'.

61. That in addition to the above, the project also got delayed due to a complete ban on extraction of ground water for construction by the Central Ground Water Board. On 13.08.2011, the Central Ground Water Board declared the entire Gurgaon district as 'notified area' which in turn led to restriction on abstraction of ground water only for drinking / domestic use. Hence, the

developer/company had to use only treated water for construction and/or to buy water for construction.

62. While India, being a common law country, does not have statutory provisions encapsulating the principles of force majeure; this principle has been given statutory recognition under Indian law by way of the doctrine of frustration under Sections 32 and 56 of the Indian Contract Act, 1872. In ***Dhanrajamal Gobindram v. Shamji Kalidas & Co.,*** (1961) 3 SCR 1020, it was held by the Hon'ble Supreme Court that,

> *"17. ...Judges have agreed that strikes, breakdown of machinery, which, though normally not included in "vis major" are included in "force majeure". An analysis of rulings on the subject into which it is not necessary in this case to go, shows that where reference is made to "force majeure", the intention is to save the performing party from the consequences of anything over which he has no control. This is the widest meaning that can be given to "force majeure", and even if this be the meaning, it is obvious that the condition about "force majeure" in the agreement was not vague." [Emphasis Supplied]*

Over a period of time the Indian judiciary has passed numerous judgments on the applicability of 'force majeure' clause in a contract and has put in place the following litmus test:

a) that the event which caused non-performance fell within the ambit of such force majeure clause;

b) the non-performance of the contract was caused due to the said event;

c) the said event as well as the non-performance of the contract were beyond the party's control and

d) that no reasonable steps could have been taken to continue performance or there existed no alternative mode of performance.

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63. That the Hon'ble Supreme Court recently in ***Puri Constructions Pvt. Ltd. Vs. Dr. Viresh Arora (Civil Appeal No. 3072 of 2020)*** on 3rd September 2020 while allowing the appeal preferred by the Developer company against an order passed by the Ld. NCDRC directed the Ld. Commission to decide afresh on the matter in issue while taking into consideration the force majeure circumstances pleaded by the developer.

64. The Hon'ble Supreme Court conceded with the submissions made by the Developer Company that though the NCDRC noted that the developer pleaded force majeure on the ground that

(i) the construction of the flats could not proceed due to a stay granted by the National Green Tribunal on construction during the winter months; and (ii) demonetization affected the real estate industry resulting in delays in completion, the submission has not been dealt with.

The second submission which was urged on behalf of the developer was that in similar other cases, the NCDRC has condoned the delay of the nature involved in the present case in handing over possession, having regard to the quantum of delay involved.

65. The Hon'ble Supreme Court in the said case was of the view that:

> *"Though the NCDRC has adverted to the submissions based on force majeure, the submissions have not been dealt with. Hence, we are of the view that it would be appropriate to restore the appeal to the NCDRC for consideration afresh.*
>
> *We accordingly allow the appeal and set aside the impugned judgment and order of the NCDRC dated 13 January 2020. Consumer Complaint No 1598 of 2017 shall stand restored to the file of the NCDRC for disposal afresh. The rights and contentions of the parties on the issues involved in the appeal are kept open to be addressed before the NCDRC."*

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Hence, as per the Hon'ble Supreme Court the force majeure circumstances have to be considered and adjudicated upon while awarding delay compensation and it is apparent from the above order that even administrative actions of the government fall within the category of 'force majeure'.

66. Thus, delay, if any, in handing over possession to allottees of Centra One has been due to reasons beyond control of the company and the same need to be taken into consideration by RERA in so awarding delay possession compensation while also giving the company an extension of 10 years so as to complete the project by 2018-19.

45. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submission made by the parties.

F. Jurisdiction of the authority

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

F. I Territorial jurisdiction

46. 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.

F. II Subject matter jurisdiction

47. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottees 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;*
>
> *The provision of assured returns is part of the builder buyer's agreement, as per clause 15 of the BBA dated..... Accordingly, the promoter is responsible for all obligations/responsibilities and functions including payment of assured returns as provided in Builder Buyer's Agreement.*
>
> ***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.

G. Findings on the objections raised by the respondent.

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

48. The respondent submitted that the complaint is neither maintainable nor tenable and is liable to be outrightly dismissed as the apartment buyer's agreement was executed between the complainants and the respondent

prior to the enactment of the Act and the provision of the said Act cannot be applied retrospectively.

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

> *"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter...*
>
> *122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."*

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

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

51. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of any other Act, rules and regulations made thereunder and are not unreasonable or exorbitant in nature. Hence, in the light of above-mentioned reasons, the contention of the respondent w.r.t. jurisdiction stands rejected.

G.II Objection regarding delayed payments

52. Though an objection has been taken in the written reply that the complainants failed to make regular payments as and when demanded. So, it led to delay in completing the project. The respondent had to arrange funds from outside for continuing the project. However, the plea advanced in this regard is devoid of merit. A perusal of statement of accounts shows

otherwise wherein like other allottees, the complainants had paid more than 80% of the sale consideration. The payments made by the allottee does not match the stage and extent of construction of the project. So, this plea has been taken just to make out a ground for delay in completing the project and the same being one of the force majeure.

G.III Objection regarding complainants are in breach of agreement for non-invocation of arbitration.

53. The respondent has raised an objection that the complainants have not invoked arbitration proceedings as per the provisions of space buyer's agreement which contains provisions regarding initiation of arbitration proceedings in case of breach of agreement. The following clause has been incorporated w.r.t arbitration in the buyer's agreement:

> *"20 Arbitration: Any disputes, differences or disagreement arising out of this Agreement, which cannot be settled amicably, shall be referred to Arbitration in accordance with the provisions of the Arbitration and conciliation Act, 1996 (as amended from time to time). The Intending Purchaser agrees that the Intending Seller shall appoint a sole Arbitrator and the decision of the said arbitrator shall be final and binding on the Parties. The venue of the arbitration shall be New Delhi ...."*

54. The respondent contended that as per the terms & conditions of the application form duly executed between the parties, it was specifically agreed that in the eventuality of any dispute, if any, with respect to the provisional booked unit by the complainants, the same shall be adjudicated through arbitration mechanism. The authority is of the opinion that the jurisdiction of the authority cannot be fettered by the existence of an arbitration clause in the buyer's agreement as it may be noted that section 79 of the Act bars the jurisdiction of civil courts about any matter which falls within the purview of this authority, or the Real Estate Appellate Tribunal.

Thus, the intention to render such disputes as non-arbitrable seems to be clear. Also, section 88 of the Act says that the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. Further, the authority puts reliance on catena of judgments of the Hon'ble Supreme Court, particularly in ***National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506***, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, consequently the authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause. Further, in ***Aftab Singh and ors. v. Emaar MGF Land Ltd and ors.***, Consumer case no. 701 of 2015 decided on 13.07.2017, the National Consumer Disputes Redressal Commission, New Delhi (NCDRC) has held that the arbitration clause in agreements between the complainants and builder could not circumscribe the jurisdiction of a consumer. The relevant paras are reproduced below:

> *"49. Support to the above view is also lent by Section 79 of the recently enacted Real Estate (Regulation and Development) Act, 2016 (for short "the Real Estate Act"). Section 79 of the said Act reads as follows: -*
>
> *"79. Bar of jurisdiction - No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."*
>
> *It can thus, be seen that the said provision expressly ousts the jurisdiction of the Civil Court in respect of any matter which the Real Estate Regulatory Authority, established under Sub-section (1) of*

Section 20 or the Adjudicating Officer, appointed under Sub-section (1) of Section 71 or the Real Estate Appellant Tribunal established under Section 43 of the Real Estate Act, is empowered to determine. Hence, in view of the binding dictum of the Hon'ble Supreme Court in A. Ayyaswamy (supra), the matters/disputes, which the Authorities under the Real Estate Act are empowered to decide, are non-arbitrable, notwithstanding an Arbitration Agreement between the parties to such matters, which, to a large extent, are similar to the disputes falling for resolution under the Consumer Act.

...

56. Consequently, we unhesitatingly reject the arguments on behalf of the Builder and hold that an Arbitration Clause in the afore-stated kind of Agreements between the Complainant and the Builder cannot circumscribe the jurisdiction of a Consumer Fora, notwithstanding the amendments made to Section 8 of the Arbitration Act."

55. While considering the issue of maintainability of a complaint before a consumer forum/commission in the fact of an existing arbitration clause in the builder buyer agreement, the Hon'ble Supreme Court in case titled as ***M/s Emaar MGF Land Ltd. V. Aftab Singh*** in revision petition no. 2629-30/2018 in civil appeal no. 23512-23513 of 2017 decided on 10.12.2018 has upheld the aforesaid judgement of NCDRC and as provided in Article 141 of the Constitution of India, the law declared by the Supreme Court shall be binding on all courts within the territory of India and accordingly, the authority is bound by the aforesaid view. The relevant para of the judgement passed by the Supreme Court is reproduced below:

"25. This Court in the series of judgments as noticed above considered the provisions of Consumer Protection Act, 1986 as well as Arbitration Act, 1996 and laid down that complaint under Consumer Protection Act being a special remedy, despite there being an arbitration agreement the proceedings before Consumer Forum have to go on and no error committed by Consumer Forum on rejecting the application. There is reason for not interjecting proceedings under Consumer Protection Act on the strength an arbitration agreement by Act, 1996. The remedy under Consumer Protection Act is a remedy provided to a consumer when there is a defect in any goods or services. The complaint means any allegation in writing made by a complainant has also been explained in Section 2(c) of the Act. The

remedy under the Consumer Protection Act is confined to complaint by consumer as defined under the Act for defect or deficiencies caused by a service provider, the cheap and a quick remedy has been provided to the consumer which is the object and purpose of the Act as noticed above."

56. Therefore, in view of the above judgements and considering the provisions of the Act, the authority is of the view that complainants are well within their rights to seek a special remedy available in a beneficial Act such as the Consumer Protection Act and RERA Act, 2016 instead of going in for an arbitration. Hence, we have no hesitation in holding that this authority has the requisite jurisdiction to entertain the complaint and that the dispute does not require to be referred to arbitration necessarily.

G.IV Objection raised by the respondent that the period of getting building plan approvals shall not be considered while calculating any delay and shall be considered as force majeure as per clause 9 of space buyer's agreement.

57. The complainants were allotted the unit in the project of respondent namely 'Centra-One' on 21.12.2007 against total sale consideration of Rs.78,68,680/-. The allotment of unit was made under construction linked payment plan and the complainants paid a total sum of Rs.68,71,139.80/- in pursuance to space buyer's agreement executed between the parties on 15.06.2009. The possession of the said unit was to be offered by the respondent-builder to the complainants by the respondent has contended that the period of delay for getting building plan approvals shall not be considered while calculating any delay and shall be considered as force majeure as per clause 9 of the agreement dated 15.06.2009. The possession of the allotted unit was to be offered by the respondent-builder to the

complainants by 31.12.2011 as per clause 2.1 of the space buyer's agreement. It is contended by the respondent builder that there was a delay in approval of building plan by DTCP, Chandigarh by one reason or other.

58. The respondent contended that an application was made to DTCP, Chandigarh for getting required building plan approvals on 29.05.2008 and the same were approved subject to 3 minor deficiencies on 30.07.2008. In pursuance of that, respondent company submitted revised building plans on 27.08.2008 after complying with the deficiencies pointed out by the concerned authority. However, the final clearance of building plan keeps on delaying due to one reason or other such as payment towards EDC, demand letter towards administration charges, payment towards labour cess, etc. Due to such delay by the DTCP in clearing approval, the respondent-company, started the construction without waiting for concerned approvals. As a result, a demand letter was issued by the DTCP of Rs.7,37,15,792/- on account of unauthorized construction. Finally, on 12.01.2018 building plan approvals were granted by the DTCP and subsequently, the respondent-company applied for grant of occupation on 29.07.2017 which was granted on 09.10.2018. As per clause 2.1 of the buyer's agreement, the due date of possession of the subject unit was 31.12.2011. The authority is of the considered view that if there is lapse on the part of competent authority in granting the required sanctions within reasonable time and that the respondent was not at fault in fulfilling the conditions of obtaining required approvals then the respondent should approach the competent authority for getting this time period i.e. 31.12.2011 till 19.11.2018 be declared as 'zero

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time period' for computing delay in completing the project. However, for the time being, the authority is not considering this time period as zero period and the respondent is liable for the delay in handing over possession as per provisions of the Act.

G.V Objection regarding delay in payments by various allottees.

59. The respondent has contended that there has been delay in completion of the project as subsequent number of allottees has failed in making regular payment. The respondent also stated that a 'Timely Payment Discount' was also given by the respondent to encourage timely payment and avoid delay in payment. It is further submitted by the complainants that a discount of Rs.52,94,000/- and Rs.88,99,000/- was availed by the allottees in FY 2010-11 and FY 2011-12 respectively. The authority is of view that as per payment plan on page no. 51 of complaint, only an amount of 5% and various charges such as EC, MC, CD, IFMS, SF, etc. were payable on offer of possession, which is to be made on or before 31.03.2011 as per clause 2.1 of buyer's agreement. Assuming timely delivery of unit by the builder-respondent, only last instalment should have been due by that time and discount offered by respondent has subsequently declined the non-payment rate by the allottees from 68% to 11% from FY 2010-11 to FY 2011-12. As per details provided by respondent in his reply that more than 11% allottees failed to make timely payments but stake of other 89 % allottees cannot be put on stake due to default of other allottees. Thus, plea taken by the respondent is devoid of merits and therefore, rejected.

H. Findings on relief sought by the complainants.

Relief sought by the complainants:

i. Direct the respondent to pay delay interest on paid amount of Rs. 68,71,139.80/- from 31.12.2011 along with pendente lite and future interest till actual possession thereon at the prescribed rate.

ii. Direct the respondent to quash the demand of PLC of Rs.3,09,000/-.

iii. Direct the respondent to quash the demand of increased charges of EDC of Rs.1,51,680/-.

iv. Direct the respondent to immediately hand over the possession of unit in habitable condition.

v. Direction be made to the respondent for restraining from raising any fresh demand an increased liability

H.I Finding on relief that respondent be directed to pay delay interest on paid amount of Rs. 68,71,139.80/- from 31.12.2011 along with pendente lite and future interest till actual possession thereon at the prescribed rate.

Delay possession charges:

60. In the present complaint, the complainants intend to continue with the project and are seeking delay possession charges at prescribed rate of interest on amount already paid by them as provided under the proviso to section 18(1) of the Act which 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."

61. Clause 2.1 of the space buyer's agreement (in short, the agreement) dated 15.06.2009, provides for handing over of possession and is reproduced below:

> ***"2.1. Possession***
> *"The possession of the said premises shall be endeavoured to be delivered to the intending Purchaser by 31st December 2011, however, subject to clause 9 herein and strict adherence to the term and conditions of the Agreement by the Intending Purchaser."*

62. The respondent promoter has proposed to handover the possession of the subject unit by 31.12.2011 subject to unforeseen delays beyond the reasonable control of the company as per clause 9. It is a rare case, where respondent builder has clearly specified a date for handing over of possession. It is welcoming step. Therefore, due date of possession comes out to be 31.12.2011.

63. **Admissibility of grace period:** The space buyer's agreement was executed on 15.06.2009 and as per clause 2.2 of the said agreement, the promoter has proposed to deliver the possession of the said unit by 30.06.2012. In the present case, the promoter is seeking 6 months' time as grace period. The said period of 6 months shall not be granted as the possession clause clearly states that the promoter will give the possession of the said unit by 30.06.2012 i.e.; 31.12.2011 plus 6 months grace period for getting occupation certificate and completion certificate. It is a matter of fact that the respondent did not applied for getting said occupation certificate and completion certificate within stipulated time i.e.; 31.06.2012. So, as per settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 6 months cannot be allowed to the promoter at this stage

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

65. 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.

66. 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., 04.08.2021 is @7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., @9.30%.

67. 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;"

68. 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.

69. On consideration of the documents available on record and submissions made by both the parties regarding contravention of provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 2.1 of the space buyer's agreement executed between the parties on 15.06.2009, the possession of the allotted unit was to be delivered within stipulated time i.e., by 31.12.2011. The grace period of 6 months is not allowed to the respondent as the promoter has not applied for occupation certificate within the time limit prescribed by the promoter in the space buyer's clause. Therefore, the due date of handing over possession was 31.12.2011. The respondent has offered the possession of the unit on 19.11.2018 after obtaining occupation certificate on 09.10.2018. Accordingly, it is the failure of the respondent/promoter to fulfil its obligations and responsibilities as per the flat buyer's 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 respondent is established. As such the allottee is entitled for delayed possession charges @9.30% p.a. w.e.f. from due date of possession i.e., 31.12.2011 till offer of possession plus two months i.e.; 19.01.2019 as per proviso to section 18(1) of the Act read with rule 15 of the rules.

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70. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 09.10.2018. The respondent offered the possession of the unit in question to the complainants only on 19.11.2018, 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 i.e. 31.12.2011 till the expiry of 2 months from the date of offer of possession (19.11.2018) which comes out to be 19.01.2019.

71. Accordingly, it is the failure of the promoter to fulfil its obligations and responsibilities as per the agreement dated 15.06.2009 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 respondent is established. As such the allottee shall be paid, by the promoter, interest for every month of delay from

due date of possession i.e., 31.12.2011 till 19.01.2019, 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.

I. Directions of the authority

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

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 i.e. 31.12.2011 till the expiry of 2 months from the date of offer of possession i.e.; 19.01.2019. 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 also directed to make payment/arrears if any due to the respondent at the equitable rate of interest i.e., 9.30% per annum.

iii. The respondent shall not charge anything from the complainants which is not part of the buyer's agreement.

iv. The cost imposed during the proceedings on either parties be included in the decree sheet.

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

73. Complaint stands disposed of.

74. File be consigned to the registry

(Samir Kumar)
Member

(Vijay Kumar Goyal)
Member

Dated:04.08.2021

JUDGEMENT UPLOADED ON 14.12.2021

HARERA
GURUGRAM