

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

Complaint no. : 3597 of 2021
First date of hearing : 06.10.2021
Date of decision : 04.02.2022

Mr. Narandera Kumar Gupta
R/o: - Flat no. 303, Tower- 3, Fresco Apartments, Nirvana
Country, Sector- 50, Gurugram- 122018

Complainant

Versus

M/s Supertech Limited.
Office at: 1114, 11th floor
Hamkunt Chambers, 89,
Nehru Place, New Delhi- 110019

Respondent

CORAM:

Shri K.K. Khandelwal
Shri Vijay Kumar Goyal

**Chairman
Member**

APPEARANCE:

Sh. Shikha Dixit
Sh. Bhrigu Dhani

Advocate for the complainant
Advocate for the respondent

ORDER

1. The present complaint dated 16.09.2021 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.	F/0503, 5 th floor, Tower- F [Page 36 of complaint]
9.	Unit measuring	1180 sq. ft. [super area]
10.	Date of execution of buyer developer agreement	19.02.2015 [Page 36 of complaint]



11.	Payment plan	Possession linked payment plan [Page 37 of complainant]
12.	Total consideration	Rs.89,90,040/- (As per payment plan page 37 of complaint)
13.	Total amount paid by the complainant	Rs.55,73,073/- (As per customer statement page 53 of complaint)
14.	Due date of delivery of possession as per clause E (24) of the buyer developer agreement: by July 2018 plus 6 months grace period for offer of possession and actual physical possession whichever is earlier.	31.07.2018 [Note: - 6 Months grace period is not allowed]
15.	Intimation regarding prepossession formalities	05.03.2021 (Page 54 of complaint)
16.	Occupation certificate	Not obtained
17.	Delay in handing over possession till the date of order i.e., 04.02.2022	3 years 6 month and 4 days

B. Facts of the complaint

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

- I. That the respondent published a very attractive brochure, highlighting the group housing colony "Supertech Hues" situated at Sector 68, Gurugram. The respondent claimed to be one of the best and finest in construction and one of the leading real estate developers of the country, in order to lure prospective customer to buy flats/apartments in the Project including the complainant.

There are fraudulent representations, incorrect and false statements in the brochure. The complainants invite the attention of the Haryana Real Estate Regulatory Authority, Gurugram to Section 12 of the Act, 2016. The Project was launched in 2013 with the promise to deliver the possession on time and huge funds were collected over the period by the respondent.

- II. That the complainant was approached by the representatives of the respondent. The sales representatives claimed and boasted of the project "Supertech Hues" as a world class project. The complainant was invited to the sales office and was lavishly entertained, and huge promises were made to him. The complainant was impressed by their statements and representations and ultimately lured to pay Rs.6,00,000/- as the booking amount of the 2BHK residential apartment no. R0380F00503 in residential Project of M/s Supertech Limited named "Supertech Hues" situated at Sector 68, Gurugram vide cheque dated 30.09.2013, which was uncashed by the respondent.
- III. That after repeated regular follow-up by the complainant, the respondent finally executed the first builder buyer agreement, on 19.07.2014 wherein the agreed date of giving possession was April 2017 and the price of the unit was Rs.86,34,091/-. The said agreement was loaded with one sided terms and conditions in favour of the respondent and against the complainant, however



the complainant was made to sign on dotted lines, which he had to sign, since having paid an amount of Rs.15,41,501/- the complainant was left with no choice but to bear the unfair terms of the agreement, as exit from the transaction was resulting in 15% of the total price as penalty on the complainant for no fault of complainant. Further, the complainant paid a total of Rs. 15,41,501/- before the execution of first builder buyer agreement dated 19.07.2014, hence the respondent violated section 13 of the Act, 2016 by taking more than ten per cent (10%) cost of the flat before the execution of the flat buyer's agreement. The total cost of the flat is Rs.86,34,091/ (later revised to Rs.89,90,040/-) while the respondent had collected a total sum of Rs.15,41,501/- around 17% of the total cost of the apartment.

- IV. That on 19.02.2015, when the payment plan was changed from construction link plan to possession linked payment plan the complainant had paid an amount of Rs. 27,02,075/-.
- V. That the respondent asked the complainant to sign a fresh agreement dated 19.02.2015 on dotted line, with upward revision in the total price of the flat to Rs.89,90,040/- (without tax) from earlier price of Rs.86,34,091/- and also inserted several clauses detrimental to the interest of the complainant without giving him any opportunity to make any variation in the stereo-typed agreement. The date of possession in the flat was also extended from earlier date of April 2017 to July 2018.

- VI. That when the complainant objected to the unilateral upward revision to the price and unilateral unfavorable clauses such as "escalation clause" longer date of possession from earlier date of possession "April 2017 to July 2018, he was asked by the respondent to seek cancellation of the unit with 15% penalty. Further, that till 09.10.2017, the complainant made payments of Rs.55,73,073/-, out of the total revised consideration of Rs.89,90,040/-. The statement of account issued by the respondent reflecting the said amount of Rs.55,73,073/- acknowledged as paid by the complainant.
- VII. That the complainant approached the respondent and pleaded for delivery of possession of his apartment as per the buyer's agreement on various occasions. The respondent did not reply to their emails, personal visits, telephone calls, seeking information about the status of the project and delivery of possession of his apartment with occupation certificate, thereby the respondent violated section 19 of the Act.
- VIII. That the respondent has in an unfair manner siphoned off funds meant for the project and utilized same for his own benefit for no cost. That the respondent being builder and developer, whenever in need of funds from bankers or investors ordinarily has to pay a heavy interest per annum. However, in the present scenario, the respondent utilized funds collected from the complainants and other buyers for his own good in other projects, being developed



by the respondent. That is why, the project has not yet been completed even after a period of more than 7 years from the date of booking. Further the respondent is not doing the construction of the project as per the quality & specifications, amenities committed at the time of application/allotment/buyer's agreement.

- IX. That surprisingly in another effort of the respondent to illegally extract money from the complainant, the respondent sent letter dated 05.03.2021 with the subject - Intimation formalities for unit no.R0380F00503 in tower-F in your project Supertech Hues Revenue Estate, Sector 68, Gurugram vide which the complainant was have to immediately clear all the pending dues and other charges as per Annexure -A, thereto within 15 days and failure to will attract holding charges @ Rs.5/- per square feet per month. The aforesaid letter further mentions that the final finishing works i.e., painting and polishing etc. shall be taken up immediately after clearance of all pending dues and other charges and final possession shall be delivered only after final clearance.
- X. The aforesaid letter dated 05.03.2021 gave an impression that the unit is complete and ready for possession except painting and polishing. However, on actual site visit, the physical condition of the unit, the project, the amenities, and common facilities were far from being habitable. The basic and mandatory requirement of occupation certificate was also not complied. The complaint post

physical visit sent the email to the respondent and asked about the reason of pathetic construction stage as against being claimed by the respondent and also about the status of "occupation certificate", however, no response on merit was given, and to avoid giving any answer on record, the complainant was asked to visit and discuss. This shows that respondent has no satisfactory answers to the queries of the complainant, which were exposing the respondent as to non- fulfillment of their obligations. Thereafter on 07.08.2021, the respondent revised the demand by rectifying few errors and issued fresh possession outstanding statement for Rs.51,88,720/-.

- XI. That the respondent has deliberately and willfully indulged in undue enrichment, by breaching the trust and cheating the complainants beside being guilty of indulging in unfair trade practices and deficiency in services in not delivering the possession with occupation certificate and by incorporating the unfair terms in the contract, keeping the complainants in dark about the lawful possession of the apartment and then remaining non-responsive to the requisitions of the complainants.
- XII. That the complainant hereby seeks to redress the various forms of legal omissions and illegal commissions perpetuated by the respondent/seller/builder/promoter/owner, which amount to unfair trade practices, breach of contract and are actionable under the Real Estate (Regulation and Development) Act 2016.

complainant seek liberty of this authority to further elaborate the misconduct of the respondent during the course of hearing. In the present circumstances, the complainant has been left with no other options but to approach and seek justice before the Haryana Real Estate Regulatory Authority at Gurugram, Haryana.

C. Relief sought by the complainant:

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

- (i) Direct the respondent to pay interest for every month of delay in offering the possession of the apartment since July 2018 to the complainant, on the amount taken from the complainant for the sale consideration and additional charges for the aforesaid apartment with interest at the prescribed rate as per the Act, 2016 till the respondent hands over the lawful possession of the apartment with occupation certificate and amenities and facilities;
- (ii) Direct the respondent to complete the construction and handover the possession of the apartment to the complainant immediately;
- (iii) Direct the respondent to complete the construction of the apartment as per the quality committed at the time of the application/allotment/ buyer's agreement and sales brochure.
- (iv) Direct the respondent to withdraw the pre-mature demand dated 07.08.2021 and raise the same at the time of actual legal

- possession after due rectification as to the interest component and removal of escalation charges;
- (v) Direct the respondent to charge interest on delayed payments if any with the same rate as payable to the complainant;
 - (vi) Direct the respondent to complete the construction of common areas infrastructural facilities and amenities like club, park, etc. of the project;
 - (vii) Direct the respondent to pay legal expenses of Rs.1,00,000/- incurred by the complainant.
 - (viii) Any other damages, interest, relief, which this authority, Gurugram may deem fit and proper under the circumstances of the case may kindly be passed in favour of the complainant and against the respondent.
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 contested the complaint on the following grounds: -
- I. That the respondent is one of the leading real estate developers 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 an apartment being number no. 0503, in tower- F, on the 5th floor, having a super area of 1180 sq. ft. (approx.) for a total consideration of Rs.89,90,040/-.
- IV. That consequentially, after fully understanding the various contractual stipulations and payment plans for the said apartment, the complainant executed the flat buyer agreement dated 19.02.2015 was executed. Thereafter, further submitted that as per Clause 24 of the terms and conditions of the agreement, the possession of the apartment was to be given by July 2018, with an additional grace period of 6 months i.e., January 2019.
- V. That as per clause 24 of the agreement, compensation for delay in giving possession of the apartment would not be given to allottee akin to the complainant who has booked their apartment under any special scheme such as 'No EMI till offer of possession, under a subvention scheme.' Further, it was also categorically stipulated

that any delay in offering possession due to 'Force Majeure' conditions would be excluded from the aforesaid possession period.

- VI. That as per clause 25 of agreement, possession of the apartment would only be given to the allottees, after payment of all dues.
- VII. That in interregnum, the pandemic of covid-19 gripped the entire nation since March 2020. The Government of India has itself categorized the said event as a 'Force Majeure' condition, which automatically extends the timeline of handing over possession of the apartment to the complainant. Thereafter, it would be apposite to note that the construction of the Project is in full swing, and the delay if at all, has been due to the government-imposed lockdowns which stalled any sort of construction activity. Till date, there are several embargos qua construction at full operational level. It is submitted that the subject apartment is ready in all respects and a prepossession demand notice has been issued to the complainant.
- VIII. That the said project is registered with this Hon'ble authority vide registration no. 182 of 2017 dated 04.09.2017 and the completion date as per the said registration is December 2021;
- IX. That 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.

- X. The delay in construction was on account of reasons that cannot be attributed to it. It is most pertinent to state that the flat buyer agreement provides 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 the said project. The relevant clause which relates to the time for completion, offering possession extension to the said period are "clause 24 under the heading "possession of allotted floor/apartment" of the "allotment agreement". The respondent seeks to rely on the relevant clause of the agreement at the time of arguments.
- XI. 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.
- XII. That the timeline stipulated under the flat buyer agreement was only tentative, subject to force majeure reasons which are beyond the control of the respondent. The respondent in an endeavor 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;

XIII. That apart from the defaults on the part of the allottee, like the complainant herein, 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;
- that such 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.

XIV. The respondent has further submitted 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 the respondent and as such the respondent may be granted reasonable extension in terms of the allotment letter.

- XV. 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.
- XVI. That the complainant has not come with clean hands before this hon'ble form and have suppressed the true and material facts

from this hon'ble forum. 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.

- XVII. The respondent has submitted that the completion of the building is delayed by reason of 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 day due to high rise in Pollution in Delhi NCR.

- XVIII. That the enactment of Real Estate (Regulation and Development) 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 market sector. The main intension of the respondent is just to complete the project within stipulated time submitted before this authority. According to the terms of the builder buyer agreement also it is mentioned that all the amount of delay possession will be completely paid/adjusted to the complainant at the time final settlement on slab of offer of possession. The project is ongoing project and construction is going on.
- XIX. That the respondent further submitted that 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 Gurgaon based projects. Further, that the parties have contracted and limited their liabilities, they are beyond the same, and relief beyond the same could not be granted.
- XX. That 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. Further, 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 leave for their native villages or look for work in other states, the resumption of work at site became a slow process and a steady pace of construction as realized after long period of time.

- XXI. The respondent has further submitted that 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.
- XXII. That 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 were 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 Credai MCHI & 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. According to Notification no. **9/3-2020 HARERA/GGM (Admn) dated 26.5.2020**, passed by this hon'ble authority, registration certificate date upto 6 months has been extended by invoking clause of force majeure due to spread of corona-virus pandemic in Nation, which is beyond the control of respondent.

- XXIII. The respondent has further submitted that the authority vide its Order dated 26.05.2020 had acknowledged the covid-19 as a force majeure event and had granted extension of six months period to ongoing projects. Furthermore, it is of utmost importance to point out that vide notification dated 28.05.2020, the Ministry of Housing and Urban Affairs has allowed an

extension of 9 months vis-à-vis all licenses, approvals, and completion dates of housing projects under construction which were expiring post 25.03.2020 in light of the force majeure nature of the covid pandemic that has severely disrupted the workings of the real estate industry.

XXIV. 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 and submission made by the parties.

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. Section 11(4)(a) of the Act 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) The promoter shall-

- (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;*

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.

10. 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 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 the project being delayed because of force majeure circumstances and contending to invoke the force majeure clause.

11. 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 **July 2018**. 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 & I.As. 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 July 2018. It is clearly mentioned by the respondent/promoter for the same project, in complaint no. 2950 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- 19 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 wrong"**. Moreover, there is nothing on the 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 complete 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.

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

12. The respondent has taken a stand that the complainant is the investor and not consumer, therefore, he is not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority observes that the respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time, the 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 buyer developer agreement, it is revealed that the complainant is a buyer, and it has paid total price of **Rs.55,73,073/-** 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;"

In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the buyer developer agreement executed between promoter and complainant, it is crystal clear that the complainant is an allottee as the subject unit was allotted to it 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. 000600000010557 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 investor is not entitled to protection of this Act also stands rejected.

G. Findings on the relief sought by the complainants

- G.1 Direct the respondent to pay interest for every month of delay in offering the possession of the apartment since July 2018 to the complainant, on the amount taken from the complainant for the sale consideration and additional charges for the aforesaid apartment with interest at the prescribed rate as per the Act, 2016 till the respondent hands over the lawful**



possession of the apartment with occupation certificate and amenities and facilities.

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

14. Clause E (24) of the buyer developer agreement (in short, agreement) provides for handing over of possession and is reproduced below: -

"E. POSSESSION OF UNIT: -

*24. The possession of the unit shall be given by **July 2018** or extended period as permitted by the agreement. However, the company hereby agrees to compensate the Allottee/s @ Rs. 5.00/- (five rupees only) 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. However, any delay in project execution or its possession caused due to force majeure conditions and/or any judicial pronouncement shall be excluded from the aforesaid possession period.** The compensation amount will be calculated after the lapse of the grace period and shall be adjusted or paid, if the adjustment is not possible because of the complete payment made by the Allottee till such date, at the time of final account statement before possession of the unit. The penalty clause will be applicable to only those Allottees who have not boked their unit under any special / beneficial scheme of the company i.e. No EMI till offer of possession, Subvention scheme, Assured return etc and who honour their agreed payment schedule and make timely payment of due instalments and additional charges as per the payment given in Allotment Letter."*



15. 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 signing of buyer developer agreement, commencement of construction, approval of building plan etc. This is a welcome step, and the authority appreciates such firm commitment by the promoter regarding handing over of possession but subject to observations of the authority given below.
16. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and application, and the complainant not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the buyer developer agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing



after delay in possession. This is just to comment as to how the builder has misused its dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

17. **Due date of handing over possession and admissibility of grace period:** As per clause E (24) of the buyer developer agreement, the possession of the allotted unit was supposed to be offered by the July 2018 with a grace period of 6(six) months i.e., January 2019. There is nothing on record to show that the respondent has completed the project in which the allotted unit is situated and has applied for occupation certificate by July 2018. Rather, it is evident from the pleadings of the respondent that the construction of the project is upto 42% complete (in complaint no. 2950 of 2020) and the entire project may take some time to get it complete and thereafter make offer of possession to the allottee. So, in view of these facts, the developer can't be allowed grace period of 6 months more beyond July 2018 as mentioned in clause E (24) in the buyer developer agreement.
18. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges at the prescribed rate. 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.

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. Taking the case from another angle, the complainant/allottee was entitled to the delayed possession charges/interest only at the rate of Rs.5/- per sq. ft. per month as per relevant clauses of the buyer's agreement for the period of such delay; whereas the promoter was entitled to interest @ 24% per annum compounded at the time of every succeeding installment for the delayed payments. The functions of the authority are to safeguard the interest of the aggrieved person, may be the allottee or the promoter. The rights of the parties are to be balanced and must be equitable. The promoter cannot be allowed to take undue advantage of his dominate position and to exploit the needs of the home buyers. This authority is duty bound to take into consideration the legislative intent i.e., to protect the interest of the



consumers/allottees in the real estate sector. The clauses of the buyer's agreement entered into between the parties are one-sided, unfair and unreasonable with respect to the grant of interest for delayed possession. There are various other clauses in the buyer's agreement which give sweeping powers to the promoter to cancel the allotment and forfeit the amount paid. Thus, the terms and conditions of the buyer's agreement are ex-facie one-sided, unfair and unreasonable, and the same shall constitute the unfair trade practice on the part of the promoter. These types of discriminatory terms and conditions of the buyer's agreement will not be final and binding.

21. 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., **04.02.2021** is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.
22. **Rate of interest to be paid by the complainant in case of delay in making payments:** - 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;"*

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

G. II Direct the respondent to complete the construction and handover the possession of the apartment to the complainant immediately.

G. III Direct the respondent to complete the construction of the apartment as per the quality committed at the time of the application/allotment/buyer's agreement and sales brochure.

G. IV. Direct the respondent to complete the construction of common areas infrastructural facilities and amenities like club, park, etc. of the project.

24. Since no occupation certificate for the concerned project has yet been obtained, no valid offer of possession can be made. It has been more than 3 years since the due date of possession but there is nothing provided on record by the respondent which can show status of the project except a written statement that the construction work is in full swing. The project developed by the respondent is registered under RERA vide registration no. 182 of 2017 and as per section 11(1)(e) of Act of 2016, the respondent is under obligation to provide quarterly update status of the project for public viewing. The respondent is directed to fulfil the obligation conferred upon him by purview of section 11(1)(e) of the Act. The respondent is further directed to expedite the process of construction and offer a valid possession



after obtaining occupation certificate from the concerned authority. However, delay possession charges as ascertained by the authority shall be payable to the complainant as per provisions of the Act.

G.V Direct the respondent to withdraw the premature demand dated 07.08.2021 and raise the same at the time of actual legal possession and after due rectification as to the interest component and removal of escalation charges.

25. **Validity of intimation of prepossession:** At this stage, the authority would express its views regarding the concept of 'valid offer of possession'. It is necessary to clarify this concept because after valid and lawful offer of possession the liability of promoter for delayed offer of possession comes to an end. On the other hand, if the possession is not valid and lawful, liability of promoter continues till a valid offer is made and the allottee remains entitled to receive interest for the delay caused in handing over valid possession. The authority after detailed consideration of the matter has arrived at the conclusion that a valid offer of possession must have following components:

- i. Possession must be offered after obtaining occupation certificate-** The subject unit after its completion should have received occupation certificate from the department concerned certifying that all basic infrastructural facilities have been laid and are operational. Such infrastructural facilities include water supply, sewerage system, storm water drainage, electricity supply, roads, and street lighting.

ii. **The subject unit should be in habitable condition-** The test of habitability is that the allottee should be able to live in the subject unit within 30 days of the offer of possession after carrying out basic cleaning works and getting electricity, water, and sewer connections etc. from the relevant authorities. In a habitable unit all the common facilities like lifts, stairs, lobbies, etc. should be functional or capable of being made functional within 30 days after completing prescribed formalities. The authority is further of the view that minor defects like little gaps in the windows or minor cracks in some of the tiles, or chipping plaster or chipping paint at some places or improper functioning of drawers of kitchen or cupboards etc. are minor defects which do not render unit uninhabitable. Such minor defects can be rectified later at the cost of the developers. The allottees should accept possession of the subject unit with such minor defects under protest. This authority will award suitable relief for rectification of minor defects after taking over of possession under protest.

However, if the subject unit is not habitable at all because the plastering work is yet to be done, flooring works is yet to be done, common services like lift etc. are non-operational, infrastructural facilities are non-operational then the subject unit shall be deemed as uninhabitable and offer of possession of an uninhabitable unit would not be considered a legally valid offer of possession.



- iii. **Possession should not be accompanied by unreasonable additional demands-** In several cases, additional demands are made and sent along with the offer of possession. Such additional demands could be unreasonable which puts heavy burden upon the allottees. An offer accompanied with unreasonable demands beyond the scope of provisions of agreement should be termed as invalid offer of possession. Unreasonable demands itself would make an offer unsustainable in the eyes of law. The authority is of the view that if respondent has raised additional demands, the allottees should accept possession under protest.
26. Now coming to the facts of the case, buyer developer agreement was entered between the parties on 19.02.2015, There is nothing with regard to escalation charges to be paid to the respondent/builder to the allottee. But while issuing intimation regarding prepossession these charges, to the tune of Rs.6,85,199/- has been raised. The authority can't rely upon letter dated 05.03.2021. The demand raised under the head of escalation charges is beyond the contractual obligations as entered into between both the parties. In the light of the above-mentioned reasoning, the authority is of the view that the respondent promoter cannot be allowed to charge Rs.6,85,199/- under the head of escalation charges.
27. The authority observes that the respondent/builder has not yet obtained occupation certificate of the project in which the allotted unit of the complainant is located. So, without getting occupation

certificate, the builder/respondent is not competent to issue any intimation regarding prepossession formalities. It is well settled that for a valid offer of possession there are three pre-requisites Firstly, it should be after receiving occupation certificate; Secondly, the subject unit should be in habitable condition and thirdly, the offer must not be accompanied with any unreasonable demand. But while issuing intimation regarding prepossession on 05.03.2021, the builder has neither obtained occupation certificate. Hence, the intimation regarding prepossession formalities offered by respondent promoter on 05.03.2021 is not a valid or lawful offer of possession.

G.VI. Direct the respondent to pay legal expenses of Rs.1,00,000/- incurred by the complainant.

28. The complainant in the aforesaid relief is seeking relief w.r.t compensation. Hon'ble Supreme Court of India, in case titled as *M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP & Ors.* (Civil appeal nos. 6745-6749 of 2021, decided on 11.11.2021), has held that an allottee is entitled for claiming compensation under sections 12, 14, 18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. Therefore, the complainant is advised to approach the adjudicating officer for seeking compensation and the complainant is at liberty to approach the adjudicating officer for seeking compensation.



29. 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(2), the Authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of clause E (24) of the agreement executed between the parties on 19.02.2015, the possession of the subject apartment was to be delivered within stipulated time i.e., by 31.07.2018. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over possession is 31.07.2018. The respondent has failed to handover possession of the subject apartment till date of this order. Accordingly, it is the failure of the respondent/promoter to fulfil its obligations and responsibilities as per the agreement to hand over the possession within the stipulated period. The authority is of the considered view that there is delay on the part of the respondent to offer of possession of the allotted unit to the complainant as per the terms and conditions of the buyer developer agreement dated 19.02.2015 executed between the parties. Further no OC/part OC has been granted to the project. Hence, this project is to be treated as on-going project and the provisions of the Act shall be applicable equally to the builder as well as allottee.
30. 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 delay possession charges at rate of the prescribed interest @ 9.30% p.a.

w.e.f. 31.07.2018 till the handing over of possession as per provisions of section 18(1) of the Act read with rule 15 of the Rules, 2017.

H. Directions of the authority

31. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

- i. The respondent is directed to pay interest at the prescribed rate of 9.30% p.a. for every month of delay from the due date of possession i.e., 31.07.2018 till the handing over of possession of the allotted unit after obtaining the occupation certificate from the competent authority;
- ii. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period;
- iii. The arrears of such interest accrued from 31.07.2018 till the date of order by the authority shall be paid by the promoter to the allottee within a period of 90 days from date of this order and interest for every month of delay shall be paid by the promoter to the allottee before 10th of the subsequent month as per rule 16(2) of the rules;
- iv. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the



allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

v. The respondent shall not charge anything from the complainant which is not the part of the buyer developer agreement.

32. Complaint stands disposed of.

33. File be consigned to registry.

V.K. Goyal

(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dr. K.K. Khandelwal

(Dr. K.K. Khandelwal)
Chairman

Dated: 04.02.2022

Judgement uploaded on 16.03.2022