BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	:	**4122 of 2021**
Date of filing complaint	:	**11.10.2021**
First date of hearing	:	**11.11.2021**
Date of decision	:	**24.03.2022**

1. 2. 3.	Shri Ram Niwas Hooda **R/O: -** 1/29, Chanakyapuri, Rohtak, Haryana-124001 Shri Azad Singh Malik **R/O: -** House no.-1662, Sector-3, Rohtak, Haryana-124001 Shri Ajit Singh **R/O: -** Chamaria, Rohtak, Haryana-124001	**Complainants**
	Versus	
1. 2.	M/s BPTP Limited M/s Countrywide Promoters Pvt. Ltd. **Both Having its Regd. Office at: -** M-11, Middle Circle, Connaught Circus, New Delhi -110001	**Respondents**

CORAM:	
Dr. K.K. Khandelwal	**Chairman**
Shri Vijay Kumar Goyal	**Member**
APPEARANCE:	
Sh. Sushil Yadav	Advocate for the Complainants
Sh. Venket Rao	Advocate for the Respondents

ORDER

1. The present complaint has been filed by the complainants/allottees under section 31 of the Real Estate

(Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoters shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the rules and regulations made there under or to the allottee as per the agreement for sale executed inter se.

A. Unit and project related details

2. The particulars of unit details, sale consideration, the amount paid by the complainants, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

Project related details		
The License no. 58 of 2010 and 45 of 2011 comprising of total land area 126.674 Acres were previously sold by the promoters by the project name i.e., Amstoria and was not registered. **As such, the promoters have registered with the authority vide registration no.31of 2020 valid till 30.04.2024 on the same land comprising of license no. 58 of 2010 and 45 of 2011. Now, the Name of the said project is 102, Eden Estate and is registered with the Authority.**		
1.	Name of the promoter	M/s Countrywide Promoters Private Limited
2.	Name of the project	'Amstoria'
3.	Location of the project	Sector-102 & 102A, Gurugram, Haryana.

4.	Nature of the project	Independent Residential Floors	
5.	Whether project is new or ongoing	Ongoing	
6.	Registered as whole/phase	Whole	
7.	RERA registered/ unregistered	**Registered**	
8.	HARERA registration no.	Registered vide no. 31 of 2020	
9.	Registration certificate	Date	Validity
		09.10.2020	30.04.2024
10.	Area registered	126.674 acres	
	Total Plots 1028 {Out of which 28 plots for villas and 155 plots for the floors (G+3)}		
11.	Extension applied on	Not Applied	
12.	DTCP license no.	58 of 2010 dated 03.08.2010	45 of 2011 dated 17.05.2011
13.	License validity/ renewal period	02.08.2025	16.05.2017
14.	Licensed area	108.068 acres	18.606 acres
15.	Name of the license holder for 58 of 2010	M/s Shivanand Real Estate Pvt. Ltd. and 9 others.	
16.	Name of the license holder for 45 of 2010	M/s Shivanand Real Estate Pvt. Ltd. and 3 others.	
17.	Occupation Certificate Date	22.01.2020 (annexure R/5 on page no. 148 of reply)	
18.	Part completion certificate date	03.10.2017 (as per DTCP report)	

19.	Part completion certificate area	66.50 acres (as per DTCP report)
20.	Unit no.	A-156-GF, ground floor (annexure R-3 on page no. 70 of reply)
21.	Unit admeasuring	1999 sq. ft. (annexure R-3 on page no. 70 of reply)
22.	Revised unit area (as per offer of possession)	2229 sq. ft. (annexure R-16 on page no. 149 of reply)
23.	Date of building plan	19.09.2012 (as per DTCP report)
24.	Date of execution of floor buyer's agreement	01.02.2012 (annexure R-3 on page no. 60 of reply)
25.	Subsequent allottees	19.03.2012 (annexure R-4 on page no. 96 of reply)
26.	Total consideration	Rs. 1,31,41,156.62/- (vide statement of accounts of page no. 151 of reply)
27.	Total amount paid by the complainants	Rs. 95,92,767/- (vide statement of accounts of page no. 151 of reply)
28.	Possession clause	"**5.1 Possession: -** Subject to force majeure, as defined in clause 14 and further subject to purchaser(s) having complied with all its obligations under the terms and conditions of this agreement and the purchaser(s) not being in default under any part of this agreement including but not limited to the timely payment of each and every instalment

		of the total sale consideration including but not limited to the timely payment of each and every instalment of the total sale consideration including DC, Stamp duty and other charges and also subject to the Purchaser(s) having complied with all formalities or documentation as prescribed by the Seller/ confirming party, **the Seller/confirming party proposes to hand over the physical possession of the said unit to the purchaser(s) within a period of 24 months from the date of sanctioning of the building plan or execution of Floor Buyer's Agreement, whichever is later. (Commitment Period).** The Purchaser(s) further agrees and understands that the seller/confirming party shall additionally be entitled to a period of 180 days ("Grace Period") after the expiry of the said Commitment Period to allow for filing and pursuing the Occupancy Certificate etc. from DTCP under the Act in respect of the entire colony." **(Emphasis supplied)**
29.	Due date of delivery of possession	19.09.2014 (Calculated from the date of building plan as it being later)
30.	Occupation certificate	22.01.2020 (annexure R-15 on page no.

		148 of reply)
31.	Offer of possession	07.02.2020 (annexure R-16 on page no. 149 of reply)
32.	Delay in handing over possession till the offer of possession plus 2 months i.e., 07.04.2020	5 years 6 months 19 days.
33.	Grace period utilization	Grace period is not allowed in the present complaint.

B. Facts of the complaint

3. That the respondents gave advertisement in various leading newspapers about their forthcoming project named "Amstoria", sector-102, Gurugram promising various advantages, like world class amenities and timely completion/execution of the project etc. Relying on the promise and undertakings given by the respondents in the advertisements the original owner, booked a floor measuring 2229 sq. ft. on ground floor in aforesaid project of the respondents for total sale consideration is Rs.1,19,82,223/- which included BSP, car parking, IFMS, club membership, PLC etc. The complainants got endorsed the unit in their name on 21.05.2012. The complainants made a payment of Rs 10,092,767/- to the respondents vide different cheques on different dates.

4. That as per flat buyer's agreement, the respondents had allotted a unit/floor bearing no. A-156 GF having super area of 2229 sq. ft. to the complainants. That as per clause 5.1 of

the FBA, the respondents had agreed to deliver the possession of the flat within 24 months from the date of signing of the agreement or sanctioning of building plan whichever is later with an extended period of six months.

5. That the complainants regularly visited the site but were surprised to see that construction work was not in progress and no one was present at the site to address the queries of the complainants. It appears that respondents have played fraud upon the complainants. The only intention of the respondents was to take payments for the floor without completing the work and handing over the possession on time. The respondent's mala-fide and dishonest motives and intention cheated and defrauded the complainants. That despite receiving of 95% approximately payments on time for all the demands raised by the respondents for the allotted unit and despite repeated requests and reminders over phone calls and personal visits of the complainants, the respondents have failed to deliver the possession of the allotted unit to the complainants within stipulated period.

6. That it could be seen that the construction of the block in which the complainants flat was booked with a promise by the respondents to deliver the flat by 19.09.2014 but was not completed within time for the reasons best known to the respondents; which clearly shows that ulterior motive of the respondents was to extract money from the innocent people fraudulently. Lastly on dated 07.02.2020 the respondents sent the offer of possession but when the complainants

visited the site , they noticed the project was not live able ,hazardous and incomplete. Even the basic infrastructure, landscaping, amenities are not in place.

7. That due to this omission on the part of the respondents, the complainants have been suffering from disruption on their living arrangement, mental torture, and agony and also continues to incur severe financial losses. This could have been avoided if the respondents had given possession of the allotted unit on time. That as per clause 6 of the agreement it was agreed by the respondents that in case of any delay, they would pay to the complainants a compensation @ Rs.30/- per sq. ft. per month of the super area of the floor. It is, however, pertinent to mention here that a clause of compensation at such a nominal rate of Rs.30/- per sq. ft. per month for the period of delay is unjust and the respondents have exploited the complainants by not providing the possession of the allotted unit even after a delay from the agreed possession plan. The respondents cannot escape the liability merely by mentioning a compensation clause in the agreement. It could be seen here that the respondents have incorporated the clause in one sided buyer's agreement and offered to pay a sum of Rs.30/- per sq. ft. for every month of delay. If calculated the amount in terms of financial charges it comes to approximately @ 2% per annum rate of interest whereas the respondents charges 18% per annum interest on delayed payment.

8. That on the ground of parity and equity, the respondents also be subjected to pay the same rate of interest. Hence the respondents are liable to pay interest on the amount paid by the complainants from the promise date of possession till the flat is actually delivered to them.

9. That the complainants have requested the respondents several times on making telephonic calls and also personally visiting the offices of the respondents to deliver possession of the allotted unit along with prescribed interest on the amount deposited by the complainants, but respondents have flatly refused to do so. Thus, the respondents in a pre-planned manner defrauded the complainants with their hard-earned huge amount of money and wrongfully gained themselves and caused wrongful loss to the complainants.

C. Relief sought by the complainants.

10. The complainants have sought following relief:

    (i) Direct the respondents to handover the possession along with prescribed interest per annum for the promissory date of delivery till actual delivery of the flat in question.

D. Reply by the respondents.

11. That the complainants themselves are a defaulter/offender under section 19 (6), 19 (7) and 19 (10) of the Real Estate (Regulation and Development) Act, 2016 and are not in compliance of these sections. The complainants cannot seek

any relief under the provision of the Act of 2016 or rules frame thereunder.

12. That the complainants are habitual defaulter as they on numerous occasions erred in remitting the timely payments due to which the respondents on multiple occasions were constrained to issue the reminder letters, final demand letters and letters of last and final opportunity coupled with termination cum intimation letters. Ostensibly, the complainant had opted for arm-twisting tactic to get the possession of unit without making or clearing the timely payments which is not only malafide and unlawful but also an attempt to gain unlawful enrichment at the cost of the respondents by misemploying the due process of law. The complainants instead of abiding with their own duty to make timely payment qua the lawful and reasonable demand as enunciated in the FBA despite of being aware that the timely payment is an essence of the contract chose to file the mischievous complaint in hand whose veracity cannot be relied upon. That till date, the complainants are in default as huge outstanding arising out of the demand of the offer of possession. Hence, it is the complainants who failed to clear their outstanding and take the possession and, to execute the conveyance deed.

13. That agreements that were executed prior to implementation of the Act of 2016 and rules shall be binding on the parties and cannot be reopened. Thus, both the parties being signatory to a duly documented FBA executed by the original

allottee out of his own free consent and will, also, without any undue influence or coercion are bound by the terms and conditions so agreed between them.

14. That the preceding para has clarified that in the rules published by the state of Haryana, the explanation given at the end of the prescribed agreement for sale in annexure A of the rules, it has been said that the developer shall disclose the existing agreement for sale in respect of ongoing project and further that such disclosure shall not affect the validity of such existing agreement executed with its customers. The explanation is extracted herein below for ready reference:

> *"Explanation (a) The promoter shall disclose the existing Agreement for sale entered between promoter and the Allottee in respect of ongoing project along with the application for registration of such ongoing project. However, such disclosure shall not affect the validity of such existing agreement (s) for sale between promoter and Allottee in respect of apartment, building or plot, as the case may be, executed prior to the stipulated date of due registration under Section 3(1) of the Act."*

15. That the complainants have approached this authority for redressal of their alleged grievances with unclean hands, i.e., by not disclosing material facts pertaining to the case at hand and, by distorting and/or misrepresenting the actual factual situation with regard to several aspects. It is further submitted that the hon'ble apex court in plethora of decisions has laid down strictly, that a party approaching the court for any relief, must come with clean hands, without concealment and/or misrepresentation of material facts, as the same amounts to fraud not only against the respondents but also

against the court and in such situation, the complaint is liable to be dismissed at the threshold without any further adjudication. The respondents have contented on the following grounds: -

- The respondents had issued reminder notices, final demand notices and last and final opportunities to the complainants, thereby, accordingly giving them an opportunity to remit the arrears arising out the unpaid demands.
- That since the complainants failed to remit the payments qua the arrears, the respondents issued termination cum intimation letters to the complainants on 28.05.2020, 28.06.2020 and 14.09.2020 respectively. However, the complainants paid no need to the same.

16. That from the above, it is very well established, that the complainants have approached this authority with unclean hands by distorting/ concealing/ misrepresenting the relevant facts pertaining to the case at hand. It is further submitted that the sole intention of the complainants is to unjustly enrich themselves at the expense of the respondents by filing this frivolous complaint which is nothing but gross abuse of the due process of law. That in light of the law laid down by the Hon'ble Apex Court, the present complaint warrants dismissal without any further adjudication.
17. The relief(s) sought by the complainants are unjustified, baseless and beyond the scope/ambit of the flat buyer's

agreement duly executed between the parties, which forms a basis for the subsisting relationship between the parties. The complainants entered into the said agreement with the respondents with open eyes and is bound by the same. Therefore, the relief sought by the complainants travel way beyond the four walls of the agreement.

18. That the complainants at the time of purchasing the unit have conducted the due diligence to their satisfaction and were acquainted with the terms and condition. So, the application for allotment and/or the FBA prior to the signing of the same and other documents. While entering into the agreement, the complainants have read the terms and condition of the application/FBA and has accepted and are bound by each and every clause of the said form/agreement, including clause 20 of the application for allotment which has been further reiterated under clause 6 of the FBA which per se provides for delayed penalty in case of delay in delivery of possession of the said unit by the respondents. The detailed relief claimed by the complainants goes beyond the jurisdiction of this authority under the Real Estate (Regulation and Development) Act, 2016 and therefore the present complaint is not maintainable qua the reliefs claimed by the complainants.

19. That a reference may be made to section-74 of the Indian Contracts Act, 1872, which clearly spells out the law regarding sanctity and binding nature of the ascertained amount of compensation provided in the agreement and

further specifies that any party is not entitled to anything beyond the same. Therefore, the complainants, if at all, are only entitled to compensation under clause-3.3 of the flat buyer's agreement.

20. That at the stage of entering into the agreement and raising vague allegations and seeking baseless reliefs beyond the ambit of the agreement, the complainants are blowing hot and cold at the same time which is not permissible under law as the same is in violation of the '*Doctrine of Aprobate & Reprobate*". Therefore, in light of the settled law, the reliefs sought by the complainants in the complaint under reply cannot be granted by this authority.

21. That the building plan was sanctioned by the respective government authorities on 19.09.2012, whereas the FBA was executed on 01.02.2012. Therefore, in view of clause 5.1of the FBA the due date of possession of the unit arrives out to be 19.03.2015.

22. That the parties had agreed that if the respondents fail to complete the construction of the unit due to force majeure circumstances or circumstances beyond the control of the respondents, then the respondents shall be entitled to reasonable extension of time for completion of construction.

23. That on 16.03.2010, DTCP, Haryana (the statutory body for approval of real estate projects) issued self-certification policy vide notification dated 16.03.2010. The respondents in accordance with the policy and other prevailing laws submitted detailed drawings and designs plans for relevant

buildings along with requisite charges and fees. In terms of the said policy, any person could construct building in licensed colony by applying for approval of building plans to the director or officers of the department delegated with the powers for approval of building plans and in case of non-receipt of any objection within the stipulated time, the construction could be started. The building plans were withheld by the DTCP, Haryana despite the fact that these building plans were well within the ambit of building norms and policies. That the respondents applied for approval of building plans under the self-certification scheme. Although the department did not object to the building plans however, to ensure that there are no legal issues/ complications at a later date, the respondents also applied for approval of building plans under the regular scheme, which were subsequently approved.

24. That while the respondents were granted license bearing no. 58/2010 for setting up a residential plotted colony on land admeasuring 108.068 acres at Village Kherki Majra and Dhankot, sector 102 and 102 A, Tehsil and District, Gurgaon for which the layout was also approved, subsequently additional license bearing no. 45/2011 was issued by DTCP for setting up plotted colony on land admeasuring 18.606 acres and at the stage of grant of additional license bearing no. 45/ 2011 for Amstoria, layout for the entire colony was also revised vide drg. No. DTCP-5618 dated 16.09.2016, by DTCP. The revised planning of the entire colony submitted to

the DTCP has affected the infrastructure development of the entire colony including 'Amstoria Floors'. The said revision in demarcation was necessary considering the safety of the allottees and to meet the area requirement for community facilities in the area. In view of the said major changes, it is imperative that the said approvals are in place before the floors are offered for possession to the various allottees.

25. That the construction was also affected on account of the NGT order prohibiting construction (structural) activity any kind in the entire NCR by any person, private or government authority. It is submitted that vide its order NGT placed sudden ban on the entry of diesel trucks more than ten years old and said that no vehicle from outside or within Delhi will be permitted to transport any construction material. Since the construction activity was suddenly stopped, after the lifting of the ban it took some time for mobilization of the work by various agencies employed with the respondents. Further, the Environment Pollution (Prevention and Control) Authority, EPCA, expressing alarm on severe air pollution level in Delhi-NCR issued press note vide which the construction activities were banned within the Delhi-NCR region. The ban was commenced from 31.10.2018 and was initially subsisted till 10.11.2018 whereas the same was further extended till 12.11.2018.

26. That in 2019, the Hon'ble Supreme Court of India on 04.11.2019, in M.C. Mehta v. Union of India banned all the construction activities. The said ban was partially lifted by

the Hon'ble Supreme Court on 09.12.2019 whereby relaxation was accorded to the builders for continuing the construction activities from 6:00 am to 6:00 pm. whereas the complete ban was lifted by the Hon'ble Apex Court on 14.02.2020. The construction of the project was going on in full swing, however, the changed norms for water usage, not permitting construction after sunset, not allowing sand quarrying in Faridabad area, shortage of labour and construction material, liquidity crunch and non-funding of real estate projects and delay in payment of instalments by customers etc. were the reasons for delay in construction and after that Government took long time in granting necessary approvals owing to its cumbersome process. Furthermore, the construction of the unit was going on in full swing and the respondents were confident to handover possession of the units in question. However, it be noted that due to the sudden outbreak of the coronavirus (COVID -19), from past 2 years construction came to a halt and it took some time to get the labour mobilized at the site. It was communicated to the complainants vide email dated 26.02.2020 that the construction was nearing completion and the respondents were confident to handover possession of the unit in question by March 2020. However, it be noted that due to the sudden outbreak of the coronavirus (COVID 19), construction came to a halt, and it took some time to get the labour mobilized at the site. Hence, the delay if any, in completing construction of the unit in question and offering possession

to the various allottees is due to factors beyond the control of the respondents.

27. That the respondents applied for the occupational certificate ("OC") on 06.12.2019 for the unit in question and the same was granted to the respondents on 22.01.2020. That post receipt of OC the respondents in time bound manner and in strict adherence to the terms and conditions of the FBA issued the offer of possession to the complainants and called them to pay the demand of offer of possession amounting to Rs. 33,25,489.62/- payable by 09.03.2020. However, to the utter dismay of the respondents, the complainants chose not to pay the said demand due to which the respondents were constrained to issue reminder notice - III dated 19.02.2020 and last and final opportunity ("LFO") dated 16/04/2020 for the payment of outstanding amount arising out of previous demands as well as demand at the time of offer of possession and to take the physical possession by executing the conveyance deed post clearance of the dues. However, all went in vain. Since the complainants were put to deaf ears despite the aforesaid reminders and LFO, therefore, the respondents in strict adherence to the terms and conditions enunciated in the relevant clauses of the FBA issued termination cum intimation letter to the complainants on two occasions i.e., on 28.05.2020 and 28.06.2020.

28. That the complainants eventually on 29.08.2020 stood up out of the blue and categorically chose to remit part payment qua the huge previous outstanding which in to comes out to be

11% of the total outstanding amount constrained by which the respondents on 14.09.2020 issued termination cum intimation letter dated 14.09.2020. Therefore, such frame of mind of the complainants per se evince that it is they failed to clear their huge outstanding amount and take the possession of the unit and executing the conveyance deed. Hence, the complainants in order to hide their own inability to pay the outstanding and to shield their own case categorically proceed to allege deficiencies qua the respondents in the compliant under reply instead of clearing their dues.

29. Copies of all the relevant do 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 respondents have raised an objection regarding jurisdiction of authority to entertain the present complaint. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana, the jurisdiction of Haryana Real Estate Regulatory Authority, Gurugram shall be entire Gurugram district for all purposes. In the present case, the project in question is situated within

the planning area of Gurugram district. Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

E. II Subject-matter jurisdiction

Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

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

So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the

adjudicating officer if pursued by the complainants at a later stage.

F. Findings on the objections raised by the respondents.

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

30. Another contention of the respondents are that authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the apartment buyer's agreement executed between the parties and no agreement for sale as referred to under the provisions of the Act or the said rules has been executed inter se parties. The authority is of the view that the Act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of ***Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)*** which provides as under:

> *"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from*

the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter.....

122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."

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

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

32. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself.

Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of any other Act, rules, statutes, instructions, directions issued thereunder and are not unreasonable or exorbitant in nature.

F. II Objection regarding untimely payments done by the complainants and cancellation of unit by the respondents.

33. The respondents have contended that the complainants have made defaults in making timely payments as a result thereof, they had to issue reminder letters dated 09.04.2013, 13.05.2013, 30.102013, 29.11.2013, 19.02.2020 and thereafter, a letter of offer of possession of the allotted unit was sent to the complainants on 07.02.2020. Further, a span of nearly 2 and half months of offering the possession of the allotted unit, the respondents issued a last and final opportunity letter to clear dues on 16.04.2020 in pursuance of the demand letters as mentioned above but the complainants failed to make the remaining payments. The complainants have paid more than 72% of the total sale consideration and are further directed to clear the

outstanding dues at an equitable rate of interest as per section 2 (za) of the Act of 2016 and take the possession of the unit. The respondents are directed to revoke the termination letter dated 28.05.2020 after receiving outstanding dues and the complainants shall further take possession of the allotted unit as already offered to them by the respondents. However, no holding charges shall be payable after the date of offer of possession in pursuance of the judgement of the Hon'ble Supreme Court in civil appeal no. 3864-3889/2020 dated 14.12.2020.

G. Findings on the relief sought by the complainants.

Relief sought by the complainants: The complainants have sought following relief:

i. Direct the respondents to handover the possession along with prescribed interest per annum for the promissory date of delivery till actual delivery of the flat in question.

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

> *"**Section 18: - Return of amount and compensation***
>
> *18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building, —*
>
> ....

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."

35. Clause 5.1 of the floor buyer's agreement provides for handing over of possession and is reproduced below:

"5.1 Possession: -

Subject to force majeure, as defined in Clause 14 and further subject to purchaser(s) having complied with all its obligations under the terms and conditions of this agreement and the purchaser(s) not being in default under any part of this agreement including but not limited to the timely payment of each and every instalment of the total sale consideration including but not limited to the timely payment of each and every instalment of the total sale consideration including DC, Stamp duty and other charges and also subject to the Purchaser(s) having complied with all formalities or documentation as prescribed by the Seller/ confirming party, the Seller/confirming party proposes to hand over the physical possession of the said unit to the purchaser(s) within a period of 24 months from the date of sanctioning of the building plan or execution of Floor Buyer's Agreement, whichever is later. (Commitment Period). The Purchaser(s) further agrees and understands that the seller/confirming party shall additionally be entitled to a period of 180 days ("Grace Period") after the expiry of the said Commitment Period to allow for filing and pursuing the Occupancy Certificate etc. from DTCP under the Act in respect of the entire colony."

36. 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 the complainants not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by

the promoters. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoters and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoters 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's agreement by the promoters are 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 his 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.

37. **Admissibility of grace period:** The promoters have proposed to hand over the possession of the said unit within period of 24 months from the date of building plans or execution of the buyer's agreement, whichever is later. In the present complaint, the date of building plan i.e., 19.09.2012 being later than the execution of the agreement i.e., 01.02.2012. So, the due date is calculated from the date of sanctioning of the building plan. Therefore, the due date of handing over possession comes out to be 19.09.2014. It is further provided in agreement that promoters shall be entitled to a grace period of 180 days for filing and pursuing the occupancy certificate etc. from DTCP. As a matter of fact,

from the perusal of occupation certificate dated 22.01.2020, it is implied that the promoters applied for occupation certificate only on 06.12.2019 which is later than 180 days from the due date of possession i.e.,19.09.2014. The clause clearly implies that the grace period is asked for filing and pursuing occupation certificate, therefore as the promoters applied for the occupation certificate much later than the statutory period of 180 days, they do not fulfil the criteria for grant of the grace period. As per the settled law, one cannot be allowed to take advantage of his own wrongs. Accordingly, this grace period of 180 days cannot be allowed to the promoters. Relevant clause regarding grace period is reproduced below: -

> *"The Purchaser(s) further agrees and understands that the seller/confirming party shall additionally be entitled to a period of 180 days ("Grace Period") after the expiry of the said Commitment Period to allow for filing and pursuing the Occupancy Certificate etc. from DTCP under the Act in respect of the entire colony."*

38. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges at the prescribed rate of interest on amount already paid by them. However, proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoters, 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.*

39. 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.

40. 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., 24.03.2022 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

41. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottees by the promoters, in case of default, shall be equal to the rate of interest which the promoters shall be liable to pay

the allottees, 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—*
> *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 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;"*

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

43. On consideration of the documents available on record and submissions made by both the parties, the authority is satisfied that the respondents are in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of 5.1 of the floor buyer's agreement executed between the parties on 01.02.2012, the possession of the subject unit was to be delivered within 24 months from the date of sanctioning of building plan or execution of the agreement, whichever is later. The date of building plan i.e., 19.09.2012 being later than the execution of the agreement i.e., 01.02.2012, the due date is calculated from

the date of sanctioning of the building plan. Therefore, the due date of handing over possession is 19.09.2014. 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 19.09.2014. The occupation certificate has been received by the respondents on 22.01.2020 and the possession of the subject unit was offered to the complainants on 07.02.2020. The authority is of the considered view that there is delay on the part of the respondents to offer physical possession of the allotted unit to the complainants as per the terms and conditions of the flat buyer's agreement dated 01.02.2012 executed between the parties. It is the failure on part of the promoters to fulfil its obligations and responsibilities as per the flat buyer's agreement to hand over the possession within the stipulated period.

44. Section 19(10) of the Act obligates the allottees to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 22.01.2020. The respondents offered the possession of the unit in question to the complainants only on 07.02.2020, so it can be said that the complainants came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the complainants should be given 2 months' time from the date of offer of possession. This 2 month of reasonable time is being given to the complainants keeping in mind that even after intimation of

possession, practically they have to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit, but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e., 19.09.2014 till the expiry of 2 months from the date of offer of possession (07.02.2020) which comes out to be 07.04.2020.

45. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondents are established. As such the complainants are entitled to delay possession at prescribed rate of interest i.e., 9.30% p.a. w.e.f. 19.09.2014 till 07.04.2020 as per provisions of section 18(1) of the Act read with rule 15 of the rules and section 19 (10) of the Act.

H. Directions of the authority

46. 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 promoters as per the function entrusted to the authority under section 34(f):

    i. The respondents are 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., 19.09.2014 till the date of offer of possession i.e., 07.02.2020+ 2 months i.e.,

07.04.2020 to the complainants as per section 19(10) of the Act.

ii. The respondents are directed to revoke the termination of the allotted unit and complainants are directed to take possession of the allotted unit after paying outstanding dues if any, as to the respondents have already offered possession to the complainants on 07.02.2020.

iii. The arrears of such interest accrued from 19.09.2014 till 07.04.2020 shall be paid by the promoters to the allottees within a period of 90 days from date of this order as per rule 16(2) of the rules.

iv. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.

v. The rate of interest chargeable from the allottees by the promoters, in case of default shall be charged at the prescribed rate i.e., 9.30% by the respondents/promoters which is the same rate of interest which the promoters shall be liable to pay the allottees, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

vi. The respondents shall not charge anything from the complainants which is not the part of the agreement. However, holding charges shall also not be charged by the promoters at any point of time even after being part of agreement as per law settled by the Hon'ble Supreme

Court in civil appeal no. 3864-3889/2020 dated 14.12.2020.

47. Complaint stands disposed of.

48. File be consigned to registry.

(Vijay Kumar Goyal) Member	**(Dr. K.K. Khandelwal)** Chairman

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 24.03.2022

HARERA
GURUGRAM