BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 335 of 2021
Date of filing complaint: 21.01.2021
First date of hearing : 05.03.2021
Date of decision : 08.10.2021

1. 2.	Shri Rajesh Kumar Smt. Kavita Both R/O: - Village Nawada, Fatehpur, Post Sikandarpur Badha, Tehsil Manesar, Near Bhuteshwar Mandir, Gurugram, Haryana-122004	**Complainants**
	Versus	
1. 2.	M/s Shree Vardhman Infra Homes Pvt. Ltd. Regd. Office at: - 301, 3rd Floor, Inder Prakash Building, 21-Barakhamba Road, New Delhi-110001 M/s Aggarwal Developers Private Limited Regd. Office at: - M-1, South Extension Part - 1, New Delhi - 110049	**Respondents**

CORAM:	
Dr. K.K. Khandelwal	**Chairman**
Shri Vijay Kumar Goyal	**Member**
APPEARANCE:	
Sh. Arun Kumar (Advocate)	Complainants
Sh. Rakshit Rautela Proxy Counsel for Sh. Varun Chugh (Advocates)	Respondents

ORDER

1. The present complaint has been filed by the complainants/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the rules and regulations made there under or to the allottees as per the agreement for sale executed inter se.

A. Unit and project related details

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

S. No.	Heads	Information
1.	Name and location of the project	"Shree Vardhman Flora", Sector-90, Gurugram
2.	Project area	10.881 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no. and validity status	23 of 2008 dated 11.02.2008 valid till

		10.02.2025
5.	Name of the license holder	Moti Ram
6.	RERA registered/ not registered	**Registered** Registered vide 88 of 2017 dated 23.08.2017
7.	RERA registration valid up to	30.06.2019 (Application for extension has been rejected by order dated 10.02.2020)
8.	Unit no.	1303, tower C2 (annexure-A on page no. 15 of the reply)
9.	Unit admeasuring	1300 sq. ft. [super area] (annexure-A on page no. 15 of the reply)
10.	Date of flat buyer's agreement	09.05.2012 (annexure-A on page no. 13 of the reply)
11.	Payment plan	Construction linked payment plan (annexure-A on page no. 32 of the reply)
12.	Subsequent allottee	12.07.2012 (annexure-A on page no. 34 of the reply)
13.	Total consideration	Rs. 48,19,573.62/- (annexure-E on page no. 41 of the reply)
14.	Total amount paid by the complainants	Rs. 39,38,366/- (annexure-E on page no. 43 of the reply)

15.	Date of commencement of construction	20.09.2012 (vide affidavit submitted on behalf of the respondents by its AR on 06.10.2021)
16.	Possession clause	**14(a)** The construction of the flat is likely to be completed **within 36 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. **(emphasis supplied)**
17.	Due date of delivery of possession	20.09.2015 (Calculated from the date of commencement of construction as provided

		on the behalf respondents by its AR on 06.10.2021)
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	6 years 18 days.
21.	Grace period utilization	Grace period is not allowed in the present complaint.

B. Facts of the complaint

3. That the complainant no. 1 was in the need of a residential flat for his own residential purposes and use. In the month of June 2011 agents and representatives of the respondents approached the complainant no. 1 and informed him that respondent no. 1 entered into an agreement with the respondent no. 2, who is the owner of the land comprising out of Khewat No. 96/80, Khatoni No. 114, Rectangle No. 42, Kila No. 2(9-0), 3(8-0), 5/2/1(3-12), 6/2(7-7), 7(8-0), 9(8-0), 10(4-10), 12/2(4-0), 13(8-0), 14(8-0), 15/1(2-12), total measuring (87K 1M) 10.881 acres (herein after referred as "the project land") situated within the revenue estate of village Hayatpur, sector 90, District Gurugram. The respondent no. 2 obtained a license bearing no. 23 of 2008 dated 11.02.2008 for the Director Town and Country Planning, Haryana, Chandigarh to develop a group housing

colony known as "Shree Vardhman Flora". (Hereinafter referred as the said 'project'). The officials and representatives of the respondents assured the complainant that the respondent no. 2 have assigned all its rights under the said agreement regarding to the development, construction, marketing and sale of the built-up area of the said project to the respondent no. 1. The agents and representatives also assured the complainant no. 1 that the respondent no. 1 is the builder of repute, they will deliver the project duly completed in all respect within 36 months from the date of booking. Later, after receiving the agreement from the respondent no. 1, the complainant no. 1 came to know that neither the respondent no. 2 nor respondent no. 1 was ever owner of the property under the project land.

4. That believing the assurances so given by the said agents and representatives to be true and correct, the complainant no. 1 paid a sum of Rs. 3,07,725/- on 20.06.2011 vide cheque No. 011026 towards the booking/registration amount and booked a residential flat comprising super area of 1300.00 in the above said group housing scheme at the rate of the basic sale price at Rs. 2250/- per square feet and total basic price of the flat at Rs. 33,15,000/- consisting of two bedrooms, two toilets, one drawing cum dining room, one study room, one

kitchen, three balconies and covered parking space. The complainant opted for a construction linked payment plan.

5. That despite of the assurances so given by the representatives, officials and agents of the respondent no. 1 of giving the receipt on the same day of the said payment, the respondent no. 1 issued the receipt on 01.07.2011.

6. That the complainants further paid a sum of Rs. 3,72,347/- on 12.12.2011 vide receipt No. 921-13.12.2011. Despite receiving two instalments, the respondents are in breach and violation of the assurances and promises so made by their own representatives/officials as they have neither executed the agreement, nor given the allotment letter which was part and parcel to the conditions pre-requisite. The respondents sent only an allotment letter dated 21.12.2011, alloting a residential flat bearing no. C2-1303 measuring 1300 sq. ft (super area) (Hereinafter referred as the said 'unit') in the said project in favour of the complainant no. 1.

7. That thereafter the respondents have made various demands and accordingly the complainants have made all the payments as agreed. The respondent also charged the penal interest on the delayed payments as high as 24%, which is arbitrary, without any consent from the complainants and the same is unlawful.

8. That it was the duty of the respondent to execute the agreement at the time of accepting the booking amount for the said unit i.e., on 20.06.2011 or on the date of issuance of the receipt i.e., on 01.07.2011 but the respondents failed to do so during this period of more than a month. After the payment of 50% of the agreed consideration including the basic price of the flat i.e. a sum of Rs. 33,15,000/- , the respondents informed in the month of April 2012 that the agreement is ready and called complainants to their office to sign the pre-printed flat buyer agreement (Hereinafter referred as the 'FBA') , while as the said agreement contained unfair, biased terms and conditions favouring the respondents. Those terms are not only against the interests as well as just rights of the complainants but also discriminating the complainants at the hands of the respondents.

9. That at the time of booking, the agents, representatives and officials of the respondent no. 1 did not disclose or discussed anything about earnest money. The complainant no. 1 was shocked to read clause 2 (b) which provides that, "fifteen percent (15%) of the basic price shall constitute "Earnest Money". Not only this, but further clause also 4 (a) is an example of the high handedness of the respondents which makes the whole agreement void being biased, unfair and not

only threatened caused grave discrimination on the complainants. The clause runs as:

> *"Timely payment of the instalment/amount due shall be the essence of this Agreement. It shall be incumbent on the Buyer(s) to make timely payments and to comply with other terms and conditions of this agreement. If payment within the period stiputlated and/or the buyer(s) commits breach(es) of any of the terms and conditions of the agreement, then this agreement shall be liable to be cancelled and the buyer(s) shall be left within no lien on the said premises/flat. The company shall thereafter be free to deal with the said premises/flat in any manner, whatsoever, at its sole discretion. In the eventuality of cancellation, earnest money being 15% of the basic price would be forfeited and the balance, if any would be refundable without interest. In any case, all the dues, whatsoever, including interest, shall be payable before taking of the flat buy the buyer(s). On cancellation of this Agreement, the buyers(s) shall be liable reimburse to the company the amount of brokerage paid, if any, by the company towards booking of the flat cancelled and the flat shall vest with the company who will be free to deal with the same in any manner."*

10. That time and again this clause has been used by the respondents as one of their biggest weapon as well as threat on the complainants as well as other buyers that in case the payment of any of the instalments is not paid on time, the whole booking and agreement will be cancelled and the complainants and other buyers will be deprived from their own houses despite being complied with the terms and conditions of the said agreement and have dishonestly,

unlawfully and arbitrarily overcharged huge money from complainants on one pretext or the other. It is important to note here that no such strict provision has been incorporated in the said agreement or imposed on the respondent in case they fail or cause undue delay in the discharge of their offered, assured or agreed liabilities. This clause stipulates that the payment of the instalments and other charges on time is the essence of the said agreement. While as for the complainant's/buyer's standpoint or the reciprocity as to the completion of the project as well as the delivery of the possession of their respective apartment is also the essence of agreement has been purposefully, wilfully missed from the agreement. Intentionally and deliberately that clause has been omitted by the respondents.

11. That the representatives, agents and officials of the respondents never disclosed anything about the maintenance of the building or the interest free maintenance security deposit. Without obtaining any consent in this regard the respondents have enumerated clause 2 (g) in the agreement wherein they have provided for the interest free maintenance security as well as nominee of the company with the sole motive of unlawful enrichment at the costs of the buyers.

12. That further nothing in regard to the cost of installation of power back-up, firefighting equipments, solar water heating system etc. and facilities in the project or said unit have been disclosed or discussed before or during the course of booking by the agents, representative and officials of the respondent with the complainant no. 1. But to the utter shock in clause 2 (i) the respondents have made provisions for the cost of installing of power back-up; in clause 2(j) for firefighting equipments which is another extra burden on the complainants and without any consent.
13. That the agents, representatives and officials of the respondents have never disclosed, informed about any additional charges. The complainant no. 1 was shocked to read clause 3(c) of the agreement which provides a mandate upon the complainants to make the payment of all additional charges as and when demanded by the respondents, which is arbitrary, unlawful, against the interest of the complainants.
14. That in clause 5 (c), the respondents have mentioned that the demand notice by the respondents to the effect that sum has become due for the payment shall be final and binding on the complainants. While as no equally similar provision has been made in the said agreement giving a binding mandate to the respondents to complete the project timely and to watch the interests of the complainants/buyers.

15. That the clause 12 (b) further aggravates high handedness, discriminating attitude, biasness and malpractice of the respondents against the complainants. This clause entitles the respondents to further undertake the construction work in case of future events which were not only uncertain at the time booking or till the time of showing of the agreement but also were never disclosed or discussed by the agents, executives or officials of the respondent to the complainant no. 1 at any point of time before the showing the agreement to the complainant. This clause alone makes the whole agreement unlawful and void.

16. That the clause 14 (a) of the agreement provides for the completion of the project and delivery of flat after completion thereof, i.e., within 36 months of commencement of construction. This clause is against the terms of assurances so given by the agents, representatives and officials of the respondents as at the time of booking they have assured the complainant no. 1 that the respondents will complete the construction of the project and will deliver within 36 months of the booking. This very condition is one among the main essence of the agreement between the parties. The respondents have dishonestly varied from the assurance so made by them and have inserted this condition in the agreement thereby provided unlawfully this condition to

favouring the respondents and is against the rights and interest of the complainants. Even though on the basis of without prejudice subject to rights and contentions as available to the complainants, if the time frame to be counted from the date of commencement of the construction the period of 36 has been expired as long ago as on 17.04.2015 as the demand was raised by the respondents on commencement of construction on 18.04.2012 from the complainants. Not only this, this very clause prohibits the complainants to raise any lawful claim including the legal redressals in case of any unlawful violation or failure(s) on the part of the respondents which makes the agreement in hand void being against law.

17. That the clause 14 (b) is another iota of high handedness, discriminating attitude, biasness and malpractice of the respondents against the complainants. On one side the respondents have charged interests on the delayed payments from the complainants as high as at the rate of 24% p.a. and on the other hand this clause provides for compensation on account of delay in delivery possession by the respondents to the complainants at the rate as meagre as Rs. 5/- per sq. ft. per month, which is much lesser than the monthly rental of the similar house in the relevant industry/market. This clause is not only against the complainants and is favouring

the respondents but also is against the principle of equality of the parties to the contract and renders the agreement into a voidable agreement.

18. That at the time of booking of the flat, the agents, representatives and officials of the respondents never disclosed to the complainant No. 1 that the respondent No. 1 or its nominee will maintain the properties even after the delivery of project or that there will be any maintenance charges. The complainant no. 1 was shocked to see clause 22 of the agreement which provides not only for such charges but also for the penalty at the rate as high as 24 % per annum. The mere question of giving consent by the complainant at the time of booking on this clause never arose.

19. That upon going through the said agreement the complainant no. 1 found that the said agreement contained unfair, biased terms and conditions against the complainants and favouring the respondents which were even not agreed upon at the time of booking of the said flat. Those terms were not in accordance with the assurances and promises so made by the agents, representatives and executives of the respondent. Those terms were not only against the interests as well as just rights of the complainants but also discriminating them too, at the hands of the respondent. The complainants

requested the official concerned of the respondent to amend the above said terms to make the agreement with provisions equally balanced with reciprocity and binding on both the parties. Surprisingly and shockingly, the official of the respondent no. 1 threatened the complainant no. 1either to sign it or leave it, this is the set format of the agreement, and no change or amendment will be made therein. Upon further request by the complainant, the official of the respondent no. 1 further threatened viz. better to sign the agreement as it is, failing which the allotment will be cancelled and amount will be refunded after forfeiting the amount as per company's policy. Such act and conduct of the respondents is scandalous and unlawful to the core as well as falls within the purview of restrictive and unfair trade practices.

20. That in the circumstances so created by the respondents, the complainants, finding no other option but compelled to sign the agreement as was given by the respondents to save their hard earned money.

21. That, there is wilful, deliberate, unjust, huge inordinate delay of over 79 months in completion of the project as well as in handing over the possession from the date of booking till the filing of the present complaint. Further, the respondents with malafide intention have not fulfilled the terms of its own pre-

printed biased and one-sided agreement and dishonestly raised demands even without reaching the stages of construction as stated in the attached schedule of payment. The respondents with its malicious design have deceived the complainant by not raising said demands in accordance with the construction-linked plan as promised by the respondents, committed unfair and restrictive trade practices, cheated the innocent complainants. In accordance with the demand so raised by the respondent, the complainant had made payment of a sum of Rs. 42,38,366/- till 20.12.2017.

22. That such facts and circumstances the complainant left with no other option but to seek the indulgence of this authority and this authority had competent jurisdiction to entertain, try and decide the present complaint.

23. That the complainant no. 1 on 12.07.2012, gifted and assigned all his rights, title and interests to the complainant no. 2, who is his family member and sister-in-law. The complainant no. 1 and 2 both are necessary parties to file the present complaint before this authority.

C. Relief sought by the complainants.

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

- To direct the respondents, jointly and severally, to pay the interest at the rate of 24% per annum compound for causing inordinate delay in delivery of possession

of the unit/flat in issue on the amount deposited by the complainants to be calculated from the due date of delivery i.e., 17.04.2015 till its full realisation.

- Direct the respondents to complete the project as well as the apartments/flat booked by the complainants and deliver the same duly completed in all respect as agreed between the parties, within 6 weeks from the date of order.

D. Reply by the respondents.

25. That the present complaint filed under section 31 of the Act of 2016, is not maintainable under the said provision as the respondents have not violated any provision of the Act.

26. That as per rule 28(1)(a) of the RERA rules, a complaint under section 31 of the Act of 2016, 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.

27. That 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 of 2016, 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 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 Act. The expression "agreement to sell" occurring in section 18(1)(a) of the Act covers within its folded hands only those agreement to sell that have been executed after coming into force of the Act and the flat buyer's agreement 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.

28. That the flat buyer's agreement executed in the present case did not provide any definite date or time frame for handing

over of possession of the apartment to the complainants and on this ground alone the refund and/or compensation and/or interest cannot be sought under Act. Even the clause 14(a) of the flat buyer's agreement 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 respondents were 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.

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

30. That the alleged delay in delivery of possession, even if assumed to have occurred, cannot entitle the complainants 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 beach thereof cannot entitle the complainants to seek rescind the contract.

31. 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.

32. That the residential group housing project in question i.e., "Shree Vardhman Flora", sector-90, Gurugram, Haryana (hereinafter said "project") is being developed by the respondents on a piece of land measuring 10.881 acres situated at village Hayatpur, sector-90, Gurugram, Haryana under a license no. 23 of 2008 dated 11.02.2008 granted by DTCP, Haryana. The license had been granted to the land owners in collaboration with M/s Aggarwal Developers Private Limited. The respondent company is developing/constructing the project under an agreement with M/s Aggarwal Developers Private Limited.

33. The project in question has been registered with this authority under section 6 of the Real Estate (Regulation & Development) Act, 2016 and the said registration is valid up to 30.12.2021

34. That the construction of the first phase of the project has been completed and the respondents have already applied for grant of occupancy certificate for towers nos. B1, B2 And B3 ("completed phase") to the concerned authority on 18.11.2019. The construction of the remaining phases/towers is also at a very advanced stage and expected to be completed soon.

35. The construction of the entire project had not been completed within the time estimated at the time of launch of

the project due to various reasons beyond the control of the respondents, 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 respondents could not be held responsible for the alleged delay in completion of construction.

36. That in 2020, looking at the situation of real estate market battling the financial crunch; the central government had formed Rs 25,000 crore special window for completion of construction of affordable and mid-income housing projects investment fund popularly known as the 'Swamih fund'. The swamih investment fund had been formed to help the genuinely distressed RERA registered residential developments in the affordable housing / middle-income category and that require last mile funding to complete construction. the government sponsored fund is for the genuine and stressed developers who are dealing the financial crisis due to reasons beyond their control including Covid-19 pandemic. The investment manager of the fund was SBICAP Ventures Ltd. The respondents have also applied for the financial support from the said Swamih fund and its application for the same has also cleared after all verification.

A fund of Rs. 6 crores had also been sanctioned to the respondents vide letter dated 12.10.2020. This sanction of financial assistance by the Government of India backed Swamih fund is in itself a testimonial of the genuineness of promoter of the project in question and also that the project is in final stages of completion.

37. That as per clause 14(a), the obligations of the respondents to complete the construction within the tentative time frame mentioned in said clause was subject to timely payments of all the instalments by the complainants. The complainants 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 respondents 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. 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 of 2016 or under any other law.

38. 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 respondents, and timely payment of instalments by the buyer, which was not done. Further, the construction could not be completed within the tentative time frame given in the agreement as various factors beyond control of respondents 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 the allottees seriously jeopardized the efforts of the respondents for completing the construction of said project within the tentative time frame given in the agreement. It is pertinent to note that the Hon'ble Punjab & Haryana High Court on 21.08.2012 in CWP No. 20032 of 2008 prohibiting ground water extraction for construction purposes in the district of Gurugram and due to the said ban, water was not available for construction of the project in question for a very long period of time. The administrator HUDA, Gurgaon granted NOC for carrying our construction at site of the project vide its memo dated 27.12.2013. Further, the civil contractors engaged by the respondents for construction of the project in question failed

to carry out the construction within the given timelines and several disputes, such as of payments to the labourers etc. cropped up between the respondents and the said contractors.

39. That the respondents had engaged M/s Mahalakshmi Infraengineers Private Limited and DSA Buildtech Private Limited the contractors who despite having received payments from respondents did not pay to its labor / work force who in term refused to work severely hampering the pace of construction work. The respondents ultimately had to remove both the contractors and carried the construction on its own. The respondents directly made the payment of their laborers/workforce/sub-contractors to regularize the work. 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, the 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 results in a longer hindrance as it become difficult to re arrange, re-gather the work force particularly the laborers as they move to other places/their villages.

40. It is also submitted that as per the FBA the tentative period given for completion of construction was to be counted from the date of receipt of sanction of the building plans/revised plans and all other approvals and commencement of construction on receipt of such approvals. The last approval being consent to establish was granted by the Haryana State Pollution Control Board on 15.05.2015 and as such the period mentioned in clause 14(a) shall start counting from 16.05.2015 only.

41. Further, 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 respondents. The unprecedented situation created by the Covid-19 pandemic presented yet another force majeure event that brought to halt all activities related to the project including construction of remaining phase, processing of approval files etc. The Ministry of Home Affairs, GOI *vide* notification dated March 24, 2020 bearing no. 40-3/2020-DM-I(A) recognised that India was threatened with

the spread of Covid-19 epidemic and ordered a complete lockdown in the entire country for an initial period of 21 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, construction activity. Pursuant to issuance of advisory by the GOI vide office memorandum dated 13.05.2020, 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 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 normalcy in construction activity could resume, the world was hit by the Covid-19 pandemic.

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

E. Jurisdiction of the authority

43. The respondents have raised an objection regarding jurisdiction of authority to entertain the present complaint. The authority observes that it has territorial as well as

subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

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

E. II Subject-matter jurisdiction

Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the 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.

F. Findings on the objections raised by the respondents.

F. I Maintainability of complaint

44. The respondents contended that the present complaint filed under section 31 of the Act is not maintainable as the respondents have not violated any provision of the Act.

45. The authority, in the succeeding paras of the order, has observed that the respondents are 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.

46. Another contention of the respondents 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."

47. 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."

48. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the flat buyer's agreements have been executed in the manner that there is no scope left to the allottees to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement and are not in contravention of any other Act, rules, regulations made thereunder and are not unreasonable or exorbitant in nature.

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

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

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

50. 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."*

51. In the present complaint also, the respondents were liable to complete the construction of the project in question and handover the possession of the said unit by 20.09.2015 and the respondents are claiming benefit of lockdown which came into effect on 23.03.2020. Therefore, the authority is of the view that outbreak of a pandemic cannot be used as an excuse for non- performance of a contract for which the deadlines were much before the outbreak itself and for the said reason the said time period is not excluded while calculating the delay in handing over possession.

b.) 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.

52. The respondents have 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 6 years from the promised date of delivery of the subject unit. In the reply it has been admitted by the respondents/promoters 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 respondents are 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 respondents 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 respondents. In view of the same, this time period is not excluded while calculating the delay in handing over possession.

G. Findings on the relief sought by the complainants.

G.I Delay possession charges.

Relief sought by the complainants: Direct To direct the respondents, jointly and severally, to pay the interest at the rate of 24% per annum compound for causing inordinate delay in delivery of possession of the unit/flat in issue on the amount deposited by the complainants to be calculated from the due date of delivery i.e., 17.04.2015 till its full realisation.

53. In the present complaint, the complainants intend to continue with the project and are 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."

54. 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 thirty six(36) months of commencement of construction of the particular tower/block in which the Flat is located with a grace period of six(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. 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/completion/part 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 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.

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

56. 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 allottees that even a single situation may make the possession clause irrelevant for the purpose of allottees and the committed date for handing over possession loses its meaning. If the said possession clause is read in entirety, the time period of handing over possession is only a tentative period for completion of the construction of the flat in question and the promoter is aiming to extend this time period indefinitely on one eventuality or the other. Moreover, the said clause is an inclusive clause wherein the numerous approvals and terms and conditions have been mentioned for commencement of construction and the said approvals are sole liability of the promoter for which allottees cannot be allowed to suffer. The promoter must have mentioned that completion of which approval forms a part of the last statutory approval, of which the due date of possession is subjected to. It is quite clear that the possession clause is drafted in such a manner that it creates confusion in the mind of a person of normal prudence who reads it. The authority is of the view that it is a wrong trend followed by the promoters from long ago and it is this unethical

behaviour and dominant position that needs to be struck down. It is settled proposition of law that one cannot get the advantage of his own fault. The incorporation of such clause in the flat buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottees of their right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottees are left with no option but to sign on the dotted lines.

57. The respondents promoters has proposed to handover the possession of the subject apartment within a period of 36 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.

58. The respondents are claiming that the due date shall be computed from 15.05.2015 i.e., date of grant of Consent to Establish being last approval for commencement of construction. The authority observed that in the present case, the respondents have not kept the reasonable balance between his own rights and the rights of the complainants-allottees. The respondents have acted in a pre-determined, preordained, highly discriminatory and arbitrary manner. The unit in question was booked by the complainants on 01.07.2011 and the flat buyer's agreement was executed between the respondents and the complainants on 09.05.2012. It is interesting to note as to how the respondents had collected hard earned money from the complainants without obtaining the necessary approval (Consent to Establish) required for commencing the construction. The respondents have obtained Consent to Establish from the concerned authority on 15.05.2015. The respondents are in win-win situation as on one hand, the respondents have 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 respondents on 06.10.2021, the date of commencement of the subject tower, where the flat in question is situated is 20.09.2012. This said statement sworn by the respondents are itself contradictory to its contention that the due date of possession is liable to be computed from consent to establish. It is evident that respondents have started construction (on 20.09.2012 as per the affidavit submitted on behalf of the respondents 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 respondents 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 commencement of construction'.

59. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the said flat within 36 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, 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 allottees. Now, turning to the facts of the present case the respondents promoters have 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.

60. **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 allottees 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.*

61. 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.

62. 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.

63. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottees by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottees, in case of default. The relevant section is reproduced below:

> *"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.*
> *Explanation. —For the purpose of this clause—*
> *(i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*

(ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"

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

65. On consideration of the circumstances, the evidence and other record and submissions made by the parties, the authority is satisfied that the respondents are in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. It is a matter of fact that the date of commencement of the subject tower, where the flat in question is situated is 20.09.2012 as per the affidavit filed by the respondents on 06.10.2021. By virtue of flat buyer's agreement executed between the parties on 09.05.2012, the possession of the booked unit was to be delivered within 36 months of the commencement of construction of the

particular tower/ block in which the flat is located which comes out to be 20.09.2015 excluding a grace period of 6 months which is not allowed in the present case for the reasons quoted above.

66. Section 19(10) of the Act obligates the allottees 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., 20.09.2015 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.

67. 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 respondents are 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 respondents from the due date of possession i.e., 20.09.2015 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

68. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

I. The respondents are directed to pay interest at the prescribed rate of 9.30% p.a. for every month of delay from the due date of possession i.e., 20.09.2015 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 20.09.2015 till date of this order shall be paid by the promoters to the allottees within a period of 90 days from date of this order and interest for every month of delay shall be payable by the promoters to the allottees before 10th day of each subsequent month as per rule 16(2) of the rules.

III. The respondents are 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 respondents/promoters which is the same rate of interest which the promoter shall be liable to pay the allottees, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

VI. The respondents shall not charge anything from the complainants which is not the part of the agreement. However, holding charges shall also not be charged by the promoter at any point of time even after being part of agreement as per law settled by the Hon'ble Supreme Court in civil appeal no. 3864-3889/2020 dated 14.12.2020.

69. Complaint stands disposed of.

70. 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