

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

Complaint no. : 2853 of 2021
 Date of filing complaint: 03.08.2021
 First date of hearing : 02.09.2021
 Date of decision : 26.10.2021

1. Nitin khanna 2. Sakshi khanna Both R/O: - House no. 762, sector 14, Gurugram-122001	Complainants
Versus	
1. M/s Capital Skyscraper Private Limited Regd. Office at: - C-96, Panchsheel Enclave, New Delhi -10017	Respondent

CORAM:	
Dr. K.K. Khandelwal	Chairman
Shri Samir Kumar	Member
Shri Vijay Kumar Goyal	Member
APPEARANCE:	
Sh. Saurabh Sharma (Advocate)	Complainant
Sh. Ishaan Dang (Advocate)	Respondent

ORDER

- The present complaint 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 allottees 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	"The Cityscape", Sector-66, Village Maidawas, Gurugram.
2.	Project area	2.0229 acres
3.	Nature of the project	Commercial Complex
4.	DTCP license no.	43 of 2010 dated 08.06.2010
	License valid up to	07.06.2022
	Name of the licensee	French Buildmart Private Limited
5.	RERA registered/not registered	Registered
	HAERA registration no.	02 of 2018 dated 01.01.2018
	Registration valid up to	31.12.2018
6.	Building plan approved on	06.11.2018
7.	Unit no.	61, ground floor, Phase-I [annexure- C on page no. 46 of the complaint]
8.	Size of unit	541 sq. ft. [annexure- C on page no. 46 of the complaint]
9.	Allotment letter	15.06.2013

		[Page no. 29 of complaint]
10.	Date of execution of buyer's agreement	06.05.2014 [annexure C on page no. 40 of the complaint]
11.	Date of commencement of construction of the project	16.12.2013 [vide annexure R5 at page no. 83 of the reply wherein the respondent had intimated the complainants with regard to the date of casting of the raft of the entire project as was promised by him in clause 7 (a) of the buyer's agreement]
12.	Due date of delivery of possession as per clause 7(a) & (b) i.e., within a period of 36 months from the date of commencement of construction of the project hereof, i.e. the date on which raft of the entire project must be casted	16.06.2017 [calculated from the date of the commencement of construction i.e. the date on which raft of the entire project is casted i.e., 16.12.2013] Note: Grace period of 180 days is allowed.
13.	Total consideration	Rs.53,15,326/- [as per applicant ledger dated 15.09.2021 at page 85 of reply]
14.	Total amount paid by the complainants	Rs. 39,41,104/- [as per applicant ledger dated 15.09.2021 at page 86 of reply]
15.	Occupation Certificate	Not received
16.	Offer of Possession	Not offered
17.	Delay in handing over the possession till the date of this order i.e., 26.10.2021	4 years 4 months 10 days

B. Facts of the complaint

3. That the complainants paid an amount of Rs. 4,59,850/- towards booking of a unit in the project "The Cityscape" at sector-66, village Maidawas, Gurugram vide booking application dated 18.12.2012. That after collecting a substantial amount of Rs. 9,50,960/- in lieu of the consideration of the unit, the respondent issued a provisional allotment letter dated 15.06.2013. That the complainants were allotted unit bearing no. 061 on the ground floor, having a super area of 541 sq. ft.
4. In 2014, i.e. after the expiry of almost 1 (one) year from the date of provisional allotment of the unit and after collecting an amount of Rs. 21,45,403/- against the unit, that the respondent executed buyer's agreement dated 06.05.2014 with the complainants. The total consideration of the unit was Rs. 53,15,325/-. It was submitted that the agreement was filled with one-sided and arbitrary terms and conditions. For instance, as per clause 3(a) of the agreement, for each delayed payment by the complainants, the respondent was entitled to charge interest at an enormous rate of 21% per annum, whereas, as per clause 9 of the agreement, in the event the respondent was unable to offer possession within the time promised, it was liable to compensate the complainants merely at the rate of Rs. 10/- per sq. ft. per month for the unit. However, the complainants could not negotiate or dispute any of them since any dispute or disagreement thereof would have led to cancellation of the unit and forfeiture of the earnest money i.e., 10% of the basic selling price as per clause 1.2(d)(i) of the agreement.

5. That as per clause 7(a) of the agreement, the possession of the unit was promised to be offered within 36 months of the date on which the raft of the entire project has been casted with additional 180 days as 'grace period'. Since excavation for the project began as on 12.08.2013, the possession of the unit was promised to be offered as on 12.02.2017.
6. The complainants complied with each payment demand as was raised by the respondent. The complainants sought regular updates from the respondent through meetings and telephonic conversations, with respect to the progress of construction work of the project and were assured that the same was progressing as per schedule and that possession of the unit would be offered within the time promised as per the agreement i.e., February 2017. By March 2016, the respondent had collected an amount of Rs. 39,41,104/- against the unit from the complainants. However, the respondent failed to offer possession of the unit to the complainants within the time promised i.e., by February 2017 or even within a reasonable period thereafter. The complainants relentlessly chased the respondent seeking a tentative date by when possession of the unit would be offered but the same was of no avail. It was submitted that the construction of the project has still not been completed by the respondent and the possession of the unit has not been offered to the complainants despite an inordinate delay of more than 4 years from the promised date of possession.
7. That despite the inordinate delay of more than 4 years from the promised date of possession as per the agreement, the

opposite party has failed to pay any amount of delay compensation to the complainants. That the respondent has further sent a final notice dated 20.03.2021, stating that the failure of making the payment of the balance amount by the complainants, would result in cancellation of the booking of the unit. That the respondent has offered compensation to the complainants @ Rs. 10/- per sq. ft. per month for the unit for the delay in delivery of the project as per clause 9 of the agreement, however the complainants would be liable to pay exorbitant interest @ 21 % per annum on any delay in making payment to the respondent.

8. That as per section 18 of the act the respondent was liable to pay interest to the complainants at a prescribed rate of interest which as per rule 15 of the rules is prescribed as the highest marginal cost of lending rate plus two percent. That the final notice dated 20.03.2021 sent by the respondent to the complainants.
9. That the respondent has failed to offer possession of the unit to the complainants within the time promised as per the agreement. It was further submitted that the respondent has also admitted the delay that has been caused in delivery of the project and the said delay continues since legal possession of the unit has not been offered to the complainants till date. It was furthermore submitted that none of the circumstances that have resulted in this inordinate delay, were and are, beyond the control of the respondent. The complainants feel cheated because it is apparent that the promises made by the respondent were

nothing but false and dishonest. The complainants have been facing irreparable loss and damage as they have already paid an amount of Rs. 39,41,104/- against the unit to the respondent by March, 2016 and even after the expiry of more than 4 years from the promised date of possession, the same has not been offered to the complainants till date.

C. Relief sought by the complainants.

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

- I. Direct the respondent to handover possession of the unit to the complainants, complete in all respects and in conformity with the buyer's agreement and for the consideration mentioned therein, with all additional facilities, warranties and as per the quality standards promised and to execute all necessary and required documents in respect of the unit in favour of the complainants.
- II. Direct the respondent to pay interest @ 9.30% per annum on the amount deposited by the complainants with the respondent with effect from the date of delivery of the unit promised in the buyer's agreement till the date the actual possession is handed over by the respondent along with all the necessary documents and common areas and facilities as promised at the time of booking being made by the complainants.
- III. Direct the respondent to pay a sum of Rs. 2,00,000/- to the complainants towards litigation costs.

D. Reply on behalf of respondent

11. That the present complaint was not maintainable in law or on facts. The present complaint was not maintainable before authority. The complainants have filed the present complaint seeking, inter alia, interest and compensation for alleged delay in delivering possession of the unit purchased by the complainants. It was respectfully submitted that complaints pertaining to compensation and interest are to be decided by the Adjudicating Officer under section 71 of the Act of 2016 read with the Haryana Real Estate (Regulation and Development) Rules, 2017 and not by this authority. The present complaint was liable to be dismissed on this ground alone. Moreover, it is respectfully submitted that the Adjudicating Officer derives his jurisdiction from the central act which cannot be negated by the rules made thereunder.
12. That the complainants have no locus standi or cause of action to file the present complaint. The present complaint was 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 06.05.2014, as shall be evident from the submissions made in the following paras of the present reply.
13. That the present complaint raises several such issues which cannot be decided in summary proceedings. The said issues require extensive evidence to be led by both the parties and

examination and cross-examination of witnesses for proper adjudication. Therefore, the disputes raised in the present complaint are beyond the purview of this authority and can only be adjudicated by the Adjudicating Officer/Civil Court. The present complaint deserves to be dismissed on this ground alone.

14. That the complainants are estopped by their own acts, conduct, acquiescence, laches, omissions etc. from filing the present complaint.
15. That the complaint was barred by limitation. The so-called cause of action as per the version of the complainants arose prior to the Act. The false and frivolous complaint is liable to be dismissed on this ground as well.
16. That the complainants were not "allottees" but investors who have booked the unit in question as a speculative investment in order to earn rental income/profit from its resale. The unit in question has been booked by the complainants as a speculative investment and not for the purpose of self-use.
17. That the complainants have not come before this authority with clean hands and have suppressed vital and material facts from this authority. The correct facts are set out in the succeeding paras of the present reply.
18. That the complainants had approached respondent sometime in the year 2012 for purchase of a unit in its

upcoming project "the cityscape" situated in sector 66, Gurugram. It is submitted that the complainants prior to approaching respondent, had conducted extensive and independent enquiries regarding the project and it was only after the complainants were fully satisfied with regard to all aspects of the project, including but not limited to the capacity of respondent to undertake development of the same, that the complainants took an independent and informed decision to purchase the unit, un-influenced in any manner by respondent.

19. That thereafter the complainants vide application form dated 18.12.2012 applied to respondent for provisional allotment of a unit in the project. The complainants, in pursuance of the aforesaid application, was allotted an independent unit bearing no. 061 admeasuring 541 square feet (super area) located on the ground floor in the said project vide provisional allotment letter dated 15.06.2013. The complainants had consciously and wilfully opted for a construction linked plan for remittance of the sale consideration for the said unit and further represented to respondent that they shall remit every Installment on time as per the payment schedule. The complainants further undertook to be bound by the terms and conditions of the application form.

20. That buyer's agreement dated 06.05.2014 was executed between the complainants and respondent. That the complainants had voluntarily executed the buyer's agreement with open eyes after carefully going through the terms and conditions mentioned therein.
21. That commencement of construction at the project site/casting of raft had taken place by 16.12.2013. Letter dated 16.12.2013 issued by respondent to the complainants.
22. That the "high street plan" as had been initially conceptualised by respondent would not have been conducive for commercial success for the said project. Therefore, certain modifications were necessary to be made in the building plans for the benefit of the allottees. It was submitted that M/s French Buildmart Pvt. Ltd. had applied to the concerned statutory authority vide letters dated 15th of December, 2018 and 3rd of April, 2019 for amendment/revision in building plans. That the revised building plans for the said project had been sanctioned by the concerned statutory authority on 11th of May, 2020 vide Memo No. ZP-661/JD(RD)/2020/7824.
23. That the time consumed by the Government authorities in sanctioning the revised building plans is beyond the control of answering respondents and therefore, the said time period must not be construed as a delay. M/s French Buildmart Pvt.

Ltd. has duly complied with the requirements put forth by the concerned authorities in order to make the necessary amendment / changes in the building plans. Furthermore, M/s French Buildmart Pvt. Ltd. had also made payment of substantial amounts to the concerned authorities in order to avail the Transit Oriented Development (TOD) benefits and get the approvals with respect to revised building plans.

24. That M/s French Buildmart Pvt. Ltd. vide letter dated 6th of July, 2017 had applied to the Director, Town & Country Planning Department, Haryana, Chandigarh for increase in FAR from 175 to 350. The in principal approval for grant of benefit under TOD policy for enhancement of FAR had been granted to M/s French Buildmart Pvt. Ltd. vide memo bearing no. LC-2157-PA(B)-2018/10085 dated 22.03.2018. Subsequently, final permission with respect to benefit under TOD policy for enhancement of FAR had been granted to M/s French Buildmart Pvt. Ltd. by Directorate of Town & Country Planning, Haryana vide memo bearing no. LC-2157-JE(VA)/2019/3496 dated 06.02.2019. It is pertinent to mention that respondent is an associate company of M/s French Buildmart Pvt. Ltd., which is the licensee company.
25. that the rights and obligations of the complainants as well as respondent are completely and entirely determined by the covenants incorporated in the buyer's agreement. That it had

been duly mentioned in clause 7 of the buyer's agreement that possession of the said unit would be handed over to the complainants within a period of 36 months from the date of casting of the raft for the project (16.12.2013). Furthermore, respondent was also entitled to a cumulative grace period of 360 business days (grace period + additional grace period) over and above the said period of 36 months for handing over of possession of the said unit to the complainants. It would not be out of place to mention that the same was subject to multiple factors including but not limited to timely payment of consideration amount by the complainants, force majeure factors, any reason beyond the control of respondent, any action of the government etc.

26. That in the meantime, respondent had raised payment demands as per the construction linked payment plan. It would not be out of place to mention that no payments had been made by the complainants after March, 2016 till date. The payments made by the complainants have been duly mentioned in applicant ledger/statement of account dated 15th of September.
27. That thereafter, final notice dated 20.03.2021 had been issued by the respondent to the complainants. The respondent was constrained to issue the aforesaid notice on account of the defaults committed by the complainants in

making payment of the outstanding dues towards the respondent pertaining to the said unit. It had been duly mentioned in the aforesaid notice that the complainants have chosen to ignore communication/reminders sent by the respondent, including letter dated 20.05.2020, letter dated 02.07.2020, letter dated 15.07.2020, letter dated 12.11.2020 and letter dated 01.03.2021.

28. That M/s French Buildmart Pvt. Ltd. (the Licensee Company) was scheduled to apply for the occupation certificate in July 2020. However, the construction work had been deeply impacted by several factors. The construction work at the project site had been halted since 04.11.2019 on account of the ban imposed by the Honourable Supreme Court over all construction activities in Delhi-NCR. This was after taking into account the drastic deterioration in air quality in and around the national capital.
29. Moreover, as the respondent was mobilizing the workforce at the project site, the lockdown on account of Covid-19 pandemic was imposed by the Government on 24.03.2020 which continued till 09.05.2020. This also severely affected the progress of the construction work at the site.
30. That it is pertinent to mention that the said project had been registered with RERA vide registration number 02 of 2018 in favour of the respondent which is an associate company of

M/s French Buildmart Pvt. Ltd. (licensee company). It would not be out of place to mention that application for extension of RERA Registration has been filed before the authority by respondent vide letter dated 10th of June, 2019.

31. That thereafter, the respondent and M/s French Buildmart Pvt. Ltd. had decided that without infringing upon the rights and interests of the existing allottees, the said project would now be developed and completed by M/s French Buildmart Pvt. Ltd. Accordingly, M/s French Buildmart Pvt. Ltd. had applied to Haryana Real Estate Regulatory Authority for reissuance/correction of RERA registration certificate in favour of M/s French Buildmart Pvt. Ltd. (licensee company) vide letter dated 24.09.2020. It had been duly mentioned in the aforesaid letter dated 24.09.2020 that M/s French Buildmart Pvt. Ltd. had already uploaded fresh A to H form vide project id: RERA-GRG-PROJ-745-2020 dated 16.09.2020. The same had been approved in principle by this authority. Subsequently, on account of Covid-19 pandemic the authority had been shut for several months. Due to the same, the RERA Registration has not been granted to M/s French Buildmart Pvt. Ltd. till date. The answering respondents cannot be held liable for the delays occurring on account of functioning of statutory authorities/Government.

32. That, without admitting or acknowledging the truth or legality of the allegations advanced by the complainants and without prejudice to the contentions of respondent, it is respectfully submitted that the provisions of the Act are not retrospective in nature. The provisions of the Act cannot undo or modify the terms of an agreement duly executed prior to coming into effect of the Act. It is further submitted that merely because the Act applies to ongoing projects which are registered with the Authority, the Act cannot be said to be operating retrospectively. The provisions of the Act relied upon by the complainants for seeking interest cannot be called in to aid in derogation and ignorance of the provisions of the buyer's agreement. The interest is compensatory in nature and cannot be granted in derogation and ignorance of the provisions of the buyer's agreement.
33. That the interest for the alleged delay demanded by the complainants is beyond the scope of the buyer's agreement. The complainants cannot demand any interest or compensation beyond the terms and conditions incorporated in the buyer's agreement.
34. That the complainants have wantonly and needlessly leveled false, defamatory and vexatious allegations against respondent. Furthermore, the complainants have consciously and voluntarily purchased the said unit in December, 2012.

The complainants were conscious and aware of the status of the project at the relevant time and had independently and willfully proceeded to purchase the unit in question. Therefore, the complainants are estopped from claiming any interest or compensation from respondent in the facts and circumstances of the case. The allegations put forth by the complainants qua respondent are absolutely illogical, irrational and irreconcilable in the facts and circumstances of the case.

35. The complainants have alleged that the possession of the unit was to be given not later than February, 2017 and therefore cause of action, if any, accrued in favour of the complainants in February, 2017. Therefore, the complaint seeking compensation and interest as a form of indemnification for the alleged delay is barred by limitation.
36. That it was submitted that several allottees have defaulted in timely remittance of payment of instalments which was an essential, crucial and an indispensable requirement for conceptualisation and development of the project in question. Furthermore, when the proposed allottees default in their payments as per schedule agreed upon, the failure has a cascading effect on the operations and the cost for proper execution of the project increases exponentially whereas enormous business losses befall upon the

respondent. The respondent, despite default of several allottees, have diligently and earnestly pursued the development of the project in question. Therefore, there is no default or lapse on the part of the respondent and there is no equity in favour of the complainants. It is evident from the entire sequence of events, that no illegality can be attributed to the respondent. The allegations levelled by the complainants are totally baseless.

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

F. Jurisdiction of the authority

38. 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.

F. 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.

F. 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 complainants at a later stage.

G. Findings on the objection raised by the respondent.

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

39. 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. The authority is of the view that the Act nowhere provides, nor can be so construed, that all previous agreements will be rewritten 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."

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

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

41. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the flat 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 and are not in contravention of any other Act, rules, regulations made thereunder and are not unreasonable or exorbitant in nature.

G. II Objection regarding entitlement of DPC on ground of complainants being investor.

42. The respondent has taken a stand that the complainant is an investor and not consumer, therefore, it is not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority observed that the respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if the promoter contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the apartment buyer's agreement, it is revealed that the complainant is buyer and it paid total price of Rs. 39,41,104/- to the promoter towards purchase of an apartment in the project of the promoter. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

"2(d) "allottee" in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment

through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;"

43. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment buyer's agreement executed between promoter and complainant, it is crystal clear that the complainant is allottee(s) as the subject unit was allotted to them by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled as *M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr.* has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottee being an investor is not entitled to protection of this Act also stands rejected.

H. Findings on the relief sought by the complainants.

Relief sought by the complainants: Direct the respondent to handover possession of the unit to the complainants, complete in all respects and in conformity with the buyer's agreement and for the consideration mentioned therein, with all additional facilities, warranties and as per the quality

standards promised and to execute all necessary and required documents in respect of the unit in favour of the complainants.

44. There is nothing on the record to show that the respondent has applied for OC of the above-mentioned project. So, in such a situation no direction can be given to the respondent to handover the possession of the subject unit, as the possession cannot be offered till the occupation certificate for the subject unit has been obtained. However, delay possession charges as ascertained by the authority shall be payable to the complainant as per the provisions of the Act.

Relief sought by the complainants: Direct the respondent to pay interest @ 9.30% per annum on the amount deposited by the complainants with the respondent with effect from the date of delivery of the unit promised in the buyer's agreement till the date the actual possession is handed over by the respondent along with all the necessary documents and common areas and facilities as promised at the time of booking being made by the complainants..

45. 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."

46. Clause 7(a) of the buyer's agreement, provides for handing over possession and the same is reproduced below:

"7. POSSESSION

(a) The Excavation work has already began on the Project Land much before the date of excavation of this Agreement and the same must not be misunderstood with or shall be considered as the date of the commencement of construction of the Project. The Company endeavors to offer the possession of the Unit in the Commercial Complex to the Allottee(s) within a period of 36 (thirty six) months from the date of commencement of construction of the Project hereof, i.e. the date on which raft of the entire Project must be casted (the "Commencement of Construction"), and this date shall be duly communicated to the Allottee(s), subject to Force Majeure (defined hereinafter in Clause 26) and/or any other reason beyond the control of the Company, subject to the Allottee(s) having strictly complied with all the terms and conditions of this Agreement and not being in default under any provisions of the same, and all amounts due and payable by the Allottee(s) under this Agreement having been paid in time to the Company. The Company shall give notice to the Allottee(s) in writing, to take possession of the Unit for his fit outs and occupational use (the "Notice of Possession") on furnishing certain documents."

47. 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 the complainants not being in default under any provisions of this agreement 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 favor of the promoters 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 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 allottees are left with no option but to sign on the dotted lines.

48. **Admissibility of grace period:** Upon perusal of the possession clause, the authority observed that there are two grace periods of 180 days each as demanded by the respondents/promoters in clause 7(b) of the buyer's agreement. Clause 7(b) of the buyer's agreement is as under:

7. Possession

(b) The allottee(s) understands and agrees that company shall be entitled to an extension period of 180 business days over the said period of 36 months for handing over the possession of the unit to the allottee(s). If the possession of the unit gets further delayed due to any reason and/or conditions / events which are unforeseeable then the company shall be entitled to an additional grace period of 180 business days over and above the said grace period.

49. The authority allows the first grace period keeping in view the fact that this grace period of 180 days is unqualified/unconditional and is sought for handing over of possession.
50. Another additional grace period of 180 days as demanded by the respondents/promoters on the eventuality of unforeseeable circumstances and conditions is hereby disallowed as no substantial evidence/document has been placed on record to corroborate that any such event, circumstances, condition has occurred which may have hampered the construction work.
51. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges at prescribed rate. However, proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under Rule 15 of the rules. Rule 15 has been reproduced as under:

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

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

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

52. The legislature in its wisdom in the subordinate legislation under 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.
53. 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., 26.10.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.
54. **Rate of interest to be paid by complainants for delay in making payments:** 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;"*

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

Relief sought by the complainants: Direct the respondent to pay a sum of Rs. 2,00,000/- to the complainants towards litigation costs.

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

57. On consideration of the documents available on record and submissions made by both the parties, the authority is satisfied that the respondents are in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of 7 (a) of the builder buyer's agreement executed between the parties on 06.05.2014, the possession of the subject unit was to be delivered within a period of 36 months from the date of commencement of construction of the project hereof, i.e. the

date on which raft of the entire project must be casted (the "commencement of construction"), i.e., 16.12.2013. Therefore, the due date of handing over possession is 16.12.2016. As far as grace period is concerned, one grace period is allowed for the reasons quoted above. Therefore, the due date of handing over possession is 16.06.2017. Copies of the same have been placed on record. The authority is of the considered view that there is delay on the part of the respondents to offer physical possession of the allotted unit to the complainants as per the terms and conditions of the buyer's agreement dated 06.05.2014 executed between the parties. It is the failure on part of the promoter to fulfil its obligations and responsibilities as per the buyer's agreement dated 06.05.2014 to hand over the possession within the stipulated period.

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. This 2 month of reasonable time is being given to the complainants keeping in mind that even after intimation of possession, practically they have 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. In the present complaint, neither the occupation certificate has been obtained nor the possession has been offered to the complainants by the respondents. It is further clarified that the delay possession charges shall be

payable from the due date of possession i.e., 16.06.2017 till the handing over of possession or offer of possession (after obtaining occupation certificate from the competent authority) plus 2 months, whichever is earlier.

59. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondents is established. As such the complainants are entitled to delay possession at prescribed rate of interest i.e., 9.30% p.a. w.e.f. 16.06.2017 till the handing over of possession or offer of possession (after obtaining occupation certificate from the competent authority) plus 2 months, whichever is earlier as per provisions of section 18(1) 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 respondents are directed to pay interest to the complainants at the prescribed rate of 9.30% p.a. for every month of delay from the due date of possession i.e., 16.06.2017 till the handing over of possession or offer of possession (after obtaining occupation certificate from the competent authority) plus 2 months, whichever is earlier.


- ii. The arrears of such interest accrued from 16.06.2017 till the handing over of possession or offer of possession (after obtaining occupation certificate from the competent authority) plus 2 months, whichever is earlier shall be paid by the promoters 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 promoters 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 promoters, in case of default shall be charged at the prescribed rate i.e., 9.30% by the respondents/promoters which is the same rate of interest which the promoters shall be liable to pay the allottees, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.
- v. The respondents are directed to provide a copy of the revised building plan and revised plan of the unit to the complainants.
- vi. The respondents shall not charge anything from the complainants which is not the part of the agreement. However, holding charges shall also not be charged by the promoter at any point of time even after being part of agreement as per law settled by the Hon'ble Supreme


Complaint No. 2853 of 2021

Court in civil appeal no. 3864-3889/2020 dated
14.12.2020.

- 61. Complaint stands disposed of.
- 62. File be consigned to registry.


(Samir Kumar)
Member


(Vijay Kumar Goyal)
Member


(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 26.10.2021

JUDGEMENT UPLOADED ON 16.12.2021