BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	:	**2939 of 2021**
Date of filing complaint:		**28.07.2021**
First date of hearing	:	**03.09.2021**
Date of decision	:	**08.10.2021**

1. 2.	Subhash Chandra Sujata Srivastava **Both RR/O: -** A-3, Tower- 5, New Motibagh Complex, Chanakyapuri, New Delhi- 110021	**Complainants**
	Versus	
1.	M/s Shree Vardhman Infra Homes Pvt. Ltd. Regd. Office at: - 301, 3rd Floor, Inder Prakash Building, 21-Barakhamba Road, New Delhi-110001	**Respondent**

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

ORDER

1. The present complaint has been filed by the complainants/allottees 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.	503, tower-B2 (annexure-P1 on page no. 18 of the complaint)

9.	Unit admeasuring	1875 sq. ft. [super area] (annexure-P1 on page no. 18 of the complaint)
10.	Date of flat buyer's agreement	24.01.2012 (annexure-P1 on page no. 16 of the complaint)
11.	Payment plan	Construction linked payment plan (annexure-P1 on page no. 35 of the complaint)
12.	Subsequent allotee	18.04.2014 (annexure-P1 on page no. 38 of the complaint)
13.	Total consideration	Rs.65,51,865.89/- (annexure-E on page no. 62 of the reply)
14.	Total amount paid by the complainants	Rs.59,53,049/- (annexure-E on page no. 61 of the reply)
15.	Date of commencement of construction	18.03.2013 (vide affidavit submitted on behalf of the respondent by its AR on 06.10.2021)
16.	Possession clause	**14(a)** The construction of the flat is likely to be completed **within 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	18.03.2016 (Calculated from the date of commencement of construction as provided on the behalf respondent by its AR on 06.10.2021)
18.	Occupation Certificate	Not obtained
19.	Offer of possession	18.01.2020 (annexure-P2 on page no. 40 of the complaint) **Note:- Not a valid/ lawful offer of possession.**
20.	Delay in handing over of possession till date of order i.e.,08.10.2021	5 years 6 months 20 days.
21.	Grace period utilization	Grace period is not allowed in the present complaint.

B. Facts of the complaint

3. That on 24.01.2012, Mrs. Manisha Sharma (hereinafter known as the "original allotee") executed a flat buyer's

agreement (hereinafter referred as the 'FBA') for flat no. 503, tower no. B-2 having super area of 1875 sq. ft (hereinafter referred as the said 'unit') at Shree Vardhman Flora, sector 90, Gurgaon, Haryana (Hereinafter as the said 'project') for a basic sale price amounting to Rs.44,90,625/-.

4. That subsequently on 19.04.2012, Mrs. Manisha Sharma i.e., the 'original allottee, transferred the unit including all its rights and liabilities under the agreement dated 24.01.2012, by endorsement to Mr. Vikas Wason. It is pertinent to note that the said transfer was done in the presence of the respondent and with his full consent. Thereafter, Mr. Vikas Sharma transferred the unit including all its rights and liabilities under the agreement dated 24.01.2012, to the complainants by endorsement dated 18.04.2014. It is also pertinent to submit that transfer was done in the presence of the respondent and with his full consent

5. That according to the clause 14 (a) of the FBA, the respondent undertook to deliver the possession of the said unit within 36 months from the date of execution of the agreement i.e., 24.01.2015.

6. That the complainants made efforts to orally enquire the status of the project from the respondent between the period

of 2014 to 2019 for which they responded in an apathetic manner.

7. That subsequently only on 18.01.2020 after delay of almost 5 years, the respondent finally offered a letter of possession for the subject unit. It is pertinent to submit that the said letter of possession was offered despite no occupancy certificate being granted for the unit, which the respondent has admitted so even in the abovementioned letter of possession. Furthermore, the letter of possession also unilaterally demanded an additional Rs.10,33,956/- which includes escalation cost of Rs.6,78,263/- for the deliberate delay cause by the builder itself and remained completely silent on the delayed interest/compensation payable for the delay in delivery of possession.

8. That it is pertinent to submit that the complainants have already paid a total of Rs.50,58,295/- for the said unit, in addition the complainants have also paid Rs.8,94,753/- as Govt taxes for the said unit.

9. That subsequent to the possession letter dated 18.01.2020, the complainants visited the site and inspected the said unit only to find that the unit was not in a livable condition for which the complainants informed the respondent vide correspondence dated 02.04.2020.

10. That the complainants also made subsequent site visits on 17.01.2021 and 08.03.2021, wherein the complainants once again found that no effort in completing the unit was being undertaken by the respondent. That when the complainants visited the office of the respondent on 05.03.2021, and had a meeting with their representatives namely, executive Ms. Hema and Sr. executive Ms. Dolly Arora, they failed to give them a timeline for completion of the said unit, payment of interest for delay/compensation, and simply evaded the complainant's queries. That the abovementioned issues, were subsequently informed by the complainants to the respondent vide email dated 21.03.2021 and letter dated 22.03.2021, wherein the complainants also reiterated that the respondent provide them with copies of occupancy certificate, fire safety clearance and completion certificate prior to the possession to ensure that the said unit is in a condition fit for possession.
11. That despite such numerous correspondences, the respondent has been completely silent on the delay interest and compensation owed to the complainants for delayed delivery, despite the liability mandated upon them under section 18 of the Real Estate (Regulation and Development) Act, 2016 and the rules made thereunder.

12. That the respondent in their haste to abdicate their responsibilities under the Real Estate (Regulation And Development) Act, 2016, is attempting to grant possession letters, to the abovementioned unit without occupancy certificate and completion certificate, being fully aware that the unit is in a condition not fit for possession much less living.
13. That as per the provisions of the Real Estate (Regulation and Development) Act, 2016, the occupancy certificate ensures that the unit is in a condition fit for occupation. The respondent are acting contrary to law by attempting to provide possession letters without obtaining the occupancy certificate from the authority.
14. That the Hon'ble Maharashtra Real Estate Regulatory Authority in '***Balraj Bansal v. Nakta Investment***' vide order dated 23.02.2018 had also directed that possession should be handed with occupancy certificate.
15. That despite such regular payments made by the complainants, in pursuance of the said agreement, the respondent has completely failed to provide timely delivery of possession of the said unit/floor and also refused to compensate the complainants for the delayed delivery despite several reminders.

16. That being aggrieved by the complete apathy shown by the respondent, the complainants served a legal notice highlighting the complainants grievances and the respondent their legal obligations which they were mandated to comply.

17. That subsequent to the abovementioned legal notice, the complainants also discovered that the registration certificate of respondent M/s Shree Vardhman Infrahome Pvt. Limited which was granted by the authority on 23.08.2017, had expired on 30.06.2019. Furthermore, their application for extension of the registration certificate was also rejected by the authority vide order dated 10.02.2020 for various reasons including expiry of license, expiry of building plan amongst others.

18. That despite the expiry of registration certificate of the respondent 30.06.2019, and the subsequent order of the authority dated 10.02.2020 rejecting the respondent's application for extension of registration, the respondent has been attempting to mislead customers by directing customers who have purchased units in the project to make payments in a new a/c opened with the State Bank of India namely A/c no. 39769756963, located at Pusa Road, Karol Bagh, New Delhi with the objective of escaping any liability that the authority may impose on them.

19. That being aggrieved by the utter lack of response by the respondent and blatant disregard to the mandated law and the terms of the agreement. The complainants have approached this authority for relief.

C. Relief sought by the complainants.

20. The complainants have sought following relief(s):
    - (i) Direct the respondent to handover possession of the said unit after obtaining OC.
    - (ii) Direct the respondent to pay interest for the delay of possession to the complainants, as mandated under section 18 of the Act.

D. Reply by the respondent.

21. That the present complaint filed under section 31 of the Act of 2016, is not maintainable under the said provision as the respondent has not violated any provision of the Act.
22. 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.
23. 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.

24. 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 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.

25. 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 respondent 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.

26. 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.

27. 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.

28. 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 respondent 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 landowners 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.

29. 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

30. That the construction of the first phase of the project has been completed and the respondent 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.

31. 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 respondent, including inter-alia, liquidity crisis owing to global economic crisis that hit the real estate sector in India very badly which is still continuing, defaults committed by allottees, depressed market sentiments leading to a weak demand, government restrictions, force majeure events etc. The respondent cannot be held responsible for the alleged delay in completion of construction. The respondent is genuine and responsible developer who fought against all odds and has already completed one phase of the project and remaining phases are also on the verge of completion.

32. 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 respondent had 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 respondent 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.
33. 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 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 respondent to complete the construction within the time frame mentioned in FBA was subject to and dependent upon time payment of the instalment by the complainants. 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.

34. 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, 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 respondent came into play, including economic meltdown, sluggishness in the real estate sectors, defaults committed by the allottees in making timely payment of the instalments, shortage of labour, non-availability of water for construction and disputes with contractors. The delayed payment / non-payment of instalments by the allottees 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 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 respondent 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 respondent and the said contractors.

35. That the respondent had engaged M/s Mahalakshmi Infraengineers Private Limited and DSA Buildtech Private Limited the contractors who despite having received payments from respondent did not pay to its labor / work force who in term refused to work severely hampering the pace of construction work. The respondent ultimately had to remove both the contractors and carried the construction on its own. The respondent 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 result 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.

36. 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.

37. 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 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. As such it is submitted without prejudice to the submission made hereinabove that in the even this authority comes to conclusion that the respondent is liable for interest/compensation for the period beyond 27.07.2017, the period consumed in the aforesaid force majeure event or the situation beyond the control of the respondent has to be excluded.

38. That the respondent has applied for grant of NOC/ approvals for Fire safety (Fire NOC) and for lift NOC and the same has been approved and sanctioned from the concerned departments.

39. 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

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

E. I Territorial jurisdiction

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

E. II Subject-matter jurisdiction

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

F. I Maintainability of complaint

41. 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.

42. 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.

43. 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."

44. 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."*

45. 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 respondent w.r.t reasons for delay in handing over possession.

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

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

47. 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."*

48. 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 18.03.2016 and the respondent is claiming benefit of lockdown which came into effect on 23.03.2020. Therefore, the authority is of the view that outbreak of a pandemic cannot be used as an excuse for non- performance of a contract for which the deadlines were much before the outbreak itself and for the said reason the said time period is not excluded while calculating the delay in handing over possession.

> 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.

49. 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 5 years from the promised date of delivery of the subject unit. In the reply, it has been admitted by the respondent/promoter that the construction of the phase of the project wherein the apartment of the complainants is situated is in an advance stage. It means that it is still not completed. It is a well settled law that no one can take benefit of his wrong. Now, the respondent is claiming benefit out of lockdown period, orders dated 25.10.2019 and 01.11.2019

passed by EPCA and order dated 04.11.2019 passed by Hon'ble Supreme Court of India which are subsequent to the due date of possession. Therefore, the authority is of the considered view that the respondent could not be allowed to take benefit of his own wrong and the innocent allottees could not be allowed to suffer for the mistakes committed by the respondent. In view of the same, this time period is not excluded while calculating the delay in handing over possession.

G. Findings on the relief sought by the complainants.

G.I Delay possession charges.

Relief sought by the complainants:

(i) Direct the respondent to handover possession of the said unit after obtaining OC.

(ii) Direct the respondent to pay interest for the delay of possession to the complainants, as mandated under section 18 of the Act.

50. In the present complaint, the complainants intends 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."

51. 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.

52. 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.

53. 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.

54. The respondent promoter 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.

55. The respondent is claiming that the due date shall be computed from 15.05.2015 i.e., date of grant of Consent to Establish being last approval for commencement of construction. The authority observed that in the present case, the respondent has not kept the reasonable balance between his own rights and the rights of the complainants-allottees. The respondent has acted in a pre-determined, preordained, highly discriminatory and arbitrary manner. The unit in question was booked by the original allottee on

04.03.2011 and the flat buyer's agreement was executed on 24.01.2012. It is interesting to note as to how the respondent had collected hard earned money from the complainants without obtaining the necessary approval (Consent to Establish) required for commencing the construction. The respondent has obtained Consent to Establish from the concerned authority on 15.05.2015. The respondent is in win-win situation as on one hand, the respondent had not obtained necessary approvals for starting construction and the scheduled time of delivery of possession as per the possession clause which is completely dependent upon the 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 commencement of the subject tower, where the flat in question is situated is 18.03.2013. 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 18.03.2013 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 commencement of construction'.

56. **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 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.

57. **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.

58. 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.

59. 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.

60. 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;"

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

62. **Validity of offer of possession**: At this stage, the authority would express its views regarding the concept of 'valid offer of possession'. It is necessary to clarify this concept because after valid and lawful offer of possession, the liability of promoter for delayed offer of possession comes to an end. On the other hand, if the possession is not valid and lawful, liability of promoter continues till a valid offer is made and allottees remains entitled to receive interest for the delay caused in handing over valid possession. The authority after detailed consideration of the matter has arrived at the conclusion that a valid offer of possession must have following components:

    a) **Possession must be offered after obtaining occupation certificate-** The subject unit after its completion should have received occupation certificate from the department concerned certifying

that all basic infrastructural facilities have been laid and are operational. Such infrastructural facilities include water supply, sewerage system, storm water drainage, electricity supply, roads and street lighting.

b) **The subject unit should be in habitable condition-** The test of habitability is that the allottee should be able to live in the subject unit within 30 days of the offer of possession after carrying out basic cleaning works and getting electricity, water and sewer connections etc from the relevant authorities. In a habitable unit all the common facilities like lifts, stairs, lobbies, etc should be functional or capable of being made functional within 30 days after completing prescribed formalities. The authority is further of the view that minor defects like little gaps in the windows or minor cracks in some of the tiles, or chipping plaster or chipping paint at some places or improper functioning of drawers of kitchen or cupboards etc. are minor defects which do not render unit uninhabitable. Such minor defects can be rectified later at the cost of the developers. The allottees should accept possession of the subject unit with such minor defects under protest. This authority will award suitable relief for rectification of minor defects after taking over of possession under protest. However, if the subject unit is not habitable at all because the plastering work is yet to be done, flooring

works is yet to be done, common services like lift etc. are non-operational, infrastructural facilities are non-operational then the subject unit shall be deemed as uninhabitable and offer of possession of an uninhabitable unit will not be considered a legally valid offer of possession.

c) **Possession should not be accompanied by unreasonable additional demands-** In several cases additional demands are made and sent along with the offer of possession. Such additional demands could be unreasonable which puts heavy burden upon the allottees. An offer accompanied with unreasonable demands beyond the scope of provisions of agreement should be termed as invalid offer of possession. Unreasonable demands itself would make an offer unsustainable in the eyes of law. The authority is of the view that if respondent has raised additional demands, the allottees should accept possession under protest.

63. The authority in the light of the afore-mentioned reasoning is of the considered view that the offer of possession made on 18.01.2020 by the respondent promoter is unlawful and not a valid offer of possession as the same has been made without obtaining OC from the competent authority.

64. 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 commencement of the subject tower, where the flat in question is situated is 18.03.2013 as per the affidavit filed by the respondent on 06.10.2021. By virtue of flat buyer's agreement executed between the parties on 24.01.2012, 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 18.03.2016 excluding a grace period of 6 months which is not allowed in the present case for the reasons quoted above.

65. 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., 18.03.2016 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.

66. Accordingly, non-compliance of the mandate contained in section 11(4) (a) read with proviso to section 18(1) of the Act on the part of the respondent is established. As such complainants are entitled to delayed possession charges at the prescribed rate of interest i.e., 9.30% p.a. for every month of delay on the amount paid by the complainants to the respondent from the due date of possession i.e., 18.03.2016 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

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

I. The respondent is directed to pay interest at the prescribed rate of 9.30% p.a. for every month of delay from the due date of possession i.e., 18.03.2016 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 18.03.2016 till date of this order shall be paid by the promoter 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 promoter to the allottees before 10th day of each subsequent month as per rule 16(2) of the rules.

III. The offer of possession letter dated 18.01.2020 is unlawful and hence not a valid offer of possession. The respondent is directed to handover the physical possession of the subject unit only after obtaining OC from the competent authority.

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

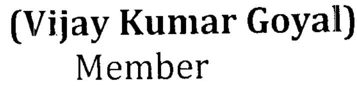
V. The rate of interest chargeable from the allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the

allottees, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

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

68. Complaint stands disposed of.

69. 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