

**BEFORE THE HARYANA REAL ESTATE REGULATORY
AUTHORITY, GURUGRAM**

Complaint no. : 179 of 2020
First date of hearing: 07.02.2020
Date of decision : 19.08.2021

1. Puneet Singh Parmar Through GPA Holder Pankaj
Singh Parmar
2. Richa Kanwar
**Both R/O: - Mahagun Mosaic-2, Flat 703, Vaishali,
Sector-4, Ghaziabad-201010**

Complainants

Versus

Ansul Housing Limited
**Regd. office: - 606, 6th Floor, Indra Prakash,
21, Barakhamba Road, New Delhi -110001**

Respondent

CORAM:

Shri Samir Kumar
Shri Vijay Kumar Goyal

**Member
Member**

APPEARANCE:

Sh. Rit Arora
Smt. Meena Hooda

Advocate for the complainants
Advocate for the respondent

ORDER

1. The present complaint dated 16.01.2020 has been filed by the complainants/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the rules and regulations

made there under or to the allottee as per the agreement for sale executed inter se.

A. Unit and project related details

2. The particulars of 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	"Ansal Highland Park", Sector 103, Gurugram.
2.	Project area	11.70 acres
3.	Nature of the project	Group housing project
4.	DTCP license no. and validity status	32 of 2012 dated 12.04.2012 valid till 11.04.2020
5.	Name of licensee	M/s Identity Buildtech Pvt. Ltd. M/s Agro Gold Chemicals India LLP
6.	HRERA registered/ not registered	Registered vide registration no. 16 of 2019 dated 01.04.2019 Valid till 30.11.2021
7.	Unit no.	STRLG-0503, 5 th floor [Page 56 of complaint]
8.	Unit measuring	1762 sq. ft. [Page 56 of complaint]
9.	Date of execution of buyer's agreement	20.03.2013 [Page 53 of complaint]
10.	Date of building plan approvals	16.04.2013
11.	Payment plan	Construction linked payment plan [Page 70 of complaint]
12.	Total consideration	Rs.88,81,936/- [Page 70 of complaint]
13.	Total amount paid	Rs.88,97,928.72/-

		[As alleged by the complainants on Page 18 of complaint] [Total of receipts attached by the complainants from page 71 to 92 amounts to Rs.84,60,355.12]
14.	Due date of delivery of possession as per clause 31 of the said agreement i.e, 48 months from the date execution of agreement (20.03.2013) or from the date of obtaining all the required sanctions and approvals necessary for commencement of construction, whichever is later + plus 6 months grace period in offering the possession of the unit. [Page 62 of complaint]	16.10.2017 [Calculated from date of construction i.e.;16.04.2013, being later] [Note: Grace period is not allowed]
15.	Occupation Certificate	Not obtained
16.	Offer of possession	Not offered
17.	Delay in handing over possession till 19.08.2021 i.e. till date of order	3 years 10 months 03 days

B. Facts of the complaint

3. That the complainants are represented by the general power of attorney holder, Pankaj Singh Parmar. The complainants are allottees of a flat in the project of the respondent company, namely, 'ANSALS HIGHLAND PARK, being located at Gurgaon-Faridabad developed by the respondent company. The complainants with the hope of living in a pollution free neighbourhood and trusting in the reputation of the respondent company made the booking of a unit in their project which was supposed to be delivered by 28.11.2017 (including grace period of 6 months). The respondent company till date has neither delivered the possession of the unit to the complainants nor

refunded the money. Being aggrieved, the complainants have preferred the present complaint for directing the respondent to deliver immediate possession of the apartment with delay interest.

4. That the respondent company launched a project in the name of "ANSALS HIGHLAND PARK" situated at Sector-103, Gurugram. The project was developed under License No. 32 of 2012 received from Director General Town & Country Planning, Chandigarh, Haryana and was promoted as Gurgaon's very own Scottish-style residential enclave. The complainants were lured with various features such as gated high-rise development with controlled entry/exit points, choice of 2 BHK, 3 BHK, 3 BHK + Utility & 3 BHK+ 1 Room+ Utility, only 620 units spread through 8 towers, jogging track & cosy sit-outs, soothing water bodies and adequate power back-up. The complainants were highly impressed by the highlights of the project and the promised on-time delivery of possession.
5. That the complainants booked an apartment in the project vide application dated 31.05.2012 and payment of Rs 1,00,000/- vide cheque no. 075915 dated 30.05.2012 and cheque no. 553792 dated 01.06.2012 towards booking amount were paid towards the respondent company. The complainants opted a construction linked payment plan for the payment of consideration towards booked unit and made various payments as and when fallen due/ demanded by the respondent. However, no agreement was executed by the respondent with the complainants in respect of the said apartment.

6. That after a delay of 10 months from the date of booking i.e. on 20.03.2013, an apartment buyer's agreement was executed between the parties. Between such period of booking of the apartment on 31.05.2012 to execution of apartment buyer's agreement on 20.03.2013, the complainants paid a total sum of Rs. 31,25,555/- for the apartment i.e. more than 35% of the total consideration of the apartment.
7. That since a substantial amount has been paid by the complainants, the respondent company took advantage of this situation and drew an unfair and arbitrary agreement with the complainants. That on perusal of the draft drawn by the respondent company, the complainants realized that they have been cheated by the respondent company and the agreement is totally one sided and arbitrary. The respondent company had drawn all the provisions in their favour only. The complainants were being denied fair scope of compensation in the agreement in case of delay of possession. That the complainants objected to such unilateral construction of the agreement, but the respondent company threatened the complainants with the cancellation of the allotment and forfeiture of the paid amount. The complainants, being paid a huge amount already, had no other option but were constrained to put his signatures on the dotted lines.
8. The complainants submitted that the arbitrary and unfairness of the apartment buyer agreement can be derived from the clauses 24, 25 and 37. The respondent had the right to terminate the agreement under clause 25 and forfeit the earnest money @ 20% and was entitled to charge interest @ 24% p.a. in case of delay in payment of instalment by the complainants. On

the other hand, as per the clause 37, in case of delay in handing over possession of the apartment, the respondent was liable to pay a meagre compensation @ Rs. 5 per sq. ft. every month of delay after expiry of 48 months plus grace period. Clause 24, 25 and 37 of agreement is reproduced as:

"24. Timely payment of instalments of Basic and other charges is the essence of the terms of the application and Agreement. It shall be the duty of the Buyer to make regular payments of instalments in accordance with the payment plan opted by him/her on his own without any dependence/reference to any demand notices being issued by the Developer, except in case of construction linked payment plan. The developer may in its discretion send call notices but non-receipt of the same not be valid reason for non-payment of the instalments/payments and the dues, so demanded by way of such notice shall be final and binding on the Buyer. Delay in payment of any amount, due and payable by the Buyer, in terms of the application and Agreement shall attract compoundable interest at the rate of 24% per annum, compounded quarterly. No interest is payable by Developer on any instalment paid early/before its due date by the Buyer unless otherwise offered as scheme by the Developer."

25. If payment of instalment/other dues are not received within the stipulated period given in the opted payment plan and/or in the event of breach of any of the terms and conditions of the application and Agreement by the Buyer, the Allotment can be cancelled at the sole discretion of the Developer and Developer shall be entitled to sell the said Unit at such price and on such terms and conditions to such other person or party (new Buyer) as the Developer may in its absolute discretion deem fit. The Developer shall refund to the Buyer the amount paid by the Buyer towards the basic sale price in pursuance of the this Agreement after receiving back the original documents from the Buyer and after compliance of necessary formalities by the Buyer but after deducting there from 20% of the basic sale price of the unit which constitute the earnest money. In case the unit is cancelled as above, the balance amount, if any, shall be refunded by Developer to the Buyer within 30 days after receiving original documents from the Buyer. Only if Developer delays in refunding the balance amount, if any, as above, the developer shall be liable to pay interest @ 5% PA on refund amount for the period starting from 30 days after receiving original documents from the Buyer till actual date of refund."

"37. That the developer would pay to the Buyer @ Rs.5/- per sq. ft. per month on Super Area for any delay in offering possession of the Unit as

mentioned in Clause no. 31 above after adjusting all dues including unpaid interest on account of late payment and any amounts of interest waived earlier on the said unit. Similarly in the event of his/her failure to pay all dues before the due date as mentioned in offer of possession and/or failure to visit the site for Final Verification/Inspection or for taking possession/Keys of the Unit for any reason (even if Sale deed has been registered) whatsoever, the Buyer shall be liable to pay, in addition to interest on delayed payments, Holding charges @ Rs. 5/- per sq.ft per month of Super Area from the due date mentioned in offer of possession letter till the Keys of the unit taken by the Buyer. In case of delay in Final Verification/Inspection, the Buyer shall pay Holding charges from the date of expiry of time given in offer of possession till the actual date of Final Verification/Inspection. Thereafter there will be a grace period of 60 days within which time the Buyer shall get the Sale deed of the unit registered and take the Keys of his unit from Site in Charge/Estate Manager. In case keys of the Unit are not taken within this grace period of 60 days, the Buyers shall pay further Holding charges up to the day of actual handing over of Keys.

9. That as per the clause 31 of the agreement dated 20.03.2013, the possession of the unit was to be handed over within 48 months from the date of execution of the apartment buyer's agreement or from the date of obtaining all the required sanctions and approval necessary for commencement of construction, whichever is later. The respondent was also entitled to 6 months grace period in addition to 48 months.
10. That in the instant case, the project was launched under the license no. 32 of 2012 and the apartment buyer's agreement was executed on 20.03.2013, therefore the respondent company was supposed to deliver the possession of the apartment by 20.09.2017. It is submitted that till date the respondent company has not completed the project and delivered the possession of the unit to the complainants. There is a delay of more than 2 years in offering possession.

11. That the provisions of the apartment buyer agreement are not at all applicable now. The compensation for the complainants has been deliberately formulated to their detriment which is illegal and unsustainable. That the Indian Parliament has enacted and enforced the Real Estate (Regulation and Development) Act, 2016 to balance the bargaining power of the allottees who have been disadvantaged by the abuse of dominant position by the developers since several years. Recently, the Hon'ble Apex Court has also taken cognizance of such one-sided agreements made by the developers and abuse of their dominant position in the case of ***Pioneer Urban Land and Infrastructure Limited versus Govindan Raghavan bearing Civil Appeal No. 12238/2018*** and held that:

"A term of a contract will not be final and binding if it is shown that the flat purchasers had no option but to sign on the dotted line, on a contract framed by the builder. The contractual terms of the Agreement dated 08.05.2012 are ex-facie one-sided, unfair, and unreasonable. The incorporation of such one-sided clauses in an agreement constitutes an unfair trade practice as per Section 2(r) of the Consumer Protection Act, 1986 since it adopts unfair methods or practices for the purpose of selling the flats by the Builder."

12. That the Law Commission of India in its 199th Report, addressed the issue of 'Unfair (Procedural & Substantive) Terms in Contract'. The Law Commission inter-alia recommended that legislation be enacted to counter such unfair terms in contracts. In the draft legislation provided in the Report, it was stated that: -

"A contract or a term thereof is substantively unfair if such contract or the term thereof is in itself harsh, oppressive or unconscionable to one of the parties."

13. That it is necessary to mention that even after delay of more than 2 years, the respondent have neither offered the possession nor paid any money to compensate such delay. Thus, in the present the circumstances, the complainants are left with no other option to file the present complaint for granting them the immediate possession of the apartment along with compensation for the delay caused herein. While deciding the amount of compensation for the complainants, the compensation should be decided as per the provisions of The Real Estate (Regulation and Development) Act, 2016.
14. That after the Real Estate (Regulation and Development) Act, 2016 came into force on 01.05.2016, the respondent company has become liable to compensate the complainants with the same rate of interest at which it charges in the case of delay in the payment of installments (which is 24% p.a. in the instant matter). That while the complainants have been abiding by their end of the agreement, the respondent company has miserably failed in completing the construction of the project within time. Hence, respondent company is liable to pay interest on the amount paid for delay and as per the principal of parity and the definition of interest under RERA demands that the buyer be compensated in the same manner in which the respondent company has compensated itself in case of alleged delay in payment of instalment. It is only appropriate that the complainants be paid 24% p.a. interest on the total money paid for the period of delay.
15. That a payment to of Rs. 88,97,928.72/- has been made by the complainants till date. In view of the above mentioned facts and circumstances it is only

appropriate that this authority may direct the respondent to deliver/ hand over the immediate peaceful possession of the flat with all the amenities and facilities as promised and charged for and hold that the respondent has failed to deliver the possession of the unit to the complainants within the assured and promised time frame of 20.09.2017. The authority may direct the respondent to pay the complainants an interest @24% p.a. on the amount paid for the flat, from the promised date of delivery of the flat till the actual delivery of the flat to the complainants.

C. Reliefs sought by the complainants:

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

- (i) Direct the respondent to deliver immediate possession of the flat along with all the promised amenities and facilities and to the satisfaction of the complainants.
- ii) Direct the respondent to pay interest @24% p.a. on the amount paid by the complainants from the promised date of delivery till the actual delivery.
- iii) Direct the respondent to pay a Rs. 5,00,000/- for causing mental agony and harassment to the complainant.
- iv) Direct the respondent to pay a sum of Rs 50,000/- as litigation expenses to the complainants.

17. 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

18. The respondent has filed and has contested the complaint on the following grounds.

- i. That the present complaint is neither maintainable nor tenable by both law and facts. The complainants have filed the present complaint seeking interest and penalty. It is respectfully submitted that complaints pertaining to refund, compensation and interest are to be decided by the Adjudicating Officer under Section 71 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as the "Act") read with Rule 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017, (hereinafter referred to as the "Rules") and not by this authority. The present complaint is liable to be dismissed on this ground alone. That even otherwise, the complainants have no locus-standi or cause of action to file the present complaint. The present complaint is based on an erroneous interpretation of the provisions of the Act as well as an incorrect understanding of the terms and conditions of the buyer's agreement dated 20.03.2013.
- ii. That the complainants approached the respondent somewhere in the year 2012 for the purchase of an independent unit in its upcoming residential project "Ansal Highland Park" situated in Sector-103, Village Tikampur, Gurugram. It is submitted that the complainants prior to approaching the respondent, had conducted extensive and independent enquiries regarding the project and it was only after the complainants were fully satisfied with regard to all aspects of the

project, including but not limited to the capacity of the respondent to undertake development of the same, that the complainants took an independent and informed decision to purchase the unit, uninfluenced in any manner by the respondent.

- iii. That thereafter the complainants vide application form dated 31.05.2012 applied to the respondent for provisional allotment of the unit in the project. The complainants, in pursuance of the aforesaid application form, was allotted an independent unit bearing no. STRLG-0503, type of Unit -3 BHK, sales area 1762 Sq. ft. (163.69 Sq. mtrs.) in the project. The complainants consciously and wilfully opted for a construction linked plan for remittance of the sale consideration for the unit in question and further represented to the respondent that the complainants shall remit every instalment on time as per the payment schedule. The respondent had no reason to suspect the bonafide of the complainants. The complainants further undertake to be bound by the terms and conditions of the application form as well as apartment buyer's agreement.
- iv. It is further submitted that despite there being several defaulters in the project, the respondent itself infused funds into the project and has diligently developed the project in question and the construction work of the project is swing on full mode and the work will be completed within prescribed time period as given by the respondent to the authority.

- v. That without prejudice to the aforesaid and the rights of the respondent, it is submitted that the respondent would have handed over the possession to the complainants within time had there been no force majeure circumstances beyond the control of the respondent, there had been several circumstances which were absolutely beyond and out of control of the respondent such as orders dated 16.07.2012, 31.07.2012 and 21.08.2012 of the Hon'ble Punjab & Haryana High Court duly passed in Civil Writ Petition No.20031 of 2008 through which the shucking/extraction of water was banned which is the backbone of construction process, simultaneously orders at different dates passed by the Hon'ble National Green Tribunal restraining thereby the excavation work causing Air Quality Index being worst, maybe harmful to the public at large without admitting any liability. Apart from these the demonetization is also one of the main factors of delay in giving possession to the home buyers as demonetization caused abrupt stoppage of work in many projects. The payments especially to workers to only by liquid cash. The sudden restriction on withdrawals led the respondent unable to cop up with the labour pressure. However, the respondent is carrying its business in letter and spirit of the apartment buyer's agreement as well as in compliance of other local bodies of Haryana government.
- vi. That it is submitted that the complaint is not maintainable or tenable under the eyes of law as the complainants have not approached this authority with clean hands and have not disclosed the true and



material facts relates to this case of complaint. The complainants thus, has suppressed and concealed the material facts and proceedings which has direct bearing on the very maintainability of purported complaint and if there had been disclosure of these material facts and proceedings the question of entertaining the present complaint would have not arising. In view of the case law titled as *S.P. Chengalvaraya Naidu Vs. Jagan Nath reported in 1994 (1) SCC Page-1* in which the Hon'ble Apex Court of the land opined that non-disclosure of material facts and documents amounts to a fraud on not only the opposite party, but also upon the authority and subsequently the same view was taken by even Hon'ble National Commission in case titled as *Tata Motors Vs. Baba Huzoor Maharaj bearing RP No.2562 of 2012* decided on 25.09.2013.

- vii. That without admitting or acknowledging the truth or legality of the allegations advanced by the complainants and without prejudice to the contentions of the respondent, it is respectfully submitted that the provisions of the Act are not retrospective in nature. The provisions of the Act cannot undo or modify the terms of an agreement duly executed prior to coming into effect of the Act. It is further submitted that merely because the Act applies to ongoing projects which registered with the authority, the Act cannot be said to be operating retrospectively. The provisions of the Act relied upon by the complainants seeking interest cannot be called in to aid in derogation and ignorance of the provisions of the apartment buyer's agreement.



It is further submitted that the interest for the alleged delay demanded by the complainants is beyond the scope of the buyer's agreement. The complainants cannot demand any interest or compensation beyond the terms and conditions incorporated in the buyer's agreement. However, in view of the law as laid down by the *Hon'ble Bombay High Court in case titled as Neelkamal Realtors Suburban Pvt. Ltd. Vs. Union of India published in 2018(1) RCR (C) 298*, the liberty to the promoter/developers has been given u/s 4 to intimate fresh date of offer of possession while complying the provision of Section 3 of Act as it was opined that the said Act is having prospective effect instead of retrospective as per para no. 86 and 119 of the above said citation are very much relevant in this regard.

- viii. That without prejudice to the contentions of the respondent, it is submitted that the present complaint is barred by limitation. The complainants have alleged that due date of possession in respect of the said unit was in September 2017, and therefore, no cause of action is arisen in favour of the complainants in the month of September 2017, and thus, the present complaint is barred by law of limitation and the authority lacks of jurisdiction.
- ix. That it is also a conceded and admitted fact that the project related to the present complaint has not yet been registered with RERA and as such the authority lacks jurisdiction to entertain the present complaint and the respondent reserves its right to file additional reply and

documents, if required, assisting the authority in deciding the present complaint at the later stage.

- x. That it would be relevant to mention here in case titled as **Mr. Abhishek Mohan Gupta Vs. M/s Ireo Grace Realtech (Pvt.) Ltd.**, Complaint no. 2044 of 2018, date of first hearing 12.03.2019, decided on 12.03.2019 by the authority,

"in para no.36, it was held by the authority that the authority came across that as per clause 13.3, the respondent has agreed to offer the possession of the said apartment within a period of 42 months from the date of approval of building plans and /or fulfilment of preconditions imposed thereunder + 180 days grace period. The building plan for the project in question was approved on 23.07.2013 which contained a precondition under clause 17(iv) that respondent should obtain clearance from Ministry of Environment and Forest, Government of India before starting construction of project. The said environment clearance for the project in question was granted on 12.12.2013 containing a pre-condition of obtaining fire safety plan duly approved by fire department before starting construction. The respondent obtained the said approval on 27.11.2014. Therefore, the due date of possession comes out to be 27.11.2018 and the possession has been delayed by 3 months and 13 days till the date of decision...."

- xi. That it is also worthwhile to mention here that the allegations having been levelled in this complaint are with regard to cheating and alluring which only can be decided by the hon'ble civil court and in these scenarios the authority also lacks jurisdiction.
- xii. That it is submitted that several allottees, including the complainants, has defaulted in timely remittance of payment of instalment which was an essential, crucial and an indispensable requirement for conceptualization and development of the project in question. Furthermore, when the proposed allottees defaulted in their payment

as per schedule agreed upon, the failure has a cascading effecting on the operation and the cost for proper execution of the project increase exponentially whereas enormous business losses befall upon the respondent. The respondent, despite default of several allottees has diligently and earnestly pursued the development of the project in question and has constructed the project in question as expeditiously as possible. It is further submitted that the respondent had applied for registration with the Authority of the said project by giving a fresh date for offering of possession. It is evident from the entire sequence of events, that no illegality can be attributed to the respondent. The allegations levelled by the complainants are totally baseless. Thus, it is most respectfully submitted that the present complaint deserves to be dismissed at the very threshold.

19. 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.

E. Jurisdiction of the authority

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

E.1 Territorial jurisdiction

20. 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

The 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 promoter, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

21. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be

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

F. Findings on the objections raised by the respondent

F.1 Objection regarding jurisdiction of authority w.r.t. buyer's agreement executed prior to coming into force of the Act

22. Another contention of the respondent is that authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the apartment buyer's agreement executed between the parties and no agreement for sale as referred to under the provisions of the Act or the said rules has been executed inter se parties. The authority is of the view that the Act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of *Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)* which provides as under:

"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not

contemplate rewriting of contract between the flat purchaser and the promoter.....

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

23. 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."

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

authorities and are not in contravention of any other Act, rules, statutes, instructions, directions issued thereunder and are not unreasonable or exorbitant in nature.

F.II Objection regarding delayed payments

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 have 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. Findings on the reliefs sought by the complainants

Reliefs sought by the complainants:

- i) Direct the respondent to pay interest @24% p.a. on the amount paid by the complainants from the promised date of delivery till the actual delivery.
- iii) Direct the respondent to pay a Rs. 5,00,000/- for causing mental agony and harassment to the complainants and Rs 50,000/- as litigation expenses to the complainants.

G.I Direct the respondent to pay a Rs. 5,00,000/- for causing mental agony and harassment to the complainants and Rs 50,000/- as litigation expenses to the complainants.

25. The complainants are claiming compensation in the present relief. The authority is of the view that it is important to understand that the Act has clearly provided interest and compensation as separate entitlement/rights which the allottee can claim. For claiming compensation under sections 12, 14, 18 and section 19 of the Act, the complainants may file a separate complaint before Adjudicating Officer under section 31 read with section 71 of the Act and rule 29 of the rules.

G.II Direct the respondent to pay interest @24% p.a. on the amount paid by the complainants from the promised date of delivery till the actual delivery.

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

"Section 18: - Return of amount and compensation

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."*

27. Clause 31 of the apartment buyer agreement (in short, agreement) provides for handing over of possession and is reproduced below:

"31. POSSESSION

Time of handing over the possession

The developer shall offer possession of the unit anytime, within a period of 48 months from the date of execution of agreement or within 48 months from the date of obtaining all the required sanctions and approval necessary for commencement of construction, whichever is

later subject to timely payment of all the dues by the buyer and subject to force majeure circumstances as described in clause 32. Further, there shall be a grace period of 6 months allowed to the developer over and above the period of 48 months as above in offering the possession of the unit."

28. As per clause 31 of buyer's agreement the respondent-promoter has proposed to handover the possession of the subject apartment within a period of 48 months from the execution of the agreement or the date of approval of and sanctions necessary for commencement of construction, whichever is later subject to timely payment by the buyer(s) and subject to force majeure circumstances. Further, the authority in the present case observed that, the respondent has misused its powers and stated an ambiguous clause where, possession is subject to various approvals and sanctions. This practice is not admissible. There must be specific description as to from what or which approval period of due date of possession is to be calculated. Moreover, in the present case buyer's agreement was executed on 20.03.2013 whereas building plan approval was obtained on a later date i.e.; 16.04.2013. Due date of possession shall be calculated from date of approval of building plan i.e.; 16.04.2013 being later than date of agreement, as per clause 31 of agreement which comes out to be 16.10.2017.
29. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the apartment by 16.10.2017 and further provided in agreement that promoter shall be entitled to a grace period of 6 months. Such grace period of 6 months is asked for offer of possession to the allottee(s). As a matter of fact, the promoter has not obtained the occupation

certificate till now and thus, no offer of possession can be made. As per the 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.

30. Admissibility of delay possession charges at prescribed rate of interest:

The complainants are seeking delay possession charges at the rate of 24% p.a. however, proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]

(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.

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

31. 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.

32. 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., 19.08.2021

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

33. 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;"*

34. 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.

35. 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 31 of the agreement executed between the parties on 20.03.2013, the possession of the subject apartment

was to be delivered within stipulated time i.e., by 16.10.2017. 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 16.10.2017. The respondent has failed to handover possession of the subject apartment till date of this order. Accordingly, it is the failure of the respondent/promoter to fulfil its 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 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., 16.10.2017 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.

H. Directions of the authority

36. 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., 16.10.2017 till the date of handing over possession, as per proviso to section 18(1) of the Act read with rule 15 of the rules.

- ii. The arrears of such interest accrued from 16.10.2017 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 promoter to the allottee before 10th of the subsequent month as per rule 16(2) of the rules.
- iii. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
- iv. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.
- v. The respondent shall not charge anything from the complainants which is not the part of the agreement.
37. Complaint stands disposed of.
38. File be consigned to registry.


(Samir Kumar)
Member


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 19.08.2021

JUDGEMENT UPLOADED ON 14.12.2021