BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	:	**5577 of 2019**
Date of filing complaint	:	**11.12.2019**
First date of hearing	:	**11.02.2020**
Date of decision	:	**22.12.2021**

1.	Gopal Krishan Arora (HUF) R/o:- C-1/17 Rana Pratap Bagh, New Delhi-110007	**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.	0801, tower WT – 07 (Vide provisional allotment letter on page no. 26 of the complaint)
7.	Size of unit	2650 sq. ft.
8.	Revised unit	2802 sq. ft. (page 69 of the complaint)
9.	Allotment letter	31.07.2012 (page no. 26 of complaint)

10.	Date of execution of buyer's agreement	26.12.2012 (page no. 30 of complaint)
11.	Total Sale Consideration	Rs. 2,23,84,584/- (annexure-L vide applicant ledger dated 07.01.2020 on page no. 81 of reply)
12.	Total amount paid by the complainant	Rs. 2,12,68,095/- (annexure-L vide applicant ledger dated 07.01.2020 on page no. 81 of reply)
13.	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)
14.	Date of Building plan approval	07.06.2012
15.	Environment clearance	27.12.2012 (annexure-M on page no. 87 of reply)
16.	Offer of Possession	08.12.2017 (annexure-I on page no. 72 of reply) Invalid offer of possession
17.	Occupation Certificate	24.12.2018 As per information provided by DTCP
18.	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.
19.	Delay in handing over the possession from due date of till the date of occupation certificate plus 2 months i.e., 24.02.2019	2 Years 7 Months and 28 days

B. Facts of the complaint

3. That on 31.07.2012, the said apartment was initially allotted to Mrs. Gunjan Agarwal and Mr. Dheeraj Sanghi jointly and an apartment buyer agreement dated 26.12.2012 was executed between them and the respondent. The said apartment was transferred to the complainant vide transfer endorsement dated 18.07.2013, which was attached to said agreement. The said agreement was containing various one sided and arbitrary clauses in the terms & conditions.

4. That at the time of said transfer in favour of the complainant, the respondent had duly assured the complainant that it would hand over the possession of the said apartment within the stipulated time period and as per the agreed specifications in terms of the said agreement dated 26.12.2012 on or before 26.06.2016.

5. That the complainant duly made all payments in time as and when demanded by the respondent without prejudice to its rights. Till date the complainant has paid more than sum of Rs. 2,15,08,016/- for the said apartment. Even after taking more than 100 per cent payable cost of the apartment, the respondent has not till date completed the construction of the said apartment and the said project, as promised.

6. That the complainant for the first time after more than four years from the date of the said agreement the complainant received a communication dated 28.04.2017 from the respondent informing about purported increase of the sale area of the said apartment by 152 sq. ft. i.e., from 2650 sq. ft. to 2802 sq. ft., without specifying any calculations/justification for the same. That prior to the said communication there was no whisper or communication whatsoever from the Respondent regarding the purported increase in the sale area. Admittedly, the said arbitrary, unilateral and illegal increase was without the consent and knowledge of the complainant and is in clear contravention/violation of the provisions of Act, rules and the Haryana Apartment Ownership Act, 1983. The total sale consideration was already demanded and received in/before time from the complainant. The complainant immediately raised objections to the alleged increase in sale area vide email dated 29.04.2017 seeking details and basis of calculations of areas. The respondent failed to provide any details or justification of alleged increase in sale area. The respondent had unilaterally altered the definition and scope of "sale area".

7. That the complainant received an email dated 29.09.2017 from the respondent raising an illegal demand for a sum of Rs. 11,91,748 on account of the alleged said illegal increase of sale area of the said apartment. The complainant vide email dated 15.10.2017, duly objected again to the said illegal demand and sought justification for such arbitrary increase of the sale area.

8. That the respondent in order to justify the said purported increase has attempted to rely upon a wholly one sided and unconscionable

clause in the said agreement vide its email dated 16.10.2017. The complainant thereafter met with official of the respondent and pointed out various other deficiencies in the construction/development of the said apartment and the said project. The respondent persisted with giving vague and contradictory replies to the pointed queries of complainant regarding basis of alleged increase in sale area. That as per respondent's own representations, there is a loading of over 70% on the carpet area of the apartment for which no justification or calculation has been provided by the respondent despite repeated requests.

9. That the respondent without addressing the concerns raised by the complainant from time to time, vide email dated 08.12.2017 informed the complainant that the respondent had received the occupation certificate for tower WT-07 and offered possession of the said apartment. Vide the said email dated 08.12.2017, the respondent also attached the illegal notice of possession as well as purported the final statement of account demanding a sum of Rs.41,70,692/- to be paid on or before 08.01.2018 after giving a purported and unreasonable adjustment of abysmally low amount of Rs.1,98,942 towards delayed compensation which was duly objected by the complainant.

10. That the offer of possession and the demand raised by the respondent was wholly illegal and unlawful, as neither the said

apartment nor the said project was complete in all respect as per the specifications of the agreement, the complainant made several visits to the site, met with the officials of the respondent and while sharing pictures of the of the incomplete work at the said project duly communicated his concerns, inter-alia;

i. The 24-meter approach road was only about 60% complete.
ii. The clubhouse being not complete.
iii. Work on other 12 towers is still in progress.
iv. The internal roads are not yet ready, etc.
v. The Skywalk and other necessary common facilities are far from ready.

11. That the said concerns were also shared vide email dated 03.01.2018. The complainant also sought details of the alleged increase in sale area and final calculations of actual area etc. The respondent did not pay any heed to the said concerns of the complainant and vide its email dated 05.01.2018 gave a vague reply.

12. That the possession was offered without completing the construction only to escape from the liability to pay penalty for late delivery of possession. The said act of offering possession without completing the apartment amounts to unfair trade practices. It is also pertinent to note that the complainant made each and every payment to the respondent, under protest without prejudice, except the payment on account of alleged increase in sale area. The

complainant has also brought to the attention of the respondent that the actual area being offered to the complainant is actually less than the area promised in the agreement.

13. That the said occupation certificate was obtained fraudulently as the development works in the said project have not been completed so far. The said occupation certificate is liable to be withdrawn and the concerned authority may initiate an inquiry as to how such certificate was procured fraudulently by the respondent. Despite demands of the complainant the documents submitted at the time of applying for said occupation certificate have also not been provided to the complainant. Even otherwise, the occupation certificate provided to the complainant is not even qua tower 7 of the said project.

14. That the respondent provided an architect certificate vide email dated 03.02.2018 which itself is vague and does not have any calculation/explanation/specification regarding the illegally revised sale area. The sale area as provided in the said one sided agreement is wholly unreasonable and the complainant cannot be compelled to pay anything accordingly. There is no justification at all provided by the respondent as to in what manner the said alleged revised sale area has been apportioned to the apartments.

15. That the complainant had several rounds of the correspondence, telephonic conversions and also made site visits and was shocked to notice large number deficiencies in the construction and

development of the said apartment and the said project which were also brought to the notice of the respondent several times including vide email dated 14.06.2018, inter-alia.

a. incomplete apartment and project,
b. apartment and project was/is 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,
c. flooring, painting, fitting of accessories and other basic things were still incomplete in the said apartment,
d. inordinate delay in completion of project,
e. no proper water and electricity connections, parking areas etc.,
f. 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,
g. 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,

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

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

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

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

l. signing of one sided 'maintenance agreement' and 'application for supply of electrical energy' ;

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

n. illegal demand for increase in the sale area,

o. even the sale area of the is smaller than as given in the agreement;

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

q. appointment of maintenance agency, etc.

r. non-registration of the project with the authority.

16. That despite reminder emails dated 19.06.2018 and 26.06.2018, the respondent failed to redress the grievances of the complainant and sent stereotype replies on 18.07.2018 and 09.10.2018 without redressing the specific queries raised by the complainant.

17. That the complainant was constrained to file RTI application dated 14.05.2019 to the Directorate of Town and Country Planning, Harayana, Chandigarh. On 30.09.2019 the complainant received the response of the said RTI application. As per the documents received from Directorate of Town and Country Planning, Harayana, Chandigarh and presentations of the respondent it has transpired that across 7 towers which covers 460 units, the total alleged sale area or being sold by respondent is 16,53,422 sq.ft., whereas the actual achieved FAR of 7 towers is 12,78,154 sq.ft. It is apparent that there is no explanation for 3,75,268sq.ft. has been provided by the respondent despite repeated follow ups and requests of the complainant. Further thereto, respondent in grave contravention to section 14 of the Act is selling area more than the approved sanctioned and layout plan. Not only, the gullible customers like complainant have been cheated but the respondent has also played fraud upon the authorities. All necessary and relevant documents should be summoned from respondent to un-wrap the mischief and fraud played by the respondent upon several like the complainant.

18. That the complainant visited the said project lastly on 09.09.2019 and was shocked to see that all concerns of the complainant are not addressed by the respondent, inter-alia, the boundary wall near the tower 7 is still broken, construction work is still going on, the project is still not habitable, etc. The respondent has not allowed

the complainant to visit and inspect the said apartment after June 2018 and kept insisting on its illegal demands.

19. That the demand 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 licence 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.

20. That the respondent has raised and was raising unwarranted and illegal demands on account of maintenance charges, holding charges, GST (earlier service tax and HSVAT) etc. Further, despite various requests and demands respondent has failed to provide the details of, inter-alia, area of units, common areas, completion certificate, stage of completion of the project, area of specific units, other related issues, list of all the units where the sale area has allegedly increased, specifying original area of each unit as per agreement vis-a-vis actual sale area being claimed, sanctioned plans of the project and also the declaration filed, with competent authorities, along with proposed areas etc at the time of applying for sanction of plans, time line for completion of the entire project, out of 200 plus buyers who have been offered possession in December 2017, how many have actually taken possession, how

many have actually moved in and when and details of the man power at the project site etc.

21. That even after delay of almost 3 years, the respondent has failed to offer the possession of the said apartment, complete in all respect as per the specification of the agreement, to the complainant till date. The respondent vide its letter dated 27.09.2019 had gone to the extent of threatening the complainant to cancel the allotment of the said apartment in favour of the complainant if it does not succumb to the illegal demands of the respondent. The said letter dated letter dated 27.09.2019 was duly replied by the complainant.

22. That the respondent has knowingly, intentionally, deliberately and wilfully induced the complainant to part with huge amount in the said project by repeatedly concealing true facts. the respondent was guilty of making wrongful gain at the cost of complainant and others like him. Any reliance by the respondent on any clause/s in the agreement or otherwise, is untenable as, all such clause/s in standard form agreements are, inter alia, unconscionable, against public policy, null and void ab initio, and unenforceable in law. It is well settled in law that compensation offered by respondent under the said agreement is insufficient/inadequate/miniscule as the loss incurred by the complainant is much higher than what was stipulated.

23. That without satisfying its part of the obligations, the respondent has had the benefit of utilising the complainant's payments, while the complainant has been deprived of the same. The respondent is liable to forthwith offer possession of the said apartment to the complainant as per the specifications contained in the buyer's 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 realisation. Furthermore, the respondent was also liable to compensate complainant for the mental agony, mental torture, harassment, stress, anxiety, financial loss and injury as a result of wrongful and illegal acts and omissions of the respondent.

24. That such acts of the respondent were in clear violation of the mandate of RERA act, which clearly intends 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 lurch.

C. Relief sought by the complainant:

25. The complainant has 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 to declare that the offer of possession made by the respondent is null and void.

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

iv. Direct the respondent to declare that the terms and conditions of the said agreement which are one sided unconscionable, unilateral, arbitrary, void ab initio, illegal are unenforceable and not in consonance with act and rules.

v. Direct the respondent to declare that the respondent is not entitled to receive any alleged holding charges from the complainant.

vi. Direct the respondent to reimburse the GST, indirect EDC and IDC charges with interest.

vii. Direct the respondent not to charge any ad-hoc charges and car parking charges.

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

ix. 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.

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

D. Reply by the respondent

26. 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 was 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 is 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 adjudicating officer under section 71 of the Act, read with Rule 29 of the Haryana Real Estate (Regulation and Development) rules of 2017, and not by this authority. The present complaint is 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 is mandated that complaint pertaining to compensation and interest and/or for any grievance under sections 12, 14, 18 and 19 of the Act are required to be filed only before the adjudicating officer under Rule-29 of the Rules, read with sections 31 and section 71 of the said Act, and not before 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.

iv. 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.

v. That this authority ought to have dismissed the present complaint at the very outset, for the reason that the project in question is neither registered under RERA nor is the same required to be registered in view of rules of 2017.

vi. That in the present case, the respondent had applied the occupation certificate for the said project on 21.4.2017 which are prior to the date of publication of the Rules, i.e. 28.07.2017, and hence the said project is not an ongoing project and therefore, this authority has no jurisdiction whatsoever to entertain the present complaint. Thereafter, the occupation certificate was issued on 06.12.2017.

vii. That along with this letter, demand was raised in accordance with the construction linked payment plan opted by the complainant, which was payable i.e. within 30 days of the booking application which was duly paid.

The total sale consideration for the apartment in question, was about Rs.2,08,75,550/-, which was to be paid in installments as per the agreed payment plan. Accordingly, the respondent kept raising demands on achieving the relevant construction milestone against which payment was required to be made by the original allottee.

viii. That thereafter, agreement dated 26.12.2012 between the original allottees and the respondent as well as payment receipts were endorsed in favor of the complainant. Accordingly, payments were made by the complainant, no objection was ever raised qua these aforesaid terms or as a matter of fact with respect to any term of the agreement.

ix. That vide letter dated 27.4.2017, respondent informed the complainant about increase in the sale area of the apartment by 152 sq.ft. Consequently, the sale area of the apartment allotted to the complainant measures 2802 sq. ft. The same was done in accordance with the terms of the agreement. That at the outset it is pertinent to mention that the respondent completed the construction of the apartment and applied for obtaining occupation certificate for the same vide application dated 21.4.2017 However, the DTCP dept. delayed the process and occupation certificate for the apartment in question was granted on 6.12.2017, after delay of approx. 8 months. That on receipt of the occupation certificate dated 6.12.2017, respondent offered possession to the

complainant on 08.12.2017 subject to payment of the outstanding amount and completion of necessary documents. Along with the 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. It was also requested to clear the outstanding payments as per the notice of possession. Thereafter, the complainant vide email dated 14.02.2018, raised doubts on the architect certificate sent to him and also once again requested to substantiate the claims by supporting details and calculations.

x. That the receipt against which the payment has been made, part of the payment towards area appropriation has been wrongly appropriated as he had disputed the claim towards the alleged increase in sale area. It was alleged that the payment of Rs. 13,53,479 was towards all charges on the basis of presumed area of 2650 sq ft. In view thereof, it was requested to cancel the receipt issued and issue the correct receipt. The respondent had sent another reminder to the complainant for paying the outstanding dues and to take possession. It may be pertinent to mention that the complaint in June/July, 2018 for the first time raised issues with respect to illegal charges of GST, HVAT despite payments being already made towards the same as demanded by the respondent much earlier before the offer of possession. The complainant also raised an issue towards delay in completion of the project,

insufficient compensation amount, which were never raised earlier. It was once again reiterated by the respondent that all concerns of the raised with the regard to the said project, units and overall progress project site have been clarified. Pursuant to the site visit, the complainant vide its email dated 14.03.2010 again raised the issues with regard to incomplete roads, project being not habitable, illegal demand exaggerated demand of EDC and IDC, alleged maintenance charges for facilities which are not functional. In view of the above clarification given, it was requested to take possession after clearing all its pending dues instead of raising false and frivolous issues.

xi. That as per the latest statement of account dated 07.01.2020, an amount of 15,87,812/- 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. The complainant after having understood the clauses had executed the agreement and therefore, the relief being claimed by the complainant did not take into account the contractual position and as such the relief claimed is not maintainable before the authority.

xii. That the complaint was also liable to be dismissed for the reason that the apartment in question was sold. As such, the terms of the agreement would prevail and govern the payment of the delay compensation, if any, to the

complainant. It is for the reason that it is settled law that the Act and rules are not retrospective in nature. Therefore, the application of the sections/rules of the Act/rules relating to any clauses of the agreement including interest and compensation, cannot be made retrospectively. As such, the complainant does not have any right whatsoever to claim any relief including compensation under the Act and the rules thereunder. In any event, in the present case, there is no question of any delay in delivery of possession. 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.

xiii. 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. 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.

xiv. 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. It is submitted 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").

xv. That L&T submitted a proposal for construction of the project on 29.9.2012, Environmental Clearance was granted on 27.12.2012, the respondent awarded work contract and executed agreement dated 5.2.2013. The commencement date of the contract was 9.1.2013 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. The non-payment of installments 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.

xvi. That the respondent, despite all difficulties, completed the construction of the apartment/tower in question applied for the occupation certificate and obtained the OC dated 06.12.2017. Subsequently, the respondent has offered possession of the apartment in question to the complainant vide notice of possession dated 8.12.2017. It is submitted 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.

xvii. 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.That it is submitted that the respondent has acted strictly in accordance with the terms and conditions of the apartment buyers 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. Apart from the aforesaid objections, this authority may also consider the following objections,

which go to the root of the maintainability of the present complaint. Moreover, most of the allegations made in the complaint are also barred by limitation.

xviii. 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. 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 is not bona fide "allottee" under the Act and the rules, but is an "investor". The complainant, is the resident of C 1/17, Rana Pratap Marg-Delhi-110007 are investors, 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. Without prejudice to the aforesaid preliminary objections and the contention of the respondent that unless the question of maintainability is first decided, the respondent ought not to be called upon to file the reply on merits to the complaint, this reply is being filed by way of abundant caution, with liberty to file such further reply as may be necessary, in case the complaint is held to be maintainable.

27. 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.

28. 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.

29. 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

30. 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

31. 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

32. 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."*

33. 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."*

34. 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

35. 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. 2,12,68,095/- 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;"*

36. 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 an allottee 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 complainant:-

(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.

37. 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."*

38. 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."*

39. 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.

40. 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 24.12.2018 and offer of possession has already been made on 08.12.2017 before the date of occupation certificate which is an invalid offer of possession. 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 the date of occupation certificate i.e., 24.12.2018 plus two months i.e., 24.02.2019. The promoter will allow inspection of the unit after fixing the date and time in a week's time.

41. **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.

42. **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.*

43. 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.

44. 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%.

45. 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;"*

46. 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 complainant in case of delayed possession charges.

47. 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 date of occupation certificate plus two months i.e., 24.02.2019 as per section 19(10) of the Act.

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

48. 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."*

49. The authority observes that the respondent at the time of offer of possession had increased the super area of the flat from 2650 sq. ft. to 2802 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 152 sq. ft. In other words, the area of the said unit is increased by 5.73%. 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 declare that the terms and conditions of the said agreement which are one sided unconscionable, unilateral, arbitrary, void ab initio, illegal are unenforceable and not in consonance with act and rules.

50. The complainant has not disclosed about the unfair clauses in the complaint. So, this relief can't be allowed as well as the respondent is directed not to charge anything which is not part of BBA.

(iv) Direct the respondent to not receive any alleged holding charges from the complainant.

51. The developer having received the sale consideration has nothing to lose by holding possession of the allotted flat except that it would be required to maintain the apartment. Therefore, the holding charges will not be payable to the developer. Even in a case where

the possession has been delayed on account of the allottee having not paid the entire sale consideration, the developer shall not be entitled to any holding charges though it would be entitled to interest for the period the payment is delayed. Also, 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.

(v) Direct the respondent to reimburse the GST, indirect EDC and IDC charges with interest.

52. 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 08.12.2017 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.

53. As per schedule V of the unit buyer agreement, EDC & IDC were included in total sale consideration. An amount of Rs.8,87,864 /- is being charged as EDC and Rs. 71,028/- as IDC. Therefore, the

respondent is justified in demanding EDC & IDC as it is included in the total sale consideration.

(vi) Direct the respondent to not charge any ad-hoc charges and car parking charges.

54. While executing the unit buyer 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. 2,34,210/- on the basis of demand raised by the respondent builder under the heading like dual meter charges (Rs.17,700/-), PHE charges (Rs.15,874/-), FTTH charges (Rs. 22,284/-), solar power charges (Rs.7,528/-), ECC charges (Rs.1,71,524/-) 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. 2,34,210/- on the basis of demands raised by the builder but the amount so received is liable to be refunded to the complainant.

55. 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.

56. In the present complaint, the respondent has charged Rs. 8,24,720/- 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 Parking 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."*

57. 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. 8,24,720/- 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. 8,24,720/- has been charged exclusive to the basic of the unit as per the terms of the agreement. The cost of car parking of Rs. 8,24,720/- 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.

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

58. As per the schedule V of the builder buyer agreement, the total sale consideration includes an amount of Rs. 2,65,000/- 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.

59. 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.

(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.

60. 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."*

61. In the present case, the respondent has demanded charges towards maintenance of Rs. 2,30,123/- through demand cum notice of possession letter dated 08.12.2017. 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.

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

62. 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;*

63. As per the schedule V of the builder buyer agreement, the total sale consideration includes an amount of Rs. 2,06,180/- 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.

(x) Direct the respondent to declare that the offer of possession made by the respondent is null and void.

64. The complainant contented that the respondent has issued an offer of possession and made a payment request of Rs.41,70,692/- on 08.12.2017 whereas occupancy certificate was issued for particular "tower 7" in the project on 24.12.2018. Therefore, the offer of possession is not valid as it was made before the grant of occupation certificate. A valid offer of possession must have following components:

a. Possession must be offered after obtaining occupation certificate;

b. The subject unit should be in habitable condition;

c. Possession should not be accompanied by unreasonable additional demands.

65. As per the above-mentioned components the said offer of possession is not valid and hence, the respondent is directed to offer possession to complainant.

66. 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.

67. Section 19(10) of the Act obligates the allottees to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 24.12.2018. The respondent offered the possession of the unit in question to the complainant only on 08.12.2017, 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., 27.06.2016 till the date of occupation certificate i.e., 24.12.2018 plus two months which comes out to be 24.02.2019 as the offer of

possession is invalid being offered before obtaining the occupation certificate.

68. Accordingly, it is the failure of the promoters 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 respondent is established. As such, the complainant is entitled to delayed possession charges i.e. interest at prescribed rate @ 9.30% p.a. w.e.f. 27.06.2016 till the date of occupation certificate i.e., 24.12.2018 which comes out to be 24.02.2019 as per section 19(10) of the Act.

H. Directions of the authority

69. 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 offer possession of the unit and handover the physical 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 the date of occupation certificate 24.12.2018 plus two months i.e., 24.02.2019 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 allottees 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 the date of occupation certificate 24.12.2018 plus two months i.e., 24.02.2019 as per section 19(10) of the Act.

v. The promoter shall not demand any extra charge which are not part of BBA or otherwise legally not payable by the allottee. 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. 2,34,210/- 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.

70. Complaint stands disposed of.

71. File be consigned to registry.

V.I-

(Vijay Kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 22.12.2021

JUDGMENT UPLOADED ON 08.02.2022