BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	:	**5375 of 2019**
Date of filing complaint	:	**09.12.2019**
First date of hearing	:	**11.02.2020**
Date of decision	:	**22.12.2021**

1.	Praveen Gambhir R/o: 87-B, Masjid Moth Ph-2, DDA Flats, GK-3, New Delhi- 110048	**Complainant**
	Versus	
1.	M/s Experion Developers Pvt. Ltd., Registered office: F-9, 1st floor, Manish Plaza 1, Plot no. 7, MLU, Sector -10, Dwarka, New Delhi-110075	**Respondent**

CORAM:	
Dr. K.K. Khandelwal	**Chairman**
Shri Vijay Kumar Goyal	**Member**
APPEARANCE:	
Shri Rahul Dubey (Advocate)	Complainant
Ms. Sarjita Kundan AR and Mr. Sanjeet Kumar Thakur AR	Respondent

ORDER

1. The present complaint has been filed by the complainant/allottee 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 allottee 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 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	Windchants, Sector – 112, Gurugram
2.	Project area	2.44 acres + 11.189 acres + 0.2 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no.	21 of 2008 dated 08.02.2008 valid upto 07.02.2020 28 of 2012 dated 07.04.2012 valid upto 06.04.2025
5.	RERA registered/not registered	**Registered** vide registration no. • 64 of 2017 dated 18.08.2017 valid upto 17.08.2018 • 73 of 2017 dated 21.08.2017 valid upto 20.08.2019 • 112 of 2017 dated 28.08.2017 valid upto 27.08.2019
6.	Unit no.	1802, 18th floor, tower WT-05 [annexure 6 vide provisional allotment letter on page no. 33 of complaint]
7.	Size of unit	4650 sq. ft.
8.	Revised unit	4857 sq. ft. [annexure-M on page no. 136 of reply]
9.	Allotment letter	31.07.2012

		[annexure-6 on page no. 37 of complaint]
10.	Date of execution of buyer's agreement	26.12.2012 [annexure-7 on page no. 43 of complaint]
11.	Payment plan	Construction linked payment plan [page no. 80 of complaint]
12.	Date of Building plan approval	07.06.2012 [page no. 44 of complaint]
13.	Environment clearance	27.12.2012 [annexure-S on page no. 171 of reply]
14.	Due date of delivery of possession [as per clause 10.1 of buyer's agreement, 42 months from the date of approval of the Building Plans or the date of receipt of the approval of the Ministry of Environment and forests, Government of India for the project or execution of this agreement, whichever is later]	27.06.2016 (Calculated from the date of EC excluding grace period)
15.	Total sale consideration	Rs.3,17,55,003/- [annexure R vide applicant ledger dated 31.12.2019 on page no. 163 of reply]
16.	Total amount paid by the complainant	Rs. 2,91,79570/- [annexure R vide applicant ledger dated 31.12.2019 on page no. 163 of reply]
17.	Offer of Possession	27.12.2018 [annexure-M on page no. 136 of reply]
18.	Occupation Certificate	06.12.2017 [annexure-23 on page no. 123 of complaint]
19.	Grace period utilization	As per the clause for possession, the company shall additionally be

		entitled to a time period of 180 days ("Grace Period") after expiry of the commitment period for unforeseen and unplanned project realities. But the respondent has neither contented in his reply nor in the court regarding the unforeseen and unplanned project realities. Therefore, the grace period is not allowed.
20.	Delay in handing over the possession from due date of possession till offer of possession plus 2 months i.e., 27.02.2019	2 years 8 months

B. Facts of the complaint

3. That the complainant was issued a provisional allotment letter with the construction linked payment plan 'CLP', whereby complainants were allotted the apartment no. 1802, tower WT – 05 in the project namely "Windchants" situated at sector – 112, Gurugram. As per, CLP payments were to be made in 17 instalments, the last instalment, due at the time of possession.

4. That the complainant was made to sign on the printed dotted lines which contained clauses which are of the unconscionable, unilateral, arbitrary, void-ab-initio, illegal, unenforceable, one-sided apartment buyer agreement purportedly dated 26.12.2012 as the complainant was at the risk of losing the earnest money paid.

5. That the respondent under the garb of government levy made excessive demands for EDC (External Development Charges) @ Rs.325/- per sq. ft. and IDC (Infrastructure Development Charges) @ Rs. 26 per sq. ft. The respondent also wrongly demanded and collected service on basic sale price and also on account of EDC and IDC which is payable to the Director Town and Country Planning, Haryana. The respondent later after various protests reduced the

EDC to Rs. 224/- per sq. ft. and refunded the service tax charged on the initial price of Rs. 325/- per sq. ft. The said final charging EDC @ Rs. 224/- per sq. ft. is also incorrect and exaggerated, it is also important to mention herein that the respondent has not deposited the amount so collected with the government, so far. Such acts of the respondent amount to unjust enrichment by the respondent. The respondent has excessively demanded and collected the amounts of Rs. 21,84,67,800/- and Rs.46,55,562/- for the project on account of EDC and IDC, respectively, from various flat buyers which it has not deposited with the DTCP.

6. That despite repeated requests and reminders, respondent never shared copies of the amounts demanded by and paid to the Director, Town and Country Planning, Haryana, on account of EDC and IDC and related calculations. The terms of License issued by the Haryana Govt. and duly accepted/affirmed by the respondent under which this group housing project has been sanctioned and constructed, permits (refer term 13 of License 28 dt. 7.04.2012) the respondent to charge from the allottee EDC & IDC only as per the rates fixed/charged by Govt. and further the respondent is also liable to provide details of per sq. ft. calculations of the same to the allottees.

7. That the respondent was also charging exorbitant amount of Rs.12,41,400/- under the garb of car parking usage charge, the same is against the mandate of Hon'ble Supreme Court which has categorically stated that builder cannot charge the home buyer for such common services.

8. That in order to avoid any purported default, the complainant under protest made payments in a timely manner to respondent,

who was in dominant position, of the instalments as and when demanded.

9. That even though the raised construction progress was well behind its promised schedule, respondent, in order to extract more money from complainant, sent a letter dated seeking acceptance to additional money of Rs. 1,08,444/- for incremental fixtures and fittings, including, charge geysers in kitchen and bathroom and piped gas line, to which the complainant vehemently opposed vide his email 13.06.2015.

10. That the respondent through a letter dated 27.04.2017 informed complainant that the sale area of the said apartment had been increased by 207 sq. ft., and therefore the revised area would be 4857 sq. ft. For an increase the respondent also demanded Rs. 12,75,120/- vide demand note dated 27.09.2017. In spite of repeated request and reminders, the respondent failed to provide detailed calculations and basis to evidence increase of 207 sq. ft. in the sale area of the apartment. Admittedly the said arbitrary, unilateral and illegal increase was without the consent and knowledge of the complainant and in clear contravention/violation of the provisions of the Act and Rules framed thereunder, and also of the Haryana Apartment Ownership Act, 1983. The respondent unilaterally and arbitrarily, correspondingly increased the sale consideration of the apartment, which was not acceptable to complainant.

11. That the respondent arbitrarily, unilaterally and illegally demanded Rs. 52,627/- from the complainant claiming as reimbursement of the amount paid by it as Haryana Value Added Tax under the Haryana Alternative Tax Compliance Scheme for

Contractors, 2016, allegedly providing an opportunity to the respondent to discharge its own VAT liability at the reduced rate of 1.05% on the advance payments received in the financial years 2012-13 & 2013-14 from the complainant on an amount of Rs.50,12,059/-.

12. That the complainant paid the amount of Rs.52,627/- on 30.06.2017 for Haryana State VAT as demanded by the respondent with an understanding that the respondent will supply the information requested to justify the payment as claimed by respondent, which even to the date of filing the complaint has not been provided by the respondent. That the said demand made by respondent was the cost of respondent which cannot be separately charged from the complainant like service tax. The respondent demanded and took the amount illegally from the complainants under the name of 'reimbursement of a state govt. tax' but acknowledged the amount received as "ad hoc charges" contrary to the understanding.
13. That the respondent thereafter also sent a demand note dated 27.09.2017 for area differential and asked complainant to further pay Rs.12,78,167.73 for the alleged increase in the apartment area.
14. That being fed up and exasperated by the repeated illegal demands of respondent, complainant wrote a comprehensive email dated 14.10.2017 to the respondent raising his queries, grievances, issues, etc., to record in writing his concerns, inter alia, that:
    i. The tax invoice/demand note dated 27/09/2017 received on 07.10.2017 for increased super/sale area carried no due date for payment. And, also mentioned that as understood from discussions with Ms. Poonam of the

respondent's office, the amount stated therein was required to be adjusted (not paid) on or before the notice of possession.

ii. Details about the GST rate applied on the said invoice, seeking clarification regarding the deduction needed to be made for the cost of land and/or for any other item/matter.

iii. Present entrance to the project as compared to what was informed at the time of allotment.

15. That an absolutely vague and lacking in material particulars response email dated 22.11.2017 was received by complainant from respondent. The complainant was constrained to send to respondent another email on 03.02.2018, again specifically putting the same questions to the respondent.

16. That in late December 2018, although neither the construction was complete nor was there any prior notice of possession, but to further harass and coerce the complainant, and to extract more and more money, the respondent sent him a one-sided, unilateral and untenable maintenance agreement and electricity supply agreement.

17. That the respondent also sent the notice of possession dated 27.12.2018 stating that they have received the occupation certificate and an over-exaggerated demand note of Rs.49,90,512/- for various items including for piped connection, solar power charge, maintenance fees, meter charges, maintenance charges etc., which were outside the agreement and despite complainant not consenting to the same. The complainant in his email and letter dated 28.01.2019 objected to the said notice of possession being

conditional, illegal and incorrect, and the said demand not being part of the agreement.

18. That upon enquiry it came to knowledge of the complainant that the conditional alleged possession of the said apartment was offered to the complainant without completing the construction only to escape from the further liability to pay penalty for late delivery of possession, asking the complainant to pay outside the agreement and to sign a one-sided printed (fixed) 'Maintenance Agreement' and again a printed/fixed 'Agreement for Supply of Electrical Energy' upon which they would get the possession.

19. That the complainant has been shocked to notice large number of deficiencies in the construction and development of their incomplete apartments and the said project, which have been brought to the notice of the respondent several times, inter-alia:

    a. The project was not habitable due to incomplete internal roads, non-operational club house, non-existing common facilities, half-built approach road which doesn't connect to any main road, non-existing main gate, broken boundary wall and other serious deficiencies, which are hazardous for the people,
    b. inordinate delay in completion of project,
    c. no proper water and electricity connections, parking areas etc.,
    d. grossly insufficient compensation amount, calculated at an abysmally low rate, offered for delay in completion on the basis of unconscionable clause of the said agreement,

e. excess amount received account of EDC & IDC which has not deposited with the concerned authority;

f. illegal demands of ad-hoc charges like dual meter, piped connection, PHE, FTTH, solar Power and ECC charges;

g. since the delay was solely caused by the respondent, therefore the complainant cannot be called upon to pay any GST;

h. not obtaining of all regular connections from the state agencies for drinking water, electricity, drainage, sewerage, etc.;

i. demanding to sign of one sided 'Maintenance Agreement' and 'Application for Supply of Electrical Energy';

j. for not sharing details/copies of the occupancy certificate, project completion certificate and copies of the initial and finally approved building plans;

k. illegal demand for increase in the sale area;

l. illegal demand of maintenance charges, in advance for the next two years;

m. appointment of maintenance agency, etc.

n. the much touted 1.5 km long 'skywalk' is ready only for about 100 meters, from tower 7 to next tower. Access beyond next tower is blocked as work is in progress and movement beyond that point is potentially dangerous and may cause injury and harm to visitors, etc.

20. That the respondent was selling more than the approved sanctioned layout plans. That across the project sanctioned by DTCP which covers 563 units, the total alleged sale area being sold by respondent is 24,17,988/- sq. ft., whereas the actual sanctioned FAR of the total project excluding EWS and shopping area and Country Planning, Haryana (DTCP) is only 17,52,963.05 sq. ft which is more than the total area constructed by 6,65,034.70 sq. ft. The respondent has no explanation for the excess area sold. Despite repeated follow-ups and requests of the complainant, the respondent has not been able to provide details and justification of the total area constructed and sold. As few occupation certificates are yet to be issued by the DTCP, therefore, the details of total FAR achieved can be computed only thereafter.
21. That the respondent in grave contravention to section 14 of the Act is selling more than the approved sanctioned and layout plan. There is an unexplained loading of over 77% on the declared RERA area while computing 'sale area', which is unlawful and nowhere match with the industry standard.
22. That the respondent was duty-bound and under obligation to handover peaceful possession of the said apartment by 25.06.2016. However, till date, lawful possession has not been offered, in terms of the agreement. Despite repeated enquiries and reminders, no circumstance has been set out by the respondent for such inordinate delay. The question of any force majeure also does not arise in the present case. Despite repeated requests and reminders, the respondent has not been able to put it on record and assure that the project is free from all the litigations, liens, charges, court cases and injunctions and has unfettered rights to sell, transfer and

register clear title in the name of complainants, which he is duty-bound to do before offer of possession.

23. That in view of the receipt of 'final notice' dated 19.09.2019, received on 29.09.2019, threatening cancellation of the apartment, and calling upon the complainant to pay the amount outside the agreement (i.e., Rs. 25,75,432/-; disputed by the complainant) in next 30 days otherwise the respondent will cancel the allotment of the apartment. The complainant apprehends that respondent may illegally terminate the agreement and refund the amount after forfeiting the earnest money.

24. That the complainant emailed his objections to the notice and sent a reply dated 08.11.2019 to the final notice dated 19.09.2019 objecting to the invalid and conditional offer of possession for an incomplete and unhabitable project where electricity, water and sewerage connections have not been obtained from the concerned state agencies and further pointing out various other deficiencies in the project including for demanding extra payments for sale area and various items outside the agreement; asking complainant to sign the one-side and unjustified 'Maintenance Agreement', and 'Electricity Supply Application'; etc., requesting the respondent to cancel the notice and handover possession in terms of the unit buyer agreement.

25. That the demand of more than Rs.2,24,000/- under the guise of Community Building Furnishing Charges (CBFC) and Community Building Security Deposit (CBSD) by respondent, as made in the notice of possession, etc, is also against the license no. 21 of 2008 dated 08.02.2008 and 28 of 2012 dated 07.04.2012 issued by the Department of Town and Country Planning, Haryana, as also the

bilateral agreement signed by the respondent with the owner of land intending to set up a Group Housing Colony and Haryana Government.

26. That further, going by the terms of license and bilateral agreements signed, as per clause 1(c) the respondent can charge maximum net profit of 15 % over the initial project cost. As understood, the respondent has sold units at a basic price ranging from Rs. 5000/- to Rs. 8500/- per sq. ft. of the 'sale area', which besides being wrong is also illegal. The detailed investigative independent audit of respondent's records needs to be conducted since the beginning and be asked to recompute the price based on its original estimates and to refund the excess amount charged to allottees with interest. Clause 1(i) read with other relevant clauses bars respondent from charging any maintenance and upkeep charges for five years from the date of issue of completion certificate. Similarly, the Haryana Govt. has inserted a number of other similar conditions in the license to protect the interest of home buyers. The respondent be directed to comply the same and refund the excess money charged, if any, with interest.
27. That the respondent was liable to forthwith offer lawful unconditional possession of the said apartment to complainant as per specification contained in the agreement along with charges/penalty/compensation for the period of delay at least at the rate of 21% per annum with effect from the date/s of accrual till the date/s of realization and be restrained from asking the complainant one-sided agreements and undertakings.
28. That such acts of the respondent are in clear violation of the mandate of RERA Act, which clearly states for completion of the

project as per approved terms and conditions and in case any fraud is committed by the promoter and the activity is not completed, the homebuyers cannot be left in a lurch. That the complainant seeks delay interest as per section 18(1) of the Act.

C. Relief sought by the complainants:

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

i. Direct the respondent to handover physical possession of the apartment and to pay an amount to be calculated @21% per annum on account of delayed possession on the total amount paid by the complainant from due date of possession till actual physical possession.

ii. Direct the respondent not to charge for any increase in the sale area.

iii. Direct the respondent to bear burden of GST and HVAT without imposing the same on the complainant.

iv. Direct the respondent not to charge EDC and IDC from the complainant.

v. Direct the respondent not to charge any ad-hoc charges and

vi. Direct the respondent not to charge the complainant for car parking charges.

vii. Direct the respondent not to charge any Intertest-Free Maintenance Security Deposit (IFMSD) from the complainant.

viii. Direct the respondent not to ask the complainant to sign on one sided, dotted line, arbitrary and unjustified "maintenance agreement and electricity supply application /agreement.

ix. Direct the respondent not to charge any Community Building Furnishing Charges (CBFC) from the complainant.

D. Reply by the respondent

30. The respondent has contested the complaint on the following grounds:

i. That the present complaint was not maintainable, either in law or on facts. It was submitted that the present complaint is not maintainable before this authority. The complainant has filed the present complaint seeking, inter alia, refund of various amounts, interest and compensation for alleged delay in delivering possession of the apartment booked by the complainant. That the present complaint is liable to be dismissed on the ground that a complaint for compensation and interest under sections 12, 14, 18 and 19 of the Act of 2016 was maintainable only before the adjudicating officer and not this authority.

ii. That complaint pertaining to refund, compensation and interest are to be decided by the hon'ble adjudicating officer under section 71 of the Act of 2016, read with Rule 29 of rules of 2017and not by this authority. The present complaint was liable to be dismissed on this ground alone and by itself.

iii. That as per the provisions of the Act and the rules made thereunder, it was mandated that complaint pertaining to compensation and interest and/or for any grievance under sections 12, 14, 18 and 19 of the Act of 2016 are required to be filed only before the adjudicating officer under Rule-29 of

the rules of 2017, read with sections 31 and section 71 of the said act, and not before this authority.

iv. That the complainant has in an extremely perfunctory manner, stated that this authority has jurisdiction to entertain the present complaint only for the reason that the project in question is situated in Gurgaon. However, the allegations made by the complainant against the respondent are of violations of Sections 12, 14, 18 and 19 of the Act, which do not fall within the jurisdiction of this authority. The legislature, in its wisdom, has decided to confer the jurisdiction to adjudge violations of the aforesaid sections only upon the adjudicating officer and not upon this authority. Therefore, it is ex-facie obvious that the present complaint lacks jurisdiction and is liable to be dismissed in limine. Moreover, the legislature has amended the Haryana RERA Rules and the amended rules were notified vide Notification dated 12.09.2019, thereafter in a matter Hon'ble P&H High Court has stayed the operation of said amended rules vide order dated 23.11.2019. That till the amended RERA rules would be under stay by high court the authority has no jurisdiction to entertain any new complaints, if any complaint has been filed the same should be kept in abeyance till final order of Hon'ble High Court in said matter. In view thereof, the complaint filed in the current format is not maintainable. Without prejudice the respondent is filing the present reply.

v. That most of the reliefs sought for are not amenable' under the said jurisdiction. They can either be decided by a Civil Court, DTCP or in a writ jurisdiction.

vi. That the complainant has booked the apartment in question in Respondent's project "Windchants". The said project in being developed in phases. After the enactment of the Act, each phase of a project is considered as a separate project in itself. The apartment of the complainant falls in Phase-3 of the project. After the enforcement of the Act, each developer was required to register its project if the same was an "ongoing project" and give the date of completion of the said ongoing project in terms of section 4(2)0)%©) of the Act. Accordingly, the respondent had registered the relevant phase of the said project, and as per extended date of completion the same was liable to be completed on or before 20.8.2019. The respondent has duly registered the phase of the project in which the apartment in question is situated having registration no.73 of 2017 dated 21.8.2017. The respondent, in terms of the Act, had accordingly offered possession to the complainant much prior to the date specified during registration of the project under the Act. the respondent has obtained the occupation certificate for the phase in which the apartment in question is situated on 24.12.2018 and offered the possession to the complainant vide notice of possession dated 27.12.2018 i.e., much prior to the agreed date of completion i.e., 20.08.2019, under the Act and rules.

vii. That the respondent was not liable to pay interest and/or delay possession compensation under the Act, read with the rules, since the respondent would be liable to pay the same as per the provisions of the Act/rules only after the expiry of the extended date of completion of the phase, as provided during the registration of the relevant phase of the project, with RERA authority, in which the apartment in question is situated. However, without prejudice, it is submitted that as per agreed terms of the apartment buyer agreement the respondent has paid/adjusted an amount of Rs. 7,77,120/- to the complainant on account of delayed possession compensation.

viii. That vide letter dated 27.4.2017, respondent informed the complainant about increase in the sale area of the apartment by 207 sq. ft. Consequently, the sale area of the apartment allotted to the complainant measures 4857 sq. ft. Pursuant to the said letter/ email, the complainant vide email dated 28.4.2017 requested to provide the detailed calculations and the basis on which computation of 207 sq. ft. has been arrived at. The said email of the complainant was duly replied by the Respondent vide its email dated 6.5.2017 clarifying that the revision in common areas elements (which form part of the sale area of the apartment) during the course of the construction has resulted in consequent change in the sale area of the apartments including your apartment which is well under the permissible limits as specified in the agreement but however the layout of the apartment as contained in Schedule IV remains unchanged. It was further

clarified that for any increase/ decrease in sale area upto 10%, the agreement provides that the payment for the same shall be required to be adjusted at the time of notice of possession or immediately in case of any transfer of the apartment before notice of possession.

ix. That on 22.6.2017, respondent informed the complainant vide its letter dated 22.06.2017 that as per the provisions of Haryana Value Added Tax Act (HVAT) 2003, the advances received against the sale of the apartment in question are liable for payment of Value Added Tax (VAT). It was also informed that due to uncertainty around the levy of VAT on such transactions, no VAT was charged but now the tax position has been made clear and such transactions are subject to contractors to discharge their due VAT liability at the reduced rate of 1.05%. It was further informed that pursuant to the said notification, the respondent has discharged VAT liability amounting to Rs.50,12,059/- on the amount received for the said apartment during the financial year 2012-2013 and 2013-2014. In view of the above, since VAT being a statutory levy, it was requested to reimburse an amount of Rs. 52,627/- already deposited.

x. That the complainant vide its emails dated 23.06.2017 and 24.06.2017 raised a grievance towards the aforesaid levy and requested the requested the respondent to provide the basis of calculation and liability for him to pay under the HVAT, 2003. The respondent vide its emails 24.6.2017 and 29.6.2017 reiterated its stand contained in the letter demanding reimbursement and further offered the

complainant to visit the office of the respondent in case he wishes to see the copies of E-challan issued to the respondent by Government of Haryana for the payment made towards the VAT. It may be noted that pursuant to the emails of the respondent clarifying the position with respect to the levy of VAT, the complainant paid the amount due towards the same on 30.6.2017 and is now estopped from raising issue towards the same.

xi. That a demand note dated 27.9.2017/4.10.2017 was raised by the respondent in continuation of the letter of the respondent dated 27.4.2017 on revision of sale area. It was specifically stated therein that as per the terms of the buyer's agreement, for any increase decrease in sale area, upto a maximum of 10%, the payment of same is required to be adjusted and not paid on or before notice of possession.

xii. That the complainant raised various issues vide its email dated 14.10.2017 and 3.2.2018 with respect to the increase in super area and requested for detailed calculations of the same, copies of the various plans submitted, sanctioned and actual construction of each tower and common area, copies of the application seeking occupation certificate of various towers etc and copies of the occupation certificate obtained etc. Besides the above, the complainant also raised various issues with respect to the present entrance of the project and the approach road, computation of demand for EDC and IDC, applicability of service, information on additional demand for Haryana VAT paid by the complainant on demand of the respondent.

xiii. That the respondent again clarified the queries of the complainant vide its email dated 22.11.2017 and 22.02.2018. The Respondent with respect to the revision in area clarified that that as per the agreement signed between the parties, the unit area comprises of the built-up area of the unit as well as the proportionate area under common use. It was also mentioned that that the as per clause 8 of the agreement, it provides for an upward/downward revision of the area. It was further mentioned that the final measurements were taken since the project in question is almost complete and in keeping with the clause of the agreement and only on the basis of the final measurements, the sale area of some units were increased or decreased and, in some cases, even the carpet area had decreased. It was pointed out that the exercise has been genuinely conducted under the guidance and supervision of the architect and a copy of the architect certificate was also shared. With respect to the issue of HVAT, it was clarified that the said HVAT was already paid and only reimbursement was later requested in the form of demand note and with respect to the demand of EDC/IDC, it was clarified that the same have been charged and paid as per the notification from various authorities and in EDC adjustment was done and credit of the same is reflected in the ledger. The respondent on the query of the complainant regarding the entrance of the present project in question stated that construction and development is done in accordance with the sanctioned and approvals granted by the competent authorities and further stated that the respondent is working

towards making provision of 2 separate approach roads for the project "Windchants".

xiv. That theereafter, the complainant continued to make payment as demanded by the respondent on achieving the relevant construction milestone. As such, all issues relating to EDC/IDC, increase in sale area, HVAT are all barred by estoppel.

xv. That the respondent completed the construction of the apartment and applied for obtaining occupation certificate for the same vide application dated 09.02.2018. However, the DTCP dept. delayed the process and occupation certificate for the apartment in question was granted on 24.12.2018, after delay of approx. 10 months. That on receipt of the occupation certificate dated 24.12.2018, respondent offered possession to the complainant on 27.12.2018 subject to payment of the outstanding amount and completion of necessary documents. Along with said letter, the respondent had enclosed the statement of account, demand notice, statement of various charges, including towards stamp duty, registration charges and legal fees.

xvi. That in response to the notice of possession, the complainant vide its email dated 28.01.2019 objected to certain demands raised in the final statement of account like basis for charging for dual meter, piped connection, PHE, Solar power, ECC, basis for reduction amount for delayed construction, advance charges for 2 years for common area maintenance, amounts of EDC and IDC, payment of stamp duty charges directly to the government, GST etc. The complainant also requested for

copies of permissions/sanctions for electricity, water, sewerage etc from the concerned authorities, completion certificate, building plan approvals etc. and according to the complainant, the respondent was also entitled to pay 18% interest plus compensation for mental harassment for the delayed construction.

xvii. That thereafter, various reminder letters were sent to the complainant for taking possession.

xviii. That in continuation to the discussion and clarifications given to the complainant in its earlier emails, the respondent further vide its email dated 04.03.2019 gave a detailed response on the queries raised by the complainant.

xix. That pursuant to the final notice dated 19.09.2019 issued by the respondent, the complainant issued an email dated 08.11.2019 raising various objections towards illegal demand for increase in super area, maintenance charges, illegal ad-hoc charges, demanding one sided maintenance agreement etc. It was further stated that the project had no drinking water supply, electricity, drainage and sewerage connections from the concerned state agencies at the time of offer of alleged possession. It was further stated that the possession has been offered of an incomplete and unhabitable project due to incomplete roads, non-operational club house, no existing common facilities etc. and there was inordinate delay in completion of the project and also that grossly insufficient compensation is given.

xx. That the said email of the complainant was duly responded by the respondent by email dated 08.11.2019 stating that the

respondent as a customer centric organisation have always replied to the queries raised and resolved the concerns. It was further stated that the occupation certificate granted by DTCP, Chandigarh is the conclusive proof that the apartment in question has been constructed as per the sanctioned plans and is ready for occupation. It was also emphasized that the final finishing of the apartment would only be possible upon realization of all payments as listed in the notice of possession. It was once again requested to complete your payment obligations as per the terms of the agreement and payment plan binding upon the parties and so that thereafter a formal inspection to the apartment can be arranged.

xxi. That as per the agreed terms, the developer has the right to develop the project in phases and the allottee has no right to claim that the whole project should be ready at the time of offer of possession of the apartment in question. With respect to the payment of delayed compensation, it was mentioned that the said payment has been adjusted paid as per the terms of the agreement. The respondent further pointed out that best in class club/ facilities have been provided and the same are available for use to the allottee.

xxii. That it was once again requested to pay the balance dues and take possession. That instead of clearing the outstanding dues and taking possession of the apartment, the complainant filed the present complaint raising concerns which were duly replied by the respondent.

xxiii. That the complainant who was seeking possession despite being offered possession in order to unjustly enrich himself

by filing the instant frivolous complaint. That the complainants delayed in making the final payments as well, which were due on offer of possession. In fact, even as on date, the complainants have failed to make complete payment. As per the latest statement of account dated 31.12.2019, an amount of Rs.25,44,690/- including delayed interest is still due. As stated above, various reminders have been sent to take possession and clear the outstanding dues and after duly addressing all concerns raised by the complainant, but to no avail.

xxiv. That the terms and conditions as set out in the agreement were accepted by the complainants and the complainant agreed and undertook to crapulously comply with the same. Therefore, the complainant is now barred by estoppel in raising any grievance qua the same.

xxv. That after fully satisfying themselves with regard to all aspects of the project including but not confined to the capacity/capability of the respondent to successfully undertake the construction, promotion, implementation of the residential project, the complainants had purchased the said apartment in question.

xxvi. That the complaint is also liable to be dismissed for the reason that the apartment in question was sold and the apartment buyers' agreement was executed on 26.12.2012, i.e. prior to coming into effect of the Act and the rules. As such, the terms of the agreement would prevail and govern the payment of the delay compensation, if any, to the complainant.

xxvii. That as per agreed terms of the apartment buyer agreement dated 26.12.2012, in terms of clause 10 thereof, the respondent was liable to offer possession of the apartment in question within 42 months from the date of receipt of approval of the building plans or the date of receipt of the approval of the Ministry of Environment and Forests, Govt. of India for the project or execution of buyer's agreement, whichever is later ("Commitment Period"). Further the respondent was also entitled to 6 (six) months grace period. In the present case, the approval of the Ministry of Environment and Forests was granted on 27.12.2012. It was also in the knowledge of the complainant that as per agreed terms of the buyer's agreement, subject to force majeure conditions as defined therein and subject to timely payment of instalments by the complainant, the estimated date of handover of possession of the apartment in question to the complainants would have been on or before 27.12.2016. Since the complainant failed to adhere to their only obligation under the agreement, i.e. of making timely payments and since the time period for handing over of possession was conditioned on timely payment of instalments, in the present case, question of delay cannot even arise.

xxviii. That it was specifically mentioned in the agreement that interest @ 18% per annum shall be levied on delayed payments and that in the event of delay in payment of outstanding amount along with interest, the allotment was liable to be cancelled and earnest money along with delayed

payment interest and other applicable charges was liable to be forfeited.

xxix. That without admitting or acknowledging in any manner the truth or legality of the allegations levelled by the complainant and without prejudice to the contentions of the respondent, it is submitted that the project has got delayed on account of the following reasons which were/are beyond the power and control of the respondent.

xxx. That there was certain delay on account of presence of force majeure events, which occurred during construction of the apartment i.e. one month on account of several bans imposed by National Green Tribunal on construction activities in Delhi NCR and one month on account of Demonetization policy announced by Govt. of India due to which labour and material was not available for carrying out construction activities. Further it was submitted that the delay in construction of the apartment is not on the part of the respondent, but due to delay caused by the contractor of the project.

xxxi. That the respondent had awarded the works of Civil (Structure, Finishing), Mechanical, Electrical, HVAC and External Development Works, including provisional sum items on design and build basis for construction of the project in question to Larsen and Toubro limited ("L&T") vide a work agreement dated 07.02.2013 ("work contract"). It was submitted that L&T submitted a proposal for construction of the project on 29.09.2012, environmental clearance was granted on 27.12.2012, the respondent awarded work contract and executed agreement dated 05.02.2013. The

commencement date of the contract was 09.01.2013 and the completion date was 09.01.2016. L&T is a well-known construction company and is amongst the most experienced companies for construction purposes. The respondent has a genuine case. The delay, if any, was on account of delay caused by the contractor of the project. The respondent should not be punished for the delays which were beyond its control.

xxxii. That non-payment of instalments on time directly impacts the ability of the developer to complete construction works. It was allottees like the complainant, who by their conduct, lead to delay in delivery of possession, and then turn around and allege default on the developer. Such conduct cannot be countenanced. If despite all this, in case the respondent is made to suffer further losses, it would result in gross injustice and inequity. The respondent, despite all difficulties, completed the construction of the apartment/tower in question applied for the occupation certificate and obtained the OC dated 24.12.2018. Subsequently, the respondent has offered possession of the apartment in question to the complainant vide notice of possession dated 27.12.2018.

xxxiii. That the other allegations raised by the complainant towards the revision in sale area, payment of GST and EDC and IDC etc. are totally false and frivolous, the same are in accordance with the terms and conditions of the agreement as agreed between the parties. That it was evident from the entire sequence of events, that no illegality can be attributed to the respondent. The allegations levelled by the complainant qua

the respondent are totally baseless and do not merit any consideration by this authority.

xxxiv. That the respondent has acted strictly in accordance with the terms and conditions of the apartment buyer's agreement between the parties. There is no default or lapse on the part of the respondent. The allegations made in the complaint that the respondent has failed to complete construction of the apartment and deliver possession of the same within the stipulated time period, are manifestly false and baseless. Moreover, most of the allegations made in the complaint are also barred by limitation. That disputed and complicated questions of fact are involved which shall require leading of evidence and cannot be decided in summary proceedings under the Act and the rules thereunder. Hence, the present complaint cannot be decided by this authority.

xxxv. That the complainant has purchased the apartment, in question as a speculative investment. The complainant never intended to reside in the said apartment and has admittedly booked the same with a view to earn a huge profit from resale of the same. Thus, the complainant was not bona fide "allottee" under the act and the rules but is an "investor". The complainant is the resident of 87-B, Masjid Moth Ph-2, DDA Flats, GK-3, New Delhi- 110048, is investor, who never had any intention to buy the apartment for their own personal use and has now filed the present complaint on false and frivolous grounds. The complainant is not entitled to any relief as prayed for. The present complaint is nothing but abuse of the process of law.

31. Written arguments and rejoinder on behalf of the complainant were also filed reiterating their version as stated in the complaint and contravening the pleas of the respondent/builder.

32. Written arguments on behalf of the respondent were also filed reiterating his version as stated in the reply and contravening the pleas of the complainant.

33. 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 and submission made by the parties

E. Jurisdiction of the authority

34. The respondent has raised preliminary 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 allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

> ***Section 11(4)(a)***
>
> *Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;*
>
> *The provision of assured returns is part of the builder buyer's agreement, as per clause 15 of the BBA dated..... Accordingly, the promoter is responsible for all obligations/responsibilities and functions including payment of assured returns as provided in Builder Buyer's Agreement.*
>
> ***Section 34-Functions of the Authority:***
>
> *34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.*

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

F. Findings on the objections raised by the respondent

F.I Objection regarding format of the complaint

35. The respondent has further raised contention that the present complaint is not maintainable as the complainant have filed the present complaint before the adjudicating officer and the same is

not in amended CRA format. The reply is patently wrong as the complaint has been addressed to the authority and not to the adjudicating officer. The authority has no hesitation in saying that the respondent is trying to mislead the authority by saying that the said complainant is filed before adjudicating officer. There is a prescribed proforma for filing complaint before the authority under section 31 of the Act in form CRA. There are 9 different headings in this form (i) particulars of the complainant- have been provided in the complaint (ii) particulars of the respondent- have been provided in the complaint (iii) is regarding jurisdiction of the authority- that has been also mentioned in para 14 of the complaint (iv) facts of the case have been given at page no. 5 to 8 (v) relief sought that has also been given at page 10 of complaint (vi) no interim order has been prayed for (vii) declaration regarding complaint not pending with any other court- has been mentioned in para 15 at page 8 of complaint (viii) particulars of the fees already given on the file (ix) list of enclosures that have already been available on the file. Signatures and verification part is also complete. Although complaint should have been strictly filed in proforma CRA but in this complaint all the necessary details as required under CRA have been furnished along with necessary enclosures. Reply has also been filed. At this stage, asking complainant to file complaint in form CRA strictly will serve no purpose and it will not vitiate the proceedings of the authority or

can be said to be disturbing/violating any of the established principle of natural justice, rather getting into technicalities will delay justice in the matter. Therefore, the said plea of the respondent w.r.t rejection of complaint on this ground is also rejected and the authority has decided to proceed with this complaint as such.

F.II Objection regarding jurisdiction of authority w.r.t. the buyer's agreement executed prior to coming into force of the Act

36. Another contention of the respondents is that in the present case the flat buyer's agreement was executed much prior to the date when the Act came into force and as such section 18 of the Act cannot be made applicable to the present case. The authority is of the view that the Act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of

Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017) which provides as under:

> *"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter....*
>
> *122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."*

37. 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 <u>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</u>. 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."*

38. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no scope left to the allottee 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 regarding entitlement of DPC on ground of complainant being investor

39. The respondent has taken a stand that the complainant is an investor and not consumer, therefore, it 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 observed 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 complainant is buyer and he has paid total price of Rs. 2,91,79570/- to the promoter towards purchase of an apartment in the project of the promoter. 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;"*

40. 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 complainant, it is crystal clear that the complainant is 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 investor is not defined or referred in the Act.

Thus, the contention of promoter that the allottee being an investor is not entitled to protection of this Act also stands rejected.

G. Findings of the authority on the relief(s) sought by the complainants:-

(i) Direct the respondent to handover physical possession of the apartment and to pay an amount to be calculated @21% per annum on account of delayed possession on the total amount paid by the complainant from due date of possession till actual physical possession.

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

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

42. Clause 10.1 of the apartment buyer agreement provides for handing over of possession and is reproduced below:

> *10.1 "Subject to Force Majeure, timely payment of the Total Sale Consideration and other provisions of this Agreement, based upon the Company's estimates as per present Project plans, the Company intends to hand over possession of the Apartment **within a period of 42 (forty two) months from the date of approval of the Building Plans or the date of receipt of the approval***

of the Ministry of Environment and forests, Government of India for the Project or execution of this Agreement, whichever is later ("Commitment Period"). *The Buyer further agrees that the Company shall additionally be entitled to a time period of 180 (one hundred and eighty) days ("Grace Period") after expiry of the Commitment Period for unforeseen and unplanned Project realities. However, in case of any default under this Agreement that is not rectified or remedied by the buyer within the period as may be stipulated, the Company shall not be bound by such Commitment Period."*

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

44. The counsel for the complainant requests for directions to the promoter for handing over of the possession as more than 95% amount has already been deposited and after adjustment of DPC amount, the paid amount will far exceed the total consideration

amount and hence, there is no reason to delay handing over of the possession. The ARs of the promoter informs that the occupation certificate for the Tower wherein the unit of the complainant is situated has already been obtained on 06.12.2017 and offer of possession has already been made on 27.12.2018. The ARs of the promoter agrees to hand over the possession subject to execution of conveyance deed. The promoter is directed to hand over the possession of the unit within one month and thereafter conveyance deed will be executed in next one month. The payment, if any, due towards the complainant shall be made after adjusting the delayed possession charges and calculating the interest at equitable rate from due date of possession i.e., 27.06.2016 till offer of possession plus two months i.e., 27.02.2019. The promoter will allow inspection of the unit after fixing the date and time in a week's time.

45. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within period of 42 months from the date of approval of building plans or the date of receipt of the approval of the ministry of environment and forests, government of India for the project or execution of the buyer's agreement. It is further provided in agreement that promoter shall be entitled to a grace period of 180 days for unforeseen and unplanned project realities. In the present complaint, the buyer's agreement was executed on 26.12.2012. The due date of possession has been calculated from date of environment clearance. Therefore,

the due date of handing over possession comes out to be 27.06.2016. There is neither anything on record nor the same have been argued during the proceedings of the court to show that any unforeseen and unplanned realities have occurred. Thus, the grace period is disallowed.

46. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges, however, 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.*

47. 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.

48. 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., 22.12.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

49. 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;"*

50. Therefore, interest on the delay payments from the complainant 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 complainants in case of delayed possession charges.

51. In view of the above-mentioned facts, the authority calculated due date of possession as per clause 10.1 of the unit buyer's agreement which states that the possession of the apartment was proposed to be delivered within 42 months from the date of environment

clearance excluding grace period which comes out to be 27.06.2016. The authority allows DPC at the prescribed rate of interest. Accordingly, the complainant is entitled for delayed possession charges as per the proviso of section 18(1) of the Real Estate Regulation and Development Act, 2016 at the prescribed rate of interest i.e., 9.30% p.a. for every month of delay on the amount paid by the complainant to the respondent from the due date of possession i.e., 27.06.2016 till offer of possession plus two months i.e., 27.02.2019 as per section 19(10) of the Act

(ii) Direct the respondent not to charge for any increase in the sale area.

52. The clause 8.6 of the apartment buyer agreement delas with the above-mentioned relief and the same is reproduced below for ready reference:

> *8.6 "While every attempt shall be made to adhere to the Sale Area, In case any changes result In any revision in the Sale Area, the Company shall advise the Buyer in writing along with the commensurate increase/decrease In Total Sale Consideration based, however, upon the BSP as agreed herein. Subject otherwise to the terms and conditions of this Agreement, a maximum of 10% variation in the Sale Area and the commensurate variation in the Total Sale Consideration is agreed to be acceptable to the Buyer and the Buyer undertakes to be bound by such Increase / decrease in the Sale Area and the commensurate increase/decrease in the Total Sale Consideration. For any Increase/decrease in the Sale Area, the payment for the same shall be required to be adjusted at the time of Notice of Possession or immediately in case of any Transfer of the Apartment before the Notice of Possession or as otherwise advised by the Company."*

53. The authority observes that the respondent at the time of offer of possession had increased the super area of the flat from 4650 sq. ft.

to 4857 sq. ft. without any prior intimation and justification. The area of the said unit can be said to be increased by 10% i.e., 465 sq. ft. The respondent has increased the super area by 207 sq. ft. In other word, the area of the said unit is increased by 4.45%. Though the respondent is entitled to charge for the same at the agreed rates being less than 10% as was agreed between both the parties upon but only after giving details of increase in the super area and that too in accordance with the plans approved by the competent authorities.

(iii) Direct the respondent to bear burden of GST and HVAT without imposing the same on the complainant

54. As per the clause 10.1 of unit buyer agreement, the due date of possession is 27.06.2016 which is prior to 01.07.2017 (date of coming into force of GST). The delay in delivery of possession is the default on the part of the respondent/promoter and the possession was offered on 27.12.2018 by that time the GST had become applicable. But it is settled principle of law that a person cannot take the benefit out of his own wrong/default. So, the respondent/promoter was not entitled to charge GST from the complainant/allottee as the liability of GST had not become due up to the deemed date of possession as per the agreements.

55. The complainant has submitted that an amount of Rs.52,627/- was paid towards HVAT to the respondent. The HVAT demand has been raised in accordance with the assessment made under the Amnesty

Scheme proposed by the State Government. It is pertinent to mention herein that all statutory dues, fees, charges, taxes et cetera are paid by the respondent to the competent authorities/State Government and the said amounts are not retained by the respondent. Thus, there is no illegality whatsoever on the part of the respondent.

(iv) Direct the respondent not to charge any ad-hoc charges from the complainant outside the agreement.

56. While executing the agreement, the payments against the allotted unit were to be paid by the allottee as per "Schedule-V". Though the claimant is stated to have paid Rs. 2,744/- on the basis of demand raised by the respondent builder under the heading like dual meter charges (Rs.150/-), piped connection charges (Rs.462/-), PHE charges (Rs.135/-), FTTH charges (Rs.314/-), solar power charges (Rs.64/-), ECC charges (Rs.1,744/-) but these are not part of "Schedule-V" as agreed upon between the parties at the time of entering into apartment buyer agreement. Even there is nothing in apartment buyer agreement with regard to liability of the allottee to pay under the headings mentioned earlier. So, in such a situation though the complainant paid a sum of Rs. 2,744/- on the basis of demands raised by the builder but the amount so received is liable to be refunded to him being beyond the scope of BBA.

(v) Direct the respondent not to charge the complainant for car parking charges.

57. As far as issue regarding parking is concerned, the authority is of the opinion that open parking spaces cannot be sold/charged by the promoter both before and after coming into force of the Act. However, as far as issue regarding covered car parking is concerned where the said agreements have been entered into before coming into force the Act, the matter is to be dealt with as per the provisions of the builder buyer's agreement subject to that the allotted parking area is not included in super area.

58. In the present complaint, the respondent has charged Rs. 12,00,000/- towards covered car parking as per payment plan annexed with BBA. The clause 3.4 of BBA deals with car parking use charges which states that it shall be mandatory for the buyer to pay a one-time fixed charge for the exclusive use of the car parking space as mentioned in schedule V i.e., payment plan. The clause 3.4 of apartment buyer agreement is reproduced below:

> ***3.4*** *CAR PARKING USE CHARGES*
> *"It shall be mandatory for the Buyer to pay a one-time fixed charge for the exclusive use of the Car Farking Space(s) designated for the Buyer within the Group Housing Colony as mentioned in Schedule V attached hereto ("Car Parking Use Charges*). Such Car Parking Use Charges are a part of the Payment Plan, are distinct from the BSP of the Apartment, are recoverable in such manner and at such time as stipulated in the Payment Plan and are non-refundable If the Apartment is transferred by the Buyer to any third party at any time."*

59. In the instant matter, the subject unit was allotted to the complainant vide allotment letter dated 31.07.2012 then as per the payment plan, the respondent had charged a sum of Rs. 12,00,000/- on account of car parking charges and the allottee had agreed to

pay the cost of covered car parking charges over and above the basic sale price. The cost of parking of Rs. 12,00,000/- has been charged exclusive to the basic of the unit as per the terms of the agreement. The cost of car parking of Rs. 12,00,000/- has already been included in the total sale consideration being one of the components and the same is charged as per the buyer's agreement. Accordingly, the promoter is justified in charging the same.

(vi) Direct the respondent to not charge any Intertest-Free Maintenance Security Deposit (IFMSD) from the complainant.

60. As per the schedule V of the builder buyer agreement, the total sale consideration includes an amount of Rs. 4,65,000/- as Intertest-Free Maintenance Security Deposit (IFMSD). IFMS is a lump sum amount that the home buyer pays to the builder which is reserved/accumulated in a separate account until a residents' association is formed. Following that, the builder is expected to transfer the total amount to the association for maintenance expenditures. The system is useful in case of unprecedented breakdowns in facilities or for planned future developments like park extensions or tightening security. The same is a one-time deposit and is paid once (generally at the time of possession) to the builder by the buyers. The builder collects this amount to ensure availability of funds in case unit holder fails to pay maintenance charges or in case of any unprecedented expenses and keeps this

amount in its custody till an association of owners is formed. IFMS needs to be transferred to association of owners (or RWA) once formed.

61. In the opinion of the authority, the promoter may be allowed to collect a nominal amount from the allottee under the head "IFMS". However, the authority directs and passes an order that the promoter must always keep the amount collected under this head in a separate bank account and shall maintain the account regularly in a very transparent manner. If any allottee of the project requires the promoter to give the details regarding the availability of IFMS amount and the interest accrued thereon, the promoter must provide details to the allottee. Therefore, respondent is justified in charging Intertest-Free Maintenance Security Deposit (IFMSD) from the complainant.

(vii) Direct the respondent not to ask the complainant to sign on one sided, dotted line, arbitrary and unjustified "maintenance agreement and electricity supply application /agreement.

62. The Act mandates under section 11 (4) (d) that the developer will be responsible for providing and maintaining the essential services, on reasonable charges, till the taking over of the maintenance of the project by the association of the allottees. Clause 1.37 read with clause 15.5, 15.6 & 15.7 of the builder buyer agreement provides

the clause for maintenance charges. The relevant clauses are reproduced below for ready reference:

1.xxxvii. *"Maintenance charges" shall have the meaning as prescribed in sub clause 15.5 hereunder.*

15.5 *"The Buyer hereby agrees and accepts that provision of such maintenance services shall at all times be subject to timely payment of costs, charges, fees and expenses for the same (by whatever name called), including but not being limited to payment of fixed as well as variable consumption-linked charges for electricity, water and other periodic maintenance charges as determined by the Maintenance Agency ("Maintenance charges") payable as per the Maintenance Agreement in the proportion that the Sale Area of the Apartment bears to the total sale area of all the apartments in the Project. Such "Maintenance Charges shall be over and above the Holding Charges as described herein and will become due from the date of Notice of Possession, irrespective of whether the "Maintenance Agreement is executed by the buyer or not."*

15.6 *"The buildings, plant, equipment, machinery and other assets at the Project provided for Common Services and Facilities, Community Building and maintenance services may loan insured with an Indian insurer against usual risks by the Maintenance Agency on behalf of all the owners of the project and the premium cost thereof shall be payable as part of the Maintenance Charges. However, the insurance of personal belongings, fixtures, fittings and other property of the Buyer inside the Apartment shall be the responsibility of the Buyer. The Buyer shall not do or permit to be done any act or thing which may render void/voidable the Insurance policy(ies) purchased by the Maintenance Agency as which may lead to imposition of adverse specific conditions, warranties and deductibles by the insurer or cause any increase in premium cost in respect thereof. Any increase in the premium cost attributable to any act of omission and commission on the part of the Buyer shall be due and payable to the Agency by the Buyer,"*

15.7 *"The Buyer shall pay the Maintenance Deposit in accordance with the Payment Plan as provided in Schedule VI attached hereto and undertakes to make further contributions to the Maintenance Deposit, when necessary and upon demand of the Maintenance Agency,"*

15.8 *" If the Buyer transfers the ownership of the Apartment by way of sale, gift or will or any other instrument to any person, upon*

furnishing of appropriate proof of transfer to the satisfaction of the Maintenance Agency, the Maintenance Deposit and CBSD shall be duly credited to the account of the transferee."

63. In the present case, the respondent has demanded charges towards maintenance of Rs. 3,98,896/- through demand cum notice of possession letter dated 27.12.2018. Generally, AMC is charged by the builders/developer for a period of 6 months to 2 years. The authority has taken a view that the said period is required by the developer for making relevant logistics and facilities for the upkeep and maintenance of the project. Since the developer has already received the OC; its ample time for a RWA to be formed for taking up the maintenance of the project and accordingly the AMC is handed over to the RWA. However, the respondent shall not demand the advance maintenance charges for more than one (1) year from the allotee even in those cases wherein no specific clause has been prescribed in the agreement or where the AMC has been demanded for more than one (1) year.

(viii) Direct the respondent to not charge any Community Building Furnishing Charges (CBFC) from the complainant.

64. The complainant has submitted that the demand under guise of CBFC by the respondent is against the license no. 21 of 2008 dated 08.02.2008 and 28 of 2012 dated 07.04.2012 issued by DTCP. It is submitted that clause 1(xiv) of the builder buyer agreement defines CBFC and the same clause is reproduced below:

1(xiv) *"CBFC" shall mean the one-time fixed costs, charges and expense for furnishing the Community Building payable by the Buyer as*

part of the Total Sale Consideration In respect of the Apartment and as specified in the Payment Plan attached hereto;

65. As per the schedule V of the builder buyer agreement, the total sale consideration includes an amount of Rs.2,00,000/- as Community Building Furnishing Charges (CBFC). Therefore, the respondent is justified in demanding CBFC as it is included in the total sale consideration as mentioned in schedule V of the builder buyer agreement.

(ix) Direct the respondent to not charge EDC and IDC from the complainant.

66. As per schedule V of the unit buyer agreement, EDC & IDC were included in total sale consideration. An amount of Rs. 15,57,948/- is being charged as EDC and Rs. 1,24,636/- as IDC. Therefore, the respondent is justified in demanding EDC & IDC as it is included in the total sale consideration.

67. On consideration of the documents available on record and submissions made by both the parties regarding contravention of provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession of the subject unit within the stipulated time as per the said agreement. By virtue of clause 10.1 of the buyer's agreement executed between the parties on 26.12.2012, possession of the booked unit was to be delivered within a period of 42 months from the date of environment clearance excluding

grace period of 180 days. Therefore, the due date of handing over possession comes out to be 27.06.2016.

68. 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 06.12.2017. The respondent offered the possession of the unit in question to the complainant only on 27.12.2018, so it can be said that the complainants 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., 27.06.2016 till the expiry of 2 months from the date of offer of possession (27.12.2018) which comes out to be 27.02.2019.

69. Accordingly, it is the failure of the promoter to fulfil its obligations, responsibilities as per the buyer's agreement dated 26.12.2012 to hand over the possession within the stipulated period.

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 respondents is established. As such, the complainants are entitled to delayed possession charges i.e. interest at prescribed rate @ 9.30% p.a. w.e.f. 27.06.2016 till offer of possession plus two months i.e., 27.02.2019 as per section 19(10) of the Act.

H. Directions of the authority

70. 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 functions entrusted to the authority under section 34(f):

i. The respondent is directed to hand over the possession of the unit within one month and thereafter conveyance deed will be executed in next one month. The promoter will allow inspection of the unit after fixing the date and time in a week's time.

ii. 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., 27.06.2016 till offer of possession plus two months i.e., 27.02.2019 as per section 19(10) of the Act.

iii. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order and interest for every month of delay shall be paid by the

promoter to the allottee before 10th of the subsequent month as per rule 16(2) of the rules.

iv. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period. The payment, if any, due towards the complainant shall be made after adjusting the delayed possession charges and calculating the interest at equitable rate from due date of possession i.e., 27.06.2016 till offer of possession plus two months i.e., 27.02.2019.

v. The promoter shall not demand any extra charge which are not part of BBA or otherwise legally not payable by the allottees. 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.

vi. The respondent is not entitled to charge GST from the complainant as the liability of GST had not become due up to the deemed date of possession as per the agreement.

vii. The complainant paid a sum of Rs. 2,477/- as ad hoc charges on the basis of demands raised by the builder but the amount so received is liable to be refunded to the complainant.

71. Complaint stands disposed of.

72. File be consigned to registry.

(Vijay Kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 22.12.2021

Judgement uploaded on 08.02.2022