

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

Complaint no. : 4607 of 2020
Date of filing complaint: 14.12.2020
First date of hearing : 22.01.2021
Date of decision : 06.04.2022

1. Shri Manoj Saxena 2. Smt. Sarika Saxena R/O: - House no.35, Ground floor, Block- D1, Sohna Road, Sector 49, South City II, Gurgaon, Haryana	Complainants
Versus	
1. M/s Shree Vardhman Infrahome Private Limited Regd. Office at: - 301, 3rd Floor, Inder Prakash Building, 21-Barakhamba Road, New Delhi- 110001	Respondent

CORAM:

Dr. K.K. Khandelwal

Chairman

Shri Vijay Kumar Goyal

Member**APPEARANCE:**

Sh. Abhijeet Gupta (Advocate)

Complainants

Sh. Gaurav Rawat (Advocate)

Respondent

ORDER

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

be responsible for all obligations, responsibilities and functions under the provision of the Act or the rules and regulations made there under or to the allottees 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:

S. No.	Heads	Information
1.	Name and location of the project	"Shree Vardhman Flora", Sector-90, Gurugram
2.	Project area	10.881 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no. and validity status	23 of 2008 dated 11.02.2008 Valid till 10.02.2025
5.	Name of the license holder	Moti Ram
6.	RERA registered/ not registered	Registered Vide registration no. 88 of 2017 dated 23.08.2017
7.	RERA registration valid up to	30.06.2019 (Application for extension has been rejected by order dated 10.02.2020)
8.	Unit no.	1303 on 13th floor, tower B3 (As per page no. 31 of the complaint)
9.	Unit admeasuring	1875 sq. ft. (super area) (As per page no. 31 of the complaint)
10.	Date of flat buyer's agreement	09.07.2012 (As per page no. 29 of the complaint)
11.	Payment plan	Construction linked payment plan (As alleged by the complainant on page no. 05 of complaint)
12.	Total consideration	Rs.83,58,781/- (As per customer ledger dated 28.12.2020 on page no. 46 of the reply)
13.	Total amount paid by the complainant	Rs.76,59,387/- (As per customer ledger dated

		28.12.2020 on page no. 48 of the reply)
14.	Date of commencement of construction	14.05.2012 (As per affidavit dated 06.10.2021)
15.	Possession clause	Clause 14(a) The construction of the flat is likely to be completed <i>within 36 months of commencement of construction of the particular tower/ block in which the subject flat is located with a grace period of 6 months</i> , on receipt of sanction of the building plans/ revised plans and all other approvals subject to force majeure including any restrains/ restrictions from any authorities, non-availability of building materials or dispute with construction agency/ workforce and circumstances beyond the control of company and subject to timely payments by the buyer(s) in the said complex.
16.	Due date of delivery of possession	14.11.2015 [Calculated from the date of the commencement of construction i.e.; 14.05.2012 + grace period of 6 months] Grace period is allowed
17.	Occupation certificate	Not obtained
18.	Offer of possession for fit out	28.12.2019 (As per page no. 53 of the reply)
19.	Delay in handing over of possession till date of order i.e.,06.04.2022	6 years 04 months 23 days.

B. Facts of the complaint

3. That relying upon the words and assurances of the respondent, the complainants duly submitted the booking application form in respect of the residential flat. Subsequently, on 08th July 2012 an allotment letter was issued by the respondent mentioning that the allotment of Residential Flat,

bearing Flat No. No. 1303, Tower No. B3, situated at "Shree Vardhman Flora" at sector-90, Gurgaon has been made in favour of the complainants.

4. That on 9th of July, 2012 the respondent and the complainants entered into an agreement for delivery of residential flats wherein the complainants made payments for the said unit bearing No. 1303 in tower No. B3 having an approximate super area of 1875 sq. ft. including three bedrooms, three toilets, one drawing cum dining room, one servant room with toilet and three balconies.
5. That with a hope to get a peaceful, vacant possession within 36 months (at most 42 months including grace period of 6 months), the complainants paid a sum of Rs. 23,71,535/- as earnest money compounded with the service tax and other compatible taxes. Accordingly, a loan was duly sanctioned and disbursed by LIC Housing Finance Ltd. in respect of the aforesaid residential flat.
6. That, the loan sanctioned by the LIC Housing Finance Limited was of Rs. 54,00,000/- out of which 52,95,274/- was disbursed by LIC housing Finance Limited towards the payment for the purchase of the property. It is also pertinent to mention that the complainants also paid an amount of Rs. 9449/- as delayed payment charges, charged by the respondent at 24% p.a. calculated at simple rate of interest in pursuance of the payments made for the residential flat in the project of the respondent.
7. That, on 22nd day of August 2012, a tripartite agreement was executed between respondent, complainants and LIC Housing Finance Limited

mentioning the terms and condition against the said disbursed loan in respect of the aforementioned residential flat. The loan sanctioned with regards to the allotted unit was under the construction link plan, wherein the complainants were liable to pay the EMI's for the home loans. It is pertinent to mention that, the complainants always duly disbursed the payments through EMI's, of the said home loan within stipulated period of time every month.

8. That the respondent was under contractual obligation to hand over the possession of the flat to complainants after expiry of 36 months from the date of signing builder buyer agreement i.e. 9th of July 2015 along with a further grace period of 6 months. However, after numerous discussion and intimation the respondent was unable to deliver the aforementioned residential flat to the complainants within the stipulated completion period. The respondent never cared about its obligatory duty in respect of delivery of the peaceful, vacant possession of residential flat to the complainants whereas the complainants always duly performed their obligatory duty to get the peaceful, vacant possession of the said residential flat.
9. That the complainants, beyond their financial capacity, duly paid an amount of Rs. 54,675/- towards EMI of the loan sanctioned and disbursed by LIC Housing Finance Limited without any delay till date.
10. That, the property where the complainants are currently residing is mortgaged with the bank against another loan availed by the complainants,

which in itself is a proof of sluggish financial condition and the capacity of the payment of the EMI's against the loans availed by the complainants.

11. That the respondent prima facie had malafide intention to dupe the hard-earned money and life savings of the complainants by luring them into a chancy project by fabricating a story of sensationally accommodated residential flat, which caused a grave injustice and harmed to the complainants mentally and physically, which is unjustified before the law.
12. That the complainants have incessantly pursued the respondent regarding the delivery of the possession of aforesaid residential flat which still remains in a nascent stage of construction. That, the complainants also intimated the respondent regarding the cancellation of the subject unit and raised a question of refund, however, the respondent never cared to provide a constructive reply against the same.
13. That by the act and conduct of the respondent it is unambiguously lucid that from the very beginning, the respondent had the malafide intention to cheat and defraud the complainants of their hard-earned money.
14. That the complainant no.1 has no other efficacious remedy with her but to file the present complaint against the respondent and the conducts of the respondents are nothing but unfair trade practices.
15. That the respondent is not only guilty of deficiency in services by not fulfilling their promises under the contractual relationship with the complainant No.1 but also for mental torture and harassment to the complainants by unnecessarily misguiding and delaying.

C. Relief sought by the complainant.

16. The complainant has sought following relief:

- (i) Direct the respondent to handover the actual possession of the floor/apartment bearing flat no. 1303 in tower B3 situated at "Shree Vardhman Flora" at Sector-90, Gurgaon along with all the rights, title and interest without any delay/default in terms of builder buyer's agreement.
- (ii) Direct the respondent to pay delayed possession charges as per the Act of 2016 till the delivery of the actual, vacant & physical possession.
- (iii) Direct the respondent to pay Rs.1,00,000/- as the cost of litigation towards this suit.

D. Reply by the respondent.

17. That the present complaint filed under section 31 of the Act of 2016, is not maintainable under the said provision as the respondent has not violated any provision of the Act.
18. That as per rule 28(1)(a) of the RERA rules, a complaint under section 31 of the Act of 2016, can be filed for any alleged violation or contravention of the provisions of the Act after such violation and/or contravention has been established after an enquiry made by the authority under section 35 of the Act. In the present case, no violation and/or contravention has been established by the authority under section 35 of the Act and as such the complaint is liable to be dismissed.
19. That complainant has sought reliefs under section 18 of the Act, but the said section is not applicable in the facts of the present case and as such the complaint deserves to be dismissed. It is submitted that the operation of section 18 is not retrospective in nature and the same cannot be applied to the transactions that were entered prior to the Act of 2016, came into force.

The parties while entering into the said transactions could not have possibly taken into account the provisions of the Act and as such cannot be burdened with the obligations created therein. In the present case also, the flat buyer's agreement was executed much prior to the date when the Act came into force and as such section 18 of the Act cannot be made applicable to the present case. Any other interpretation of the Act will not only be against the settled principles of law as to retrospective operation of laws but will also lead to an anomalous situation and would render the very purpose of the Act nugatory. The complaint as such cannot be adjudicated under the provisions of Act. The expression "agreement to sell" occurring in section 18(1)(a) of the Act covers within its folded hands only those agreement to sell that have been executed after coming into force of the Act and the flat buyer's agreement executed in the present case is not covered under the said expression, the same having been executed prior to the date the Act came into force.

20. That the flat buyer's agreement executed in the present case did not provide any definite date or time frame for handing over of possession of the apartment to the complainant and on this ground alone the refund and/or compensation and/or interest cannot be sought under Act. Even the clause 14(a) of the flat buyer's agreement merely provided a tentative/ estimated period for completion of construction of the flat and filing of application for occupancy certificate with the concerned authority. After completion of construction the respondent was to make an application for grant of occupation certificate (OC) and after obtaining the OC, the possession of the flat was to be handed over.
21. That the delivery of possession by a specified date was not the essence of the flat buyer's agreement and the complainant was aware that the delay in

completion of construction beyond the tentative time given in the contract was possible. Even the flat buyer's agreement contains provisions for grant of compensation in the event of delay. As such, it is submitted without prejudice that the alleged delay on part of the respondent in delivery of possession, even if assumed to have occurred, cannot entitle the complainant to ignore the agreed contractual terms and to seek interest and/or compensation on any other basis.

22. That the alleged delay in delivery of possession, even if assumed to have occurred, cannot entitle the complainant to rescind the FBA under the contractual terms or in law. The delivery of possession by a specified date was not essence of the FBA and the complainant was aware that the delay in completion of construction beyond the tentative time given in the contract was possible. Even the FBA contain provisions for grant of compensation in the event of delay. As such the time given in clause 14 (a) of FBA was not essence of the contract and the breach thereof cannot entitle the complainant to seek rescind the contract.
23. That issue of grant of interest/compensation for the loss occasioned due to breaches committed by one party of the contract is squarely governed by the provisions of section 73 and 74 of the Indian Contract Act, 1872 and no compensation can be granted de-hors the said sections on any ground whatsoever. A combined reading of the said sections makes it amply clear that if the compensation is provided in the contract itself, then the party complaining the breach is entitled to recover from the defaulting party only a reasonable compensation not exceeding the compensation prescribed in the contract and that too upon proving the actual loss and injury due to such breach/default. On this ground the compensation, if at all to be granted to

- the complainant, cannot exceed the compensation provided in the contract itself.
24. That the residential group housing project in question i.e., "Shree Vardhman Flora", sector-90, Gurugram, Haryana (hereinafter said "project") is being developed by the respondent on a piece of land measuring 10.881 acres situated at village Hayatpur, sector-90, Gurugram, Haryana under a license No. 23 of 2008 dated 11.02.2008 granted by DTCP, Haryana. The license had been granted to the landowners in collaboration with M/s Aggarwal Developers Private Limited. The respondent company is developing/constructing the project under an agreement with M/s Aggarwal Developers Private Limited.
 25. The project in question has been registered with this authority under section 6 of the Real Estate (Regulation & Development) Act, 2016 and the said registration is valid up to 30.12.2021 (*sic 30.06.2019*).
 26. That the construction of the first phase of the project has been completed and the respondent has already applied for grant of occupancy certificate for towers nos. B1, B2 and B3 ("completed phase") to the concerned authority on 18.11.2019. The construction of the remaining phases/towers is also at a very advanced stage and expected to be completed soon.
 27. The construction of the entire project had not been completed within the time estimated at the time of launch of the project due to various reasons beyond the control of the respondent, including inter-alia, liquidity crisis owing to global economic crisis that hit the real estate sector in India very badly which is still continuing, defaults committed by allottees, depressed market sentiments leading to a weak demand, government restrictions, force majeure events etc. The respondent could not be held responsible for the

alleged delay in completion of construction. The respondent is genuine and responsible developer who fought against all odds and has already completed one phase of Project and the remaining phases are also on the verge of completion.

28. That in 2020, looking at the situation of real estate market battling the financial crunch; the central government had formed Rs 25,000 crore special window for completion of construction of affordable and mid-income housing projects investment fund popularly known as the 'SWAMIH FUND'. The SWAMIH investment fund had been formed to help the genuinely distressed RERA registered residential developments in the affordable housing / middle-income category and that require last mile funding to complete construction. the government sponsored fund is for the genuine and stressed developers who are dealing the financial crisis due to reasons beyond their control including Covid-19 pandemic. The investment manager of the fund was SBICAP Ventures Ltd. The respondent had also applied for the financial support from the said SWAMIH fund and its application for the same has also cleared after all verification. A fund of Rs. 6 crores had also been sanctioned to the respondent vide letter dated 12.10.2020. This sanction of financial assistance by the Government of India backed SWAMIH fund is in itself a testimonial of the genuineness of promoter of the project in question and also that the project is in final stages of completion.
29. That as per clause 14(a), the obligations of the respondent to complete the construction within the tentative time frame mentioned in said clause was subject to timely payments of all the instalments by the complainant. The complainant failed to make payments of the instalments as per the agreed payment plan, the complainant cannot be allowed to seek compensation or

interest on the ground that the respondent failed to complete the construction within time given in the said clause. The obligation of the respondent to complete the construction within the time frame mentioned in FBA was subject to and dependent upon time payment of the instalment by the complainant. As such no allottee who has defaulted in making payment of the instalments can seek refund, interest or compensation under section 18 of the Act of 2016 or under any other law.

30. The tentative/estimated period given in clause 14 (a) of the FBA was subject to conditions such as force majeure, restraint/restrictions from authorities, non-availability of building material or dispute with construction agency / work force and circumstances beyond the control of the respondent company and timely payment of installments by all the buyers in the said complex including the Complainant. Many buyers / allottees in the said complex, including the complainant, committed breaches / defaults by not making timely payments of the installments. Further, the construction could not be completed within the tentative time frame given in the agreement as various factors beyond control of respondent came into play, including economic meltdown, sluggishness in the real estate sectors, defaults committed by the allottees in making timely payment of the instalments, shortage of labour, non-availability of water for construction and disputes with contractors. The delayed payment / non-payment of instalments by the allottee seriously jeopardized the efforts of the respondent for completing the construction of said project within the tentative time frame given in the agreement. It is pertinent to note that the Hon'ble Punjab & Haryana High Court on 21.08.2012 in CWP No. 20032 of 2008 prohibiting ground water extraction for construction purposes in the district of Gurugram and due to the said ban, water was not available for construction of the project in

question for a very long period of time. The administrator HUDA, Gurgaon granted NOC for carrying our construction at site of the project vide its memo dated 27.12.2013. Further, the civil contractors engaged by the respondent for construction of the project in question failed to carry out the construction within the given timelines and several disputes cropped up between the respondent and the said contractors.

31. That the respondent has engaged M/s Mahalakshmi Infraengineers Private Limited and DSA Buildtech Private Limited the contractors who despite having received payments from respondent did not pay to its labour/workforce who in term refused to work severely hampering the pace of construction work. The respondent ultimately had to remove both the contractors and carried the construction on its own. The respondent directly made the payment of their laborers/workforce/sub-contractors to regularize the work. It is also submitted that the construction activity in Gurugram has also been hindered due to orders passed by Hon'ble NGT/State Govts./EPCA from time to time putting a complete ban on the construction activities in an effort to curb air pollution. The District administration, Gurugram under the graded response action plan to curb pollution banned all construction activity in Gurugram, Haryana from 01.11.2018 to 10.11.2018 which resulted in hindrance of almost 30 days in construction activity at site. In previous year also, the NGT vide its order 09.11.2017 banned all construction activity in NCR and the said ban continued for almost 17 days hindering the construction for 40 days. The stoppage of construction activity even for a small period results in a longer hindrance as it become difficult to re arrange, re-gather the work force particularly the laborers as they move to other places/their villages.

32. It is also submitted that as per the FBA the tentative period given for completion of construction was to be counted from the date of receipt of sanction of the building plans/revised plans and all other approvals and commencement of construction on receipt of such approvals. The last approval being consent to establish was granted by the Haryana State Pollution Control Board on 15.05.2015 and as such the period mentioned in clause 14(a) shall start counting from 16.05.2015 only.
33. Further, the tentative period as indicated in FBA for completion of construction was not only subject to force majeure conditions, but also other conditions beyond the control of respondent. The unprecedented situation created by the Covid-19 pandemic presented yet another force majeure event that brought to halt all activities related to the project including construction of remaining phase, processing of approval files etc. The Ministry of Home Affairs, GOI vide notification dated 24.03.2020 bearing no. 40-3/2020-DM-I(A) recognised that India was threatened with the spread of Covid-19 epidemic and ordered a complete lockdown in the entire country for an initial period of 21 days which started from 25.03.2020. By virtue of various subsequent notifications, the Ministry of Home Affairs, GOI further extended the lockdown from time to time and till date the lockdown has not been completely lifted. Various state governments, including the Government of Haryana, have also enforced several strict measures to prevent the spread of Covid-19 pandemic including imposing curfew, lockdown, stopping all commercial, construction activity. Pursuant to issuance of advisory by the GOI vide office memorandum dated 13.05.2020, regarding extension of registrations of real estate projects under the provisions of the Real Estate (Regulation and Development) Act, 2016 due to 'force majeure', the Haryana Real Estate Regulatory Authority has also

extended the registration and completion date by 6 (six) months for all real estate projects whose registration or completion date expired and, or, was supposed to expire on or after 25.03.2020. In recent past the Environmental Pollution (Prevention and Control) Authority for NCR ("EPCA") vide its notification bearing No. EPCA-R/2019/L-49 dated 25.10.2019 banned construction activity in NCR during night hours (6pm to 6am) from 26.10.2019 to 30.10.2019 which was later on converted into complete 24 hours ban from 01.11.2019 to 05.11.2019 by EPCA vide its notification No. EPCA-R/2019/L-53 dated 01.11.2019. The Hon'ble Supreme Court of India vide its order dated 04.11.2019 passed in *writ petition no. 13029/1985 titled as "M.C. Mehta vs Union of India"* completely banned all construction activities in NCR which restriction was partly modified vide order dated 09.12.2019 and was completely lifted by the Hon'ble Supreme Court vide its order dated 14.02.2020. These bans forced the migrant labourers to return to their native states/villages creating an acute shortage of labourers in NCR region. Due to the said shortage the construction activity could not resume at full throttle even after lifting of ban by the Hon'ble Supreme Court. Even before normalcy in construction activity could resume, the world was hit by the Covid-19 pandemic. As such it is submitted without prejudice to the submissions made hereinabove that in the event this authority comes to the conclusion that the respondent is liable for interest/compensation for the period beyond 27.07.2017, the period consumed in the aforesaid force majeure events or the situations beyond control of the respondent has to be excluded.

34. 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

35. The respondent has 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;

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

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

decided by the adjudicating officer if pursued by the complainant at a later stage.

F. Findings on the objections raised by the respondent.

F. I Maintainability of complaint

36. The respondent contended that the present complaint filed under section 31 of the Act is not maintainable as the respondent has not violated any provision of the Act.

37. The authority, in the succeeding paras of the order, has observed that the respondent is in contravention of the section 11(4)(a) read with proviso to section 18(1) of the Act by not handing over possession by the due date as per the agreement. Therefore, the complaint is maintainable.

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

38. Another contention raised by the respondent is that in the present case the flat buyer's agreement was executed much prior to the date when the Act came into force and as such section 18 of the Act cannot be made applicable to the present case. The authority is of the view that the Act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of *Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)* which provides as under:

"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter...."

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

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

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

40. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the flat buyer agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement and are not in contravention of any other Act, rules, regulations made thereunder and are not unreasonable or exorbitant in nature.

F.III Objection of respondent w.r.t reasons for delay in handing over possession.

41. The respondent submitted that the period consumed in the force majeure events or the situations beyond control of the respondent has to be excluded while computing delay in handing over possession.

a.) Unprecedented situation created by Covid-19 pandemic and lockdown for approx. 6 months starting from 25.03.2020.

42. The Hon'ble Delhi High Court in case titled as *M/s Halliburton Offshore Services Inc. V/S Vedanta Ltd. & Anr.* bearing no. O.M.P (1) (Comm.) no. 88/2020 and I.As 3696-3697/2020 dated 29.05.2020 has observed that-

"69. 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."

43. In the present complaint also, the respondent was liable to complete the construction of the project in question and handover the possession of the said unit by 14.11.2015 and the respondent is claiming benefit of lockdown which came into effect on 23.03.2020 whereas the due date of handing over of possession was much prior to the event of outbreak of Covid-19 pandemic. Therefore, the authority is of the view that 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 and for the said reason the said time period is not excluded while calculating the delay in handing over possession.

b.) Order dated 25.10.2019, 01.11.2019 passed by Environmental Pollution (Prevention and Control) Authority (EPCA) banning construction activities in NCR region. Thereafter, order dated 04.11.2019 of hon'ble

Supreme Court of India in Writ petition no. 13029/1985 completely banning construction activities in NCR region.

44. the respondent is claiming benefit out of lockdown period, orders dated 25.10.2019 and 01.11.2019 passed by EPCA and order dated 04.11.2019 passed by Hon'ble Supreme Court of India. The respondent has neither completed the construction of the subject unit nor has obtained the OC for the same from the competent authority till date i.e., even after a delay of more than 6 years from the promised date of delivery of the subject unit. In the reply it has been admitted by the respondent/promoter that an application for obtaining occupation certificate with regard to the tower in which the unit of the complainants is situated has been made to the concerned authority on 18.11.2019. It means that the occupation certificate with regard to tower in which the unit of the complainants is situated has yet not obtained. It is a well settled law that no one can take benefit of his wrong. The respondent is claiming benefit of orders dated 25.10.2019 and 01.11.2019 passed by EPCA and order dated 04.11.2019 passed by Hon'ble Supreme Court of India which are subsequent to the due date of possession. Therefore, the authority is of the considered view that the respondent could not be allowed to take benefit of his own wrong and the innocent allottee could not be allowed to suffer for the mistakes committed by the respondent. In view of the same, no extension over and above the time specified in clause 14(a) of the agreement can be granted. Hence, this time period is not excluded while calculating the delay in handing over possession.

G. Findings on the relief sought by the complainant.

Relief sought by the complainants: -

- (i) Direct the respondent to handover the actual possession of the floor/apartment bearing flat no. 1303 in tower B3 situated at "Shree Vardhman Flora" at Sector-90, Gurgaon along with all the rights, title and interest without any delay/default in terms of builder buyer's agreement.
- (ii) Direct the respondent to pay delayed possession charges as per the Act of 2016 till the delivery of the actual, vacant & physical possession.
- (iii) Direct the respondent to pay Rs.1,00,000/- as the cost of litigation towards this suit.

G.I Direct the respondent to handover the actual possession of the floor/apartment bearing flat no. 1303 in tower B3 situated at "Shree Vardhman Flora" at Sector-90, Gurgaon along with all the rights, title and interest without any delay/default in terms of builder buyer's agreement.

45. The respondent has made an application to obtain the occupation certificate on 18.11.2019 to the concerned authority but till date no occupation certificate has yet been obtained. Vide order dated 03.09.2021, the authority directed the respondent to file an affidavit that why promoter has offered the position to some of the allottees without obtaining occupation certificate. The respondent has filed an affidavit dated 06.10.2021 wherein stating that

"That the answering respondent has not handed over possession of any flat in the project in question to any of the allottee(s). As the Flats were ready and Occupation Certificate was not issued by the authority due, various allottees of the project in question approached the respondent company with the request for handover of temporary possession of their respective flats to enable them to carry out the fit out/furnishing work in their flats for purpose of interior & designing work only. I further say that considering the difficulties being faced by the Allottees due to non-grant of Occupancy Certificate, the respondent company had handed over possession of their respective flats to them for the limited purpose of fit out along with their signed undertaking that the allottees shall not use their respective flat for residential purpose till the grant of Occupation Certificate except the interior & finishing work."

It is to be noted that the respondent stated that the possession of allotted flats was handed over to the respective allottees but for a limited purpose of fit out only along with assigned undertaking that allottee shall not use the respective flat for residential purpose till the grant of occupation certificate.

46. 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;
 - ii. The subject unit should be in habitable condition;
 - iii. The possession should not be accompanied by unreasonable additional demands.
47. In the present case, no occupation certificate has been obtained by the promoter and the very first condition has not been satisfied, therefore the said offer of possession cannot be regarded as a valid offer of possession.

G.II Direct the respondent to pay delayed possession charges as per the Act of 2016 till the delivery of the actual, vacant & physical possession.

48. In the present complaint, the complainant intends 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."

Clause 14(a) of the flat buyer's agreement, provides for handing over possession and the same is reproduced below:

14.(a) The Construction of the Flat is likely to be completed within a period of thirty six(36) months of commencement of construction of the particular tower/block in which the Flat is located with a grace period of six(6) months, on receipt of sanction of the building plans/revised plans and all other approvals subject to force majeure including any restrains/restrictions from any authorities, non-availability of building materials or dispute with construction agency/workforce and circumstances beyond the control of Company and subject to timely payments by the Buyer(s) in the Said Complex. No claims by way of damages/compensation shall be against the Company in case of delay in handing over the possession on account of said reasons. For the purposes of this Agreement, the date of application for issuance of occupancy/completion/part completion certificate of the Said Complex or the Flat shall be deemed to be the date of completion. The Company on completion of construction shall issue a final call notice to the Buyer(s), who shall remit all dues within thirty (30) days thereof and take possession of the Flat after execution of Sale Deed. If possession is not taken by the Buyer(s) within thirty (30) days of offer of possession, the Buyer(s) shall be deemed have taken possession for the purposes of this Agreement and for the purposes of payment of the maintenance charges, taxes, property tax or any other tax imposable upon the Flat.

49. A flat buyer's agreement is a pivotal legal document which should ensure that the rights and liabilities of both builders/promoters and buyers/allottees are protected candidly. Flat buyer's agreement lays down the terms that govern the sale of different kinds of properties like residentials, commercials etc. between the buyer and builder. It is in the interest of both the parties to have a well-drafted agreement which would thereby protect the rights of both the builder and buyer in the unfortunate event of a dispute that may arise. It should be drafted in the simple and unambiguous language which may be understood by a common man with an ordinary educational background. It should contain a provision with regard to stipulated time of delivery of possession of the apartment, plot or building, as the case may be and the right of the buyer/allottee in case of delay in possession of the unit.
50. The authority has gone through the possession clause of the agreement and observed that the possession has been subjected to all kinds of terms and



conditions of this agreement. 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 allottees that even a single situation may make the possession clause irrelevant for the purpose of allottees and the committed date for handing over possession loses its meaning. If the said possession clause is read in entirety, the time period of handing over possession is only a tentative period for completion of the construction of the flat in question and the promoter is aiming to extend this time period indefinitely on one eventuality or the other. Moreover, the said clause is an inclusive clause wherein the numerous approvals and terms and conditions have been mentioned for commencement of construction and the said approvals are sole liability of the promoter for which allottee cannot be allowed to suffer. The promoter must have mentioned that completion of which approval forms a part of the last statutory approval, of which the due date of possession is subjected to. It is quite clear that the possession clause is drafted in such a manner that it creates confusion in the mind of a person of normal prudence who reads it. The authority is of the view that a wrong trend was followed by the promoters from long ago and this unethical behaviour and dominant position that needs to be struck down. It is settled proposition of law that one cannot get the advantage of his own fault. The incorporation of such clause in the flat buyer's 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 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.

51. The respondent/promoter has proposed to handover the possession of the subject apartment within a period of 36 months of the commencement of construction of the particular tower/ block in which the flat is located with a grace period of 6 months on receipt of sanction of the building plans/revised plans and all other approvals subject to force majeure including any restrains/restrictions from any authorities, non-availability of building materials or dispute with construction agency/workforce and circumstances beyond the control of company and subject to timely payments by the buyer(s) in the said complex.
52. The respondent is claiming that the due date shall be computed from 15.05.2015 i.e., date of grant of Consent to Establish being last approval for commencement of construction. The authority observed that in the present case, the respondent has not kept the reasonable balance between his own rights and the rights of the complainant-allottee. The respondent has acted in a pre-determined, preordained, highly discriminatory and arbitrary manner. The unit in question was booked by the complainant on 04.07.2012 and the flat buyer's agreement was executed between the respondent and the complainant on 09.07.2012. It is interesting to note as to how the respondent had collected hard earned money from the complainant without obtaining the necessary approval (Consent to Establish) required for commencing the construction. The respondent has obtained Consent to Establish from the concerned authority on 15.05.2015. The respondent is in win-win situation as on one hand, the respondent had not obtained necessary approvals for starting construction and the scheduled time of delivery of possession as per the possession clause which is completely dependent upon the commencement of the construction and on the other hand, a major part of the total consideration is collected prior to the start of

the construction. Further, the said possession clause can be said to be invariably one sided, unreasonable, and arbitrary. Moreover, it is a matter of fact that as per the affidavit filed by the respondent on 06.10.2021, the date of commencement of construction of the subject tower, where the flat in question is situated is 14.05.2012. This said statement sworn by the respondent is itself contradictory to its contention that the due date of possession is liable to be computed from consent to establish. It is evident that respondent has started the construction (on 14.05.2012 as per the affidavit submitted on behalf of the respondent by its A.R on 06.10.2021.) without obtaining CTE which shows delinquency on the part of the promoter. Therefore, in view of the above reasoning, the contention of the respondent that due date of handing over possession should be computed from date of CTE does not hold water and the authority is of the view that the due date shall be computed from the date sworn by the promoter in the affidavit as 'date of commencement of construction'.

53. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the said flat within 36 months from the date of commencement of construction of the particular tower in which the flat is located and has sought further extension of a period of 6 months, on receipt of sanction of the building plans/revised plans and all other approvals subject to force majeure including any restrains/restrictions from any authorities, non-availability of building materials or dispute with construction agency/workforce and circumstances beyond the control of company and subject to timely payments by the buyer(s) in the said complex. It may be stated that asking for the extension of time in completing the construction is not a statutory right nor has it been provided in the rules. This is a concept which has been evolved by the promoters themselves and

now it has become a very common practice to enter such a clause in the agreement executed between the promoter and the allottee. In the present case, the said extension of 6 months on account of grace period is not incidental to happening of any particular event/ circumstances. There have been certain circumstances beyond the control of respondent on account of which extension has been asked by the respondent. In view of present situation and to balance the rights of both the parties, the authority is of considered view that grace period of 6 months be allowed to the promoter. But it is pertinent to mention herein that no period over and above the grace period of six months shall be given to the promoter.

54. Admissibility of delay possession charges at prescribed rate of interest:

The complainants are seeking delay possession charges, 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.

55. 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.

56. 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., 06.04.2022 is 7.30% p.a. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30% p.a.
57. 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;"*

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

G.III Direct the respondent to Rs.1,00,000/- as the cost of litigation towards the suit.

59. The complainants are claiming compensation in the above-mentioned relief. For claiming compensation under sections 12, 14, 18 and section 19 of the Act, the complainant may file a separate complaint before Adjudicating

Officer under section 31 read with section 71 of the Act and rule 29 of the rules.

60. On consideration of the circumstances, the evidence and other record and submissions made by the parties, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. It is a matter of fact that as per the affidavit filed by the respondent on 06.10.2021, the date of commencement of construction of the subject tower, where the flat in question is situated is 14.05.2012. By virtue clause 14(a) of flat buyer's agreement executed between the parties on 09.07.2012, the possession of the booked unit was to be delivered within 36 months of the commencement of construction of the particular tower/ block in which the flat is located(i.e.; 14.05.2012) which comes out to be 14.11.2015 including grace period of 6 months which is allowed in the present case for the reasons quoted above.
61. 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. These 2 months' of reasonable time is being given to the complainant keeping in mind that even after intimation of possession practically he has 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., 14.11.2015 till offer of possession plus two months or handing over of possession, whichever is earlier as per the provisions of section 19(10) of

the Act. But in the present case, since the offer of possession for fit out is not considered as a valid offer of possession as the same is made without obtaining occupation certificate from the concerned authority, therefore, the respondent is under obligation to pay delayed possession charges from due date of handing over of possession i.e.; 14.11.2015 till actual handing over of possession.

62. Accordingly, non-compliance of the mandate contained in section 11(4) (a) read with proviso to section 18(1) of the Act on the part of the respondent is established. As such complainant is entitled to delayed possession charges at the prescribed rate of interest i.e., 9.30% p.a. for every month of delay on the amount paid by the complainant to the respondent from the due date of possession i.e., 14.11.2015 till actual handing over of possession as per the 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

63. 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., 14.11.2015 till actual handing over of possession as per section 19 (10) of the Act.
- II. The arrears of such interest accrued from 14.11.2015 till date of this order shall be paid by the promoter to the allottees within a period of 90 days from date of this order and interest for every month of delay

shall be payable by the promoter to the allottees before 10th day of each subsequent month as per rule 16(2) of the rules.

- III. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
- IV. The rate of interest chargeable from the allottees 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 allottees, 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 agreement.

64. Complaint stands disposed of.

65. File be consigned to registry.


(Vijay Kumar Goyal)
Member


(Dr. K.K Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 06.04.2022