BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	:	**6381 of 2019**
Date of filing complaint	:	**13.12.2019**
First date of hearing	:	**11.02.2020**
Date of decision	:	**22.12.2021**

1.	Poonam Verma	
2.	Kshitij Verma Both R/o: C-302 Caitriona Apartment, Behind Ambience Mall, Ambience Island Gurugram, Haryana-122002	**Complainants**
	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)	Complainants
Ms. Sarjita Kundan AR and Mr. Sanjeet Kumar Thakur AR	Respondent

ORDER

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

the Act or the rules and regulations made there under or to the 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 project
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.	901, tower WT - 01 (Vide provisional allotment letter on page no. 30 of the complaint)
7.	Size of unit	3600 sq. ft.
8.	Revised unit	3725 sq. ft. (page 120 of the reply)
9.	Allotment letter	04.08.2012 (page no. 30 of complaint)
10.	Date of execution of buyer's agreement	26.12.2012

		(page no. 33 of complaint)
11.	Payment plan	Construction linked payment plan (page no. 69 of complaint)
12.	Date of Building plan approval	07.06.2012 (page no. 34 of complaint)
13.	Environment clearance	27.12.2012 (annexure-N on page no. 127 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. 2,43,85,588/- (annexure-M vide applicant ledger dated 07.01.2020 on page no. 120 of reply)
16.	Total amount paid by the complainants	Rs. 2,20,95,267/- (annexure-M vide applicant ledger dated 07.01.2020 on page no. 120 of reply)
17.	Offer of Possession	07.12.2017 (annexure-J on page no. 110 of reply)
18.	Occupation Certificate	06.12.2017 (annexure-C on page no. 110 of reply)
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., 07.02.2018	1 year 7 months and 11 days

B. Facts of the complaint

3. That the complainants were issued a provisional allotment letter with the construction linked payment plan 'CLP', whereby complainants were allotted the apartment no. 901, tower WT – 01 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 complainants were 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 complainants were at the risk of losing the earnest money paid. Initially complainant no. 1 signed the agreement, as the sole applicant but later on complainant no. 2, was added as co-owner, endorsement dated 28.03.2013 of the same by respondent.

5. That the respondent under the garb of government levy wrongly demanded 'service tax' on the amounts demanded on account of EDC (External Development Charges) and IDC (Infrastructure Development Charges) payable to the Director Town and Country Planning, Haryana. The respondent also wrongly demanded and collected 'Service Tax' on basic sales price. The said demands are

completely incorrect, and 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 respondents.

6. That the respondent was also charging exorbitant amount of Rs.8,24,720/- 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.

7. That in order to ensure proper and due payment of the instalments demanded by the respondent, the complainants availed the loan from Axis bank for the amount of Rs. 1,00,00,000/- at the rate of interest of 10.15% annually.

8. That even though the raised construction progress was well behind its promised schedule, respondent, in order to extract more money from complainants charged additional money of Rs. 1,08,444/- for incremental fixtures and fittings, including, geysers in kitchen and bathroom and piped gas line.

9. That the respondent through a letter dated 27.04.2017 informed complainants that the sale area of the said apartment had been increased by 125 sq. ft., and therefore the revised area would be 3725 sq. ft. For an increase the respondent also demanded Rs. 12,75,120/- vide demand note dated 27.09.2017. Prior to the said communication there was no whisper or communication whatsoever from the respondent regarding the purported increase in the sale area. The respondent had failed to provide detailed calculations and basis of increase of 125 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 complainants 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 complainants.

10. That the complainants 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 complainants 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.
11. That the respondent also sent the notice of possession dated 07.12.2017 stating that they have received the occupation certificate and an over-exaggerated demand note of Rs. 39,74,134/- for various items including for piped connection, solar power charge, maintenance fees, meter charges, maintenance charges etc., which were outside the agreement and despite complainants not consenting to the same.
12. That after receiving the said alleged letter of possession the complainant no.2 went to inspect the project and flat but

shockingly was not allowed by the respondent to see the said apartment.

13. That upon enquiry it came to knowledge of the complainants that the conditional alleged possession of the said apartment was offered to the complainants without completing the construction only to escape from the further liability to pay penalty for late delivery of possession, asking the complainants 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.

    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.

14. That the complainants have not even been allowed to visit and inspect the said apartment and the respondent kept insisting on its illegal demands which also depicts that said apartment is not even ready as per specification contained in the agreement.

15. That the complainants sent a notice dated 05.05.2018 to the respondent pointing various deficiencies in the project and

apartment and also the continuous harassment caused by respondent to complainants. The said legal notice was evasively replied dated 02.7.2018 by the respondent.

16. That the respondent in grave contravention to section 14 of the Act is selling more than the approved sanctioned and layout plan. The respondent has made huge deviations in the built area, sale area etc. It can be seen that across 7 towers which roughly covers 460 units, the total alleged sale area being sold by respondent is 16,53,422 sq. ft., whereas the actual achieved FAR of 7 towers declared by the Respondent before the Director, Town and Country Planning, Haryana (DTCP) is only 12,78,154 sq. ft. It is apparent that there is no explanation for 3,75,268 sq. ft. as excess area charged, has been provided by the respondent despite repeated follow-ups and requests of the complainants. Further thereto, respondent in grave contravention to section 14 of the Act was selling area more than the approved sanctioned and layout plan.
17. That the complainants visited the said project lastly in November 2019 and was shocked to see that all concerns of the complainant are not addressed by the respondent, inter-alia, the boundary wall is still broken, construction work is still going on, the project is still not habitable, etc.
18. That the respondent was duty-bound and under obligation to handover peaceful possession of the said apartment by 26.06.2016. 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.

19. That in view of the receipt of 'final notice' dated 06.09.2019, received on 14.09.2019, threatening cancellation of the apartment, and calling upon the complainants to pay the amount outside the agreement in next 30 days otherwise the respondent will cancel the allotment of the apartment. The complainants apprehend that respondent may illegally terminate the agreement and refund the amount after forfeiting the earnest money.

20. That the complainants emailed his objections to the notice and sent a reply dated 05.10.2019 to the final notice dated 06.09.2019 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 complainants 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.

21. That the demand of more than Rs.2,60,000/- 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.

22. That the respondent was liable to forthwith offer lawful unconditional possession of the said apartment to complainants 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 complainants one-sided agreements and undertakings.

23. 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 complainants seek delay interest as per section 18(1) of the Act.

C. Relief sought by the complainants:

24. 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 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.

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

v. Direct the respondent to reimburse the GST, service tax on BSP, HVAT, indirect EDC and IDC charges with interest.

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

25. 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. Therefore, it is ex-facie obvious that the present complaint lacks jurisdiction, and was 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 the respondent had applied the occupation certificate for the said project on 21.4.2017 which is 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. The total sale consideration for the apartment in question, was about Rs.2,31,66,324 /-, which was to be paid in instalments as per the agreed payment plan.

vii. That thereafter, agreement dated 26.12.2012 between the respondent and the complainnat no.1. That vide letter dated 01.06.5015 informed the complainants applicable EDC stood revised downwards to Rs. 224/- per sq. ft. and accordingly adjusted the amount in the ledger of the complainants.

viii. That vide letter dated 27.04.2017, respondent informed the complainant about increase in the sale area of the apartment by 125 sq.ft. Consequently, the sale area of the apartment allotted to the complainant measures 3725 sq. ft. The same was done in accordance with the terms of the agreement.

ix. That on 22.6.2017, respondent informed the complainant vide its letter dated 22.6.2017 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.55,36,229 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. 58,130 already deposited.

x. That in between the respondent accordingly had kept raising demands on achieving the relevant construction milestone against which payment was required to be made by the complainants. In the present case, it may be submitted that the complainants have defaulted in payment of virtually all instalments.

xi. That thereafter, the complainants had continued to make payment as demanded by the respondent on achieving the relevant construction milestone, however the payments have been made belatedly. As such, all issues relating to EDC/IDC, increase in sale area, HVAT are all barred by estoppel.

xii. 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 06.12.2017, after delay of approx. 8 months. That on receipt of the occupation certificate dated 06.12.2017, respondent offered possession to the complainant on 7.12.2017 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. Since the complainants did not come forward to pay the outstanding amounts and take possession, respondent issued a reminder dated 28.02.2018 to the complainants for taking possession but to of no avail.

xiii. That the complainants only after 5 months on receipt of the offer of possession letter, the complainant sent a legal notice to the respondent on 22.05.2018 for the first-time raising issues inter-alia mainly with respect to demands towards the increase in area as well as compensation for delay which according to the complainants should have been Rs. 3,24,000 for the delay of 12 months. In view thereof, the complainants requested for refund of the amounts paid to the respondent with interest at the rate of 24% along with Rs. 10 lac as compensation for extreme stress and mental agony.

xiv. That the said legal notice was duly replied by the respondent on 02.07.2018 stating that the complainants were always in the knowledge of the terms of the agreement. It was stated it was only on the completion of construction and on receipt of

the occupation certificate, the possession was offered. It was inter-alia clarified that the compensation for delay has been credited to the respondent in accordance with the terms of clause 10 of the agreement wherein respondent with 48 months including 6 months grace period was subject to force majeure and timely payments of instalments by the complainants. With respect to the increase in area, it was agreed between the parties that as per clause 8 of the agreement, for any increase/ decrease in sale area, upto a maximum of 10%, the payment of the same is required to be paid/adjusted on or before notice of possession. It was also informed to the complainants that the apartment in question is less than 10%.

xv. That instead of the clarifications given in the reply to the legal notice, the complainants still did not come forward to take the possession. Thereafter, the respondent was constrained to issue a final notice dated 06.09.2019 to the complainants for clearing the outstanding dues and for taking possession.

xvi. That pursuant to the final notice dated 06.09.2019 issued by the respondent, the complainants issued an email dated 05.10.2019 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.

xvii. That the said email of the complainants was duly responded by the respondent by email dated 11.10.2019 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. It was also stated 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 allottees.

xviii. 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 complainants filed the present complaint raising concerns which were duly replied by the respondent.

xix. That the complainants who are 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 07.01.2020, an amount of Rs.32,28,529 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.

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

xxi. 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.

xxii. 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 complainants.

xxiii. 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 complainants 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 complainants, 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 complainants 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.

xxiv. 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.

xxv. 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.

xxvi. 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.

xxvii. 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.

xxviii. That the 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 06.12.2017. Subsequently, the respondent has offered possession of the

apartment in question to the complainant vide notice of possession dated 08.12.2017.

xxix. 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.

xxx. 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.

xxxi. 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 "allottees" under the act and the rules but are "investors". The complainants are the resident of C-302 Caitriona Apartment, behind Ambience Mall, Ambience Island Gurugram, Haryana-122002 (address mentioned in the present complaint) 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 complainants are not entitled to any relief as prayed for. The present complaint is nothing but abuse of the process of law.

xxxii. That 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 was held to be maintainable.

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

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

28. 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

29. 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 complainants at a later stage.

F. Findings on the objections raised by the respondent

F.I Objection regarding format of the complaint

30. 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

31. 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."

32. Also, in appeal no. 173 of 2019 titled as ***Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya***, in order dated 17.12.2019 the Haryana Real Estate Appellate Tribunal has observed-

"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."

33. 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

34. 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 it paid total price of Rs. 2,20,95,267/- 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;"

35. 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.

36. 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."*

37. 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."*

38. Builder buyer's agreement is a pivotal legal document which should ensure that the rights and liabilities of both builders/promoters and buyers/allottees are protected candidly. 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.

39. 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 07.12.2017. 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., 07.02.2018. The promoter will allow inspection of the unit after fixing the date and time in a week's time.

40. **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.

41. **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.*

42. 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.

43. 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%.

44. 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;"

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

46. 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., 24.02.2019 as per section 19(10) of the Act.

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

47. 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."*

48. The authority observes that the respondent at the time of offer of possession had increased the super area of the flat from 3600 sq. ft. to 3725 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 125 sq. ft. In other word, the area of the said unit is increased by 3.47%. 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.

49. 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.

50. 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, service tax on BSP, HVAT, indirect EDC and IDC charges with interest.

51. 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 07.12.2017 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.

52. 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.

53. As per schedule V of the unit buyer agreement, EDC & IDC were included in total sale consideration. An amount of Rs.12,06,156/- is being charged as EDC and Rs. 96,492/- 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 allottees as per "Schedule-V". Though the claimants are stated to have paid Rs. 3,326/- on the basis of demand raised by the respondent builder under the heading like dual meter charges (Rs.150/-), piped connection charges (Rs.462/-),Geyser charges(Rs.520/-), PHE charges (Rs.135/-), FTTH charges (Rs.251/-), 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 complainants paid a sum of Rs. 3,326/- 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 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."*

57. In the instant matter, the subject unit was allotted to the complainant vide allotment letter dated 04.08.2012 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. 3,60,000/- 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 allottees 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. 3,05,927/- through demand cum notice of possession letter dated 07.12.2017. 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.

64. 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.

65. Section 19(10) of the Act obligates the allottees to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. 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 complainants only on 07.12.2017, 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 complainants should be given 2 months' time from the date of offer of possession. This 2 month of reasonable time is being given to the complainants 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 (07.12.2017) which comes out to be 07.02.2018.

66. 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 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., 07.02.2018 as per section 19(10) of the Act.

H. Directions of the authority

67. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the 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., 07.02.2018 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 complainants are 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., 07.02.2018.

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 was 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 complainants paid a sum of Rs. 3,326/- 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 complainants.

68. Complaint stands disposed of.

69. File be consigned to registry.

(Vijay Kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 22.12.2021