

**BEFORE THE HARYANA REAL ESTATE REGULATORY
AUTHORITY, GURUGRAM**

Complaint no. : 3770 of 2021
First date of hearing: 25.11.2021
Date of decision : 04.02.2022

Satvinder Kumar Sachdeva
R/o: -L-80A, GF, opp. Agrawal Eye
Institute, Malviya Nagar, New Delhi- 110017

Complainant**Versus**

1.M/s Supertech Limited.
2. Ram Kishor Arora
3. Mohit Arora
4. AK Jain
5. Gulshan Lal Khera
6. Sangeeta Arora
All Having **Regd. office at:** 1114,
11th floor, Hamkunt Chambers, 89,
Nehru Place, New Delhi- 110019

Respondents**CORAM:**

Shri K.K. Khandelwal
Shri Vijay Kumar Goyal

**Chairman
Member****APPEARANCE:**

Sh. Satvinder Kumar Sachdeva
Sh. Bhrigu Dhami

Complainant in person
Advocate for the respondents

ORDER

1. The present complaint dated 17.09.2021 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 as provided 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	"Supertech Hues", Sector- 68, Gurugram.
2.	Project area	32.83 acres (As per the RERA Registration)
3.	Nature of the project	Group Housing Project
4.	DTCP license no. and validity status	106 of 2013 and 107 of 2013 dated 26.12.2013 valid till 25.12.2017
5.	Name of licensee	Sarv Realtors Private Limited
6.	RERA Registered/ not registered	Registered vide no. 182 of 2017 dated 04.09.2017. (Tower No. A to H, K, M to P and T, V, W)
7.	RERA registration valid up to	31.12.2021
8.	Unit no.	A/0803, 8 th floor, tower- A [Page no.39 of complaint]

9.	Unit measuring	1180 sq. ft. [super area]
10.	Date of execution of buyer developer agreement	05.07.2014 [page no. 38 of complaint]
11.	Date of execution of memorandum of understanding	16.08.2016 [page no. 19 of complaint]
12.	Date of execution of tripartite agreement	23.07.2016 [page no. 14 of complaint]
13.	Payment plan	Construction linked payment plan [Page no.40 of complaint]
14.	Total consideration	Rs.86,66,720/- [as per payment plan page no. 40 of complaint]
15.	Total amount paid by the complainant	Rs.85,70,577/- [as per latest statement of payment received dated 17.09.2021 page no. 55 of complaint]
16.	Due date of delivery of possession as per clause E (25) of the buyer developer agreement by April 2017 plus 6 months grace period upto the offer letter of possession or actual physical possession whichever is earlier. [Page 45A of complaint]	30.04.2017 [Note: - 6 Months grace period is not allowed]
17.	Delay in handing over possession till the date of order i.e., 04.02.2022	4 years 9 months and 5 days
18.	Occupation certificate	Not obtained
19.	Status of the project	Ongoing

B. Facts of the complaint

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

- I. That the complainant in the year 2013 booked a flat bearing no. 0803, 8th floor, tower-A in the respondent's project namely 'Supertech Hues' situated in sector-68, Gurugram. As per the builder buyer's agreement the respondent promised to deliver possession of the said unit by April 2017. The construction at the project site was significantly delayed and this delay is totally not acceptable as the respondent was not completing the construction work intentionally.
- II. That in June 2016, the respondent offered the complainant a subvention plan through an e-mail dated 14.06.2016, 27.06.2016 & 22.07.2016, a tripartite agreement dated 23.07.2016 and a MoU dated 16.08.2016. The respondent for its own benefit having a tie-up with Indiabulls Housing Finance Limited got disbursed Rs.44.85 lakh which was directly paid to the respondents. The complainant never communicated with Indiabulls Housing Finance Limited for a loan, and the same fact can be verified with the call records made when the Indiabulls Housing Finance Limited officials called the complainant to get the loan form signed at his residence and thus, a tripartite agreement was executed between the respondent, Indiabulls Housing Finance Limited and the complainant.
- III. That the loan was disbursed under the subvention plan where there was to be no EMI till the possession of the said unit and the

respondent was pay all the pre-EMI/interest directly to Indiabulls Housing Finance Limited which the respondent did. In December 2018, the tenure of the pre-EMI loan granted by Indiabulls Housing Finance Limited got over and denied granting an extension of the subvention loan to the respondent. The respondent with a malafide intention and unable to deliver the possession within the agreed time entered into a fresh tie-up having with L&T Housing Finance (LTHF). It is also pertinent to mention here that the complainant never approached LTHF and only on the request of the respondent, the complainant submitted an application to the respondent for getting the loan/bank transfer as per the practice of Indiabulls under direct payment of pre-EMI by the respondent under the subvention plan.

- IV. That a tripartite agreement between the respondent, L&T Housing and the complainant was executed, and a blank Loan form was signed under the subvention plan and wherein the respondent was to be liable and responsible for pre-EMI till possession for a tenure of 204 months as per loan offer letter dated 08.01.2019 and a letter of L&T Housing dated 31.01.2019. The respondent and L&T Housing in association approached the complainant for financial arrangement and disbursed an amount of Rs.50.50 lakhs against the bank transfer of loan of Indiabulls Housing Finance Limited Rs.44.85 lakhs. The

respondent directly got disbursed Rs.5 lakh, which was in excess, no loan amount was paid to the complainant at all. The complainant having no option having already paid an amount of Rs.35.62 lakh but to fall in the track of L&T and the respondent in the hope to get the possession of the said unit.

- V. That the complainant also wrote to L&T Housing to not disburse any further amount of loan to the respondent as he had already made excess payment to the respondents. In this regard, the respondent also issued a letter to the complainant clarifying that *"We assure you that the PRE-EMI is liability of the company, and we shall bear the same till possession. The possession is expected by Dec.2020"*. The respondent directly made the payment of pre-EMI to India bulls Housing Finance Limited and LTHF Housing as per MoU agreement till January 2020.
- VI. That on 16 January 2020, the respondent issued six PDCs in favour of the complainant to pay the pre-EMI to LTHF Housing. Out of six, only two PDCs got cleared and payment was very well remitted to LTHF Housing in the month of March 2020 and June 2020. In the month of April and May 2020, Moratorium was offered by the respondent. The respondent stopped payment of remaining four PDCs/cheques (dis-honoured itself) intentionally.
- VII. That a notice dated 19.04.2021 of Rajendra P. Adav, Advocate having Kolkata regd. office of LTHF Housing, which the



complainant forwarded to the respondent to remit payment to LTHF Housing and sent a reply to Rajendra P.Adav Advocate with a copy to LTHF & the respondent, wherein Mr. Rajat Kamal, (Sr. Manager, CRM,) of the respondent company mentioned that the same has been forwarded to concerned team for necessary action. Subsequently, on 03.09.2021, the complainant received summons bearing no. 3902 from the Hon'ble High Court of Kolkata to appear on 28.09.2021. At point no. 5 of the summons, it was written that ECS/NACH mandate to debit Rs.40,139/- vide transaction id no.MN0803210339 dated 07.03.2021 was presented in the complainant's bank and declined the transaction unpaid on 07.03.2021. It is submitted that the complainant has confirmed from his bank namely Canara Bank, Hauz Khas, New Delhi whether any ECS/NACH in his account No.1445101008787 was presented as in the statement no bounce/return charges was debited. The bank has confirmed in writing that "No mandate is given by the party-L&T".

- VIII. That till date the respondent has not handed over the possession of said unit. On 17.01.2016 the complainant's mother had a brain stroke/paralysis & cancer and was bed-ridden. All medical documents were sent to the official of the respondent company Mr. Mohit Arora. It is also pertinent to mention here that in October 2016, the complainant's wife met with a serious accident.

She had undergone 4 major surgeries implanting a 22-inch rod in leg, multiple bone grating. The treatment from all major hospitals of Delhi including AIIMS Trauma Centre, New Delhi had been taken but she had not yet recovered till date.

C. Relief(s) sought by the complainant:

4. The complainant has filed an application for amendment of relief sought and the same was allowed by this authority vide order dated 25.11.2021 and as per the same the complainant has sought following relief(s):

(i) **Alternative refund the amount of Rs.86.14 lakh with interest @24% along with penalty, late payment, bounce charges, and mis. Charges outstanding of L&T upto 11.10.2021 i.e., Rs.4,92,042/- without forfeiting by cancellation charges because Supertech has totally failed to adhere the BBA/delivery the possession of time.**

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

D. Reply by the respondent

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



- I. That the respondent is one of the leading real estate developer in the State of Haryana and NCR. It has several projects across the state, and such has built a great reputation for having the highest quality of real estate development. The respondent has been represented in the instant proceedings by its authorized representative, Ms. Isha Dang.
- II. That one of its marquee projects is the "**Supertech Hues**", located in Village Badshahpur, Sector 68, Gurugram, Haryana ('Project' hereinafter for the sake of brevity). The complainant approached the respondent, making enquiries about the project, and after thorough due diligence and complete information being provided to him, sought to book an apartment in the said project.
- III. That the complainant was offered apartment being number 0803, in tower A, on the 8th floor, having a super area of 1180 sq. ft. (approx.) for a total consideration of Rs.86,66,720/-.
- IV. That the relief for refund of above noted amount is not maintainable in view of the fact that the complainant had admittedly taken a loan from Indiabulls Housing Finance Ltd. which was subsequently transferred to L&T Bank (**Financier**) for an amount of Rs.56,89,072.14/- and in this regard he had entered into a tripartite agreement with the respondent and the financier.
- V. That the relief as sought is not maintainable as the complainant have taken a loan for the purchase of the said unit however, have

malafidely not made the financier, L&T Housing Finance, a party in the present proceedings. L&T Housing Finance in terms of the loan obtained by the complainant got mortgaged the property/unit. Thus, the complaint is bad for non-joinder of necessary parties and is liable to be dismissed in limine on this very ground alone.

- VI. That the clauses of the tripartite agreement duly set out the terms and conditions which bind all the parties with respect to the said transaction. The TPA clearly stipulates that in the event of cancellation of the apartment for any reason whatsoever, the entire amount advanced by the financier will be refunded by the builder to the financier. Therefore, the complainant subrogated all his rights for refund with respect to the said residential apartment in favour of the financier. Thus, the complainant is devoid any right to seek refund of the amount advanced for the subject apartment.
- VII. That the complainant has not been financially prejudiced in any way in as much as besides paying a nominal amount, the respondent has not received any other monies from him and has only received money disbursed by the bank and not by the complainant. Therefore, he is not entitled to seek any refund over and above the amount mentioned herein above or any other relief prayed for.

- VIII. That in fact the respondent has paid/adjusted substantial amounts towards pre-EMI on behalf of the complainant to the financier and in fact, is entitled to refund of the same from the complainant if any relief, if any, is granted to the complainant.
- IX. That the complainant after entering into agreements which clearly specify the rights and obligations of parties cannot wriggle out of its obligations merely on its whim and fancies and more over merely on the ground of financial difficulties without substantiating the said averment. It is submitted that the complainant may be put to strict proof in this regard.
- X. That the regular benefactor through means of wrongful gains, the complainant has strictly failed to abide by the terms of the clause "F" of the builder buyer's agreement which clearly defines the process of cancellation and loss it can cause to both the buyer and the developer.
- XI. That without prejudice to the aforesaid, the delay if at all, has been beyond the control of the respondents and as such extraneous circumstances would be categorized as '*Force Majeure*', and would extend the timeline of handing over the possession of the unit, and completion the project.
- XII. The delay in construction was on account of reasons that cannot be attributed to the respondents. It is most pertinent to state that the agreements provide that in case the developer/respondent

delays in delivery of unit for reasons not attributable to the developer/respondent, then the developer/respondent shall be entitled to proportionate extension of time for completion of said project. The relevant clauses which relate to the time for completion, offering possession extension to the said period is "clause 1 under the heading "Possession of Floor/Apartment" of the agreement. The respondent seeks to rely on the relevant clauses of the agreement at the time of arguments in this regard.

- XIII. That the *force majeure* clause, it is clear that the occurrence of delay in case of delay beyond the control of the respondent, including but not limited to the dispute with the construction agencies employed by the respondent for completion of the project is not a delay on account of the respondent for completion of the project.
- XIV. That with respect to the present agreement, the time stipulated for delivering the possession of the unit was on or before April 2017. However, the agreement duly provides for extension period of 6 months over and above the said date. Thus, the possession in strict terms of the agreement was to be handed over in and around October 2017. However, the proposed possession date was subject to the *force majeure* clause.
- XV. That the project got inadvertently delayed owing to the above noted *force majeure* events. Further, since March 2020, as owing

to the nationwide Government imposed lockdown, no construction/development could take place at site. It is submitted that owing to the lockdown, the construction labour workers were forced to return to their native villages and thus, even at the unlocking stage no conclusive construction/ development could take place at site. It is submitted that such a long break in construction has put the project many milestones back. However, the respondent has dedicated itself to delivering the projects at the earliest.

XVI. That due to the Covid-19 and its devastating effect on the Indian economy specially the real estate sector, arranging of funds for completion of projects has become an impossible task as the banks and NBFC's have made it difficult for builders to apply for loans for completion of pending projects. However, the respondent undertakes to handover possession of the subject unit at the earliest.

XVII. That the delivery of a project is a dynamic process and heavily dependent on various circumstances and contingencies. In the present case also, the respondent had endeavoured to deliver the property within the stipulated time. The respondent earnestly has endeavoured to deliver the properties within the stipulated period but for reasons stated in the present reply could not complete the same.

XVIII. That the timeline stipulated under the agreements was only tentative, subject to force majeure reasons which are beyond the control of the respondent. The respondent endeavour to finish the construction within the stipulated time, had from time to time obtained various licenses, approvals, sanctions, permits including extensions, as and when required. Evidently, the respondent had availed all the licenses and permits in time before starting the construction.

XIX. That despite the best efforts of the respondent to handover timely possession of the residential unit booked by the complainant, the respondent could not do so due to certain limitations, reasons and circumstances beyond the control of the respondent. That apart from the defaults on the part of the allottees, like the complainant, the delay in completion of project was on account of the following reasons/circumstances that were above and beyond the control of the respondent: -

- Shortage of labour/ workforce in the real estate market as the available labour had to return to their respective states due to guaranteed employment by the Central/ State Government under NREGA and JNNURM Schemes;
- Acute shortage of labour, water and other raw materials or the additional permits, licenses, sanctions by different departments were not in control of the respondent and were not at all

foreseeable at the time of launching of the project and commencement of construction of the complex. The respondent cannot be held solely responsible for things that are not in control of the respondent.

XX. That the intention of the force majeure clause is to save the performing party from the consequences of anything over which he has no control. It is no more *res integra* that force majeure is intended to include risks beyond the reasonable control of a party, incurred not as a product or result of the *negligence or malfeasance* of a party, which have a materially adverse effect on the ability of such party to perform its obligations, as where non-performance is caused by the usual and natural consequences of external forces or where the intervening circumstances are specifically contemplated. Thus, in light of the aforementioned it is most respectfully submitted that the delay in construction, if any, is attributable to reasons beyond the control of them and as such the respondent may be granted reasonable extension in terms of the agreement.

XXI. It is public knowledge, and several courts and quasi-judicial forums have taken *cognisance* of the devastating impact of the demonetisation of the Indian economy, on the real estate sector. The real estate sector is highly dependent on cash flow, especially with respect to payments made to labourers and contractors. The

advent of **demonetisation** led to systemic operational hindrances in the real estate sector, whereby the respondent could not effectively undertake construction of the project for a period of 4-6 months. Unfortunately, the real estate sector is still reeling from the aftereffects of demonetisation, which caused a delay in the completion of the project. The said delay would be well within the definition of 'Force Majeure', thereby extending the time period for completion of the project.

XXII. That the complainant has not come with clean hands before this authority and have suppressed the true and material facts from this authority. It would be apposite to note that the complainant is a mere speculative investor who has no interest in taking possession of the apartment. In fact, a bare perusal of the complaint would reflect that he has cited 'financial incapacity' as a reason, to seek a refund of the monies paid by him for the apartment. In view thereof, this complaint is liable to be dismissed at the threshold.

XXIII. That the project "**HUES**" is registered under the Haryana Real Estate Regulatory Authority vide registration certificate no. 182 of 2017 dated 04.09.2017. The authority had issued the said certificate which is valid for a period commencing from 04.09.2017 to 31.12.2021. Thus, in view of the said registration

certificate, the respondent hereby undertakes to complete the said project by June 2022.

XXIV. That it is pertinent to reiterate that the possession of the said premises was proposed to be delivered by the respondent to the complainant by April 2017 with an extended grace period of 6 months which comes to an end by October, 2017. The completion of the building is delayed by reason of Covid - 19, non-availability of steel and/or cement or other building materials and/or water supply or electric power and/ or slow down strike as well as insufficiency of labour force which is beyond the control of respondent and if non-delivery of possession is as a result of any act and in the aforesaid events, the respondent shall be liable for a reasonable extension of time for delivery of possession of the said premises as per terms of the agreement executed by the complainant and the respondent. The respondent and its officials are trying to complete the said project as soon as possible and there is no malafide intention of the respondent to get the delivery of project, delayed, to the allottees. It is also pertinent to mention here that due to orders also passed by the Environment Pollution (Prevention & Control) Authority, the construction was /has been stopped for a considerable period of days due to high rise in pollution in Delhi NCR.

- XXV. That the enactment of the Act, 2016 is to provide housing facilities with modern development infrastructure and amenities to the allottees and to protect the interest of allottees in the real estate sector market. The main intention of the respondent is just to complete the project within stipulated time submitted before this authority. According to the terms of agreement also it is mentioned that all the amount of delay possession will be completely paid/adjusted to the complainant at the time of final settlement on slab of offer of possession.
- XXVI. That in today's scenario, the Central Government has also decided to help bonafide builders to complete the stalled projects which are not constructed due to scarcity of funds. The Central Government announced Rs.25,000 Crore to help the Bonafide Builders for completing the Stalled/ unconstructed projects and deliver the homes to the Homebuyers. It is submitted that the respondent/promoter, being a bonafide Builder, has also applied for realty stress funds for its Gurugram based projects. The said news was also published in Daily News/Media.
- XXVII. That the project is an ongoing project and orders of refund at a time when the real-estate sector is at its lowest point, would severally prejudice the development of the project which in turn would lead to transfer of funds which are necessary for timely completion of the project. It is most humbly submitted that any

refund order at this stage would severally prejudice the interest of the other allottees of the project as the diversion of funds would severally impact the project development. Thus, no order of refund may be passed by this authority in lieu of the present prevailing economic crisis and to safeguard the interest of the other allottees at large.

XXVIII. That the complainant cannot unilaterally cancel/ withdraw from the project at such an advanced stage as the same would fly in the face of numerous judicial pronouncements as well as the statutory scheme as proposed under the Real Estate (Regulation and Development) Act, 2016.

XXIX. That the Hon'ble Supreme Court in its judgment of *"Pioneer Urban Land and Infrastructure Limited &Anr. V. Union of India &Anr"*, has nuanced a balanced approach in dealing with legitimate builders. Furthermore, the court has laid emphasis on the concept of *"legitimate/bona fide buyers"* whereby one cannot be considered a homebuyer if he/she is not willing to see the project to its end or is investing in the project with a speculative mindset, to withdraw his/her money before giving credence to the project. The said reasoning has also been used by the National Company Law Appellate Tribunal in its judgment titled *"NavinRaheja v. Shilpi Jain and Ors."*. The NCLAT was even more strenuous in its approach whereby it called these

speculative investors as trigger-happy investors who ignite the flame which may very well lead the genuine developer company to its death.

XXX. Further, compounding all these extraneous considerations, the Hon'ble Supreme Court vide order dated 04.11.2019, imposed a blanket stay on all construction activity in the Delhi- NCR region. It would be apposite to note that the "**HUES**" project of the respondent was under the ambit of the stay order, and accordingly, there was next to no construction activity for a considerable period. It is pertinent to note that similar stay orders have been passed during winter period in the preceding years as well, i.e., 2017-2018 and 2018-2019. It is most respectfully submitted that a complete ban on construction activity at site invariably results in a long-term halt in construction activities. As with a complete ban, the concerned labor leaves for their native villages or look for work in other states, the resumption of work at site becomes a slow process and a steady pace of construction is realized after long period of time.

XXXI. That the Graded Response Action Plan targeting key sources of pollution has been implemented during the winters of 2017-18 and 2018-19, These short-term measures during smog episodes include shutting down power plant, industrial units, ban on construction, ban on brick kilns, action on waste burning and

construction, mechanized cleaning of road dust, etc. This also includes limited application of odd and even scheme.

XXXII. Unfortunately, circumstances have worsened for the respondent and the real estate sector in general. The pandemic of Covid 19 has had devastating effect on the world-wide economy. However, unlike the agricultural and tertiary sector, the industrial sector has been severally hit by the pandemic. The real estate sector is primarily dependent on its labour force and consequentially the speed of construction. Due to government-imposed lockdowns, there has been a complete stoppage on all construction activities in the NCR area till July 2020. In fact, the entire labour force employed by the Respondent was forced to return to their hometowns, leaving a severe paucity of labour. Till date, there is shortage of labour, and as such the respondent has not been able to employ the requisite labour necessary for completion of its projects. The Hon'ble Supreme Court in the seminal case of *Gajendra Sharma v. UOI & Ors*, as well *CredaiMCHI & Anr. v. UOI&Ors*, has taken cognizance of the devastating conditions of the real estate sector, and has directed the UOI to come up with a comprehensive sector specific policy for the real estate sector. In view of the same, it is most humbly submitted that the pandemic is clearly a 'Force Majeure' event, which automatically extends the timeline for handing over possession of the apartment.

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

E. Jurisdiction of the authority

The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.1 Territorial jurisdiction

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

E. II Subject-matter jurisdiction

9. The authority is well within its jurisdiction to proceed further in the matter to grant refund to the complainant in view of the recent judgement of the Hon'ble Apex court in the case of "**Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors.**" **SC/1056/2021 decided on 11.11.2021** observes that: -

"86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is that although the Act indicates the distinct expressions like

'refund', 'interest', 'penalty' and 'compensation', a conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest thereon, it is the regulatory authority which has the power to examine and determine the outcome of a complaint. At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon Under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of Section 71 read with Section 72 of the Act. If the adjudication Under Sections 12, 14, 18 and 19 other than compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating officer Under Section 71 and that would be against the mandate of the Act 2016"

10. So, in view of the above-mentioned reason, the authority has complete jurisdiction to decide the present complaint regarding non-compliance of obligations by the promoter as per provisions of section 11(4)(a) of the Act, 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 entitlement of DPC on ground of complainant being an investor.

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

principle of interpretation that preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time, preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if it 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 paid total price of **Rs.85,70,577/-** 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;"

12. 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(s) as the subject unit was allotted to him 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) Ltd. 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.

F. II. Objection regarding the respondents is reiterating that the project is being delayed because of force majeure circumstances and contending to invoke the force majeure clause.

13. From the bare reading of the possession clause of the buyer developer agreement, it becomes very clear that the possession of the apartment was to be delivered by **April 2017**. The respondent in its contention pleaded the force majeure clause on the ground of Covid- 19. The High Court of Delhi in case no. *O.M.P (I) (COMM.) No. 88/2020 & IAs. 3696-3697/2020 title as M/S HALLIBURTON OFFSHORE SERVICES INC VS VEDANTA LIMITED & ANR. 29.05.2020* held that the past non-performance of the Contractor cannot be condoned due to the COVID-19 lockdown in March 2020 in India. The Contractor was in breach since September 2019. Opportunities were given to the Contractor to cure the same repeatedly. Despite the same, the Contractor could not complete the Project. The outbreak of a pandemic cannot be used as an excuse for non-performance of a contract for which the deadlines were much before the outbreak itself. Now, this means that the respondent

/promoter has to complete the construction of the apartment/building by December 2019. It is clearly mentioned by the respondent /promoter for the same project, in complaint no. 2916 of 2020 (on page no. 28 of the reply) that only 42% of the physical progress has been completed in the project. The respondent/promoter has not given any reasonable explanation as to why the construction of the project is being delayed and why the possession has not been offered to the complainant/allottee by the promised/committed time. The lockdown due to pandemic in the country began on 25.03.2020. So, the contention of the respondent/promoter to invoke the force majeure clause is to be rejected as it is a well settled law that ***"No one can take benefit out of his own wrongs"***. Moreover, there is nothing on record to show that the project is near completion, or the developer applied for obtaining occupation certificate. Rather, it is evident from its submissions that the project is completed upto 42% and it may take some more time to get occupation certificate. Thus, in such a situation, the plea with regard to force majeure on ground of Covid- 19 is not sustainable and the same is liable to be rejected.

G. Findings on the relief sought by the complainant

- G.1** Direct the respondent to pay refund the amount of Rs.86.14 lakh with interest @24% along with penalty, late payment, bounce charges, and mis. Charges outstanding of L&T upto 11.10.2021 i.e., Rs.4,92,042/- without forfeiting by cancellation charges because Supertech has totally failed to adhere the BBA/delivery the possession of time.

14. In the present complaint, the complainant intends to withdraw from the project and is seeking refund of the amount paid by him in respect of the subject unit with interest at prescribed rate as provided under section 18(1) of the Act. Sec. 18(1) 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, —

- (a). in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or
- (b). due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,

he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act.

15. Clause E (25) of the allotment letter provides for handing over of possession and is reproduced below: -

"E POSSESSION OF UNIT: -

25. The possession of the unit shall be given in 42 months i.e., by April 2017 or extended period as permitted by the agreement. However, the company hereby agrees to compensate the Allottee/s @ Rs. 5.00/- per sq. ft. of super area of the unit per month for any delay in handing over possession of the unit beyond the given period plus the grace period of 6 months and up to the offer letter of possession or actual physical possession whichever is earlier, to cover any unforeseen circumstances. Upon receiving the offer letter of possession, the buyer(s) shall within time stipulated, take possession of the unit by executing sale deed, undertaking, maintenance agreement and any other documents as prescribed and required. If the Buyer(s) fails to take possession within the time period prescribed, the developer shall be entitled to cancel the agreement and forfeit the 15% of the total cost/price of the unit and

refund the balance amount to the Buyer(s) without any interest. The developer may decide to condone the delay by Buyer(s) in taking the possession of the unit in deserving on the condition that Buyer(s) shall pay the Developer penal interest and holding charges for the entire period of delay in taking possession/executing the registration of sale deed of allotted unit, whichever is later. The rate of Holding Charges shall be equal to the rate of delay penalty as offered by developer in case of delay in possession. These charges shall be in addition to the maintenance, or any other charges as provided under the Buyer Developer Agreement. The Buyer shall be given an opportunity to inspect the allotted unit before possession. After taking possession, the Buyer(s) shall have no right or claim in respect of any item of work which the Buyer(s) may allege as completed or in respect of any design or specification."

16. The authority has gone through the possession clause of the agreement and observes that this is a matter very rare in nature where builder has specifically mentioned the date of handing over possession rather than specifying period from some specific happening of an event such as offer letter of possession or actual physical possession whichever is earlier. This is a welcome step, and the authority appreciates such firm commitment by the promoter regarding handing over of possession.
17. **Admissibility of grace period:** Considering the above-mentioned facts, the authority calculated due date of possession as per clause (E) 25 of the buyer developer agreement executed between the parties on 05.07.2014, wherein the respondent has proposed to handover the possession of the subject apartment by 30.04.2017. It is pertinent to mention over here that even after a passage of more than 4 and a half years neither the construction is complete nor the offer of possession of the allotted unit has been made to the allottee by the builder.

Further, the authority observes, that there is no document place on record from which it can be ascertained that whether the respondent has applied for occupation certificate/part occupation certificate or what is the status of construction of the project. Rather, it is evident from the pleadings of the respondent that the construction of the project is upto 42% complete in complaint no. 2916 of 2020 (page 28 of reply) and there are no signs of completion of the project in the near future. In view of the same, the allottee intends to withdraw from the project. The authority has no hitch to proceed further.

18. **Admissibility of refund along with prescribed rate of interest:** The complainant is seeking refund the amount paid by him at the rate of 24% p.a. However, allottee intends to withdraw from the project and is seeking refund of the amount paid by him in respect of the subject unit with interest at prescribed rate as provided 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.

19. 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.

20. 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., **04.02.2022** is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.
21. 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;"*

22. On consideration of the circumstances, the documents, submissions made by the parties and based on the findings of the authority regarding contravention as per provisions of rule **28(1)**, the Authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of clause E (25) of the buyer developer agreement executed between the parties on 05.07.2014, the possession of the


subject apartment was to be delivered within stipulated time i.e., by 30.04.2017. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over of possession is 30.04.2017. The respondents have failed to handover the possession of the subject apartment till date of this order. Accordingly, it is a failure on the part of the respondents/promoters to fulfil its obligations and responsibilities as per the agreement to handover the possession of the allotted unit within the stipulated period. The authority is of the considered view that there is delay on the part of the respondents to offer possession of the allotted unit to the complainant as per the terms and conditions of the buyer developer agreement dated 05.07.2014 executed between the parties. Further no OC/part OC has been granted for the project. In view of the above-mentioned fact, the allottee intends to withdraw from the project and is well within his right to do the same in view of section 18(1) of the Act, 2016. Further, the authority has no hitch in proceeding further and to grant a relief in the present matter in view of the recent judgement ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors.*** SC/1056/2021 decided on 11.11.2021.

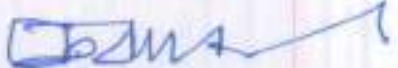
"Para 25 and was observed that in terms of section 18 of the Rera Act, if a promoter fails to complete or is unable to give possession of the apartment duly completed by the date specified in the agreement, the promoter would be liable, on demand, to return the amount received by him

in respect of that apartment if the allottee wishes to withdraw from the project. Such right of the allottee is specifically made "without prejudice to any other remedy available to him". The right so given to the allottee is unqualified and if availed, the money deposited by the allottee has to be refunded with interest at such rate as may be prescribed."

23. 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 refund the entire amount paid by him at the prescribed rate of interest i.e., @ 9.30% p.a. from the date of payment of each sum till its actual realization as per provisions of section 18(1) of the Act read with rule 15 of the rules, 2017.
24. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):
- The respondents/promoters are directed to refund the entire amount of Rs.85,70,577/- paid by the complainant along with prescribed rate of interest @ 9.30% p.a. from the date of payment of each sum till the date of its actual realization within 90 days from the date of this order as per provisions of section 18(1) of the Act read with rule 15 of the rules, 2017.

- ii. The amount of Pre-Emi's paid by the respondents/promoters in the account of complainant, if any, would be deducted while calculating the total amount due towards him.
 - iii. The loan amount received by the complainant against the allotted unit and paid by the respondents/promoters would be charge payable to the financial institution and the same would be paid to it prior to paying the deposited amount to him.
 - iv. The respondents/promoters are further debarred from creating 3rd party rights with regard to unit in question without paying the amount detailed above.
25. Complaint stands disposed of.
26. File be consigned to registry.


(Vijay Kumar Goyal)
Member


(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 04.02.2022

Judgement uploaded on 16.03.2022