BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	:	**2660 of 2021**
Date of filing complaint	:	**07.07.2021**
First date of hearing	:	**05.08.2021**
Date of decision	:	**19.04.2022**

1. Mr. Gurdeep Singh Ahluwalia
2. Mrs. Inderpreet Kaur Ahluwalia
   Both R/o: Flat No. J-303, Chintels Paradiso, Sector, 109, Gurugram, Haryana-122006 **Complainants**

Versus

M/s Chintels India Limited
Regd. Office at: - Chintels Corporate Park, Sector-114, Gurugram -122017 **Respondent**

CORAM:

Dr. K.K. Khandelwal **Chairman**

Shri Vijay Kumar Goyal **Member**

APPEARANCE:

Ms. Priyanka Agarwal Advocate for the complainants

Sh. Rakesh Kumar AR of the respondent

ORDER

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

that the promoter shall be responsible for all obligations, responsibilities and functions 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 complainant, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S. No.	Heads	Information
1.	Name and location of the project	'Chintels Paradiso' at Sector - 109, Gurugram, Haryana.
2.	Nature of the project	Group Housing Colony
3.	Area of the project	12.306 acres
4.	DTCP license nos.	i.) 251 of 2007 dated 02.11.2007 valid upto 01.11.2017 ii.) 9 of 2008 dated 17.01.2008 valid upto 16.01.2018
5.	Name of License Owners	For license no. 251 of 2007: - i. Chintel Exports Pvt. Ltd. ii. Shri Ashok Solomon
		For license no. 9 of 2008: - i. Chintels India Pvt. Ltd.
6.	RERA registered/not registered	**Not Registered**
7.	Unit no.	J-303, 3rd Floor, Tower-J (annexure P-3 on page no. 38 of the complaint)
8.	Unit area	2630 sq. ft.

9.	Date of Booking	21.05.2012 (annexure P-1 on page no. 25 of complaint)
10.	Allotment Letter	05.10.2012 (annexure P-2 on page no. 27 of complaint)
11.	Date of start of construction of the tower in which allotment is made.	**21.08.2012** (annexure R-6 on page no. 30 of the reply)
12.	Date of execution of apartment buyer's agreement	22.01.2013 (annexure P-3 on page no. 36 of the complaint)
13.	Payment Plan	Construction linked payment plan (Page no. 62 of complaint)
14.	Total consideration	Rs. 1,74,88,494/- (vide statement of accounts dated 07.06.2021 annexed as annexure P-1 on page no. 25 of complaint)
15.	Total amount paid by the complainants	Rs. 1,75,75,026/- (Rs. 1,73,50,995/- alongwith HVAT of Rs. 1,45,130 and Rs. 78,900 of Interest on delay payments.) (vide statement of accounts dated 07.06.2021 annexed as annexure P-1 on page no. 25 of complaint)
16.	Due date of delivery of possession **Note:** - Possession clause: (36 months with a grace period of six months from the date of actual start of construction of a particular tower building	**21.02.2016** **Note:** - Grace period is allowed.

	in which the registration for allotment is made)	
17.	Occupation certificate	20.06.2017 (annexure R-2 on page no. 22 of the reply)
18.	Offer of possession	29.06.2017 (annexure P-4 on page no. 65 of the complaint)
19.	Possession Letter	15.06.2018 (annexure R-3 on page no. 24 of the reply)
20.	Delay in handing over possession till offer of possession dated 29.06.2017 + 2 months i.e. 29.08.2017	1 years 6 months 8 days.

B. Facts of the complaint

The complainants have submitted as under: -

3. That the complainants approached the respondent initially for booking of an apartment admeasuring 2630 sq. ft. in J Tower, in the said project situated in, sector -109, Gurugram, Haryana, but at that time the unit was not available with the builder directly but reportedly, available with one of channel partner M/S Investor Home Solutions.

4. Based on application no. CIL/PARADISO/0429 dated 21.05.2012, unit no. J-303, admeasuring 2630 sq. ft. was allotted to Investor Home Solutions, reportedly a channel partner of the respondent company.

5. That the complainants purchased unit, J-303 from channel partner M/S Investor Home Solutions and submitted the documents for transfer of the unit to respondent company. A transfer acknowledgment letter dated 01.10.2012 duly signed

by Mr Gulzar Nabi, Chief Manager, Commercials & IT was received by the complainants.

6. That the complainants executed requisite documents including affidavits F-1, F-2 & F-3 and paid 35% of the basic sale price (charged as initial booking amount for the construction of basement/ ground and second floor) amounting to Rs. 52,64,283/- (including Rs. 30,27, 283/-) an outstanding of the channel partner on account of demands due upon 45 days and 90 days of the booking).
7. That the complainants were thus allotted apartment no. J-303 with customer code CIL/PARADISO/0429/T1 by the respondent.
8. That the respondent to dupe the complainants even executed an apartment buyer's agreement signed between them on 22.01.2013. The respondents created a false belief that the project shall be completed in time bound manner and in the garb of this agreement persistently raised demands, due to which they were able to extract huge amount of money from the complainants.
9. That the total cost of the said unit is Rs. 1,58,32,750/- (excluding taxes) as per the agreement and sum of Rs 1,73,50,995/- (including taxes) were paid by the complainants (more than 100% of total sale consideration) as and when demanded, in time bound manner.
10. That the complainants had paid 35% of the basic sale price @ Rs 52,19,000/- in Oct/Nov 2012, before they were supplied with copies of apartment buyer's agreement (ABA) for

signatures. The apartment buyer's agreement was one-sided agreement, containing many unreasonable and discriminatory clauses, heavily in favour of the dominant respondent company. The complainants had no choice but to sign on dotted lines as they needed the apartment in the upcoming area.

11. That the complainants also executed a tripartite agreement with SBI and the respondent company on 05.03.2014 as parties, to raise a home loan of Rs. 50,00,000/- @ 10.15% interest in order to meet the requirement of funds for the said unit, that was booked with the respondent and was affirmed to be handed over latest by year 2015.

12. That the complainants should have been given the possession of the said unit on 01.10.2014, duly completed in all respect in terms of clause 11 of the apartment buyer's agreement and habitable as per specifications listed out at annexure-III of the apartment buyer's agreement, since the construction had commenced on 01.04.2011 the day excavation for construction of the basement started.

13. That the complainants, however, received the actual possession of the unit on 15.06.2018, once deficiencies related to flooring/ services and other facilities/ amenities were completed as per specifications given out at annexure-III of the apartment buyer's agreement. It is a matter of record, that the project had been delayed due to slow and poor construction/ workmanship of the contractor (M/s Bhayana builders pvt ltd), that was engaged by the respondent

company for construction of the project, as per submissions of the respondent themselves in ***'Case No. 1731 of 2018, Mr. Nitin Bhayana V/S Chintels India Limited'*** decided on 28.03.2019 by this authority.

14. That the complainants approached the CRM of the respondent company on 05.06.2017 and 12.06.2017, informing that the possession of the flat is already overdue along with a request to raise final demand upon possession, so that the complainants can seek final disbursement of the home loan from SBI during his leave period. However, only approx. amount due on possession was intimated and in absence of any formal demand letter upon possession, the complainants could not get the final disbursement of the home loan from SBI and reverted back to place of duty in counter insurgency area of J&K.
15. That the respondent received the OC no. 13823 from DTCP in respect of J tower on 20.06.2017 and immediately issued letter offered final vacant possession of the said unit on 21.06.2017, despite the unit having deficiencies/shortcomings with respect to flooring/tiling/services in the unit.
16. This letter dated 21.06.2017, was never shared over email, as hither to fore done for other demands, but was sent by DTDC courier that was received in mid July 2017, wherein payments were solicited by 30.09.2017.
17. That the complainants visited the said unit in August 2017 and found major shortcomings i.e., (a) kitchen granite

slab/drawer cabinet/ ss washbasin & water cp fittings were deficient (b) the drawing cum dining room and the passage lobby was without vitrified tiles, (c) all the four bedrooms were without wooden flooring, (d) all the four washrooms were without cp fittings,(e) the servant room glass door had no latch/lock, the washroom had no cp fittings, (f) the slider glass doors and the glass windows were without locks and latches, (g) the balcony grill was without paint as only primer had been put and (h) the outside façade of the tower was yet to be distempered. The complainants having inspected the said unit along with Mr. Prabhjot Singh, a representative responsible at the site for handing over of the flats being an employee of the respondent company. The concerned individual was requested to get these deficiencies/shortcomings rectified at the earliest possible.

18. That the complainants had paid for demand raised on completion of flooring @ Rs 8,80,000/- on 11.02.2016 and raised a demand on completion of services of respective units @ Rs 12,00,000/- on 31.05.2017 and 03.06.2017 however, the said unit was not at all complete or in habitable on 21.06.2017, in terms of specifications listed at annexure-III of the ABA, the day respondent company issued the letter for final vacant possession.

19. That the complainants again visited the said unit on 10.11.2017 and found that the deficiencies/shortcomings have not at all been addressed by the respondent company till date, owning to the shortage of technical teams attending to

these jobs. The complainants next formally raise the issue on 22.11.2017 over Email titled- "Raising of Final Demand for Possession of Flat J-303 And Charging 18% Interest While Unit/Tower Not Yet Ready for Possession", along with 06 photos as conclusive evidence/ proof, that was acknowledged by the CRM of the respondent company on 04.12.2017.

20. That the complainants, thereafter, exchanged regular emails with CRM of the respondent company including an email on 01.01.2018, asking for compensation on account of delayed possession and also requesting for early possession of the said unit J-303 by 31.01.2018, since the spouse of the complainants was to join the job of founder principal of euro international school w.e.f. 01.02.2018 which is right opposite to the location of the said project. However, the respondent company could not complete the deficiencies as per specifications and handover the unit in a habitable condition resulting in professional opportunity being missed.

21. That the complainants had paid all instalments on due date, except one instalment, that was delayed owning to non-availability of leave to the complainants from J&K due to operational exigencies, where the complainants were serving in a counter insurgency area. The complainants paid the demand raised on possession on 10.112017 and 05.12.2017, despite the noticed deficiencies/shortcomings, that were rectified by the respondent company in Jun 2018 only, owing to shortage of technical teams attending to these jobs at the project site.

22. The complainants finally received the physical possession of the said unit on 15.06.2018, after a delay of 44 months and 15 days, once all the shortcomings/deficiencies were formally informed to the respondent company on 22.11.2017 and they completed and made it a habitable premise with functional kitchen and washrooms as per agreed specifications handed over.

23. That the complainants were however, denied compensation for delay in possession in terms of para 12 of the apartment buyer's agreement by the CRM of the respondent company, on the grounds that there has been default by the complainants in remitting payments attracting penalty interest.

24. That the complainants have made all payments well before due date and only once was charged Rs 5539/- as 18% penalty (interest ocassion-1) on 03.03.2015 in terms of clause 4(ii) of the ABA, for a delay in payment of Rs. 8,89,000/- on account completion of super structure.

25. That the complainants were wrongfully charged 18% penalty interest from 01.10.2017 to 05.12.2017, despite the said unit not being ready, when demand on possession/additional charges was raised on 21.06.2017 to be paid by 30.09.2017. The complainants raised the grievance with AGM Commercials & IT of the respondent company on 24.04.2018. The complainants met and apprised the concerned official on 05.05.2018, that since the said unit is not yet ready for handing over, despite all deficiencies/ shortcomings been communicated over email on 22.11.2017, the levy of 18%

penalty interest from 01.10.2017 is arbitrary/highly unjustified.

26. That the complainants were thus refunded excess charged amount @ Rs 78,900/- in July 2018, by the respondent company on merits, as the flat was never ready in a habitable condition as per specification of ABA for handing over on 21.06.2017, when letter offering final vacant possession was issued.
27. That the complainants were also refunded Rs 1,45,131/- after a gap of 26 months without any Interest on 03.02.2020, that was charged in excess to complainants as HVAT Deposit on 03.12.2017, by the respondent company however till 2021 respondent's account statement is not reflecting the same.
28. That the complainants were finally handed over physical possession of the said unit after a delay of 44 months and 15 days, on 15.06.2018, when the said unit was actually ready for habitation and the maintenance agency of the respondent levied monthly maintenance charges from the complainants w.e.f. 16.06.2018.
29. Thus, the complainants qualifies for an award of interest, on account of delay in handing over of the actual possession of the said unit for a period of 44 months and 15 days from 01.10.2014 to 15.06.2018.
30. That the builders before physical possession, many a time make false promises for possession of apartment and breach the trust and agreement. That as per section 19 (6) of Act of 2016, complainants have fulfilled their responsibility in

regard to making the necessary payments in the manner and within the time specified in the said agreement except one incident of delayed payment due to non-availability of timely leave owing to exigencies of service, since the complainant was posted in J & K and for such default the complainants was charged penalty interest of 18% . Therefore, the complainants herein are not in breach of any of its terms of the apartment buyer's agreement, wilfully.

31. That the respondent has indulged in all kinds of illegality in drafting of ABA with a malicious intention and caused deliberate and huge mental and physical harassment to the complainants and the complainants are eminently justified in seeking delayed penalty interest charges on possession of said unit.

32. That the respondent offered possession of flat without any delay charges of approx. 44 months and 15 days of delay in handing over of possession, which has created extra financial burden on the complainants in terms of pre-EMI instalments of home loan, and the complainants have objected to arbitrary denial of grant of any delayed compensations to the respondent company at the time of offer of possession, being highly unjustified and illegal & arbitrary.

33. That such an inordinate delay in the delivery of possession to the buyer without any delayed penalty compensation is an outright violation of the rights of the buyer under the provisions of Act of 2016, as well the agreement executed between complainants and respondent. The complainants

demand delay penalty in terms of section 18(1) read with section 18(3) of the Act.

34. It is submitted that the cause of action to file the instant complaint has occurred within the jurisdiction of this authority as the apartment which is the subject matter of this complaint is situated in sector-109, Gurugram which is within the jurisdiction of this authority.

C. Relief sought by the complainants.

35. The complainants have sought following relief:

(i) Direct the respondent to pay the interest for delay on paid amount of Rs. 1,73,50,995/- at the prevailing rate of interest as per the Act of 2016.

D. Reply by the respondents.

36. The respondent has contested the complaint on the following grounds:

i. That the present complaint, as has been filed, is neither maintainable nor sustainable both in facts and in Law. The present complaint being nothing but a total misuse of the process of law, requires an outright dismissal from this authority.

ii. That the present complaint filed by the complainant is not maintainable and liable to be dismissed, *in-limine*, for want of jurisdiction as the project of the respondent (pertaining to the unit in question) is not an ongoing project as per rule 2(1)(o)

of Haryana Real Estate (Regulation & Development) Rules, 2017.

iii. That the phase-II of the project i.e., "Chintels Paradiso" at 109, Gurgaon, Haryana (hereinafter referred to as the "said project") of the respondent is neither covered under the Haryana Real Estate (Regulation & Development) Rules, 2017 nor is the project of the respondent registered with this hon'ble authority. It is pertinent to mention here that the answering respondent applied for grant of part occupation vide application dated 14.02.2017 and the respondent was granted occupation certificated vide memo no. ZP-354/SD(BS)/2017/13823 dated 20.06.2017 before publication of the rules. It is pertinent to mention here that the rules were published on 28.07.2017.

iv. That without prejudice to the above, the above stated position is further substantiated by rule 4(5) which clearly states that any project for which an application for occupation certificate, part thereof or completion certificate or part-completion certificate is made to the competent authority on or before the publication of the rules i.e. 28.07.2017, is outside the purview of this authority, unless the said application is refused by the competent authority and it is only then that the project is required to be registered within 30 days of the receipt of such refusal. In the present case the answering respondent was

granted occupation certificated vide memo no. ZP-354/SD(BS)/2017/13823 dated 20/6/2017 before publication of the rules.

v. That the present complaint is not maintainable as much as relief sought by the complainant is contrary to terms and condition of apartment buyer's agreement, possession letter and sale deed executed between complainant and respondent.

vi. That the present complaint filed by the complainant is not maintainable and liable to be dismissed, *in-limine*, because there is no delay as alleged in the complaint. It was submitted that the proposed estimated time is for completing the construction of the subject unit and applying for the occupation certificate and not for handing over the possession, as alleged. At the same time the delay by statutory authorities to issue the OC shall not be construed as delay, in any manner. Without prejudice to the above, such proposed estimated time of 48 months is applicable only subject to force majeure and the complainant having complied with all the terms and conditions and not being in default of any the terms and conditions of the apartment buyer agreement, including but not limited to the payment of instalments.

vii. That the present complaint has been filed without any basis with sole motive to cause harassment to the respondent and malign the reputation of the respondent under the garb of the

present complaint. As per the agreement, the respondent has offered the possession of unit on 29.06.2017, and complainant took the possession of the unit on 15.06.2018. It is pertinent to mention here that at the time of taking of possession, the complainant has given confirmation/ declaration that he shall not raise any *"claim of any nature in terms of the Apartment Buyer Agreement"*. It is further necessary to mention here that the complainant agreed not to raise any claim on account of any delay etc. The same is evident from clause no. 2 of the sale deed dated 27.06.2019. Hence, the complaint is liable to be dismissed on this ground alone.

viii. That the complainant has sought reliefs under section 11 and 18 read with rule 15 of the Act of 2016 but the said section is not applicable in the facts of the present case and as such the complaint deserves to be dismissed. It was submitted that the operation of section 11 and 18 are 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 apartment buyer agreement was executed on 22.01.2013 much prior to the date when Act of 2016 came into force and as such section 11 and 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 the Act of 2016.

ix. That the complaint has made false averments in the complaint and also concealed the material facts. Therefore, the complaint is liable to be dismissed with Heavy. The complainant has concealed the fact that the complainant's unit falls in tower 9 (tower J), phase II of the project, the construction of which started in the month of August 2012 and was completed within time frame as provided in the agreement after completion of construction the respondent applied for occupation certificate on 14.02.2017. It is pertinent to mention here that the complainant did not raise any dispute for three years after taking possession of the subject unit, and even at the time of registration of conveyance deed, rather at the time of taking possession gave a declaration that he shall not raise any other claim of any nature in terms of the apartment buyer agreement.

x. That the expression "agreement for sale" occurring in section 18(1)(a) of the Act covers within its folds only those agreements for sale (builder agreement) that have been

executed after the Act came into force and the apartment buyer agreement executed in the present case is not covered under the said expression, the same having been executed on 22.01.2013 prior to the date the act came into force.

xi. That it was submitted that delivery of possession by a specified date was not essence of the apartment buyer 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 apartment buyer agreement in clause 12 contain provisions for grant of compensation in the event of delay. As such it was further submitted that the alleged delay on part of 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 except Rs. 5/- per sq. ft. on salable build up area of the unit per month for the period of delay.

xii. That it was submitted 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 74 of the Contract Act, 1872 and no compensation can be granted de-hors the said section on any ground whatsoever. A simple reading of the said section 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 providing 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.

xiii. That it was submitted that the tentative/estimated period given in clause 11 of the apartment buyer agreement 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 instalments by all the in the said complex including the complainant. Many allottees in the said complex, including the complainant, committed breaches/defaults by not making timely payments of the instalments. 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 various allottees seriously jeopardized the efforts of the respondent for completing the construction of said project within the tentative time frame given in the agreement. It was also submitted that the construction activity in Gurugram has also been hindered due to orders passed by Hon'ble NGT/State Govt./EPCA from time to time putting a complete ban on the construction activities in an effort to curb air pollution. In the year 2017 also, Hon'ble 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 result in a longer hindrance as it become difficult to re-arrange, regather the work force particularly the laborers as they move to other places/their villages. In various previous years also, similar orders were there.

xiv. That without admitting the contents of the complaint, it was submitted that there are no valid grounds mentioned in the entire complaint, which entitled him for grant of the relief as claimed therein as such the complaint of the complainant is liable to be dismissed with heavy cost. It is necessary to mention here that the complainant very well knew that he is not entitled to claim any compensation for delay, as he is not

original allottee. As per apartment buyer agreement only original allottee are entitled for delay compensation. (clause 12 of the apartment buyer agreement).

xv. That the present complaint has been filed by the complainant after almost two years from the date of execution of conveyance deed and three years from the date of taking possession with malafide intention to harass the respondent. Hence liable to be dismissed on the grounds of limitation.

37. 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

38. 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;*
>
> *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 complainant at a later stage.

F. Findings on the objections raised by the respondent.

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

39. The respondent has raised a contention that the agreements that were executed prior to the implementation of the Act and rules shall be binding on the parties and cannot be reopened. Thus, both the parties being signatory to a duly documented ABA and the same was executed by the complainants out of his/her own free will and without any undue influence or coercion, the terms of FBA are bound by the terms and conditions so agreed between them.

40. 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."

41. 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."

42. 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.

G. Findings on the relief sought by the complainants.

G.I Delay possession charges: - Direct the respondent to pay the interest for delay on paid amount of Rs. 1,73,50,995/- at the prevailing rate of interest as per the Act of 2016.

43. 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."*

44. Clause 11 of the apartment buyer agreement provides time period for handing over of possession and the same is reproduced below:

> **"11. Time of Handing Over Possession**
>
> *Barring unforeseen circumstances and Force Majeure events as stipulated hereunder, the possession of the said Apartment is proposed to be delivered by the Company to the Allottee within*

36 months (three years) with a grace period of six months (hereinafter referred to as "the Stipulated Date") from the date of actual start of the construction of a particular Tower Building in which the registration for allotment is made, subject always to timely payment of all charges including the Basic Sale Price, Stamp Duty Registration Fees and Other Charges as stipulated herein or as may be demanded by the Company from time to time in this regard. The date of actual start of construction shall be the date on which the foundation of the particular Building in which the said Apartment is allotted shall be laid as per certification by the Company's Architect/Engineer-in-charge of the Complex and the said certification shall be final and binding on the Allottee."

45. 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 promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favor of the promoter and against the allottees that even a single default by the allottees in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottees and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottees of their rights 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 allottees are left with no option but to sign on the dotted lines.

46. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges at prescribed rate. However, proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under Rule 15 of the rules. Rule 15 has been reproduced as under:

> ***Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]***
>
> *(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.:*
>
> *Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.*

47. The legislature in its wisdom in the subordinate legislation under 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.

48. Consequently, as per website of the State Bank of India i.e., the marginal cost of lending rate (in short, MCLR) as on date i.e.,

19.04.2022 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

49. **Rate of interest to be paid by complainants for delay in making payments**: The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

> *"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.*
> *Explanation. —For the purpose of this clause—*
> *(i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default.*
> *(ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"*

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

51. On consideration of the documents available on record and submissions made by both 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. By virtue of clause 11 of the

apartment buyer agreement executed between the parties on 22.01.2013, the possession of the subject unit was to be delivered within 36 months with a grace period of six months from the date of actual start of the construction of a particular tower building in which the registration for the allotment is made i.e., 21.08.2012. Therefore, the due date of handing over possession is 21.02.2016. As far as grace period is concerned, the same is allowed. Therefore, the due date of handing over possession is 21.02.2016. The occupation certificate has been received by the respondent on 20.06.2017 and the possession of the subject unit was offered by the respondent to the complainants on 29.06.2017. The allottee is duty bound to take possession within 2 months of offer of possession on clearing outstanding dues. The outstanding dues were cleared on 10.11.2017 and immediately after that site was visited by the complainant on 22.11.2017 and an email was sent to the promoter objecting charging of 18% interest for delayed payment even when unit is not ready for possession and also conveyed large number of defects in the unit as mentioned in para no.4 of the email dated 22.11.2017. The promoter on 16.12.2017 sent an email to the complainant confirming receipt of payments towards unit and intimation to the complainant that promoter has informed project team to initiate work in the unit and it was also written that we will inform you as and when the same is ready. The physical possession of the unit was handed over to the complainant on 15.06.2018 as per the possession letter. Copies of the same

have been placed on record. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the complainants as per the terms and conditions of the apartment buyer agreement dated 22.01.2013 executed between the parties. It is the failure on part of the promoter to fulfil its obligations and responsibilities as per the apartment buyer agreement dated 22.01.2013 to hand over the possession within the stipulated period.

52. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainants are entitled to delay possession at prescribed rate of interest i.e., 9.30% p.a. w.e.f. 21.02.2016 till the date of offer of possession i.e., 29.06.2017 + 2 months i.e. 29.08.2017 as per provisions of section 18(1) of the Act read with rule 15 of the rules.

H. Directions of the authority

53. 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., 21.02.2016 till the offer of possession i.e., 29.06.2017 + 2 months i.e. 29.08.2017 to the complainants.

ii. The arrears of such interest accrued from 21.02.2016 till 29.08.2017 shall be paid by the promoter to the allottees within a period of 90 days from date of this order as per rule 16(2) of the rules.

iii. The complainants are 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 complainants which is not the part of the agreement.

54. Complaint stands disposed of.

55. File be consigned to registry.

V.I -

(Vijay Kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman
Haryana Real Estate Regulatory Authority, Gurugram

Dated: 19.04.2022