

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

Complaint no. : 2363 of 2021
Date of filing : 07.06.2021
Date of first hearing: 14.07.2021
Date of decision : 08.10.2021

Shri Bajrang Lal Jain

R/O: Flat No.1401, Tower T-9, B. L. Jain
Tower, RPS Savana, Sector-88, Greater
Faridabad, Nahar Par, Haryana-121002

Complainant

Versus

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:	
None	Complainant
Sh. Rakshit Rautela Proxy Counsel for Sh. Varun Chugh (Advocates)	Respondent

ORDER

1. The present complaint has been filed by the complainant/allottee 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 complainant, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S. No.	Heads	Information
1.	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.	1601, tower-C (annexure- A on page no. 15 of the reply)
8.	Unit admeasuring	1350 sq. ft. (annexure- A on page no. 15 of the reply)
7.	Date of flat buyer's agreement	01.06.2013 (annexure- A on page no. 12 of the reply)
8.	Payment plan	Construction linked payment plan (annexure- A on page no. 31 of the reply)
9.	Total consideration	Rs. 82,13,000/- (annexure- D on page no. 38 of the reply)
10.	Total amount paid by the complainant	Rs. 74,35,914/- (annexure- D on page no. 40 of the reply)
11.	Date of commencement of construction	07.05.2014 (vide affidavit submitted on behalf of the respondent by its AR on 06.10.2021)
12.	Possession clause	14(a) The construction of the flat is likely to be

		<p>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) in the said complex.</p> <p>(emphasis supplied)</p>
13.	Due date of delivery of possession	07.09.2017 (Calculated from the date of commencement of construction)
14.	Occupation certificate	Not obtained
15.	Offer of possession	Not offered
16.	Delay in handing over of possession till date of order i.e.,08.10.2021	4 years 1 month 1 day
17.	Grace period utilization	Grace period is not

		allowed in the present complaint.
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B. Fact of the complaint

3. That the respondent M/s Shree Vardhman Infraheights Pvt. Ltd. is a company incorporated under the Companies Act, 1956 having site office at Shree Vardhman Victoria, sector-70, Gurugram, Haryana-122001 and the project in question is known as "Shree Vardhman Victoria" at sector -70, Gurugram-122001, Haryana (hereinafter called as the said 'project').
4. That as per section 2(zk) of the Real Estate (Regulation and Development) Act, 2016, the respondent falls under the category of "Promoter" and is bound by the duties and obligations mentioned in the said act, and is under the territorial jurisdiction of this authority.
5. That in June 2012, the respondent through its representative/broker approached the complainant and marketed for booking of a unit in the said project, stating that they are the most reputed builder in Gurugram. The marketing staff showed a rosy picture of the project through glitzy advertisements and colourful brochures, proposing to develop and construct a group housing project at the prime location of sector-70, Gurugram claiming the same to be an oasis of convenience, space, and luxury and a perfect example

of modern-day residential complexes of par excellence. They assured that they had all requisite approvals for the project and promised that the project shall be completed and possession will be given within 40 months with all facilities and amenities such as club house, play courts, swimming pool, etc.

6. That being relied upon representation & assurances of the office bearers and marketing staff of the respondent, the complainant on 09.06.2012 booked an apartment in the said project by signing a pre-printed advance registration form for a 2BHK + study apartment admeasuring 1300 sq. ft. through a broker by paying an amount of Rs. 8,24,720/- vide cheque no. 00012 of Kotak Mahindra Bank Ltd. dated 09.06.2012.
7. That on 17.11.2012, the complainant had again paid Rs. 6,72,765/- vide RTGS no. HDFCH12322094362 as registration charges & service tax on basic against advance for a unit in said project and the same was acknowledged through receipt no.999 dated 17.11.2012 issued by respondent.
8. That the respondent on 25.12.2012 issued an allotment letter and allotted a residential flat no. C-1601, tower no. C admeasuring 1350 sq. ft. super area (Hereinafter reffered as the said 'unit') in the said project. The said unit was

purchased by the complainant for a total sale consideration of Rs. 72,63,000/- at basic rate of Rs. 5,380/- per sq. ft. excluding open car parking charges of Rs. 1,50,000/- and club membership charges of Rs. 1,25,000/-etc.

9. That the respondent on 18.01.2013, vide ref no.: SVIPL/1199 demanded the next instalment of Rs. 5,98,994/- due on 08.02.2013 and respectively on 02.03.2013, vide ref no.: SVIPL/1657 demanded next instalment of Rs. 11,23,114/- that was due on 25.03.2013.
10. That till May 2013 before execution of flat buyer's agreement (Hereinafter referred as the 'FBA'), the respondent had already received Rs. 14,52,600/-, which is more than 15% of the basic price of the said unit (earnest money) resulting into a clear-cut violation of section 12 and 13 of the Real Estate (Regulation and Development) Act, 2016 by taking the amount of Rs. 14,52,600/- which is more than 10% of the consideration amount for the said unit prior to entering in to the FBA.
11. That after much delay on the part of the respondent, on 09.05.2013 issued the letter for execution of the FBA and on 01.06.2013, a pre-printed, unilateral, one-sided, arbitrary ex-facie FBA was executed by and between the complainant & respondent for said unit under a construction linked payment

plan. This agreement has a plethora of clauses and according to clause 14 (a), ***the builder has to give the possession of the said Flat to the Allottees within a period of forty (40) months of commencement of construction of the particular tower/block in which the Flat is located with a grace period of six (06) months, on receipt of sanction of building plans/ revised plans and all other approvals subject to force majeure.*** The construction of the tower was commenced before the execution of the flat buyer's agreement therefore the due date of possession as per FBA was 01.10.2016 (01.04.2017, with 6 months grace period).

12. That on 29.10.2013, the respondent issued permission to mortgage letter to the PNB Housing Finance Ltd. for the said unit allotted in favour of the complainant to avail loan facilities against total consideration of Rs. 79,43,000/- as per the FBA.
13. That the PNB Housing Finance Ltd. had sanctioned a loan of Rs. 46,000/- against loan account no. 66660010607 in favour of the complainant and due to higher rate of interest & EMI payment, the complainant approached the State Bank of India and same issued a loan sanction letter on 21.11.2014 for a medium-term loan of Rs. 60,00,000/-. As a result, the complainant had to pay more interest & EMI against loan

obtained from PNB Housing Finance Ltd. and SBI due to delay in completion of the project on the part of the respondent.

14. That the respondent kept on demanding more amounts from the complainant without any progress in construction and also without any certificate issued by architect showing the stage of construction. On 08.07.2015, the respondent issued a letter informing the complainant that the construction work is in full swing and assured that they will hand over the possession before time, attaching some photographs. However, the photographs provided by the respondent against the subject tower-C at a different time were not in conformity with the terms & conditions of the FBA and Haryana Apartment Ownership Act. Rather on visiting the site in October 2018, the complainant was shocked to see that there was no progress on work at site and particularly in the subject tower-C and when he inquired about the date of completion/possession; the respondent did not give any concrete response.
15. That since 30.10.2019 to 11.12.2019, the complainant continuously wrote emails to the respondent about the progress of work and expected date of possession, however the respondent vide its email dated 11.12.2019 replied that the possession for phase-II which includes tower-C will be held between Sep-2020 to Dec-2020. Thereafter, the

complainant on 16.12.2019, wrote an email to the respondent demanding delay penalty charges or to refund the entire amount of Rs.71,85,834/-paid with 18% rate of interest, as the project was already delayed for more than 4 years and the respondent was at the stage of commencement of external plaster only without flooring. As a result, the respondent threatened the complainant to cancel the allotment and refund the amount only after deducting 15% of basic consideration plus brokerage, taxes & other charges illegally.

16. That the complainant continued to pay each of the remaining instalments as per the payment schedule of the FBA and have already paid more than 90% amount i.e. Rs. 74,35,664/- till 02.11.2019, along with other allied charges demanded from time to time. The complainant, however, observed that there was no progress in the construction of the subject flat as per the committed time frame, and accordingly raised his grievance to the respondent. Though the complainant was always ready and willing to pay the remaining instalments provided if there was a progress in the construction of the said unit.
17. That the complainant sent several grievances emails and made several phone calls to the respondent and asked for the status of the said project and requested for delayed

possession interest on account of failure to complete the project at a given time. Since 09.10.2015 up to 04.02.2020, the complainant was continuously following up with the respondent vide emails and telephonic conversations about work completion schedule and exact date of possession, as the project was already delayed for more than 4 years. However, the respondent on 14.01.2020 wrote a letter to the complainant that "the project is almost complete and some finishing work is going on and they are trying to handover the tower A, B, C, H & I by the end of June 2020".

18. That the respondent again demanded Rs.10,07,247.17/- including arrear of interest vide call notice/intimation letter dated 06.08.2020 on account of commencement of flooring payable by 28.08.2020 without any progress on work at site. However, the complainant is ready to pay the balance amount during offer of possession only after obtaining OC by the respondent for the subject tower-C from the concerned authority.
19. That the work on other amenities, like external, internal MEP services of the project are not yet to be completed, and even after post 9 years of booking, the respondent has failed to complete the construction of all flats reflecting a disregard, unprofessionalism, and negligence upon their part. Based on the present status of the project, it seems that the project will

take at least another one year to be completed in all respects, subject to the willingness and intent of the respondent to complete the project. That the facts and circumstances as enumerated above would lead to the irrefutable conclusion that there is a deficiency of service on the part of the respondent.

20. That there is an apprehension in the mind of the complainant that the respondent has not disclosed all the facts and the situation, with the intention of deceiving and defrauding the complainant and other co-owners and their hard-earned money. A probe needs to be initiated to determine malicious practices adopted by the respondent.
21. That for the first-time cause of action for the present complaint arose in June 2013, when the flat buyer's agreement containing unfair and unreasonable terms was, for the first time, forced upon the allottees. The cause of action further arose in October 2017, when the respondent Party failed to handover the possession of the said unit as per the FBA. Further, the cause of action again arose on various occasions, including on: a) October 2015; b) October 2019; c) December 2019, d) February 2020, e) August 2020 and on many times till date, when the protests were lodged with the respondent about its failure to deliver the project and the assurances were given by them that the possession would be

delivered by a certain time. The cause of action is alive and continuing and will continue to subsist till such time as this authority restrains the respondent by an order of injunction and/or passes the necessary orders.

22. That the complainant do not want to withdraw from the project. The promoter has not fulfilled its obligation therefore as per obligations on the promoter under section 12, 11 (4), and 18, the promoter is obligated to pay delayed possession interest at the prescribed rate.

C. Relief sought by the complainant.

23. The complainant has sought following relief(s):
- (i) Direct the respondent to give possession of the said unit, complete in all respect, after obtaining the OC.
 - (ii) Direct the respondent to pay delayed possession interest on the amount paid by the allottee, at the prescribed rate from the due date of possession till the actual possession of the said unit is handed over as per the proviso to section 18(1) of the Real Estate Regulation and Development) Act, 2016.

D. Reply by the respondent

The respondent has contested the following grounds: -

- I. 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 complainant has sought reliefs under section 18 of the Act but the said section is not applicable in the facts of the present case and as such the complaint deserves to be dismissed. It is submitted that the operation of Section 18 is not retrospective in nature and the same cannot be applied to the transactions that were entered prior to the Act came into force. The parties while entering into the said transactions could not have possibly taken into account the provisions of the Act and as such cannot be burdened with the

obligations created therein. In the present case also the flat buyer'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 complainant are in direct conflict with the terms and conditions of the FBA and on this ground alone the complaint deserve to be dismissed. The complainant cannot be allowed to seek any relief which is in conflict with the said terms and conditions of the FBA. The complainant signed the agreement only after having read and understood the terms and conditions mentioned therein and without any duress, pressure or protest and as such the terms thereof are fully binding upon the complainant. The said agreement was executed much prior to the Act coming 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 complainant was aware that the delay in completion of

construction beyond the tentative time given in the contract was possible. Even the FBA contain provisions for grant of compensation in the event of delay. As such it 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 complainant was aware that the delay in completion of construction beyond the tentative time given in the contract was possible. Even the FBA contain provisions for grant of compensation in the event of delay. As such the time given in clause 14(a) of FBA was not essence of the contract and the breach thereof cannot entitle the complainant 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 complainant, 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 allottee, 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 complainant cannot be allowed to seek compensation or interest on the ground that the respondent failed to complete the construction within time given in the said clause. The obligation of the respondent to complete the construction within the time frame mentioned in FBA was subject to and dependent upon time payment of the instalment by the complainant and other allottee. Many buyer/allottee in the said complex, including the complainant, 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 complainant, 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 allottee 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 complainant 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-I(A) recognised that India was threatened with the spread of Covid-19 epidemic and ordered a complete lockdown in the entire country for an initial period of 21 (twenty) days which started from 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

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

Section 11(4)(a)

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

The provision of assured returns is part of the builder buyer's agreement, as per clause 15 of the BBA dated..... Accordingly, the promoter is responsible for all obligations/responsibilities and functions including payment of assured returns as provided in Builder Buyer's Agreement.

Section 34-Functions of the Authority:

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

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

F. Findings on the objections raised by the respondent

F.I Maintainability of complaint

26. 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.

27. 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

28. 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."

29. 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.

30. 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.

31. 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."

32. 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 07.09.2017 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.

33. 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 4 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 complainant 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 allottee 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.1 Delay possession charges.

34. **Relief sought by the complainant:** Direct the respondent to pay delayed possession interest on the amount paid by the allottee, at the prescribed rate from the due date of possession till the actual possession of the said unit is handed over as per the proviso to section 18(l) of the Real Estate Regulation and Development) Act, 2016.
35. In the present complaint, the complainant intends to continue with the project and is seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under.

"Section 18: - Return of amount and compensation

18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building, —

.....

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the

promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."

36. 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."

37. 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 residential, 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.

38. 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.

39. 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.

40. 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 complainant-allottee. The respondent has acted in a pre-determined, preordained, highly discriminatory and arbitrary manner. The unit in question was booked by the complainant on 11.06.2012 and the flat buyer's agreement was executed between the respondent and the complainant on 01.06.2013. It is interesting to note as to how the respondent had collected hard earned money from the complainant without obtaining the necessary approval (Consent to Establish) required for commencing the construction. The respondent has obtained Consent to Establish from the concerned authority on 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 07.05.2014. 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 07.05.2014 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.

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

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

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

Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the

State Bank of India may fix from time to time for lending to the general public.

42. 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.
43. 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.
44. 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;"*

45. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 9.30% p.a. by the respondent/promoter which is the same as is being granted to the complainant in case of delay possession charges.
46. 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 flat in question is situated is 07.05.2014 as per the affidavit filed by the respondent on 06.10.2021. By virtue of flat buyer's agreement executed between the parties on 01.06.2013, 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 07.09.2017 excluding a grace period of 6 months which is not allowed in the present case for the reasons quoted above.

47. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. These 2 months' of reasonable time is being given to the complainant keeping in mind that even after intimation of possession practically he has to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e., 07.09.2017 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.

48. Accordingly, non-compliance of the mandate contained in section 11(4) (a) read with proviso to section 18(1) of the Act on the part of the respondent is established. As such complainant is entitled to delayed possession charges at the prescribed rate of interest i.e., 9.30% p.a. for every month of delay on the amount paid by the complainant to the respondent from the due date of possession i.e., 07.09.2017 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

49. 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):

1. 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., 07.09.2017 till the offer of possession of the subject flat after obtaining

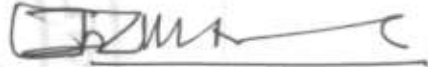
- occupation certificate from the competent authority plus two months or handing over of possession whichever is earlier as per section 19 (10) of the Act.
- II. The arrears of such interest accrued from 07.09.2017 till date of this order shall be paid by the promoter to the allottee within a period of 90 days from date of this order and interest for every month of delay shall be payable by the promoter to the allottee before 10th day of each subsequent month as per rule 16(2) of the rules.
 - III. The respondent is directed to handover the physical possession of the subject unit after obtaining OC from the competent authority.
 - IV. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
 - V. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

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

50. Complaint stands disposed of.

51. File be consigned to registry.

V.I. →
(Vijay Kumar Goyal)
Member


(Dr. K.K Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 08.10.2021

HARERA
GURUGRAM

Judgement uploaded on 28.12.2021.