BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 1983 of 2021
First date of hearing : 13.04.2021
Date of decision : 21.09.2021

Sh. Gagandeep Singh
Through POA holder
Mr. Rajender Singh Chawla
R/o: - A-603, Plot No. 5, Swami
Dayanand Apartment CGHS Ltd., Sector-6, Dwarka,
New Delhi- 110075 **Complainant**

Versus

M/s VSR Infratech Pvt. Ltd.
Regd. Office: - Plot No. 14, Ground Floor,
Sector-44, Institutional Area,
Gurugram- 122003 **Respondent**

CORAM:
Shri Samir Kumar **Member**
Shri Vijay Kumar Goyal **Member**

APPEARANCE:
Shri Gaurav Rawat Advocate for the complainant
Ms. Shreya Takkar Advocate for the respondent

ORDER

1. The present complaint dated 09.04.2021 has been filed by the complainant/allottee in Form CRA under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible

for all obligations, responsibilities and functions to the allottee as per the agreement for sale executed inter-se them.

A. Unit and project related details

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

S. No.	Heads	Information
1.	Project name and location	"114 Avenue", Sector-114, Village Bajghera, Gurugram, Haryana.
2.	Area of the project	2.968 acres
3.	Nature of the project	Commercial Complex
4.	DTCP License	72 of 2011 dated 21.07.2011
5.	Valid upto	20.07.2024
6.	RERA registration/not registered	Registered vide no. 53 of 2019 dated 30.09.2019
7.	RERA registration valid upto	31.12.2019
8.	RERA extension	113 of 2020 dated 05.10.2020
9.	RERA extension valid upto	31.12.2020 (Extension validity expired)
10.	Unit no.	G-15, ground floor [page 54 of complaint]
11.	Unit measuring (super area)	804.29 sq. ft.
12.	Allotment letter	N/A
13.	Date of execution of space buyer's agreement	30.09.2012

14.	Date of endorsement	14.06.2013 [Page 76 of complaint]
15.	Total sales consideration	Rs.77,78,123/- (As per SOA at page no.148 of reply)
16.	Total amount paid by the complainant	Rs. 74,08,657/- (As per statement annexed at page no. 148 of reply)
17.	Payment plan	Construction Linked Plan
18.	Date of start of construction	01.01.2012 (As stated by the promoter in DPI)
19.	Due date of delivery of possession ***"32. That the Company shall give possession of the said unit within 36 months of signing of this agreement or within 36 months from the date of start of construction of the said building whichever is later. If the completion of the said Building is delayed by reason of non-availability of steel and/or cement or other building materials...."***	30.09.2015 **Note: - Date of start of construction is 01.01.2012 as per DPI submitted by the promoter, thus the due date is calculated from the date of signing of the agreement i.e. 30.09.2012.**
20.	**Offer of possession to the complainant**	20.02.2021
21.	**Delay in handing over of possession till date of offer of i.e. 20.02.2021**	5 years 4 months and 21 days

B. Facts of the complaint

3. The complainant has made the following submissions in the complaint:-

I. The complainant submitted that the commercial colony project "114 Avenue" situated in the Sector 65, Village Bajghera, Haryana,

in a land parcel admeasuring a total area of approximately on the 2.97 acres of land, under the license no. 72 of 2011 dated 21.07.2011, issued by DTCP, Haryana, Chandigarh.

II. That the complainant, Mr. Gagandeep Singh (through special power of attorney holder Mr. Rajinder Singh Chawla) is the law-abiding citizen. Currently residing at A-151, plot no-11, Prodyogiki apartments, Near Sector-4 Market Sector-3, DwarkaSector-6, New Delhi-110075

III. That in 2011, the respondent company issued an advertisement announcing a commercial colony project "114 Avenue" situated in the Sector 114, Village Bajghera, Haryana, in a land parcel admeasuring a total area of approximately on the 2.97 acres of land, under the license no. 72 of 2011 dated 21.07.2011, issued by DTCP, Haryana, Chandigarh and thereby invited applications from prospective buyers for the purchase of unit in the said project. Respondent confirmed that the projects had got building plan approval from the authority.

IV. The complainant while searching for a flat/accommodation was lured by such advertisements and calls from the brokers of the respondent for buying a commercial in their project namely 114 Avenue. The respondent company talked about the moonshine reputation of the company and the representative of the respondent company made huge presentations about the project mentioned above and also assured that they have delivered several

such projects in the National Capital Region. The respondent handed over one brochure to the complainants which showed the project like heaven and in every possible way tried to hold the complainant and incited the complainants for payments.

V. Relying on various representations and assurances given by the respondent company and on belief of such assurances, original allottee namely Mr. Raghvendra Singh, booked a commercial unit in the project by paying an amount of Rs.40,000/- vide cheque no. 762991 dated 14.07.2011 the booking of the said unit bearing no. G-15, ground floor, in sector 114, having super area measuring 804.290 sq. ft. to the respondent dated 14.07.2011 and the same was acknowledged by the respondent vide receipt dated 14.07.2011.

VI. That the respondent sent an allotment letter dated 10.12.2011 to original allottee confirming the booking the said unit and also mentioning the moonshine reputation of the company and the location of project. Further, providing the details of payment to be made by the complainants.

VII. That the respondent sent allotment letter dated 10.12.2011 to original allottee, confirming the booking of the unit dated 14.07.2011, allotting a unit no. G-15, ground floor, (hereinafter referred to as 'unit') measuring 804.290 Sq. Ft (super built-up area) in the aforesaid project of the developer for a total sale consideration of the unit i.e. Rs.74,44,342/-, which includes basic

price, plus EDC and IDC, and other specifications of the allotted unit and providing the time frame within which the next instalment was to be paid.

VIII. That as per the payment plan and demand raised by the respondent. The complainant paid sum of Rs.8,40,000/- vide cheque no. 762998 and 005802 dated 30.12.2012 for Rs.8,40,000/-. The payment plan, the respondent raised demand of Rs.6,68,357/- on 28.05.2012 and the same was paid the by the complainant.

IX. That the original allottees sold the said unit to Mr. Gagandeep Singh (complainant) vide an endorsement dated 14.06.2013 in his favour. And the same was acknowledged by the respondent vide endorsement dated 14.06.2013 in the favour of the complainant.

X. That the space buyer's agreement was executed between the original allottee (same was endorsed in favour of the complainant on 14.06.2013) and respondent on 30.09.2012.

XI. As per clause 32 of the space buyer's agreement the respondent had to deliver the possession within a period of 36 months from the date of signing of the agreement or the date of start of construction, whichever is later. The date of start of construction is 15.06.2012. Therefore, the due date of possession comes out to be 30.09.2015.

XII. The complainant submitted as per the demands raised by the respondent, based on the payment plan, the complainant to buy the

captioned unit already paid a total sum of Rs.74,93,036.49/- towards the said unit.

XIII. That the payment plan was designed in such a way to extract maximum payment from the buyers viz a viz or done/completed. The complainant approached the respondent and asked about the status of construction and also raised objections towards non-completion of the project. It is pertinent to state herein that such arbitrary and illegal practices have been prevalent amongst builders before the advent of RERA, wherein the payment/demands/ etc. have not been transparent and demands were being raised without sufficient justifications and maximum payment was extracted just raising structure leaving all amenities/finishing /facilities/common area/road and other things promised in the brochure, which counts to almost 50% of the total project work.

XIV. That during the period the complainant went to the office of respondent several times and requested them to allow them to visit the site, but it was never allow saying that they do not permit any buyer to visit the site during construction period, once complainant visited the site but was not allowed to enter the site and even there was no proper approached road. The complainant even after paying amounts still received nothing in return but only loss of the time and money invested by them.

XV. That in terms of clause 32 (a) of the said buyer's agreement, the respondent was under dutiful obligation to complete the construction and to offer the possession within 24 months from the date of start of construction. That complainant approached in person to know the fate of the construction and offer of possession in terms of the said buyer's agreement, respondent misrepresented to complainants that the construction will get completed soon.

XVI. That the complainant requested the respondent to show/inspect the unit before complainants pay any further amount and requesting to provide the car parking space no, but respondent failed to reply. Despite having made multiple tall representations to the complainants, the respondent has chosen deliberately and contemptuously not to act and fulfil the promises and have given a cold shoulder to the grievances raised by the cheated allottees.

XVII. The respondent has completely failed to honour their promises and have not provided the services as promised and agreed through the brochure, agreement and the different advertisements released from time to time. Further, such acts of the respondent are also illegal and against the spirit of the Act, 2016 and the Rules, 2017.

XVIII. That the complainant is the one who has invested their life savings in the said project and are dreaming of a home for themselves and

the respondents have not only cheated and betrayed them but also used their hard-earned money for their enjoyment.

C. Relief sought by the complainant:

4. The complainant has sought following relief(s).

(i) To allow the complaint, directing the respondent to hand over the possession of the said unit with the amenities and specifications as promised in all completeness without any further delay and not to hold delivery of the possession for certain unwanted reasons much outside the scope of agreement.

(ii) Direct the respondent to pay the interest on the total amount paid by the complainants at the prescribed rate of interest as per the Act from due date of possession till date of actual physical possession as the possession is being denied to the complainants by the respondent in spite of the fact that the complainants desires to take the possession.

(iii) The respondent to pay the balance amount due to the complainant from the respondent on account of the interest, as per the guidelines laid in the RERA, 2016, before signing the conveyance deed/sale deed.

(iv) The respondent not to force the complainants to sign any indemnity cum undertaking indemnifying the builder from anything legal as a precondition for signing the conveyance deed.

(v) To order the respondent to kindly handover the possession of the unit after completing in all aspect to the complainants and not to force to deliver an incomplete unit.

(vi) To direct the respondent to provide the exact lay out plan of the said unit.

5. On the date of hearing, the authority explained to the respondent/promoter about the contravention as alleged to have been committed in relation to section 11(4)(a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent

6. The respondent has contested the complaint on the following grounds.

I. That the present complaint is required to be filed before the adjudicating officer under rule 29 of the Haryana Real Estate (Regulation & Development) Rules, 2017 (hereinafter referred to as the "said Rules") read with section 31 and section 71 of the said Act and not before the regulatory authority under rule 28. It is submitted that the complainant is seeking interest for a grievance under section 12, 14, 18 and 19 of the Real Estate (Regulation & Development) Act, 2016 (hereinafter referred to as the "said Act") and are required to be filed before the adjudicating officer under rule 29 of the Haryana Real Estate (Regulation & Development) Rules, 2017 (hereinafter referred to as the "said Rules") read with

section 31 and section 71 of the said Act and not before this regulatory authority under rule 28.

II. The complaint pertains to the alleged delay in delivery of possession and the complainant has filed the present complaint under rule 28 of the said rules and is seeking delayed interest at 18% p.a. for the alleged delay in delivery. The project of the respondent is registered with this regulatory authority, the complaint, if any, is still required to be filed before the adjudicating officer under rule 29 of the said rules and not before this regulatory authority under rule 28 as this regulatory authority has no jurisdiction whatsoever to entertain such complaint and such complaint is liable to be rejected.

III. That the Real Estate (Regulation & Development) Act, 2016 is a complete code in itself and as per the provisions of the Act, the legislature had categorically formed two separate bodies i.e. the authority under section 20 for regulatory functions under the Act and the adjudication officer under section 71 of the Act for adjudicatory function. Thus there is a clear distinction under the said act including the regulatory and adjudicatory functions as provided under the Act.

IV. That from the facts and law as stated above this authority does not have jurisdiction to entertain the present complaint. Therefore, the complaint is liable to be dismissed at the threshold itself.

V. That the space buyer's agreement was entered into between the original allottee and the answering respondent on 30.09.2012 and later on the rights and interest in said apartment was transferred/endorsed in the name of the present complainant on 14.06.2013 after properly understanding each and every clause contained in the space buyer's agreement and, as such, the complainant is bound by the terms and conditions mentioned in the space buyer's agreement. That the complainant herein acquired the rights and interest of the original allottee in the said apartment from the original allottee at his own free will and understanding. He was neither forced nor influenced to do so. That by acquiring the rights and interest of the original allottee in the said apartment from the original allottee, the complainant has stepped into the shoes of the original allottee.

VI. That it is trite law that the terms of the agreement are binding between the parties. The Hon'ble Supreme Court in the case of ***"Bharti Knitting Co. vs. DHL Worldwide Courier (1996) 4 SCC 704"*** observed that that a person who signs a document containing contractual terms is normally bound by them even though he has not read them, and even though he is ignorant of their precise legal effect. It is seen that when a person signs a document which contains certain contractual terms, then normally parties are bound by such contract; it is for the party to establish exception in a suit. When a party to the contract

disputes the binding nature of the singed document, it is for him or her to prove the terms in the contract or circumstances in which he or she came to sign the documents.

VII. That the Hon'ble Supreme Court in the case of ***"Bihar State Electricity Board, Patna and Ors. Vs. Green Rubber Industries and Ors, AIR (1990) SC 699"*** held that the contract, which frequently contains many conditions, is presented for acceptance and is not open to discussion. It is settled law that a person who signs a document which contains contractual terms is normally bound by them even though he has not read them, even though he is ignorant of the precise legal effect.

VIII. That without prejudice to the above, it is stated that the statement of objects and reasons of the said Act clearly state that the RERA is enacted for effective consumer protection. RERA is not enacted to protect the interest of investors. As the said Act has not defined the term consumer, therefore the definition of "Consumer" as provided under the Consumer Protection Act, 1986 has to be referred for adjudication of the present complaint. The complainant is an investor and not a consumer.

IX. That the respondent has acted in accordance with the terms and conditions of the space buyer's agreement executed between the parties on their own free will. That the complainants were duly informed about the schedule of possession as per clauses 32 of

the space buyers agreement entered into between both the parties.

X. That in the present case as per the space buyer agreement was executed between the original allottee and the respondent company dated 30.09.2012. That thereafter the unit in question was transferred in the name of the present complainant on 14.06.2013 after completion of all requisite formalities and all the receipts and the agreement were endorsed in the favour of the subsequent allottee, the respondent was supposed to hand over the possession within a period of 36 months of signing of this agreement i.e., 20.09.2012 or within 36 months from the date of start of construction of the said building i.e., in the year 2012 whichever is later. It is submitted that the property in question was transferred in the name of the complainant on 14.06.2013 and thus as per the law laid down by the Supreme Court in catena of judgments the possession date ought to be calculated from the date of transfer. It is submitted that the later date is the date of execution of the agreement i.e., 30.09.2012 and the possession date comes out to be 30.09.2015. However, the said timeline was subject to force majeure conditions. That it is submitted that as per clause 32 of the space buyer's agreement which clearly states that respondent shall be entitled to extension of time for delivery of possession of the said premises if such performance is prevented or delayed due to conditions as mentioned therein.

XI. That despite exercising diligence and continuous pursuance of project to be completed, project of answering respondent could not be completed as prescribed for the following reasons: -

a. That the project in question was launched in the year 2010 and is right on the Dwarka expressway, which was supposed to be completed by the State of Haryana by the end of 2012. That the star purpose of launching the project and object of the complaints buying the project was the connectivity of Dwarka expressway which was promised by the State Government to be completed in the year 2012. That it is reiterated that the only approach road to the project in this Dwarka Expressway which is still not complete and is likely to take another year or so. There being no approach road available it was initially not possible to make the heavy trucks carrying construction material to the project site and after a great difficulty and getting some kacha paths developed, materials could be supplied for the project to get completed which took a lot extra time. Even now the Govt has not developed and completed the basic infrastructure, despite the fact that EDC/IDC were both deposited with the State Government on time. The Dwarka Expressway was earlier scheduled to be completed by the year 2012, by the State Government of Haryana, but later failed to develop the said road. In the year 2017, NHAI joined to complete the Dwarka Expressway, but again both State Government as well as NHAI again missed the deadlines and still the Expressway is incomplete, now likely to be completed by the year 2022, if the deadline is adhered to be these agencies. That in this view of the circumstances as detailed above the respondent developer can by no means be expected to complete

a project which does not even have an approach road to be constructed by the State. Thus the respondent cannot be held accountable for the delay in the project and State of Haryana and NHAI, are responsible, hence answerable for the delay in completing Dwarka expressway, which in turn has caused the delay of the present project. That completion of Dwarka expressway which in turn affected the completion of the project in question was beyond the control of the respondent. Thus, for just and fair adjudication of this complaint both State of Haryana and NHAI are necessary parties to the present proceedings for the purpose of causing the delay in the project and thus they are jointly and severally liable for the delay of the project and pay compensation to the complainant.

b. It is submitted that in the year, 2012 on the directions of the Hon'ble Supreme Court of India, the mining activities of minor minerals were regulated. The Hon'ble Supreme Court directed framing of Modern Mineral Concession Rules. Reference in this regard may be had to the judgment of ***"Deepak Kumar v. State of Haryana, (2012) 4 SCC 629"***. The competent authorities took substantial time in framing the rules and in the process the availability of building materials including sand which was an important raw material for development of the said project became scarce in the NCR as well as areas around it.

c. The company faced the problem of sub soil water which persisted for a period of 6 months and hampered excavation and construction work. The problem still persists, and we are taking appropriate action to stop the same.

d. On 19.02.2013, the office of the Executive engineer, Huda, Division No. II, Gurgaon vide Memo No. 3008-3181 has issued instruction to all Developers to lift tertiary treated effluent for

construction purpose from Sewerage treatment plant Behrampur. Due to this instruction, the company faced the problem of water supply for a period of 6 months.

e. The company is facing the labour problem for last 3 years continuously which slowed down the overall progress of the project and in case the company remains to face this problem in future, there is a probability of further delay of project.

f. The contractor of the project stopped working due to his own problems and the progress of project was completely at halt due to stoppage of work at site. It took almost 9 months to resolve the issues with contractor and to remobilize the site.

g. The building plans were approved in January 2012 and company had timely applied for environment clearances to competent authorities, which was later forwarded to State Level Environment Impact Assessment Authority, Haryana. Despite of our best endeavor we only got environment clearance certificate on 28.05.2013 i.e. almost after a period of 17 month from the date of approval of building plans.

h. The typical design of fifth floor slab casting took a period of more than 6 month to design the shutting plans by structural engineer which hampered the overall progress of work.

i. The infrastructure facilities are yet to be created by competent authority in this sector is also a reason for delay in overall project. The drainage, sewerage and other facility work not yet commenced by competent authority.

j. There was a stay on construction in furtherance to the direction passed by the Hon'ble NGT. In furtherance of the above-mentioned order passed by the Hon'ble NGT.

k. That the sudden surge requirement of labour and then sudden removal has created a vacuum for labour in NCR region. That the

projects of not only the respondent but also of all the other developers /builders have been suffering due to such shortage of labour and has resulted in delays in the projects beyond the control of any of the developers. That in addition the respondent states that this further resulted in increasing the cost of construction to a great extent.

l. Due to active implementation of social schemes like National Rural Employment Guarantee and Jawaharlal Nehru National Urban Renewal Mission, there was also more employment available for labours at their hometown despite the fact that the NCR region was itself facing a huge demand for labour to complete the projects.

m. Labour shortage can be substantiated by way of newspaper articles elaborating on the above-mentioned issues hampering the construction projects in NCR. That this was certainly never foreseen or imagined by the opposite party while scheduling the construction activities. That it is submitted that even today in current scenario where innumerable projects are under construction all the developers in the NCR region are suffering from the after-effects of labour shortage on which the whole construction industry so largely depends and on which the respondent has no control whatsoever.

n. That the Ministry of environment and Forest and the Ministry of mines had imposed certain restrictions which resulted in a drastic reduction in the availability of bricks and availability of Sand which is the most basic ingredient of construction activity. That said ministry had barred excavation of topsoil for manufacture of bricks and further directed that no more manufacturing of bricks be done within a radius of 50 km from

coal and lignite-based thermal power plants without mixing 25% of ash with soil.

o. That shortage of bricks in region has been continuing ever since and the respondent had to wait many months after placing order with concerned manufacturer who in fact also could not deliver on time resulting in a huge delay in project.

p. That sand which is used as a mixture along with cement for the same construction activity was also not available in the abundance as is required since mining Department imposed serious restrictions against manufacturing of sand from Aravali region.

q. That this acute shortage of sand not only delayed the project of the answering respondent but also shot up the prices of sand by more than hundred percent causing huge losses to respondent.

r. That same further cost huge delay in project and stalling various parts and agencies at work in advanced stages, for now the respondent had to redo, the said work causing huge financial burden on respondent, which has never been transferred to complainant or any other customers of project.

s. That in addition the current Govt. has on 8th Nov. 2016 declared demonetization which severely impacted the operations and project execution on the site as the labours in absence of having bank accounts were only being paid via cash by the sub-contractors of the company and on the declaration of the demonetization, there was a huge chaos which ensued and resulted in the labours not accepting demonetized currency after demonetization.

t. That in July 2017 the Govt. of India further introduced a new regime of taxation under the Goods and Service Tax which further created chaos and confusion owning to lack of clarity in

its implementation. That ever since July 2017 since all the materials required for the project of the company were to be taxed under the new regime it was an uphill task of the vendors of building material along with all other necessary materials required for construction of the project wherein the auditors and CA's across the country were advising everyone to wait for clarities to be issued on various unclear subjects of this new regime of taxation which further resulted in delays of procurement of materials required for the completion of the project.

u. That there was a delay in the project also on account of violations of the terms of the agreement by several allottees. That because of the recession in the market most the allottees have defaulted in making timely payments and this accounted to shortage of money for the project which in turn also delayed the project.

v. Developer was faced with certain other force majeure events including but not limited to non-availability of raw material due to various stay orders of Hon'ble Punjab & Haryana High Court and National Green Tribunal thereby stopping/regulating the mining activities, brick kilns, regulation of the construction and development activities by the judicial authorities in NCR on account of the environmental conditions, restrictions on usage of water, etc. That in addition to above all the projects in Delhi NCR region are also affected by the Blanket stay on construction every year during winters on account of AIR pollution which leads to further delay the projects. That such stay orders are passed every year either by Hon'ble Supreme Court, NGT or/and other pollution boards, competent courts, Environment Pollution (Prevention & Control) Authority established under

Bhure Lal Committee, which in turn affect the project. That to name few of the orders which affected the construction activity are as follows: (i) Order dated 10.11.2016 and 09.11.2017 passed by the Hon'ble National Green Tribunal, (ii) Notification/ orders passed by the Pollution control board dated14.06.2018, 29.10.2018 and 24.12.2018 and (iii) Letter dated 01.11.2019 of EPCA along with orders dated 04.11.2019, 06.11.2019 and 25.11.2019 of the Hon'ble Supreme Court of India.

w. That the Government of India declared nationwide lockdown due to COVID 19 Pandemic effective from 24.03.2020 midnight. It is submitted that the construction and development of the project was affected due to this reason as well. This authority has vide its order dated 26.05.2020 invoked the force majeure clause.

XII. That after making sincere efforts despite the force majeure conditions, the respondent completed the construction and thereafter applied for the occupation certificate on 15.07.2020. However, it took considerable time in grant of occupation certificate and was finally received by the respondent on 17.02.2021, i.e. almost 7 months from the date of application for grant of occupation certificate. That this delay of the competent authority in giving occupation certificate cannot be attributed in considering the delay in delivering the possession of the unit, since on the day the respondent applied for occupation certificate the unit was complete in all respects. That the occupation certificate with respect to the tower where the unit is situated

was only granted after inspections by the relevant authority and after ascertaining that the construction was completed in all respect in accordance with the approved plans and that the unit was in a habitual condition.

XIII. That immediately after the receipt of the occupation certificate on 17.02.2021, the respondent company sent a letter dated 20.02.2021 along with the statement of account requesting the complainant to come forward and clear his dues and start the process of fit outs.

XIV. That the complainant has approached the authority with unclean hands and have supressed and concealed materials facts and proceedings which have a direct bearing on the vary maintainability of the purported complaint and if there had been disclosure of these material facts and proceedings, the question of entertaining the purported complainant would not have arisen.

XV. That the complainant is not a consumer and a second user since he has purchased the unit in question purely for commercial purpose as a speculative investor and to make profits and gains, it is submitted that reliance in this regard is placed on clause 24 of the space buyer's agreement. Thus, it is clear that the complainant has invested in the unit in question for commercial gains, i.e. to earn income and to earn premium thereon. Since the investment has been made for the aforesaid purpose, it is for commercial purpose and as such the complainants are a

consumer/end user. The complaint is liable to be dismissed on this ground alone. Under these circumstances, it is all the more necessary for the complainants, on whom the burden lies, to show how the complainants are a consumer.

XVI. The complainant has not disclosed its financial position and the statement of income and assets for the last 5 (five) years prior to the date of booking of the above unit. It is necessary for the complainant to file copies of its income tax returns for the 5 (five) years prior to the date of booking. Details of the total assets both moveable and immovable together with the value of each asset in the name of the complainant should also be disclosed, which would indicate whether the aforesaid booking was done, like other properties, for investment purposes.

XVII. That the complainant is a subsequent purchaser/re-allottee/ subsequent buyer who purchased the floor in dispute from the original allottee on 14.06.2013. it is worth mentioning that the Hon'ble supreme court in Haryana Urban Development Authority VS Raja Ram (Civil appeal no. 2381 of 2003) decided on 23.10.2008 whereby it was held that if reallotment has been made, the purchaser was aware of delay in delivering the allotted unit and in spite of it, they took re allotment, they were also aware that time for performance was not stipulated as the essence of the contract and therefore, the hon'ble Supreme court held that

interest while giving possession was neither warranted nor justified.

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

E. Jurisdiction of the authority

The respondent has raised a preliminary submission/ objection the authority has no jurisdiction to entertain the present complaint. The objection of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. 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

8. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram District. Therefore, this authority has 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 allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

Section 11(4)(a)

> *Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;*
>
> *The provision of delayed possession charges is part of the application form, as per clause 7(b) of the application form dated 04.09.2010. Accordingly, the promoter is responsible for all obligation s/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.*

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

F. Findings on the objections raised by the respondent

F.1 Objection regarding entitlement of DPC on ground of complainant being investor

10. The respondent has taken a stand that the complainant is the investor and not consumer, therefore, he is not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority observes that the respondent is correct in

stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states main aims& objects of enacting a statute but at the same time preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if the promoter contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the apartment buyer's agreement, it is revealed that the complainants are buyers and they have paid total price of Rs.74,08,657/- to the promoter towards purchase of an apartment in its project. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

> *"2(d) "allottee" in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;"*

11. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment buyer's agreement executed between promoter and complainants, it is crystal clear that the complainants are allottee(s) as the subject unit was allotted to them by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be

"promoter" and "allottee" and there cannot be a party having a status of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled as ***M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr.*** has also held that the concept of investors is not defined or referred in the Act. Thus, the contention of promoter that the allottee being investor is not entitled to protection of this Act also stands rejected.

F. II objection regarding complainant is a subsequent allottee

I. **Where the subsequent allottee had stepped into the shoes of original allottee before the due date of handing over possession**:

12. Even in the instant case (4031/2019), the complainant/subsequent allottee had been acknowledged as an allottee by the respondent vide nomination letter dated 24.05.2013. The authority has perused the nomination letter where the promoter has confirmed the transfer of allotment in favour of subsequent allottee, Mr. Varun Gupta (complainant) and the instalments paid by the original allottees, Mr. Sandeep Chopra and Mrs. Anupama Chopra, are adjusted in the name of the subsequent allottee and the next instalments are payable/due as per the original allotment letter. Similarly, we have also perused the builder buyer's agreement which was originally entered into between the original allottees, Mr. Sandeep Chopra and Mrs. Anupama Chopra, and the promoter, M/s Emaar MGF Land Limited. The same builder buyer's agreement has been endorsed in favour of Mr. Varun Gupta, subsequent allottee. All the terms of builder buyer's agreement

remain the same, so it is quite clear that the subsequent allottee has stepped into the shoes of the original allottee.

Though the promised date of delivery was 08.05.2015 but the construction of the tower in question was not completed by the said date and it was offered by the respondent only on 08.05.2019 i.e. after delay of 3 years 8 months 29 days. If these facts are taken into consideration, the complainant/subsequent allottee had agreed to buy the unit in question with the expectation that the respondent/promoter would abide by the terms of the builder buyer's agreement and would deliver the subject unit by the said due date. At this juncture, the subsequent purchaser cannot be expected to have knowledge, by any stretch of imagination, that the project will be delayed, and the possession would not be handed over within the stipulated period. So, the authority is of the view that in cases where the subsequent allottee had stepped into the shoes of original allottee before the due date of handing over possession, the delayed possession charges shall be granted w.e.f. due date of handing over possession.

II. Where subsequent allottee had stepped into the shoes of original allottee after the due date of handing over possession but before the coming into force of the Act:

13. In cases where the complainant/subsequent allottee had purchased the unit after expiry of the due date of handing over possession, the authority is of the view that the subsequent allottee cannot be expected to wait for any uncertain length of time to take possession. Even such allottees are waiting for their promised flats and surely, they would be

entitled to all the reliefs under this Act. It would no doubt be fair to assume that the subsequent allottee had knowledge of delay, however, to attribute knowledge that such delay would continue indefinitely, based on priori assumption, would not be justified. Therefore, in light of ***Laureate Buildwell judgment (supra),*** the authority holds that in cases where subsequent allottee had stepped into the shoes of original allottee after the expiry of due date of handing over possession and before the coming into force of the Act, the subsequent allottee shall be entitled to delayed possession charges w.e.f. the date of entering into the shoes of original allottee i.e. nomination letter or date of endorsement on the builder buyer's agreement, whichever is earlier.

G. Findings on the relief sought by the complainant

G.1 To allow the complaint, directing the respondent to hand over the possession of the said unit with the amenities and specifications as promised in all completeness without any further delay and not to hold delivery of the possession for certain unwanted reasons much outside the scope of agreement.

14. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the original allottee as per the terms and conditions of the buyer's agreement dated 30.09.2012 executed between the parties. Thereafter the original allottee endorsed the allotted to the complainant on 14.06.2013. The endorsement dated 14.06.2013 was duly acknowledged by the respondnet.

Validity of offer of possession

15. 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 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 allottee 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:

i. **Possession must be offered after obtaining occupation certificate;**

ii. **The subject unit should be in habitable condition;**

iii. **Possession should not be accompanied by unreasonable additional demands.**

16. In the present matter the respondent has applied for the occupation certificate from the concerned authority on 15.07.2020 and the same was received on 17.02.2021. thereafter, the respondent company has offered the possession of the allotted unit to the complainant on 20.02.2021. As per section 19(10) of the Act, the complainant/allottee is duty bound to take possession within two months of the occupancy certificate issued by the said unit from the concerned apartment.

G.II Direct the respondent to pay the interest on the total amount paid by the complainants at the prescribed rate of interest as per the Act from due date of possession till date of actual physical possession as the possession is being denied to the

complainants by the respondent in spite of the fact that the complainants desires to take the possession.

17. In the present complaint, the complainant intends to continue with the project and is seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under.

> *"**Section 18: - Return of amount and compensation***
>
> *18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building, —*
>
> .....
>
> *Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."*

18. As per clause 32 of the space buyer's agreement, the possession was to be handed over within a period of 36 months from the date of signing of the space buyer's agreement or the date of start of construction, whichever is later. Further, a grace period of 6 months is allowed by the authority for delivering the possession of the subject unit due to certain force majeure circumstances which could not be avoided by the builder. As, the date of start of construction comes out to be 01.01.2012 and the date of execution of agreement is 30.09.2012, the due date of handing over the possession is calculated from the date of signing of the agreement which comes out to be 30.09.2015. Clause 32 of the space buyer's agreement is reproduced below:

> *"32 That the Company shall give possession of the said unit within 36 months of signing of this Agreement or within 36 months from the date of start of construction of the said Building whichever is later...."*

19. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds

of terms and conditions of this agreement and application, and the complainants not being in default under any provisions of these agreements and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottees in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottees and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

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

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

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

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

21. 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.

22. 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., 21.09.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

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

"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.

Explanation. —For the purpose of this clause—

(i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;

(ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is

refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"

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

25. On consideration of the documents available on record and submissions made by both 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. By virtue of clause 32 of the space buyer's agreement executed between the parties on 30.09.2012, possession of the booked unit was to be delivered within a period of 36 months from the date of execution of space buyer's agreement or the date of start of construction, whichever is later. The date of start of construction comes out to be 01.01.2012 and the date of execution of agreement is 30.09.2012, the due date of handing over the possession is calculated from the date of signing of the agreement which comes out to be 30.09.2015. Occupation certificate has been received by the respondent on 17.02.2021 and the possession of the subject unit was offered to the complainants on 20.02.2021. Copies of the same have been placed on record. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the complainant as per the terms and conditions of the apartment buyer's agreement dated 30.09.2012 executed

between the parties. It is the failure on part of the promoter to fulfil its obligations and responsibilities as per the space buyer's agreement dated 30.09.2012 to hand over the possession within the stipulated period.

26. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 17.02.2021. The respondent offered the possession of the unit in question to the complainant only on 20.02.2021, so it can be said that the complainant came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the complainant should be given 2 months' time from the date of offer of possession. This 2 month of reasonable time is being given to the complainant keeping in mind that even after intimation of possession, practically they have to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit, but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e. 30.09.2015 till the expiry of 2 months from the date of offer of possession (17.02.2021) which comes out to be 17.04.2021.

27. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent

is established. As such the complainants are entitled to delay possession at prescribed rate of interest i.e. 9.30% p.a. w.e.f. 30.09.2015 till 20.04.2021 as per provisions of section 18(1) of the Act read with rule 15 of the rules.

H. Directions of the authority

28. 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 the interest at the prescribed rate i.e. 9.30% per annum for every month of delay on the amount paid by the complainant from due date of possession i.e. 30.09.2015 till 20.04.2021. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order as per rule 16(2) of the rules.

ii. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.

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

iv. The respondent shall not charge anything from the complainant which is not the part of the buyer's agreement. The respondent is debarred from claiming holding charges from the complainant /allottee at any point of time even after being part of apartment buyer's agreement as per law settled by hon'ble Supreme Court in civil appeal no. 3864-3889/2020 decided on 14.12.2020.

29. Complaint stands disposed of.

30. File be consigned to registry.

(Samir Kumar)
Member

(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 21.09.2021

Judgement uploaded on 15.01.2022