BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 4884 of 2020
First date of hearing: 23.02.2020
Date of decision : 19.08.2021

1. Mrs Sushma Bajaj,
2. Mr. Satish Bajaj,
R/o: Flat no. 04112, ATS Pristine,
Sector-150, Noida, Uttar Pradesh-201310 **Complainants**

Versus

M/s Ansal Housing Ltd.
Office address: 2nd floor, Ansal Plaza,
Sector-1, Near Vaishali Metro Station,
Vaishali, Ghaziabad-201010, U.P. **Respondent**

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

APPEARANCE:
Smt. Priyanka Agarwal Advocate for the complainants
Smt. Meena Hooda Advocate for the respondent

ORDER

1. The present complaint dated 14.01.2021 has been filed by the complainants/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions 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 Height 86", Sector 86, Gurugram
2.	Project area	12.843 acres
3.	Nature of the project	Residential Project
4.	DTCP license no. and validity status	48 of 2011 dated 29.05.2011 valid till 28.05.2017
5.	Name of licensee	M/s Resolve Estate Pvt. Ltd.
6.	HRERA registered/ not registered	Not registered
7.	Unit no.	I-0601, Tower- I [As per page no. 23 of complaint]
8.	Unit measuring	1360 sq. ft. [As per page no. 56 of complaint]
9.	Date of execution of flat buyer's agreement	26.08.2013 [As per page no. 20 of complaint]
10.	Endorsement of Unit as per endorsement sheet on page no. 37 of complaint	10.01.2014 [As alleged by the complainants on page no. 11 of complaint]
11.	Payment plan	Construction linked payment plan [As per page no. 36 of complaint]
12.	Total consideration	Rs.54,17,050/- [As per page no. 38 of complaint]
13.	Total amount paid	Rs.56,03,873.25/-

		[As per customer ledger dated 05.08.2019 on page no. 42 of complaint]
14.	Commencement of construction	01.10.2013 [As per page no. 43 of complaint]
15.	Due date of delivery of possession as per clause 31 of the said agreement i.e. 42 months from the date execution of agreement (26.08.2013) 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. [As per page no. 31 of complaint]	26.02.2017 [Calculated from the date of agreement i.e.; 26.08.2013, as no date for approval and sanction necessary or construction are placed on record] [**Note:** Grace period is not allowed]
16.	Occupation certificate	Not obtained
17.	Offer of fit-out possession	04.12.2020 [As per page no. 49 of complaint]
18.	Delay in handing over possession till date of order i.e.; 19.08.2021	4 years 5 months 24 days

B. Facts of the complaint

3. That the complainants were subjected to unethical trade practice as well as subject of harassment, flat buyer agreement clause of escalation cost, many hidden charges which will forcedly imposed on buyer at the time of possession as tactics and practice used by builder guise of a biased, arbitrary and one sided. That the executed flat buyer's agreement between respondent and complainants mentioned in developer's representations, DTCP given the licence 48 of 2011 to Resolved Estate Pvt. Limited (Confirming Party -1) this company transferred his rights to Optus Corona

Developers Pvt. Ltd. (Confirming Party-2). Confirming party- 2 transferred his rights to Samyak Projects Pvt. Ltd (Confirming Party-3) at last confirming party -3 makes another arrangement to joint with respondent those all arrangements create doubt, suspicion, M/s Ansal Housing Ltd. have legal right to collect money from allotees against the unit no.-I-0601, Tower I, "Ansal Heights 86", Sector 86, Gurugram, Haryana and have legal & valid license to develop this project.

4. That based on the promises and commitment made by the respondent, previous allottee booked a 2 BHK flat admeasuring 1360 sq. ft. along with one covered car parking in the unit no. I-0601, tower-I in residential project "Ansal Heights 86", sector 86, Gurugram, Haryana. The initial booking amount was paid in 2011 (more than 9 year back). After that the unit was endorsed in favour of the complainants. By this endorsement complainants became legal allottee and purchaser of the said property.
5. That the respondent to dupe the complainants in their nefarious net even executed flat buyer agreement Signed between M/S Ansal Housing Ltd. and Mr Vaibhav Jain dated 26.08.2013. Finally, respondent endorsed the said agreement in favour of complainants (Mrs Sushma Bajaj & Mr Satish Bajaj) on dated 10.01.2014. By this endorsement complainants became legal allottee and purchaser of the said property. The respondent create a false belief that the project shall be completed in time bound manner and in the garb of this agreement persistently raised demands due to which they were able to extract huge amount of money from the complainants. That the total

cost of the said flat is Rs.54,17,050/-and a sum of Rs.56,03,873.25/- has been paid by the complainants in time bound manner till date.

6. That complainants have paid all the installments timely. That respondent in an endeavour to extract money from allottees devised a payment plan under which respondent linked more than 35 % amount of total paid against as an advance, rest 60% amount was linked with the construction of super structure of the total sale consideration to the time lines, which is not depended or co-related to the finishing of flat and internal development of facilities amenities and after taking the same respondent have not bothered to any development on the project. Till date as a whole project it is not more than 60 % completed and in term of particular tower just a super structure has been built only.
7. That the respondent was liable to hand over the position of the said unit before 26.02.2017. The completion of the project was nowhere near completion and the respondent offered the possession 04.12.2020, that is much later than due date of possession and moreover, the flats were not in habitable condition.
8. That in February 2017, respondent offered an option to pay in advance the amount (subject to minimum of rupees one lakh) and at the time of offer of possession, simple interest @12% p.a.. for the periods the amount. So, the complainants opted the advance against scheme and paid Rs.2,27,070/- through cheque no. 706448 dated 17.06.2017 to the respondent.

9. That complainants wrote various mails to the respondent, but no reply has been filed by the respondent. The respondent-builder extracted huge amount from complainants and given loan to others.

C. Relief sought by the complainants:

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

(i) Direct the respondent to pay delayed on paid amount of Rs.56,03,873.25/- @24% p.a. till the handing over of the physical possession.

(ii) Direct the respondent to pay advance payment scheme interest @12% on advance paid of amount of Rs.2,27,070/- from 17.06.2017 till the offer of possession.

(iii) Direct the respondent to quash the escalation cost of Rs.3,06,152.47/-.

(iv) Direct the respondent to pay interest on maintenance security.

(v) Direct the respondent to complete the construction of the project and immediately handover the possession of the unit.

(vi) Pass the order for the forensic audit as more than 100% amount has been extracted by the builder.

(vii) Direct the respondent to quash one- sided clause from BBA.

(viii) Direct the respondent for payment of GST amount levied upon the complainants and taken the benefit of input credit by builder.

11. 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

12. 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. It is submitted that the present complaint is not maintainable before this authority. 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 26.08.2013.

ii. That initially the unit was allotted to Shri Vaibhav Jain who approached the respondent in the year 2011 for the purchase of 2 'BHK' flat bearing unit number I-0601 tower-I in residential project "Ansal Heights 86" and thereafter on 10.01.2014 the said unit was transferred in the name of the present complainant by way of endorsement of the said agreement. It is submitted that complainants prior to approaching the respondent had conducted extensive and independent inquiries regarding the project and

it was only after the complainants were being fully satisfied with regards to all aspects of the project, including but limited to the capacity of the respondent to undertake development of the same and the complainants took an independent and informed decision to purchase the unit, uninfluenced in any manner.

iii. That there had been several circumstances which were absolutely beyond and out of control of the respondent such as order 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.20032 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 Hon'ble National Green Tribunal thereby restraining the excavation work causing air quality index being worst, may be harmful to the public at large without admitting any liability. Apart from these the demonetization is also one of the main factors of delay to delay in given possession to the home buyers as demonetisation caused abrupt stopping of work in many projects.

iv. 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 has not disclosed the true and material facts related to this case of complaint. The complainants, thus, have approached the authority with unclean hands and also has suppressed and concealed the material facts and proceedings which have directed 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. Chengalvarara 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 title as ***Tata Motors Vs. baba Huzoor Maharaj*** bearing RP No.2562 of 2012 decided on 25.09.2013

v. That without admitting or acknowledging the truth or legality of the allegations of the respondent, it is respectfully submitted that the provisions of the Act are not retrospective in nature.

vi. That the complainants cannot demand any interest or compensation beyond the terms and conditions incorporated in the builder 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 ©298

13. 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 based on these undisputed documents and submission made by the complainants.

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.I Territorial jurisdiction

14. 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.*

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.I Objection regarding various ban by NGT, delay in payment by various allottees and demonetization.

15. Though an objection has been taken in the written reply that the construction of the project is delayed because of various NGT order, delay in payments by various allottees and demonetization. The respondent has raised an objection that complainants along with other allottees made various default in payment towards consideration of allotted unit. The plea taken by the respondent is rejected on devoid of merits as it is evident through customer ledger on page no. 42 & 43 of complaint that complainants have already paid an amount of Rs.56,03,873.25/- towards consideration of allotted unit against total amount of Rs.54,17,050/-. The respondent also took a plea of various NGT orders and demonetization. As per clause 31 of buyer's agreement, due date of possession comes to 26.02.2017 and the events such as various NGT orders barring extractions of water of June & July 2012 and demonetization ordered on 08.11.2016, were either before execution of agreement between the parties or after the due date of possession. Therefore, no benefit of either of these circumstances can be given to the respondent.

F.II Objection regarding format of complaint

16. The respondent has further raised contention that the present complaint is not maintainable as the complainants have filed the present complaint before the adjudicating officer and the same is not in amended CRA format. The reply is patently wrong as the complaint has been addressed to the authority and not to the adjudicating officer. The authority has no hesitation in saying that the respondent is trying to mislead the authority by saying that the said complaint is filed before adjudicating officer. There is a prescribed proforma for filing complaint before the authority under section 31 of the Act in form CRA. There are 9 different headings in this form (i) particulars of the complainants have been provided in the complaint (ii) particulars of the respondent- have been provided in the complaint (iii) is regarding jurisdiction of the authority- that has been also mentioned in para 14 of the complaint (iv) facts of the case have been given at page no. 5 to 8 (v) relief sought that has also been given at page 10 of complaint (vi) no interim order has been prayed for (vii) declaration regarding complaint not pending with any other court- has been mentioned in para 15 at page 8 of complaint (viii) particulars of the fees already given on the file (ix) list of enclosures that have already been available on the file. Signatures and verification part are also complete. Although complaint should have been strictly filed in proforma CRA but in this complaint all the necessary details as required under CRA have been furnished along with necessary enclosures. Reply has also been filed. At this stage, asking complainants to file complaint in form CRA strictly will serve no purpose and it will not vitiate the proceedings of the authority or can be said to be disturbing/violating any of the established

principle of natural justice, rather getting into technicalities will delay justice in the matter. Therefore, the said plea of the respondent w.r.t rejection of complaint on this ground is also rejected and the authority has decided to proceed with this complaint as such

G. Findings on the relief sought by the complainants

Relief sought by the complainants:

G.I Finding on relief of delayed possession interest @24% till physical possession of the allotted unit.

17. The complainants requested the authority to direct the respondent to pay delayed on paid amount of Rs.56,03,873.25/- @24% p.a. till the handing over of the physical possession.

18. 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."*

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

> *"31.*

The developer shall offer possession of the unit anytime, within a period of 42 months from the date of execution of agreement or within 42 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 42 months as above in offering the position of the unit."

20. At the outset it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and application, and the complainants not being in default under any provisions of this agreements and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottees that even a single default by the allottees in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottees and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottees of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottees is left with no option but to sign on the dotted lines.

21. As per clause 31 of buyer's agreement possession of the unit was to be handed over within a period of 42 months from the date of execution of

buyer's agreement between the parties or from the date of sanctions and approvals necessary for the construction. Since no details with regards to sanctions and approvals are placed on record, therefore, due date of possession shall be calculated from date of agreement i.e.; 26.08.2013, which comes out to be 26.02.2017.

22. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the apartment by 26.02.2017 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 offered the possession of the subject unit on 04.12.2021 without obtaining the occupation certificate. Therefore, such offer of possession cannot be treated as a valid offer of possession. 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.

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

24. 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.

25. 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%.

26. 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;"

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

G.II Findings on relief for payment of GST amount levied upon the complainants and benefit of input credit taken the by the builder.

28. The complainants submitted that the due date of possession of act was in 26.02.2017 i.e., after prior to the coming into force of the GST Act 2016.

29. As per the buyer's agreement, taxes shall be payable as per the government rules as applicable from time to time. Taxes are levied as per government norms and rules and is leviable in respect of real estate projects as per the government policies from time to time. Therefore, there is no substance in the plea of the complainants in regard to the illegality of the levying of the said taxes. However, the issue pending determination is as to whether the allottee shall be liable to pay such taxes which became payable on account of default and delay in handing over of possession by the builder beyond the deemed date of possession.

30. It is important to understand herein the background of transgression from VAT to GST regime and quantum of tax which shall be applicable.

31. The liability to pay Value Added Tax by the builder as works contractor has clearly been settled by the **Hon'ble Apex Court in *M/s Larsen and Toubro Limited Vs State of Karnataka (2013) 46 PHT 269 (SC)*** wherein it was held that the builders/developers etc. engaged in the activities of the construction of building, flat and commercial properties are covered under the definition

of "works contract" and are liable to pay Sales Tax as per applicable laws of the state. The provisions of Haryana VAT Act, 2003 (herein after referred as HVAT Act) r/w Haryana Value Added Tax Rules further clarified that the agreements entered with prospective buyers for sale of constructed flats, apartments or other buildings by builders and/or developers amount to transfer of property of goods involved in the execution of a works contract and thus liable to be subjected to VAT. The above is supported by "sale" as defined under sub-clause (ii) of section 2(1)(ze) of the HVAT Act which includes "the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract." The term "works contract" has been defined under section 2(1)(zt) which "includes any agreement for carrying out for cash, deferred payment or other valuable consideration, the assembling, construction, building, altering ,manufacturing, processing, fabrication, installation, fitting out, improvement, repair or commissioning of any movable or immovable property." "Goods" have been defined under section 2(1)(r) of the Act as under:

> *"goods" means every kind of movable property, tangible or intangible, other than newspapers, actionable claims, money, stocks and shares or securities but includes growing crops, grass, trees and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale."*

30 Thus, the provisions of Haryana Value Added Tax Act, 2003 allows charging of Value Added Tax (VAT) only on the goods transferred/utilized in the execution of a works contract. Accordingly, VAT is not chargeable on the

labour, land component of the unit as well as other items which are not covered under the definition of "Goods".

31 Further, it is pertinent to point that there is no standard formula as to what percentage of VAT is to be levied on the consideration to be paid by the prospective buyer. In order to ascertain the tax liability on under construction property; firstly, the quantification of goods involved in the under-construction property need to be calculated as per the mechanism provided by the State of Haryana vide **notification No. 19/ST-1/H.A.6/2003/S.60/2015 dated 23rd July, 2015**, thereafter taxed the taxable turnover according to the rate of tax on various goods such as steel, cement, concrete, wood etc. incorporated, utilized and transferred in the execution of the works contract. The Government of Haryana vide **notification No. 19/ST-1/H.A.6/2003/S.59A/2016 dated 12.09.2016** also provided for an amnesty scheme namely, the Haryana Alternative Tax Compliance Scheme for Contractors, 2016, for the recovery of tax, interest, penalty or other dues payable under the said Act, for the period **up to 31st March, 2014**. Therein, an option was provided to the builder/ developer to discharge their Value Added Tax obligation at a flat rate of 1.05% (1% VAT +5% Surcharge on VAT) on the entire aggregate amount received or receivable for the business carried out during the year for the period prior to 31.03.2014; whether assessed or not assessed.

32 It is further noted that the majority of the builders opted for the scheme and discharged their liabilities including the respondent-promoter as per the list available on the website of the Excise and Taxation Department, Haryana. Thus, the VAT liability stands discharged by the developers including the respondent-promoter by paying lump sum tax @ 1.05% up to the period 31-03-2014.

33 That the Govt. of Haryana, Excise and Taxation Department vide **notification No. S.O.89/H.A.6/2003/S.60/2014 dated 12.08.2014** provided a lump-sum scheme in respect of builders/developers which was further amended vide another notification **No. 23/H.A.6/2003/S.60/2015 dated 24.09.2015** according to which the builder/developer can opt for this scheme **w.e.f 01.04.2014**. Under the above scheme a developer had an option to pay lump sum tax in lieu of tax payable by him under the Act, by way of lump sum tax calculated at the compounded rate of 1% of entire aggregate amount specified in the agreement or value specified for the purpose of stamp duty, whichever is higher, in respect of the said agreement. The builder/developer opting for this scheme here-in-after shall be referred to as the 'Composition Developer'. **This scheme remained in force till 30.06.2017**. The purpose of the lump sum scheme was to mitigate the hardship being caused in determining the tax liability of the builders/ developers. Again, most of the

builders opted/availed the benefit of the scheme. The list of the builders who opted the scheme is also available on the website of Excise and Taxation Department, Haryana. **Thus, the VAT liability for developer/builder opted for this scheme for the period 01-04-2014 to 30-06-2017 comes to 1.05%.**

34 Further, in case any builder/ developer had not opted for any of the above two schemes then the VAT liability comes to approximately 4-5 percent (maximum). It is noteworthy that the amnesty scheme was available up to 31.03.2014, however the same was silent on the issue of charging VAT @ 1.05% from the buyers/ prospective buyers whereas in the lump-sum/ composition scheme under rule 49(a) of the HVAT Rules, 2003 it was specifically mentioned that incidence of cost has to be borne by the promoter/ builder/developer only. **Thus, the builders/developers who opted for the lump-sum scheme, were not eligible to charge any VAT from the buyers/prospective buyers during the period 01-04-2014 to 30-06-2017. In other words, the developer/builder has to discharge the VAT liability out of their own pocket.**

35 A plain reading of this would indicate that all the existing applicable taxes were already included in the basic sale price of the units and through the aforesaid clause the additional demand could be made only in respect of a fresh incidence of taxes. In the instant case VAT has been charged up to

March 2014, Service Tax has been charged up to 31.08.2015 and GST has also been charged thereafter. The respondent counsel argued that the taxes are levied by the state government and have to be deposited with the state on demand, hence are justified. With respect to GST the respondent counsel stated that this tax came into force in the year of 2017, therefore it is fresh tax and has been charged justifiably.

36 In this context attention of the authority was drawn to the fact that the legislature while framing the GST law specifically provided for anti-profiteering measures as a check and to maintain the balance in the inflation of cost on the product/services due to change in migration to a new tax regime i.e. GST, by incorporating section 171 in Central Goods and Services Tax Act, 2017/ Haryana Goods and Services Tax Act, 2017, the same is reproduced herein below:

> *Section 171. (1) Any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices.*

37 The intention of the legislature was amply clear that the benefit of tax reduction or 'Input Tax Credit' is required to be passed onto the customers in view of section 171 of HGST/CGST Act, 2017. As per the above said provisions of the Act, it is mandatory for the respondent to pass on the benefits of 'Input Tax Credit' by way of commensurate reduction in price of the flat/unit. Accordingly, respondent should reduce the price of the

unit/consideration to be realized from the buyer of the flats commensurate with the benefit of ITC received by him.

38 The authority after hearing both the parties is of the view that admittedly the due date of possession of the unit was 26.02.2017. Had the unit been delivered within the due date or even with some justified delay, the incidence of GST would not have fallen on the allottees. Therefore, an additional tax burden with respect to GST was enforced upon the buyer for no fault of his sins and is due to the wrongful act of the promoter in not delivering the unit within due date of possession; also, the tax liability would have been very less as compared with the GST if levied @ 12%.

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

> *"8. The complainant has then argued that the respondent's demand for GST/VAT charges is unjustified for two reason: (i) the GST liability has accrued because of respondent's own failure to handover the possession on time and (ii) the actual VAT rate is 1.05%*

instead of 4% being claimed by the respondent. The authority on this point will observe that the possession of the flat in term of buyer's agreement was required to be delivered on 1.10.2013 and the incidence of GST came into operation thereafter on 01.07.2017. So, the complainant cannot be burdened to discharge a liability which had accrued solely due to respondent's own fault in delivering timely possession of the flat. Regarding VAT, the Authority would advise that the respondent shall consult a service tax expert and will convey to the complainant the amount which he is liable to pay as per the actual rate of VAT fixed by the Government for the period extending upto the deemed date of offer of possession i.e., 10.10.2013."

In appeal no. 21 of 2019 titled as M/s Pivotal Infrastructure Pvt. Ltd. vs. Prakash Chand Arohi, Haryana Real Estate Appellate Tribunal, has upheld the Parkash Chand Arohi vs. M/s Pivotal Infrastructure Pvt. Ltd. (supra). The relevant para is reproduced below:

"93. This fact is not disputed that the GST has become applicable w.e.f. 01.07.2017. As per the first Flat Buyer's Agreement dated 14.02.2011, the deemed date of possession comes to 13.08.2014 and as per the second agreement dated 29.03.2013 the deemed date of possession comes to 28.09.2016. So, taking the deemed date of possession of both the agreements, GST has not become applicable by that date. No doubt, in Clauses 4.12 and 5.1.2 the respondent/allottees has agreed to pay all the Government rates, tax on land, municipal property taxes and other taxes levied or leviable now or in future by Government, municipal authority or any other government authority. But this liability shall be confined only up to the deemed date of possession. The delay in delivery of possession is the default on the part of the appellant/promoter and the possession was offered on 08.12.2017 by that time the GST had become applicable. But it is settled principle of law that a person cannot take the benefit of his own wrong/default. So, the appellant/promoter was not entitled to charge GST from the respondent/allottees as the liability of GST had not become due up to the deemed date of possession of both the agreements."

II. For projects where due date of possession was after 01.07.2017 (date of coming into force of GST).

40 For the projects where due date of possession was/is after 01.07.2017 i.e., date of coming into force of GST the builder is entitled for charging GST, but builder has to pass the benefit of input tax credit to the buyer. That in the event the respondent-promoter has not passed the benefit of ITC to the buyers of the unit which is in contravention to the provisions of section

171(1) of the HGST Act, 2017 and has thus committed an offence as per the provisions of section 171 (3A) of the above Act. The allottees shall be at liberty to approach the State Screening Committee Haryana for initiating proceedings under section 171 of the HGST Act against the respondent-promoter. The concerned SGST Commissioner is advised to take necessary action to ensure that the benefit of ITC is passed on to the allottees in future.

III. The final tax liability is to be re-fixed after considering the benefit u/s 171 of the SGST/CGST Act. However, the respondent-promoter shall not recover the amount charged towards GST from the allottees till the final calculation by the profiteering committee is provided and shall be payable only till the deemed due date of possession subject to the decision and calculation of the profiteering committee.

32. 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 26.08.2013, the possession of the subject apartment was to be delivered within stipulated time i.e., by 26.02.2017. 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 26.02.2017. 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 allottees shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 26.02.2017 till the handing over of the possession after obtaining occupation certificate, 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

33. 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., 26.02.2017 till the date of handing over possession after obtaining occupation certificate 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 26.02.2017 till the date of order by the authority shall be paid by the promoter to the allottees 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 allottees 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 allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoters which is the same rate of interest which the promoter shall be liable to pay the allottees, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

v. The respondent shall not charge anything from the complainants which is not the part of the agreement.

34. Complaint stands disposed of.

35. File be consigned to registry.

(Samir Kumar)
Member

(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 19.08.2021