BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	:	**232 of 2020**
Date of filing complaint:		**17.01.2020**
First date of hearing	:	**25.03.2020**
Date of decision	:	**28.09.2021**

1.	Ms. Mamta Yadav **R/O: -** House No.-720, Sector 47, Gurugram, Haryana-122018	**Complainant**
	Versus	
1.	M/s Shree Vardhman Buildprop Pvt. Ltd. Regd. Office at: - 301, 3rd Floor, Inder Prakash Building, 21-Barakhamba Road, New Delhi-110001	**Respondent**

CORAM:	
Shri Samir Kumar	**Member**
Shri Vijay Kumar Goyal	**Member**
APPEARANCE:	
Sh. Sushil Yadav (Advocate)	Complainant
Sh. Shalabh Singhal, Sh. Yogender S. Bhaskar, Sh. Varun Chugh and Sh. Rakshit (Advocates)	Respondent

ORDER

1. The present complaint has been filed by the complainant/allottee 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 complainant, 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	"Shree Vardhman Mantra", Sector-67, Gurugram.
2.	Project area	11.262 acres
3.	Nature of the project	Group housing colony under the policy of low cost/affordable housing
4.	a) DTCP license no.	69 of 2010 dated 11.09.2010
	b) Validity status	Valid till 30.04.2022
	c) Name of the licensee	DSS Infrastructure Pvt. Ltd.
5.	a) RERA registered/not registered	**Not Registered**
6.	Unit no.	1304, 13th floor, tower- F [annexure- A on page no. 16 of the reply]
7.	Unit measuring	520 sq. ft. [annexure- A on page no. 16

		of the reply]
8.	Date of execution of flat buyer's agreement	08.11.2011 [annexure- A on page no. 13 of the reply]
9.	Payment plan	Time linked payment plan [annexure- A on page no. 33 of the reply]
10.	Total consideration	Rs. 19,80,175/- [annexure- F on page no. 44 of reply]
11.	Total amount paid by the complainant	Rs. 15,61,612/- [annexure- F on page no. 46 of reply]
12.	Possession clause	**9.(a)** The construction of the flat is likely to be completed **within a period of thirty six(36) months from the date of start of foundation of the particular tower in which the flat is located with a grace period of six(6) months,** on receipt of sanction of the building plans/revised building plans and approvals of all concerned authorities including the fire service department, civil aviation department, traffic department, pollution control department as may be required for commencing and carrying of the construction subject to force majeure restrains or restrictions from any courts/ authorities, non-availability of building materials or dispute with contractors/workforce etc.

		and circumstances beyond the control of company and subject to timely payments by the flat buyer(s). **(emphasis supplied)**
13.	Date of start of foundation	Cannot be ascertained
14.	Due date of delivery of possession	08.11.2014 (Calculated from the date of execution of agreement and the grace period is not allowed)
15.	Zero period	**2 years, 10 months, 29 days** i.e., from 01.11.2017 to 30.09.2020 (vide order of DTCP, Haryana Chandigarh dated 03.03.2021)
16.	Occupation Certificate	23.07.2021 [annexure-F in the compilation of documents filed by the respondent on 28.09.2021]
17.	Offer of Possession	Not offered
18.	Delay in handing over the possession (after deducting zero period) till the date of decision i.e., 28.09.2021	**3 years, 11 months, 20 days** **[2 years, 11 months, 14 days** (from 17.11.2014 to 31.10.2017) plus **11 months, 28 days** (from 01.10.2020 to 28.09.2021)**]** **Note:** Separate calculation of period of delay is done due to the declaration of 'zero period' w.e.f 01.11.2017 to 30.09.2020 as per the order dated 03.03.2021 of DTCP, Haryana Chandigarh.

19.	Grace period utilization	Grace period is not allowed in the present complaint.

B. Facts of the complaint

3. That the respondent gave advertisement in various leading newspapers about their forthcoming project named "Shree Vardhman Mantra" sector 67, Gurugram promising various advantages, like world class amenities and timely completion/execution of the project etc. Relying on the promise and undertakings given by the respondent in the advertisements the complainant, booked an apartment/flat admeasuring 520 sq. ft. i.e., 48 sq. mtrs. in aforesaid project of the respondent and same was purchased by the complainant for total sale consideration is Rs 16,00,000/- which includes BSP, car parking, IFMS, club membership, PLC etc.

4. That the complainant made payment of Rs. 15,61,612/- including all taxes to the respondent vide different cheques & RTGS on different dates.

5. That as per flat buyers' agreement the respondent had allotted a unit/flat bearing no. F-1304 on 13th floor in tower-F having super area of 520 sq. ft. to the complainant. That as per clause 9(a) of the FBA, the respondent had agreed to deliver the possession of the flat within 36 months from the date of start of construction dated with an extended period of six months.

6. That the complainant regularly visited the site but was

surprised to see that construction work is not in progress and no one was present at the site to address the queries of the complainant. It appears that respondent has played fraud upon the complainant. The only intention of the respondent was to take payments for the tower without completing the work. The respondent mala-fide and dishonest motives and intention cheated and defrauded the complainant. That despite receiving of 95% payment of all the demands raised by the respondent for the said unit and despite repeated requests and reminders over phone calls and personal visits of the complainant, the respondent has failed to deliver the possession of the allotted unit to the complainant within stipulated period.

7. That it could be seen that the construction of the block in which the complainant flat was booked with a promise by the respondent to deliver the flat by 08.05.2015 but was not completed within time for the reasons best known to the respondent, which clearly shows that ulterior motive of the respondent was to extract money from the innocent people fraudulently.

8. That due to this omission on the part of the respondent the complainant has been suffering from disruption on his living arrangement, mental torture, agony and continues to incur severe financial losses. This could be avoided if the respondent had given possession of the said unit on time. That as per clause 9(c) of the flat buyer's agreement dated

08.11.2011 it was agreed by the respondent that in case of any delay, the respondent shall pay to the complainant a compensation @ Rs.5/- per sq. ft. per month of the super area of the apartment/flat. It is, however, pertinent to mention here that a clause of compensation at a such of nominal rate of Rs.5/- per sq. ft per month for the period of delay is unjust and the respondent has exploited the complainant by not providing the possession of the flat even after a delay from the agreed possession plan. The respondent cannot escape the liability merely by mentioning a compensation clause in the agreement. It could be seen here that the respondent has incorporated the clause in one sided buyers' agreement and offered to pay a sum of Rs.5/- per sq. ft. for every month of delay. If calculated, the amount in terms of financial charges it comes to approximately @ 2% per annum rate of interest whereas the respondent charges 24% per annum interest on delayed payment.

9. That on the ground of parity and equity the respondent also be subjected to pay the same rate of interest hence the respondent is liable to pay interest on the amount paid by the complainant @24%per annum to be compounded from the promise date of possession till the said unit is delivered to the complainant. That the complainant has requested the respondent several times on making telephonic calls and also personally visiting the office of the respondent to deliver possession of the said unit in question along with interest @

24% per annum on the amount deposited by the complainant, but respondent has flatly refused to do so. Thus, the respondent in a pre-planned manner defrauded the complainants with his hard-earned huge amount and wrongfully gain himself and caused wrongful loss to the complainant.

C. Relief sought by the complainant.

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

    (i) Direct the respondent to handover the possession of the flat along with prescribed interest per annum from the promised date of delivery till actual possession of the flat is delivered to the complainant.

D. Reply by the respondent.

11. That the present complaint filed under section 31 of the Real Estate (Regulation and Development) Act, 2016 is not maintainable under the said provision. The respondent has not violated any of the provisions of the Act.

12. That the complaint has not been filed as per the format prescribed under The Haryana Real Estate (Regulation and Development) Rules, 2017 and is liable to be dismissed on this ground alone.

13. That as per rule 28(1) (a) of the Rules of 2017, a complaint under section 31 of Act can be filed for any alleged violation

or contravention of the provisions of the Act after such violation and/or contravention has been established after an enquiry made by the authority under section 35 of the Act. In the present case no violation and/or contravention has been established by the authority under section 35 of the Act and as such the complaint is liable to be dismissed.

14. That the complainant has sought reliefs under section 18 of the Act but the said section is not applicable in the facts of the present case and as such the complaint deserves to be dismissed. It is submitted that the operation of section 18 is not retrospective in nature and the same cannot be applied to the transactions that were entered prior to the Act came into force. The parties while entering into the said transactions could not have possibly taken into account the provisions of the Act and as such cannot be burdened with the obligations created therein. In the present case also, the flat buyer agreement was executed much prior to the date when the Act came into force and as such section 18 of the Act cannot be made applicable to the present case. Any other interpretation of the Act will not only be against the settled principles of law as to retrospective operation of laws but will also lead to an anomalous situation and would render

the very purpose of the Act nugatory. The complaint as such cannot be adjudicated under the provisions of the Act.

15. That the expression "agreement to sell" occurring in section 18(1)(a) of the Act covers within its folds only those agreements to sell that have been executed after the Act came into force and the FBA executed in the present case is not covered under the said expression, the same having been executed prior to the date the Act came into force.

16. That the FBA executed in the present case did not provide any definite date or time frame for handing over of possession of the apartment to the complainant and on this ground alone the refund and/or compensation and/or interest cannot be sought under the Act. Even the clause 9 (a) of the FBA merely provided a tentative/estimated period for completion of construction of the flat and filing of application for occupancy certificate with the concerned authority. After completion of construction, the respondent was to make an application for grant of occupation certificate (OC) and after obtaining the OC, the possession of the flat was to be handed over.

17. That the reliefs sought by the complainant are in direct conflict with the terms and conditions of the FBA and on this ground alone the complaint deserve to be dismissed. The

complainant cannot be allowed to seek any relief which is in conflict with the said terms and conditions of the FBA. The complainant signed the agreement only after having read and understood the terms and conditions mentioned therein and without any duress, pressure or protest and as such the terms thereof are fully binding upon the complainant. The said agreement was executed much prior to the Act coming in to force and the same has not been declared and cannot possibly be declared as void or not binding between the parties.

18. That it is submitted that delivery of possession by a specified date was not essence of the FBA and the complainant was aware that the delay in completion of construction beyond the tentative time given in the contract was possible. Even the FBA contain provisions for grant of compensation in the event of delay. As such it is submitted without prejudice that the alleged delay on part of respondent in delivery of possession, even if assumed to have occurred, cannot entitle the complainant to ignore the agreed contractual terms and to seek interest and/or compensation on any other basis.

19. That it is submitted without prejudice that the alleged delay in delivery of possession, even if assumed to have occurred, cannot entitle the complaint to rescind the FBA under the

contractual terms or in law. The delivery of possession by a specified date was not essence of the FBA and the complainant was aware that the delay in completion of construction beyond the tentative time given in the contract was possible. Even the FBA contain provisions for grant of compensation in the event of delay. As such the time given in clause 9(a) of FBA was not essence of the contract and the breach thereof cannot entitle the complainant to seek rescind the contract.

20. That it is submitted that issue of grant of interest/compensation for the loss occasioned due to breaches committed by one party of the contract is squarely governed by the provisions of section 73 and 74 of the Indian Contract Act, 1872 and no compensation can be granted de-hors the said sections on any ground whatsoever. A combined reading of the said sections makes it amply clear that if the compensation is provided in the contract itself, then the party complaining the breach is entitled to recover from the defaulting party only a reasonable compensation not exceeding the compensation prescribed in the contract and that too upon proving the actual loss and injury due to such breach/default. On this ground the compensation, if at

all to be granted to the complainant, cannot exceed the compensation provided in the contract itself.

21. That the residential group housing project in question has been developed by the respondent on a piece of land measuring 11.262 acres situated at village Badshahpur, sector-67, Gurugram, Haryana under a license no. 69 of 2010 dated 11.09.2010 granted by the Town and Country Planning Department, Haryana under the provisions of the Haryana Development and Regularization of Urban Areas Act, 1975 under the policy of Govt. of Haryana for low cost/affordable housing project. The license has been granted to M/s DSS Infrastructure Limited and the respondent company has developed/constructed the project under an agreement with the licensee company.

22. That the construction of the phase of the project wherein the apartment of the complainant is situated has already been completed and awaiting the grant of occupancy certificate from the Director General, Town and Country Planning (DTCP), Haryana. The occupancy certificate has already been applied by the licensee vide application dated 27.07.2017 to the Director General, Town and Country Planning, Haryana for grant of occupancy certificate. However, till date no occupancy certificate has been granted by the concerned

authority despite follow up. The grant of such occupancy certificate is a condition precedent for occupation of the flats and habitation of the project.

23. That in fact the office of the Director General, Town and Country Planning Haryana is unnecessarily withholding grant of occupation certificate and other requisite approvals for the project, despite having approved and obtained concurrence of the Government of Haryana. It is submitted that in terms of order dated 01.11.2017 passed by the Hon'ble Supreme Court of India in Civil Appeal no.8977/2014 titled as ***Jai Narayan @ Jai Bhagwan & Ors. vs. State of Haryana & Ors.***, the CBI is conducting an inquiry in release of land from acquisition in sector 58 to 63 and sector 65 to 67 in Gurugram, Haryana. Due to pendency of the said inquiry, the office of the Director General, Town and Country Planning, Haryana has withheld, albeit illegally, grant of approvals and sanctions in the projects falling within the said sectors.

24. That aggrieved by the situation created by the illegal and unreasonable stand of the Director General, Town and Country Planning, Haryana, a CWP No. 22750 of 2019 titled as ***DSS Infrastructure Private Limited vs. Government of Haryana and others*** had been filed by the licensee before

the Hon'ble High Court of Punjab and Haryana for reliefs of direction to the office of DTCP to grant requisite approvals to the project in question. The said CWP has been disposed off vide order dated 06.03.2020 and in view of the statements made by DTCP that they were ready to grant OC and other approvals. However, despite the same, the grant of approvals is still pending despite continuous efforts being made by the licensee/respondent.

25. That in the meantime, as the flats were ready, various allottees of the project in question approached the respondent with the request for handover of temporary possession of their respective flats to enable them to carry out the fit out/furnishing work in the their flats. Considering the difficulties being faced by the allottees due to non-grant of occupancy certificate by the department in question, the respondent acceded to their request and has handed over possession of their respective flats to them for the limited purpose of fit out. If the complainant so desire, he may also take possession of his apartment like other allottees as aforesaid.

26. That it is submitted that in the FBA no definite period for handing over possession of the apartment was given or agreed to. In the FBA only, a tentative period for completion

of the construction of the flat in question and for submission of application for grant of occupancy certificate was given. Thus, the period indicated in clause 9(a) of FBA was the period within which the respondent was to complete the construction and was to apply for the grant of occupancy certificate to the concerned authority. It is clearly recorded in the said clause itself that the date of submitting an application for grant of occupancy certificate shall be treated as the date of completion of flat for the purpose of the said clause. Since, the possession could be handed over to the complainant after grant of OC by DTCP Haryana and the time likely to be taken by DTCP in grant of OC was unknown to the parties, hence the period/date for handing over possession of the apartment was not agreed and not given in the FBA. The respondent completed the construction of the flat in question and applied for grant of occupancy certificate on 27.07.2017 and as such the said date is to be taken as the date for completion of construction of the flat in question. It is submitted without prejudice; that in view of the said fact the respondent cannot otherwise be held liable to pay any interest or compensation to the complainant for the period beyond 27.07.2017.

27. That as per the FBA, the tentative period given for completion of construction was to be counted from the date of receipt of sanction of the building plans/revised plans and all other approvals and commencement of construction on receipt of such approvals. The last approval being Consent to Establish was granted by the Haryana State Pollution Control Board on 15.05.2015 and as such the period mentioned in clause 9(a) shall start counting from 16.05.2015 only.

28. That it is submitted, without prejudice to the fact that the respondent completed the construction of the flat within the time indicated in the FBA, that even as per clause 9(a), the obligation of the respondent to complete the construction within the time tentative time frame mentioned in said clause was subject to timely payments of all the instalments by the complainant and other allottees of the project. As various allottees and even the complainant failed to make payments of the instalments as per the agreed payment plan, the complainant cannot be allowed to seek compensation or interest on the ground that the respondent failed to complete the construction within time given in the said clause. The obligation of the respondent to complete the construction within the time frame mentioned in FBA was subject to and dependent upon time payment of the instalments by the

complainant and other allottees. As such no allottee who has defaulted in making payment of the instalments can seek refund, interest or compensation under section 18 of the Act or under any other law.

29. That without prejudice to the submissions made hereinabove, that the tentative period as indicated in FBA for completion of construction was not only subject to force majeure conditions, but also other conditions beyond the control of respondent. The non-grant of OC and other approvals including renewal of license by the DTCP Haryana is beyond the control of the respondent. The DTCP Haryana accorded it's in principal approval and obtained the concurrence from the Government of Haryana on 02.02.2018 yet it did not grant the pending approvals including the renewal of license and OC due to pendency of a CBI investigation ordered by Hon'ble Supreme Court of India. The said approvals have not been granted so far despite the fact that the state counsel assured to the Hon'ble High Court of Punjab and Haryana to grant approvals/OC as aforesaid. The unprecedented situation created by the Covid-19 pandemic presented yet another force majeure event that brought to halt all activities related to the project including construction of remaining phase, processing of approval files

etc. The Ministry of Home Affairs, GOI *vide* notification dated March 24, 2020 bearing no. 40-3/2020-DM-I(A) recognised that India was threatened with the spread of Covid-19 epidemic and ordered a complete lockdown in the entire country for an initial period of 21 (twenty) days which started from March 25, 2020. By virtue of various subsequent notifications, the Ministry of Home Affairs, GOI further extended the lockdown from time to time and till dtae the lockdown has not been completely lifted. Various state governments, including the Government of Haryana have also enforced several strict measures to prevent the spread of Covid-19 pandemic including imposing curfew, lockdown, stopping all commercial, construction activity. Pursuant to issuance of advisory by the GOI *vide* office memorandum dated May 13, 2020, regarding extension of registrations of real estate projects under the provisions of the Real Estate (Regulation and Development) Act, 2016 due to '*force majeure*', this authority has also extended the registration and completion date by six months for all real estate projects whose registration or completion date expired and, or, was supposed to expire on or after March 25, 2020. In past few years construction activities have also been hit by repeated bans by the courts/authorities to curb air pollution in NCR

region. In recent past the Environmental Pollution (Prevention and Control) Authority for NCR ("**EPCA**") vide its notification bearing no. EPCA-R/2019/L-49 dated 25.10.2019 banned construction activity in NCR during night hours (6pm to 6am) from 26.10.2019 to 30.10.2019 which was later on converted into complete 24 hours ban from 01.11.2019 to 05.11.2019 by EPCA vide its notification no. EPCA-R/2019/L-53 dated 01.11.2019. The Hon'ble Supreme Court of India vide its order dated 04.11.2019 passed in Writ petition no. 13029/1985 titled as ***"M.C. Mehta....vs.....Union of India"*** completely banned all construction activities in NCR which restriction was partly modified vide order dated 09.12.2019 and was completely lifted by the Hon'ble Supreme Court vide its order dated 14.02.2020. These bans forced the migrant labourers to return to their native states/villages creating an acute shortage of labourers in NCR region. Due to the said shortage the construction activity could not resume at full throttle even after lifting of ban by the Hon'ble Supreme Court. Even before the normalcy in construction activity could resume, the world was hit by the 'Covid-19' pandemic. As such, it is submitted without prejudice to the submissions made hereinabove that in the event this authority comes to the conclusion that the

respondent is liable for interest/compensation for the period beyond 27.07.2017, the period consumed in the aforesaid force majeure events or the situations beyond control of respondent has to be excluded.

30. Copies of all the relevant do 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

31. The respondent has raised an objection regarding jurisdiction of authority to entertain the present complaint. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

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

E. II Subject-matter jurisdiction

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

> ***Section 11(4)(a)***
>
> *Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;*
>
> *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 complainant at a later stage.

F. Findings on the objections raised by the respondent.

F. I Objection regarding maintainability of the complaint.

32. The respondent contended that the present complaint filed under section 31 of the Act is not maintainable as the respondent has not violated any provision of the Act.

33. The authority, in the succeeding paras of the order, has observed that the respondent is in contravention of the section 11(4)(a) read with proviso to section 18(1) of the Act by not handing over possession by the due date as per the agreement. Therefore, the complaint is maintainable.

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

34. Another contention of the respondent is that in the present case the flat buyer's agreement was executed much prior to the date when the Act came into force and as such section 18 of the Act cannot be made applicable to the present case.

35. 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."*

36. 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 <u>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</u>. 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."*

37. 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.III Objection regarding format of the compliant

38. The respondent has further raised contention that the present complaint has not been filed as per the format prescribed under the rules and is liable to be dismissed on this ground alone. 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 complainant 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 is 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 complainant 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.

F.IV Objection of the respondent w.r.t reasons for the delay in handing over of possession.

39. The respondent submitted that the period consumed in the force majeure events or the situations beyond control of the respondent has to be excluded while computing delay in handing over possession.

a. The respondent submitted that non-grant of OC and other approvals including renewal of license

by the DTCP Haryana is beyond the control of the respondent and the said approvals have not been granted so far despite the fact that the State Counsel assured to the hon'ble High Court of Punjab and Haryana to grant approvals/OC.

40. As far as the aforesaid reason is concerned, the authority observed that the Hon'ble High Court of Punjab and Haryana vide its order dated 06.03.2020 in CWP-22750-2019 (O&M) has held as under:

> *"Learned State counsel, at the outset, submits that it has been decided to grant occupation certificate to the petitioner subject to fulfillment of other conditions/ formalities and rectification of any deficiency which are pointed out by the authority. He further submits that in case the petitioner makes a representation regarding exclusion of renewal fee and interest on EDC/IDC for the period from 25.07.2017 till date, same shall be considered by respondent no.2 as per law and fresh order shall be passed. Learned State counsel further assures that as soon as the representation is received, necessary steps shall be taken and the entire exercise shall be completed at the earliest, in any case, not later than two months.*
>
> *In view of the above, no further direction is necessary. Present petition is hereby disposed of."*

41. In view of aforesaid order of Hon'ble High Court of Punjab and Haryana, an office order of the DTCP, Haryana, Chandigarh dated 03.03.2021 has been issued. The para 4 of the said order states that "Government has accorded approval to consider the period i.e., 01.11.2017 to 30.09.2020 as 'Zero Period' where the approvals were withheld by the department within the said period in view of

the legal opinion and also gave relaxations as mentioned in para 3". Accordingly, the authority is of the considered view that this period should be excluded while calculating the delay on the part of the respondent to deliver the subject flat.

b. Unprecedented situation created by Covid-19 pandemic and lockdown for approx. 6 months starting from 25.03.2020.

42. The Hon'ble Delhi High Court in case titled as M/s Halliburton Offshore Services Inc. V/S Vedanta Ltd. & Anr. bearing no. O.M.P (I) (Comm.) no. 88/ 2020 and I.As 3696-3697/2020 dated 29.05.2020 has observed that-

> *"69. The past non-performance of the Contractor cannot be condoned due to the COVID-19 lockdown in March 2020 in India. The Contractor was in breach since September 2019. Opportunities were given to the Contractor to cure the same repeatedly. Despite the same, the Contractor could not complete the Project. The outbreak of a pandemic cannot be used as an excuse for non- performance of a contract for which the deadlines were much before the outbreak itself."*

43. In the present complaint also, the respondent was liable to complete the construction of the project in question and handover the possession of the said unit by 08.11.2014 and the respondent is claiming benefit of lockdown which came into effect on 23.03.2020. Therefore, the authority is of the

view that outbreak of a pandemic cannot be used as an excuse for non- performance of a contract for which the deadlines were much before the outbreak itself and for the said reason the said time period is not excluded while calculating the delay in handing over possession.

c. Order dated 25.10.2019, 01.11.2019 passed by Environmental Pollution (Prevention and Control) Authority (EPCA) banning construction activities in NCR region. Thereafter, order dated 04.11.2019 of hon'ble Supreme Court of India in Writ petition no. 13028/1985 completely banning construction activities in NCR region.

44. The respondent in the reply has admitted that the construction of the phase of the project wherein the apartment of the complainant is situated has already been completed and the respondent has applied for grant of the occupancy certificate vide application dated 27.07.2017 to DTCP, Haryana. The respondent is trying to mislead the authority by making false or self-contradictory statement. On bare perusal of the reply filed by respondent, it becomes very clear that the construction of the said project was completed on 27.07.2017 as on this date the respondent has applied for grant of OC. Now, the respondent is claiming benefit out of lockdown period, orders dated 25.10.2019 and 01.11.2019 passed by EPCA and order dated 04.11.2019 passed by hon'ble Supreme Court of India which are subsequent to the date when the respondent has already completed the

construction. Therefore, this time period is not excluded while calculating the delay in handing over possession.

G. Findings on the relief sought by the complainant.

G.I Delay possession charges.

Relief sought by the complainant: Direct the respondent to handover the possession of the flat along with prescribed interest per annum from the promised date of delivery till actual possession of the flat is delivered to the complainant.

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

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

46. Clause 9(a) of the flat buyer's agreement provides for handing over possession and the same is reproduced below:

> *9.(a) The Construction of the Flat is likely to be completed within a period of thirty six(36) months from the date of start of foundation of the particular tower in which the Flat is located with a grace period of six(6) months, on receipt of sanction of the building plans/revised building plans and approvals of all concerned authorities including the fire service department, civil aviation department, traffic*

department, pollution control department as may be required for commencing and carrying of the construction subject to force majeure restrains or restrictions from any courts/ authorities, non-availability of building materials or dispute with contractors/workforce etc. and circumstances beyond the control of company and subject to timely payments by the flat buyer(s). No claims by way of damages/compensation shall lie against the Company in case of delay in handing over the possession on account of any of such reasons and the period of construction shall be deemed to be correspondingly extended. The date of submitting application to the concerned authorities for the issue of completion/part completion/occupancy/part occupancy certificate of the Complex shall be treated as the date of completion of the flat for the purpose of this clause/agreement.

47. A flat buyer's agreement is a pivotal legal document which should ensure that the rights and liabilities of both builders/promoters and buyers/allottees are protected candidly. Flat buyer's agreement lays down the terms that govern the sale of different kinds of properties like residentials, commercials etc. between the buyer and builder. It is in the interest of both the parties to have a well-drafted agreement which would thereby protect the rights of both the builder and buyer in the unfortunate event of a dispute that may arise. It should be drafted in the simple and unambiguous language which may be understood by a common man with an ordinary educational background. It should contain a provision with regard to stipulated time of delivery of possession of the apartment, plot or building, as

the case may be and the right of the buyers/allottees in case of delay in possession of the unit.

48. The authority has gone through the possession clause of the agreement and observed that the possession has been subjected to all kinds of terms and conditions of this agreement. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single situation may make the possession clause irrelevant for the purpose of allottee and the committed date for handing over possession loses its meaning. If the said possession clause is read in entirety, the time period of handing over possession is only a tentative period for completion of the construction of the flat in question and the promoter is aiming to extend this time period indefinitely on one eventuality or the other. Moreover, the said clause is an inclusive clause wherein the numerous approvals and terms and conditions have been mentioned for commencement of construction and the said approvals are sole liability of the promoter for which allottees cannot be allowed to suffer. The promoter must have mentioned that completion of which approval forms a part of the last statutory approval, of which the due date of possession is

subjected to. It is quite clear that the possession clause is drafted in such a manner that it creates confusion in the mind of a person of normal prudence who reads it. The authority is of the view that it is a wrong trend followed by the promoter from long ago and it is this unethical behaviour and dominant position that needs to be struck down. It is settled proposition of law that one cannot get the advantage of his own fault. The incorporation of such clause in the flat buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottees of their right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

49. The respondent promoter has proposed to handover the possession of the subject apartment within a period of 36 months from the date of start of foundation of the particular tower in which the flat is located with a grace period of 6 months, on receipt of sanction of the building plans/revised plans and approvals of all concerned authorities including the fire service department, civil aviation department, traffic department, pollution control department as may be

required for commencing and carrying of the construction subject to force majeure restrains or restrictions from any courts/ authorities, non-availability of building materials or dispute with contractors/workforce etc. and circumstances beyond the control of company and subject to timely payments by the flat buyer(s).

50. The respondent is claiming that the due date shall be computed from 15.05.2015 i.e., date of grant of Consent to Establish being last approval for commencement of construction. The authority observed that in the present case, the respondent has not kept the reasonable balance between his own rights and the rights of the complainants-allottees. The respondent has acted in a pre-determined, preordained, highly discriminatory and arbitrary manner. The unit in question was booked by the complainant on 25.02.2011 and the flat buyer's agreement was executed between the respondent and the complainant on 08.11.2011. It is interesting to note as to how the respondent had collected hard earned money from the complainant without obtaining the necessary approval (Consent to Establish) required for commencing the construction. The respondent has obtained Consent to Establish from the concerned authority on 15.05.2015. The respondent is in win-win

situation as on one hand, the respondent had not obtained necessary approvals for starting construction and the scheduled time of delivery of possession as per the possession clause which is completely dependent upon the start of foundation and on the other hand, a major part of the total consideration is collected prior to the start of the foundation. Further, the said possession clause can be said to be invariably one sided, unreasonable, and arbitrary. Moreover, the authority vide order dated 03.09.2021 has directed the respondent/ promoter to submit the date of start of foundation tower-wise on an affidavit. The respondent promoter filed an affidavit on 23.09.2021 in compliance of the said order but failed to provide the date of start of foundation of particular tower in which the subject flat is located. This shows the mischievous and the irresponsible behaviour of the respondent promoter. The respondent promoter has failed to comply with the orders of this authority. Therefore, the authority is of the considered view that as 'date of start of foundation of the subject tower in which the flat is located' cannot be ascertained in the present matter so, the due date shall be computed from date of execution of the flat buyer's agreement.

51. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the said flat within 36 months from the date of start of foundation of the particular tower in which the flat is located and has sought further extension of a period of 6 months, on receipt of sanction of the building plans/revised plans and approvals of all concerned authorities including the fire service department, civil aviation department, traffic department, pollution control department as may be required for commencing and carrying of the construction subject to force majeure restrains or restrictions from any courts/ authorities, non-availability of building materials or dispute with contractors/workforce etc. and circumstances beyond the control of company and subject to timely payments by the flat buyer(s). It may be stated that asking for the extension of time in completing the construction is not a statutory right nor has it been provided in the rules. This is a concept which has been evolved by the promoters themselves and now it has become a very common practice to enter such a clause in the agreement executed between the promoter and the allottees. Now, turning to the facts of the present case, the respondent promoter has not completed the construction of the subject project in the promised time. The OC has been

obtained from the competent authority on 23.07.2021 i.e., after a delay of more than 6 years. It is a well settled law that one cannot take benefit of his own wrong. In the light of the above-mentioned reasons, the grace period of 6 months is not allowed in the present case.

52. **Admissibility of delay possession charges at prescribed rate of interest**: The complainant is 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.*

53. 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.

54. 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., 28.09.2021 is 7.30% p.a. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e.,9.30% p.a.

55. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottees by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottees, 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;"*

56. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e.,

9.30% p.a. by the respondent/promoter which is the same as is being granted to the complainant in case of delay possession charges.

57. On consideration of the circumstances, the evidence and other record and submissions made by the parties, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. It is pertinent to mention over here that the respondent promoter has filed a list of additional documents on 10.07.2021, wherein an office order of the DTCP, Haryana, Chandigarh has been annexed. The para 4 of the said order has mentioned that "Government has accorded approval to consider the period i.e., 01.11.2017 to 30.09.2020 as 'Zero Period' where the approvals were withheld by the department within the said period in view of the legal opinion and also gave relaxations as mentioned in para 3". Accordingly, the authority is of the considered view that this period should be excluded while calculating the delay on the part of the respondent to deliver the subject flat. It is a matter of fact that the date of start of foundation of the subject tower, where the flat in question is situated cannot be ascertained in this matter as the same is not provided by the

respondent promoter even after the orders of this authority on 03.09.2021. Hence, the due date of possession is calculated from the date of execution of the flat buyer's agreement. By virtue of flat buyer's agreement executed between the parties on 08.11.2011, the possession of the booked unit was to be delivered within 36 months from the date of start of foundation of the particular tower in which the subject flat is located, which is not provided by the respondent promoter even after the orders of this authority on 03.09.2021. Hence, the due date of possession is calculated from the date of date of execution of the flat buyer's agreement which comes out to be 08.11.2014 and a grace period of 6 months which is not allowed in the present case for the reasons quoted above.

58. 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. These 2 months' of reasonable time is being given to the complainant 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., 08.11.2014 till the date of handing over of the possession of the unit or upto two months from the valid offer of possession if possession is not taken by the complainant, whichever is earlier (excluding 'Zero period' w.e.f. 01.11.2017 till 30.09.2020) as per the provisions of section 19(10) of the Act.

59. Accordingly, 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 complainant is entitled to delayed possession charges at the prescribed rate of interest i.e., 9.30% p.a. for every month of delay on the amount paid by the complainant to the respondent from the due date of possession i.e., 08.11.2014 till the date of handing over of the possession of the unit or upto two months from the valid offer of possession if possession is not taken by the complainant, whichever is earlier (excluding 'Zero period' w.e.f. 01.11.2017 till 30.09.2020) as per the provisions of section 18(1) of the Act read with rule 15 of the rules and section 19 (10) of the Act.

H. Directions of the authority

60. 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., 08.11.2014 till the date of handing over of the possession of the unit or upto two months from the valid offer of possession if possession is not taken by the complainant, whichever is earlier (excluding 'Zero period' w.e.f. 01.11.2017 till 30.09.2020) as per section 19 (10) of the Act.

II. The arrears of such interest accrued from 08.11.2014 till date of this order 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 payable by the promoter to the allottee before 10th day of each subsequent month as per rule 16(2) of the rules.

III. The respondent is directed to handover the physical possession of the subject unit after obtaining OC from the competent authority.

IV. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.

V. 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.

VI. The respondent shall not charge anything from the complainant which is not the part of the agreement.

61. Complaint stands disposed of.

62. File be consigned to registry.

(Samir Kumar)
Member

(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 28.09.2021

Judgement uploaded on 22.12.2021.