

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

Complaint no. : 3602 of 2020
Date of filing : 05.11.2020
Date of first hearing: 18.12.2020
Date of decision : 08.10.2021

1. 2.	Mr. Neeraj Vinocha Mrs. Sangeetha Vinocha Both R/O: House No. 366/12, Gali No. 9, Krishna Colony, Gurgaon Rural, Gurugram, Haryana-122001	Complainants
1.	M/s. Shree Vardhman Infraheights Pvt. Ltd Regd. office at: 302, 3rd Floor, Indraprakash Building, 21 Barakhamba Road, New Delhi-110001	Respondent

CORAM:	
Dr. K.K. Khandelwal	Chairman
Shri Vijay Kumar Goyal	Member
APPEARANCE:	
Smt. Aanchal Basur (Advocate)	Complainants
Sh. Rakshit Rautela Proxy Counsel for Sh. Varun Chugh (Advocates)	Respondent

ORDER

1. The present complaint has been filed by the complainants/allottees in Form CRA 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 to the allottee as per the agreement for sale executed inter se.

A. Unit and project related details

2. The particulars of the project, the details of sale consideration, the amount paid by the complainants, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S. No.	Heads	Information
1.	Name and location of the project	"Shree Vardhman Victoria", village Badshapur, Sector-70, Gurugram
2.	Project area	10.9687 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no. and validity status	103 of 2010 dated 30.11.2010 valid upto 29.11.2020
5.	Name of the Licensee	Santur Infrastructures Pvt. Ltd.
6.	RERA registered/ not registered	Registered Registered vide no. 70 of 2017 dated 18.08.2017
	Validity status	31.12.2020
7.	Unit no.	402, tower E

		(annexure- A on page no. 15 of the reply)
8.	Unit area	1950 sq. ft. (annexure- A on page no. 15 of the reply)
9.	Revised unit no.	404, tower H (annexure P2 on page no. 43 of the complaint)
10.	Revised unit area	Cannot be ascertained
11.	Date of flat buyer's agreement	13.11.2014 (annexure- A on page no. 12 of the reply)
12.	Payment plan	Construction linked payment plan (annexure- A on page no. 31 of the reply)
13.	Total consideration	Rs. 1,17,51,690/- (annexure- D on page no. 40 of the reply)
14.	Total amount paid by the complainants	Rs. 1,02,37,996/- (annexure- D on page no. 39 of the reply)
15.	Date of commencement of construction	13.10.2014 (vide affidavit submitted on behalf of the respondent by its AR on 06.10.2021)
16.	Possession clause	14(a) The construction of the flat is likely to be completed within a period of 40 months of commencement of construction of the particular tower/ block

		<p>in which the subject flat is located with a grace period of 6 months, on receipt of sanction of the building plans/ revised plans and all other approvals subject to force majeure including any restrains/ restrictions from any authorities, non-availability of building materials or dispute with construction agency/ workforce and circumstances beyond the control of company and subject to timely payments by the buyer(s) in the said complex.</p> <p>(emphasis supplied)</p>
17.	Due date of delivery of possession	13.02.2018 (Calculated from the date of commencement of construction of the particular tower in which the flat is located. In the present case the revised unit no. is located in tower H and as per the affidavit submitted by the respondent's AR the commencement of construction of for tower-H was started on 13.10.2014)
18.	Occupation certificate	Not obtained
19.	Offer of possession	Not offered
20.	Delay in handing over of possession till date of order i.e.,08.10.2021	3 years 7 months 25 days

21.	Grace period utilization	Grace period is not allowed in the present complaint.
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B. Fact of the complaint

3. That in the year 2014, the complainants decided to search for and invest their hard earned, life savings into buying a home. During the course of their search for an ideal property, the complainants were introduced to Shree Vardhman Infraheights Pvt. Ltd. The respondent in his attempt to lure the complainants towards making an investment in their projects, boasted of an experience of more than a decade and claimed the completion of several other projects but the complainants decision to invest in the respondent's project, has been nothing short of a financial and emotional nightmare, due to the ill-treatment and harassment that has been meted out by the respondent, since the inception of the association, between the complainants and the respondent.
4. That based upon the requirement of the complainants, the respondent apprised the complainants about a new and upcoming project, "Shree Vardhman Victoria" (Hereinafter referred as the said "project"), located in sector 70, Gurugram, Haryana. As per the projections of the respondent, the project was to comprise of, "spacious and luxurious" multi-storied flats accompanied with modern amenities and facilities.
5. That after completely relying on the statements, explanations, oral representations and promises of the respondent towards

the project, which was supposed to include facilities such as parking, horticulture, parks, club, and other similar facilities, the complainants filed an application of allotment with the respondent for the aforementioned project.

6. That on the basis of the application form and in due consideration of the timely payments made by the complainants, the respondent allotted flat no. 402, tower-E, admeasuring 1950 sq. ft. (hereinafter referred as the said 'unit') to the complainants.
7. That the payment plan for the said unit had been decided amongst the options provided by the respondent and the same has been adhered by the complainants at every step. As per the agreed upon payment plan for the said unit, the complainants opted for the "construction linked plan". The complainants paid the first instalment, due at the time of booking, of Rs.28,84,971/-. Accordingly, receipts were issued by the respondent.
8. That in accordance with the payment plan, the complainants ensured that they have cleared the due payments within the stipulated time frame and duly fulfilled their obligations in order to ensure that they presented no roadblocks to the project whatsoever. As per the statement of account dated 12.05.2017 issued by the respondent, the complainants have already cleared 87% of the total due basic price and completely paid off the additional charges including but not

limited to “club membership fee”, “covered parking charges” and various taxes.

9. That the complainants and the respondent entered into a “flat buyer’s agreement” (hereinafter referred as the “FBA”) and the same was executed on 13.11.2014.
10. That as per clause 14(a) of the FBA, the possession of the said unit was to be handed over within 40 months from the commencement of construction. Based upon the agreed timelines, the possession of the said unit was due on 07.10.2017. Even after extension of 6 months, the construction of the said project was delayed.
11. That the complainants during the entire duration ensured that he vociferously tracked the progress of the project in terms of construction, however the progress of the said project was pathetically slow right from the outset. In fact, even after regular follow up through enquiries made to respondent and regular visits to the construction site, the complainants primarily come across instances of construction activities ongoing at snail’s pace. Furthermore, despite the lethargic approach of the respondent towards the construction of the project, part payments were promptly made by the complainants towards the due amount, as per the payment plan agreed upon.
12. That the continued delay, pause and absolute halt in the construction from time to time ensured that the actual pace continued falling way behind the proposed timeline of

possession. Furthermore, there seemed to have been no initiative on the part of the respondent to arrest this delay, rectify the same and bring the project back on course. The state of affairs the said project was in, left the complainants absolutely frustrated and dejected. But since the complainants had already invested a sizeable amount (more than 90% of the total sale price) into the project, they had no option but to continue keeping faith in the same.

13. That the circumstances aforementioned continued to extend, and by November 2018, the possession had already been delayed by significantly. At this stage, the complainants decided to intervene and confront the respondent regarding the delay in possession. Due to a delay of approximately 27 months (until November 2018), the complainants were entitled to a monthly delay interest, payable by the promoter as prescribed per the statutory provisions of section 18(1)(a) of the Real Estate (Regulation and Development) Act, 2016 read with rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017. On the basis of the said provision the complainants are entitled to a total sum of approximately Rs. 28 Lacs as of November 2018.
14. That after scores of telephonic / email communications, several meetings in person and follow ups, the complainants were assured that the respondent, first and foremost would take responsibility for the delay in construction of the project and handing over the possession of the said unit. It was

accepted and acknowledged by both the complainants and the respondent, that the ongoing delay was to be rectified and compensated as per the governing statutory provisions.

15. That it was at this juncture that the respondents provided an alternate remedy for the same and basis the communication, the respondent offered the allotment of another flat in a different tower, flat H-404 (hereinafter referred to as "flat II"), located in the same project and location. It was further agreed upon that any difference in the total sale price between said unit and flat II shall be adjusted from the delay interest that was accumulated and liable to be paid by the respondent. A letter dated 10.01.2019 was issued by the respondent confirming the allotment of flat II.
16. That post the above-mentioned negotiations and settlement was complete, the complainants were under the impression that the issue has been amicably dealt with and that the respondent will rectify its missteps and follow through with the amended transactional promises. However, this was a grave misconception of the complainants. Immediately after, what seemed like a resolution of the issue, the respondent was back to old habits, as the delivery of possession for the new flat II continues to be delayed till date. But the harassment meted out by the respondent was further aggravated by the fact that the respondent began to relentlessly demand for an additional deposit of approximately Rs. 14,00,000/- over and above the total sale

price of the said unit combined with the accumulated delay interest.

17. That the respondent is liable to hand over the possession of the flat II at the earliest instance to the complainants. Furthermore, due to a delay of approximately 31 months (as on 06.10.2020), the Complainants are entitled to receive a delay interest as per the applicable law in accordance with the total sale price for each month of delay until the possession is handed over to the complainants.
18. That the complainants on several occasion tried to contact the respondent to seek clarification on the pending possession and the due delay interest, however to no avail. Followingly, on 27.07.2020 a legal notice was sent by the legal counsels on behalf of the complainants to the respondent, seeking the withdrawal of respondent's unjustified and wrongful demand letter dated 30.06.2020 and payment of the pending delay interest by the respondent. However, the said legal notice dated 20.07.2020, was met with no response from the respondent and therefore, the complainants are constrained in this present scenario to approach this authority.
19. Thus, the complainants are entitled to file the present complaint under section 19 (4) of the Act of 2016, which provides for the rights and duties of the allottees and section 18(1)(a), read with section 31 of the Act.

20. That the cause of action to file the present case is still continuing as the respondent has continued to fail in providing payment of the delay interest continues till date. Therefore, despite regular follow-ups initiated by the complainants, the respondent has continued to fail in performing its contractual and statutory obligations.
21. That this authority has jurisdiction to entertain the present complaint since the project is situated in Gurugram within the jurisdiction of this authority.
22. That the complainants have not filed any other complaint or suit of similar nature in any court of law.

C. Relief sought by the complainants.

23. The complainants have sought following relief(s):
 - (i) Direct the respondent to pay the delay interest at the interest rate prescribed under law to the complainants as per section 19 of the Real Estate (Regulation and Development) Act, 2016.

D. Reply by the respondent

The respondent has contested the following grounds: -

1. 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.

- II. The as per rule 28(1) (a) of rules of 2017 a complaint under section 31 of the 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.
- III. That the complainants have 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's agreement (hereinafter "FBA") 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.

- IV. 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.
- V. 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 14 (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.
- VI. That the reliefs sought by the complainants are in direct conflict with the terms and conditions of the FBA

and on this ground alone the complaint deserve to be dismissed. The complainants cannot be allowed to seek any relief which is in conflict with the said terms and conditions of the FBA. The complainants 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 complainants. The said agreement was executed much prior to the Act coming into force and the same has not been declared and cannot possibly be declared as void or not binding between the parties.

- VII. That it was submitted that delivery of possession by a specified date was not essence of the FBA, and the complainants were 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 was 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.
- VIII. That it was 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 complainants were 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 14(a) of FBA was not essence of the contract and the breach thereof cannot entitle the complainants to seek rescind the contract.

- IX. That it was 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 complainants, cannot exceed the compensation provided in the contract itself.

- X. That the residential group housing project in question i.e., "Shree Vardhman Victoria" sector-70, Gurugram, Haryana is being developed by the respondent on a piece of land measuring 10.9687 acres situated at village Badshahpur, Sector-70, Gurugram, Haryana under a license no. 103 of 2010 dated 30.11.2010 granted by the Town and Country Planning Department, Chandigarh, Haryana (DTCP). The license has been granted to the landowners in collaboration with M/s Santur Infrastructures Private Limited. The respondent company is developing/constructing the project under an agreement with M/s Santur Infrastructures Private Limited. The project in question has been registered with this authority vide registration no. 70 of 2017 dated 18.08.2017 under section 6 of the Real Estate (Regulation & Development) Act, 2016.
- XI. That it is submitted that construction of first phase of the project consisting of tower - A, tower - B, tower - C, tower - H and tower - I has been completed and an application for grant of occupancy certificate has already been made to the Director General Town and Country Planning, Haryana on 23.02.2021 and the same is likely to be granted soon.

- XII. That the construction of the entire project could not be completed within the time estimated at the time of launch of the project due to various reasons beyond the control of the respondent, including inter-alia liquidity crisis owing to global economic crisis that hit the real estate sector in India very badly which is still continuing, defaults committed by allottees, depressed market sentiments leading to a weak demand, government restrictions, force majeure events etc. The respondent cannot be held responsible for the alleged delay in completion of construction. The respondent is genuine and responsible developer who fought against all odds and has already completed one phase of Project and the remaining phases are also on the verge of completion.
- XIII. That without prejudice to the fact that as per clause 14(a), the obligations of the respondent to complete the construction within the tentative time frame mentioned in said clause was subject to timely payments of all the instalments by the complainant and other allottee of the project. As various allottee and even the complainant failed to make payments of the instalments as per the agreed payment plan, the complainants 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 instalment by the complainants and other allottees. Many buyer/allottee in the said complex, including the complainants, committed breaches/defaults by not making timely payments of the instalments. 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.

- XIV. That the tentative/estimated period given in clause 14 (a) of the FBA was subject to conditions such as force majeure, restraint/restrictions from authorities, non-availability of building material or dispute with construction agency / work force and circumstances beyond the control of the respondent company and timely payment of instalments by all the buyers in the said complex including the complainant. Many buyers/allottee in the said complex, including the complainants, committed breaches/ defaults by not making timely payments of the instalments. Further, the construction could not be completed within the tentative time frame given in the agreement as various factors beyond control of respondent came into play, including economic meltdown, sluggishness in the real

estate sectors, defaults committed by the allottees in making timely payment of the instalments, shortage of labour, non-availability of water for construction and disputes with contractors. The delayed payment / non-payment of instalments by various allottee including the complainants seriously jeopardized the efforts of the respondent for completing the construction of said project within the tentative time frame given in the agreement. It is also submitted that the construction activity in Gurugram has also been hindered due to orders passed by Hon'ble NGT/State Govts./EPCA from time to time putting a complete ban on the construction activities in an effort to curb air pollution. The District administration, Gurugram under the Graded Response Action Plan to curb pollution banned all construction activity in Gurugram, Haryana from 01.11.2018 to 10.11.2018 which resulted in hindrance of almost 30 days in construction activity at site. In previous year also Hon'ble NGT vide its order 09.11.2017 banned all construction activity in NCR and the said ban continued for almost 17 days hindering the construction for 40 days. The stoppage of construction activity even for a small period result in a longer hindrance as it become difficult to re-arrange, re-gather the work force particularly the labourers as they move to other places/their villages.

- XV. 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 12.07.2014 and as such the period mentioned in clause 14(a) cannot start before 12.07.2014.
- XVI. 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 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 24.03.2020 bearing no. 40-3/2020-DM-1(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 25.03.2020. By virtue of various subsequent notifications, the Ministry of Home Affairs, GOI further extended the lockdown from time to time and till date 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, and 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*', the Haryana Real Estate Regulatory Authority has also extended the registration and completion date by 6 (six) months for all real estate projects whose registration or completion date expired and, or, was supposed to expire on or after 25.03.2020. 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 should come to the conclusion that the respondent is liable for interest/compensation, the period consumed in the aforesaid force majeure events or the situations beyond control of respondent has to be excluded.

24. 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.

E. Jurisdiction of the authority

The authority has territorial as well as subject matter jurisdiction to entertain the present complaint for the following reasons.

E.I Territorial jurisdiction

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

E.II Subject-matter jurisdiction

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

Section 11(4)(a)

Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

The provision of assured returns is part of the builder buyer's agreement, as per clause 15 of the BBA

dated..... Accordingly, the promoter is responsible for all obligations/responsibilities and functions including payment of assured returns as provided in Builder Buyer's Agreement.

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

27. F. Findings on the objections raised by the respondent

F. I Maintainability of complaint

28. 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.

29. 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. the flat buyer's agreement executed prior to coming into force of the Act

30. 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 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."*

31. 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."

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

32. 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.

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

33. 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."

34. 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 13.02.2018 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 above-mentioned time period is not excluded while calculating delay in handing over possession.

- 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. 13029/1985 completely banning construction activities in NCR region.

35. The respondent has neither completed the construction of the subject unit nor has obtained the OC for the same from the competent authority till date i.e., even after a delay of more than 3 years from the promised date of delivery of the subject unit. In the reply it has been admitted by the respondent/promoter that the construction of the phase of the project wherein the apartment of the complainants is situated is in an advance stage. It means that it is still not completed. It is a well settled law that no one can take benefit of his wrong. 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 due date of possession. Therefore, the authority is of the considered view that the respondent could not be allowed to take benefit of his own wrong and the innocent allottees

could not be allowed to suffer for the mistakes committed by the respondent. In view of the same, this time period is not excluded while calculating the delay in handing over possession.

G. Findings of the authority

G. I Delay possession charges.

36. **Relief sought by the complainants:** Direct the respondent to pay the delay interest at the interest rate prescribed under law to the complainants as per section 19 of the Real Estate (Regulation and Development) Act, 2016.
37. 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."

38. Clause 14(a) of the flat buyer's agreement, provides for handing over possession and the same is reproduced below:

"14(a)The construction of the flat is likely to be completed within a period of 40 months of commencement of construction of the particular tower/ block in which the subject flat is located with a grace period of 6 months, on receipt of sanction of the building plans/ revised plans and all other approvals subject to force majeure including any restrains/ restrictions from any authorities, non-availability of building materials or dispute with construction agency/ workforce and circumstances beyond the control of company and subject to timely payments by the buyer(s). No claims by way of damages/compensation shall be against the Company in case of delay in handing over the possession on account of said reasons. For the purposes of this Agreement, the date of application for issuance of occupancy/part occupancy/completion/part occupancy/completion certificate of the Said Complex or the Flat shall be deemed to be the date of completion. The Company on completion of construction shall issue a final call notice to the Buyer(s), who shall remit all dues within thirty (30) days thereof and take possession of the Flat after execution of Sale deed. If possession is not taken by the Buyer(s) within thirty (30) days of offer of possession, the Buyer(s) shall be deemed to have taken possession for the purposes of this Agreement and for the purposes of payment of the maintenance charges, taxes, property tax or any other tax imposable upon the Flat."

39. A flat buyer's agreement is a pivotal legal document which should ensure that the rights and liabilities of both builder/promoter and buyer/allottee 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 buyer/allottee in case of delay in possession of the unit.

40. 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 allottee 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 allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

41. The respondent promoter has proposed to handover the possession of the subject apartment within a period of 40 months of the commencement of construction of the particular tower/ block in which the flat is located with a

grace period of 6 months, on receipt of sanction of the building plans/revised plans and all other approvals subject to force majeure including any restrains/restrictions from any authorities, non-availability of building materials or dispute with construction agency/workforce and circumstances beyond the control of company and subject to timely payments by the buyer(s) in the said complex.

42. The respondent is claiming that the due date shall be computed from 12.07.2014 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 complainants on 07.06.2012 and the flat buyer's agreement was executed between the respondent and the complainants on 13.11.2014. It is interesting to note as to how the respondent had collected hard earned money from the complainants 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

12.07.2014. 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 commencement of the construction and on the other hand, a major part of the total consideration is collected prior to the start of the construction. Further, the said possession clause can be said to be invariably one sided, unreasonable, and arbitrary. Moreover, it is a matter of fact that as per the affidavit filed by the respondent on 06.10.2021, the date of start of foundation of the subject tower, where the flat in question is situated is 13.10.2014. This said statement sworn by the respondent is itself contradictory to its contention that the due date of possession is liable to be computed from consent to establish. It is evident that respondent has started construction (on 13.10.2014 as per the affidavit submitted on behalf of the respondent by its A.R on 06.10.2021.) without obtaining CTE which shows delinquency on the part of the promoter. Therefore, in view of the above reasoning, the contention of the respondent that due date of handing over possession should be computed from date of CTE does not hold water and the authority is of the view that the due date shall be

computed from the date sworn by the promoter in the affidavit as 'date of start of foundation'.

24. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the said flat within 40 months from the date of commencement of construction of the particular tower in which the flat is located and has sought further extension of a period of 6 months (after the expiry of the said 40 months), on receipt of sanction of the building plans/revised plans and all other approvals subject to force majeure including any restrains/restrictions from any authorities, non-availability of building materials or dispute with construction agency/workforce and circumstances beyond the control of company and subject to timely payments by the buyer(s) in the said complex. 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 allottee. Now, turning to the facts of the present case the respondent promoter has neither completed the construction of the subject project nor has obtained the occupation certificate from the competent

authority till date. 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.

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

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

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

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

44. 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.

45. 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., 08.10.2021 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.

46. 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;"

47. Therefore, interest on the delay payments from the complainants 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.

48. 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 a matter of fact that the date of foundation of the subject tower, where the revised flat in question is situated is 13.10.2014 as per the affidavit filed by the respondent on 06.10.2021. By virtue of flat buyer's agreement executed between the parties on 13.11.2014, the possession of the booked unit was to be delivered within 40 months of the commencement of construction of the particular tower/ block in which the flat is located which comes out to be 13.02.2018 excluding a grace period of 6 months which is not allowed in the present case for the reasons quoted above.

49. 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 complainants keeping in mind that even after intimation of possession practically he has to arrange a lot of logistics and requisite documents

including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e., 13.02.2018 till offer of possession of the subject flat after obtaining occupation certificate from the competent authority plus two months or handing over of possession whichever is earlier as per the provisions of section 19(10) of the Act.

50. 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 complainants are 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 complainants to the respondent from the due date of possession i.e., 13.02.2018 till the offer of possession of the subject flat after obtaining occupation certificate from the competent authority plus two months or handing over of possession whichever is earlier 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

51. 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., 13.02.2018 till the offer of possession of the subject flat after obtaining occupation certificate from the competent authority plus two months or handing over of possession whichever is earlier as per section 19 (10) of the Act.
- II. The arrears of such interest accrued from 13.02.2018 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 allottees 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 complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
- V. The rate of interest chargeable from the allottees by the promoter, in case of default shall be charged at the


prescribed rate i.e., 9.30% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottees, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

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

52. Complaint stands disposed of.

53. File be consigned to registry.


(Vijay Kumar Goyal)
Member


(Dr. K.K Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 08.10.2021

Judgement uploaded on 28.12.2021.