Complaint No.: (1) RERA-PKL-Comp.113/2018 - Madhu Sareen V/s M/s BPTP Ltd.

(2) RERA-PKL-Comp.117/2018 - Puran Sharma V/s M/s BPTP Ltd.

(3) RERA-PKL-Comp.118/2018 - D.K. Vij V/s M/s BPTP Ltd.

(4) RERA-PKL-Comp.119/2018 - Sachin Wadhwa V/s M/s BPTP Ltd.

(5) RERA-PKL-Comp.121/2018 - Babita Kaushik V/s M/s BPTP Ltd.

(6) RERA-PKL-Comp.122/2018 - Pawan Kumar Jagotra V/s M/s BPTP Ltd.

(7) RERA-PKL-Comp.123/2018 - Jai Parkash Gupta V/s M/s BPTP Ltd.

(8) RERA-PKL-Comp.124/2018 - Yojna Khator V/s M/s BPTP Ltd.

(9) RERA-PKL-Comp.126/2018 - Akshita Sharma V/s M/s BPTP Ltd.

(10) RERA-PKL-Comp.127/2018-Antony Vergese V/s M/s BPTP Ltd.

(11) RERA-PKL-Comp.128/2018 - Rajdeep Kaur Bhambrah V/s M/s BPTP Ltd.

(12) RERA-PKL-Comp.129/2018 - Shalini Gupta V/s M/s BPTP Ltd.

(13) RERA-PKL-Comp.130/2018 - Yogesh V/s M/s BPTP Ltd.

(14) RERA-PKL-Comp.131/2018 - Kamal Jain V/s M/s BPTP Ltd.

(15) RERA-PKL-Comp.132/2018 - Manish Sharma V/s M/s BPTP Ltd.

(16) RERA-PKL-Comp.133/2018 - Ritu Sarin V/s M/s BPTP Ltd.

(17) RERA-PKL-Comp.134/2018 - Arup Kumar Banerjee V/s M/s BPTP Ltd.

(18) RERA-PKL-Comp.135/2018 - Sanjiv Mehrota V/s M/s BPTP Ltd.

(19) RERA-PKL-Comp.137/2018 - Raj Ratti V/s M/s BPTP Ltd.

(20) RERA-PKL-Comp.138/2018 - Neera R.Pathak V/s M/s BPTP Ltd.

(21) RERA-PKL-Comp.139/2018 - Meenakshi Kwawatra V/s M/s BPTP Ltd.

(22) RERA-PKL-Comp.140/2018 - Priyadarsh Kumar Singh V/s M/s BPTP Ltd.

(23) RERA-PKL-Comp.141/2018 - K.M. Pai V/s M/s BPTP Ltd.

Date of hearing: 16.07.2018, 6th Hearing

Present:

1. Shri Vikas Chaudhary, Advocate on behalf of complainants.
2. Shri Shailendra Jain, Senior Advocate along with Shri Hemant Saini and Deepti Rajpal, Advocates on behalf of respondent.

ORDER:-

1. This order will dispose of all the 23 complaints listed above because the core issues being dealt are similar in all the cases.

2. The lead case complaint No.113 of 2018 Madhu Sareen Versus BPTP Ltd. was filed before this Authority on 27.03.2018. It was first heard by the Authority on 04.04.2018 when it was decided to issue a notice to the respondent as well as to the Director, Town & Country Planning Department, Government of Haryana, hereafter called the Director. For the second time it was heard on 09.04.2018 when a short reply was filed by the respondent BPTP Ltd. Reply of the Director was also received. The respondent had pleaded that this Authority does not have jurisdiction to entertain the complaint because they had filed an application dated 17.07.2017 before the Director for issuing completion certificate in respect of the project, accordingly, the project was covered by the provisions of Rule 2(o)(1), of the Haryana Real Estate (Development & Regulation) Rules, 2017, therefore, their project was not required to be registered with

the Authority in terms of the sub rule (o)(1) of Rule 2. It was further pleaded that since their project was not required to be registered under the Act, therefore this Authority does not have jurisdiction to entertain any complaint in respect of the projects covered by the said Rule. On the request of the counsel for the respondent the matter was adjourned to 25.04.2018 for detailed arguments on the issue of jurisdiction of the Authority in such matters.

3. The Authority further heard this matter on 25.04.2018 when after detailed arguments the issue of jurisdiction was finally settled. It was ordered by the Authority that it has jurisdiction to entertain the complaint. The said order dated 25.04.2018 of the Authority shall be read as a part of this order.

4. There-after the matter was listed on three different dates i.e. 15.05.2018, 30.05.2018 and 19.06.2018 when both the parties had sought to arrive at a compromise by way of out of court settlement. However, despite efforts a compromise could not be reached. Finally this matter was listed on 16.07.2018 for decision on merits.

5. In brief, the complainant's case is that on the basis of certain advertisements in the year 2009 she booked a 4 BHK flat measuring 1306 Sft. in the "Park Elite Premium" project situated in Sector-84, Faridabad

promoted by the respondents. She paid booking amount of Rs.3.00 lacs on 29.07.2009 and opted for constructions linked payment plan. An allotment letter was issued to her on 16.12.2009 and builder-buyer agreement was executed on 15.01.2011.

The complainant further states that between the years 2009 and 2012 she paid 95% of the sales consideration, and as per builder-buyer agreement possession of the constructed apartment should have been handed over to her by January, 2013 after taking into account the grace period. However, between 2012 and 2018 nothing was heard from the respondents. Admittedly the construction of the apartment has been badly delayed which is evident from the fact that an application was filed for issuing occupation certificate by the respondent before the Director on 17.05.2017 i.e. with a delay of more than 5 years, and actual offer of possession has been received by her on 21.03.2018.

6. The complainant further pleads that vide the said letter dated 21.03.2018 an offer has been received to take possession of the flat within 30 days where-after interest shall be charged. Her grievance is that against the basic selling price of Rs.26.64 lakhs she has already paid Rs.33.50 lakhs inclusive of EDC and IDC charges, and now the respondent has raised additional demand of about Rs.13.05 lakhs to be deposited before taking the

possession. The complainant challenges that the demands made by the respondent on account of enhanced area; cost escalation; club membership charges; electrification and STP charges; power back-up installation charges; service tax; Goods and Services Tax (GST); Value Added Tax etc.; are totally unjustified. The complainant is not liable to pay the said charges. It has also been alleged that the respondent is indulging in various un-reasonable and unfair trade practices and the demands being made are totally illegal.

7. The complainant has also pleaded that the possession of the apartment has been offered with huge delay of more than 5 years, therefore they should be fully compensated for the same. The complainant has also pleaded that the flat buyers agreement dated 15.01.2011 is in the nature of standard form of contract and the entire agreement is one sided as no liability or responsibility has been cast upon the respondents. The only duty/responsibility of the respondents was to handover the flat within agreed time frame, in which the respondent has miserably failed. The complainant has been making payment in time and there has been no default of any kind on her part.

8. The respondent in his reply dated 23.04.2018 has denied all the allegations and have pleaded that all the actions taken and demands raised

are in accordance with the flat buyer's agreement. The respondent once again challenged the jurisdiction of the Authority in entertaining this and other similar complaints for the reason that the flat buyer agreements were executed prior to coming into force of the Act and the Rules framed there-under, and part occupation certificate has been issued by the director, therefore the said agreement now cannot be re-opened and examined under the Act. Also the complainants are barred by latches and estopped from raising issues pertaining the actions of the respondent which are covered by the terms agreements.

9. Arguments of both the parties have been heard, and written pleadings have been examined in detail. Following issues emerges for adjudication by this Authority:-

(i) Whether this Authority has jurisdiction to entertain this and other similar complaints in the face of the fact that the respondent had applied for issuance of an occupation certificate on 17.05.2017 i.e. prior to coming into force of the Haryana Real Estate (Regulation & Development) Rules, 2017; and whether the facts of their case are fully covered within the sub rule (o) of Rule 2 of the said rules? Further, whether this Authority has jurisdiction to entertain complaints

relating to the projects in respect of which a completion/occupation certificate has been issued by the competent Authority, as in the present case part occupation certificate dated 27.02.2018 stands issued in respect of part of the project of the respondent.

(ii) Whether the agreements made between the complaints and the respondents much before coming into force the RERA Act can be reopened and revised after coming into force of the Act.

(iii) Whether the super area of the apartment could be increased unilaterally by the respondent from 1306 sq.ft. to 1402 sq.ft. and whether the complainants are liable to pay the cost in respect of the enhanced super area?

(iv) Whether the additional money demanded by the respondent on account of cost escalation vide their letter dated 21.03.2018 can be allowed and if yes to what extent?

(v) Whether additional demand raised by the respondent in respect of the electrification, STP charges, and power back up installation charges are covered by the flat buyer's agreement and the charges being levied on these accounts vide the said letter dated 21.03.2018 are justified?

(vi) Whether the demands made for payment of Service Tax, Goods & Services Tax (GST), and Value Added Tax are justified. If yes then to what extent?

(vii) Whether the demands made on account of preferential location charges, car parking charges, club membership charges are justified in terms of the provisions of the flat buyer's agreement?

(viii) Whether there has been any delay in the construction of flats. If yes then to what extent delay compensation should be paid by the respondent to the complainants.

(ix) Whether the demand being made towards external development charges & IDC; and enhanced external development charges (EEDC) are justified or not.

10. Now, each issue will be dealt with in the following paragraphs:-

(i) **Jurisdiction**:

The jurisdiction of the Authority has been challenged by the respondent on two counts. First, that they had applied for issuance of an occupation certificate on 17.05.2017 i.e. prior to coming into force the Rules, therefore, there was no obligation on the part of the respondent to register their

projects with the Authority, and since it was not a compulsory register-able project, therefore, the Authority has no jurisdiction to entertain any compliant in respect of the project.

As already noted in Para-3 above, the Authority after hearing both the parties had passed its orders dated 25.04.2018 vide which it has been ruled that the Authority has jurisdiction to entertain complaints in respect of such projects. The said order dated 25.04.2018 shall be read as a part of this order.

The 2nd facet of challenge by the respondent to the jurisdiction of this Authority is that the Director has already issued part occupation certificate to the project vide their letter dated 27.02.2018 therefore, after issuance of the occupation certificate to the project the jurisdiction of the Authority does not stand. This issue has been dealt with by the Authority in detail in its order dated 12.06.2018 in Complaint No.144 of 2018, Sanju Jain Vs TDI Infrastructure Ltd. The said order is reproduced below:-

> "The present complaint filed under the provisions of the Real Estate (Regulation and Development)

Act, 2016 (for short 'the Act') raises grievance regarding non performance of obligations cast upon the promoter under the buyer agreement.

Ld. Counsel for the promoter has argued that the promoter had already obtained a partial completion certificate attached as Annexure R-3 with his reply, and therefore, his project does not require registration under Section 3 of the Act and this Authority will have no jurisdiction to adjudicate the complaint relating to such project of the promoter.

The Authority has given thought to consideration to the submissions of learned counsel and is of the considered opinion that the argument is devoid of force and is a result of misconception of the provisions of the Act.

The underlying object for enacting the Act is two folds. Firstly, it is aimed at ensuring sale of plot/apartment/building in the real estate sector in an efficient and transparent manner. For serving of such purpose, the registration of the real estate project has been made compulsory before a promoter is allowed to put his project on sale. Elaborate provisions concerning the process of registration have been laid in Chapter-II of the Act; thereby, requiring the promoter to disclose and bring to the public domain all such information as is reasonably necessarily for a prospective purchaser of property, to effectively decide on the question as to whether or not he should invest his money with the promoter in his proposed project. The registration process is also aimed at ensuring that 70% of the money collected from the prospective buyers is invested in the project without its diversion for other purpose.

The second purpose for enacting the Act is to establish an adjudicating mechanism for speedy redressal of the grievances of allottees and promoters. The legislature in order to achieve this purpose has laid provisions detailing out the functions and duties of the promoters in Chapter-III,

rights and duties of the allottees in Chapter IV and also by creation of Real Estate Regulatory Authority and Appellate Tribunal as per the provisions contained in Chapter-V and in Chapter-VII of the Act. There is Chapter VIII relating to the offences emerging from different kind of violations committed in respect of various provisions of the Act and vesting of powers in the Authority/Appellate Tribunal for punishing those offences.

Section 11 of the Act defines and elaborates the functions and duties of a promoter. Nowhere in this section is used the expression 'Promoter of a registered project' and since the expression used everywhere in the Section is 'Promoter', it cannot be legitimately argued that the duties cast upon the promoter will be applicable only to the promoter of a registered project and not to the promoter of an unregistered project.

Sub section (4) of Section 11 of the Act manifests that a host of responsibilities and the obligations which are cast upon the promoter under the Act, Rule and an agreement of sale shall extend much beyond the date of completion of the project. For example, the obligation for executing conveyance deed extends till the actual execution of the instrument; the obligation for delivery of possession extends till transfer of physical possession to the allottee; the obligation to rectify structural defects in the sold property extends for a period of five years from the date of handing over the possession; the obligation for maintenance of essential services extends till taking over of the maintenance of project by the association of allottees; the obligation to pay all outgoings extend till the transfer of physical possession of project to the association of the allottee etc.

Simultaneously, Section 34(f) of the Act enjoins a duty upon the Authority to ensure compliance of all the obligations by the stake-holders in the real estate project as envisaged under the Act, Rules and

Regulations made thereunder. There is no provision in the Act which expressly or impliedly provides that duties, responsibilities and obligations of a promoter towards his allottees will cease to exists upon grant of completion or occupation certificate. So, no promoter can be allowed to argue that he stands absolved of discharging his statutory obligations after receipt of completion certificate or that the Authority after grant of completion certificate will have no jurisdiction to adjudicate the complaints of the allottees.

The completion certificate is a requirement of Rule 16 of the Haryana Development and Regulation of Urban Area Rules, 1976 (HDRD Rules) or under sub code 4.10 of Haryana Building Code, 2017 and its grant is aimed at certifying that the project has been laid in accordance with the said Rules. So, grant of completion or occupation certificate can at the most absolve the promoter only of the obligation towards the State under the provisions of HDRD Rules and not in respect of the obligations which such promoter has towards the allottees under the provisions of the Act.

That apart, the issuance of a part or full completion certificate will not be a conclusive proof of the fact that the project has been developed as envisaged under the agreement of sale executed between the promoter and the allottee. Unless the development of the project is carried out in the manner as promised to the allottee under the agreement of sale, the allottee may have some genuine grievance against the promoter and will have a right to invoke the jurisdiction of this Authority for redressal of his grievance, irrespective of the fact that the promoter had obtained a completion/part completion or a occupation certificate for his project. The actual status of the project in such eventuality shall always remain a subject for verification by the Authority in order to determine whether or not the promoter has discharged his obligations in respect of

development works. Thus viewed, no promoter can save himself from discharging his obligations on the ground that he has obtained a completion/occupancy certificate in respect of his project and this Authority has jurisdiction to adjudicate upon the complaint filed against a promoter regarding non performance of his obligations.

The respondent's learned counsel while referring to the provisions of Section 71 of the Act, has next argued that since the complainant is seeking relief for refund of his money alongwith interest and interest being a component in the nature of compensation payable to an aggrieved person, the Adjudicating Officer alone and not this Authority has the jurisdiction to adjudicate the complaint. This argument too is not acceptable.

Section 71 of the Act vests jurisdiction in the Adjudicating Officer for adjudging the compensation after holding enquiry and ascertaining the factors as elaborated in Section 72 of the Act. Said provisions do not restrict the power of Authority for grant such relief to the allottees which do not require determination on the basis of detailed enquiry and can be ascertained summarily on the basis of plain language of the Act, Rules or an agreement of sale. The present case is one in which the complainant is seeking refund of money which the respondent had received towards purchase of a residential unit. The respondent has not disputed the money so paid to him and since the money has been paid against receipts, the relief of refund can be granted without making detailed enquiry. The compensation is claimed in the form of money payable on account of damage and harassment caused to a person. Interest claimed on refund is not a compensation for harassment and it is rather a claim for return of earning, which the holder has derived by unlawful withholding the money paid to him by the person claiming refund. So, the interest payable on refund amount would not be in the nature of compensation and the Authority will have

jurisdiction to grant relief of refunding the amount alongwith interest to the complainant.

Consequently, the respondent's objection is rejected on the point that this Authority has no jurisdiction to adjudicate the complaints."

Accordingly, the second challenge to the jurisdiction of this Authority stands disposed of in terms of the above order.

(ii) Regarding re-opening of the agreement that was executed prior to coming into force of the RERA Act. Sub Section 2 of Section 13(1) provides that the promoter will not accept a sum more than 10% of the cost of apartment without first entering into an agreement for sale. Further, Sub Section 2 of the Section 13 of the Act provides that the agreement for sale referred to Sub Section 1 shall be in such format as may be prescribed. The definition of the expression "prescribed" in the Act is that "prescribed means prescribed by Rules made under this Act". The State Government accordingly has prescribed the format for entering into agreements by the parties. Clause (a) of the explanation of the draft agreement prescribed in the Rules is reproduced below:

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

Accordingly, as per explanation (a) quoted above, the agreements executed prior to the stipulated due date of registration under Section 3(1) of the Act cannot be reopened. Further, it is a general principle of law that unless an Act specifically provides for its coming into force with retrospective effect it is to be ordinarily construed to be effective with prospective effect. The RERA Act nowhere provides, nor can it be so construed, that all previous agreements will be re-written after coming into force of RERA. Therefore, the provisions of the Act, the Rules and the Agreements have to be interpreted harmoniously. However, if the Act or the Rules provides for dealing with certain specific situation in a 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. However, before the date of coming into force of the Act and the Rules, the provisions of the agreement shall remain applicable. Numerous provisions of the Act saves the provisions of the agreements made between the buyers and seller.

(iii) **Increase in Super Area**:

In Clause 2(i) of the flat buyer agreement dated 15.01.2011 signed by the complainant, approximate of super area of the apartment has been shown to be 1306 sft.(121.330 sq. mtrs.). It further reads: "The areas are tentative and are subject to change till the grant of occupation certificate by the Authority."

Further, Clause 2.4 of the agreement inter-alia reads:-

> "Any increase or decrease in the Sale Consideration, on the basis of increase or decrease in the Super Area of the flat, shall be payable or refunded as the case may be without any interest thereon and at the same rate as agreed above. No other claim, whatsoever, monetary or otherwise shall lie against the Seller/Confirming Party by the Purchaser(s) in case, there is a variation of more than 15% in the agreed Super Area above and the Purchaser(s) is unwilling to accept the

changed Super Area by ways of refusing to pay the enhanced Sale Consideration or by accepting the refund for the changed Super Area, then the allotment shall automatically be treated as terminated and the payments received against the Sale Consideration of the Flat shall be refunded with simple interest at the rate of 6% per annum....".

Further Clause 5.1 reads ".....If there is any increase or decrease in the super area of the flat, the revised sale consideration shall be accordingly determined by the seller on the basis of the prices/charges...."

Accordingly, as per provisions of the flat buyer agreement reproduced above, the super area could be changed to the extent of 15%. In the present case the super area has been increased from 1306 sft. to 1402 sft. which represents an increase of about 7.5%, therefore, the change in super area and the demand made in accordance with that is covered by the flat buyer agreement. The respondent, therefore, is entitled to charge for the same at the agreed rates. This, however, will remain subject to the condition that the flats and other components of super area in the project have been constructed in accordance with the plans approved by the department/competent authorities. To the extent the

enhancement in super area is found not to be in accordance with the approved plans, the respondent will not be entitled to charge for the same. The respondent shall send a detailed and reasoned communication to the allottees stating therein the details of increased super area. A fresh challenge before this Authority can accordingly be made by any party if they so desire.

(iv) **Cost escalation**:

In the lead case, vide letter dated 21.3.2018 the respondents have demanded Rs.8.34,190/- towards cost escalation from the complainant. Clause 12.11 of the flat buyer agreement deals with the cost escalation. The said clause 12.11 is reproduced below:-

> "that the purchaser(s) understands and agrees that the basic sale price is escalation free except a situation where the cost of steel, cement and other construction materials increase beyond 10%. It is further agreed and understood that the steel price of Rs.27500/- per ton and prices of other construction material has been taken as per index price as on 1.9.2009. The company is fully authorised to revise the cost of construction materials, based on market conditions. The reasons, if any, shall be intimated to the purchaser(s) at the time of possessions. The purchaser(s) agrees and undertakes to unconditionally accept the price revision and pay the escalated amount without any objection or challenge whatsoever."

The operative part of above said Clause 12.11 is that basic sale price is escalation free except in the situation where the cost of steel, cement and other construction materials increase beyond 10%. Accordingly, no escalation charges can be levied in case the increase in cost of these materials is less than 10%. It also means that escalation up to 10% was already accounted for in the basic price charged from the buyers.

In the above context certain facts needs to be noted. The flat buyer agreement in the case of lead complaint No.113/2018 was executed by both the parties on 15.1.2011. It was agreed that the possession of the apartment will be given within 36 months. A further grace period of 180 days was agreed for the purpose of applying and obtaining occupation certificate. The period of 36 months expired on 15.01.2014 and further grace period of six months is expired on 15.07.2014. The possession of the apartment should have been delivered by 15.07.2014. However, by virtue of Clause 3.3 of the agreement, the date of delivery of possession works out to 06.11.2014.

Admittedly the possession has been offered on 21.03.2018 thus with a delay of 4 years and 4 months.

Both the parties argued about the basis on which the escalation in cost may be calculated. While the respondents proposes to calculate the escalation in cost on the basis of the table applicable to the Central Public Works Department (CPWD) the complainants wants it to be calculated on the basis of the table applicable to the Construction Industries Development Corporation (CIDC). By adopting the table of CIDC the increase in price is lower as compared to the price calculated on the basis of CPWD table. They argued that the table which create lesser liability on the allottees should be used.

Before deciding the basis of calculating the escalation in prices, it may be relevant to decide the date up to which the escalation in prices may be allowed. The respondent in their letter dated 21.03.2018 addressed to the complainant have not given any basis for calculation of the cost escalation nor have they indicated the date up to which the escalation in cost has been calculated.

The question that arise before this Authority is whether the cost escalation should be allowed up to the deemed date of possession i.e. 06.11.2014 or up to actual date of offer of possession i.e. 21.03.2018. Admittedly, almost entire sale consideration was paid by the complainant to the respondents up to the year 2012. No default on the part of the complainant in making payment to the respondents has been alleged with any substantive evidence. Admittedly, the project has been delayed by over 4 years for no fault on the part of the complainant. It is, therefore, fair and just that the cost escalation, should be calculated only from the date of executing the flat buyer agreement i.e. 15.01.2011 up to the deemed date of delivery of possession after grace period i.e. 06.11.2014. No escalation in cost can be allowed after 06.11.2014 because no justifiable reason has been cited or explanation offered by the respondents for such inordinate delay in offering the possession to the complainant.

Now, comes the issue of the basis of calculating the cost escalation. The prices of steel, cement and other construction materials fluctuate widely. It will be a very difficult accounting

exercise to work out the actual escalation in the costs of these materials during the aforesaid period up to the deemed date of offering possession. Necessarily, therefore, some standard index will have to be followed. The dispute is whether CPWD or CIDC table should be adopted.

CPWD is a public works department of the Central Government. It is presumed that they factor in all facts and circumstances while revising cost index of various materials. This Authority, therefore, orders that the CPWD table shall be followed to calculate escalation in cost of construction between the period of flat buyer agreement and the deemed date of possession. These dates may vary in each individual case being disposed off through this common order. The respondent will recalculate the cost of escalation on the basis of above principle and communicate the revised escalation in cost to the complainants. Further, these calculations will be made only in respect of increase in the cost beyond initial 10% because 10% increase has already been accounted for in the basic cost charged from the buyers.

(v) **Power back up installation charges; cost of electrification and STP charges**:

Regarding power back up installation charges (PBIC) sub-clause (f) of clause 2.1 reads "For PBIC Rs. 25,000/- per KVA (minimum 3 KVA is required or flats measuring 906 sq.tt. and 1128 sq.ft. whereas minim 5 KVA is required for flats measuring 1306 sq.ft.

Accordingly, this being a clear stipulation made in the flat buyers agreement that PBIC @ Rs.25,000/- per KVA will be payable, the demand of Rs.1.25 lakhs raised by the respondents in respect of the lead case, therefore, is justified. It shall be calculated at the same rate in respect of all other cases.

With regard to the electrification and STP charges, Clause 2.3 of the agreement reads "the purchaser(s) shall also be liable to make the payment, if applicable in respect of (a) electrification charges (including prorate cost of purchasing & installing transformers; (b) cost of installing STP/effluent treatment plant, pollution control devices and (c) additional fire fighting charges if any or any other facilities, services, additions as may be required or specified by the Authority.

The ordinary meaning of buying an apartment in a licensed and developed colony means and implies that the

allottees when move into their apartments it will be electrified, it will have water supply and its effluents will be treated in accordance with the prevalent law. The additional charges proposed to be levied in this regard under ordinary circumstances would not be justified. However, since this is a specific provision of the agreement and both the parties have agreed and signed the same, the complainants are duty bound to pay to the respondents for these facilities. The respondents however shall convey to the complainants the actual cost incurred in electrification and installation of the STP, and pro-rata distribute those costs amongst all the apartments in the colony. The actual pro-rata cost to be worked out in respect of each apartment only shall be charged by the respondents. The basis of such calculations should also be conveyed to the complainants. Further, the costs in these regards shall be calculated only upto the deemed date of possession of the apartments.

(vi) **Service Tax; Goods & Services Tax (GST) Value Added Tax**:

Regarding the taxes the last 1st Para of Clause 2.1 provides that "the purchasers understands and agrees that in

fresh incidents of tax whatsoever including VAT; service tax or statutory demands or any increase on such account even if it is called retrospective infect shall also be paid by the purchasers in proportionate to the ..."

A plain reading of this would dictate that all existing applicable taxes were already included in the basic sale price of the flats and through the aforesaid clause the additional demand could be made only in respect of a fresh incidence of taxes.

In the lead case, vide letter dated 21.03.2018, (i) Rs.1,79,684/- as GST; (ii) Rs.61,421/- as Service Tax and (iii) Rs. 34,181/- as VAT up to March, 31st 2014 has been demanded. Regarding the GST the arguments of the complainant is that this tax came into force in the year 2017, therefore, it is a fresh tax. The possession of the apartment was supposed to be delivered by November, 2014, therefore, the tax which has come into existence after the deemed date of delivery should not be levied being unjustified. The arguments of the respondent it that this is a tax levied by the State and this

amount has to be deposited to the State, therefore, a demand on this account is fully justified.

Admittedly, the delivery of the apartment has been delayed by more than 4 years. Had it been delivered by the due date or even with some justified period of delay, the incidence of GST would not have fallen upon the buyers. It is the wrongful act on the part of respondent in not delivering the project in time due to which the additional tax has become payable. There is no fault of the complainants in this regard. For the inordinate delay by the respondent in delivering the apartments, the incidence of GST should be borne by the respondent only. It is also observed that the amount of GST which is being demanded may not actually be leviable on the apartments purchased by way of construction linked payment plans. The respondents would be well advised to take the opinion of GST experts about the quantum of the tax leviable in the situation in which the complainants are placed. That advice of the experts may form a part of the record of the respondent for use in future.

Regarding Service Tax, advice of a service tax expert should be taken about the quantum of service tax payable in the given circumstances by the complainants up to the deemed date of offering the possession of the apartments. In accordance with the advice of the experts whatever service tax is payable up to the deemed date of offer of possession shall be demanded by the respondents and accordingly will be paid by the complainants.

Regarding the Value Added Tax, an advice of the tax expert should be obtained and communicated to the complainants along with detailed justification thereof. Whatever amount is worked out by the taxation expert in this regard shall be paid by the complainants.

(vii)**Preferential location charges, car parking charges, club membership charges**:

As per sub clause (b) of Clause 2.1 of the agreement preferential location charges are leviable @ Rs. 100 per sq.ft. for ground floor, Rs.75/- per sq.ft. for the 1st floor; Rs.75/- per sq.ft for te 2nd floor and Rs.75/- per sq.ft for the landscape flats. The demand on account of the preferential location charges accordingly is justified. It shall, however, be

calculated in accordance with the rates provided in the aforesaid clause.

Sub clause (e) of Clause 2.1 provides that car parking charges @ Rs.1.50,000/- per car parking slot shall be charged. The demands in this regard made by the respondents vide their letter dated 21.03.2018, therefore, is justified.

Regarding club membership charges, the club is an important component of an apartment complex. Usually the construction of the club is done with the help of contribution from the buyers. If the full club has come into existence, and the same is operational or is likely to become operational soon the demand of Rs.50,000/- shall be discharged by the complainants. However, if the club building is yet to be constructed, the respondents should prepare a plan for completion of the club and demand money from members in instalments up to the date of completion of the club.

(viii)**Delay compensation**:

Clause 3.3 of the agreement deals with delay compensation. The relevant portion of the clause is reproduced below:

"Subject to the remittance and adherence to the terms & conditions of this agreement by the purchaser(s) and subject to Clause 10 herein, if, the seller/confirming parties fails to offer possession of the flat within a period of 42 months from the date of issuance of the sanction letter of the colony, it shall be liable to pay to the purchaser(s) compensation equivalent to the holding charges calculated @ Rs.5/- (Rupees five only) per sq.ft. for every month of delay thereafter until the actual date fix by the seller/confirming party for handing over of possession which both parties agree that the same is a reasonable estimate of the damages i.e. the purchaser(s) may suffer and the purchaser(s) agrees that it shall have no other rights whatsoever for the delay in offering the possession of the flats to the purchaser(s). The adjustment of such compensation shall be done only at the time of execution of the conveyance deed."

As per the aforementioned clause the possession was to be offered within a period of 42 months from the date of issuance of the sanction letter of the colony. The agreement of the flats buyers was made in January, 2011. However, the building plans of the colony were approved on 6.05.2011. The respondents apparently have violated the provisions of Urban Development Act, 1976 by selling the apartments much before the approval of the building plans of the colony. As such they have violated the provisions of the State laws in this regard. Be that as if may it was for the relevant authority of the State Government to take necessary action in this regard. Precisely

calculated in accordance with Clause 3.3, after approval of the building plan on 06.05.2011, the deemed date of delivery of the possession comes to 06.11.2014 after accounting for the grace period.

As per provisions of the agreement the complainants have to be compensated equivalent to the holding charges @ Rs.5/- per sq.ft. for every month of delay until the actual date of handing over the possession.

Admittedly the delay in handing over the possession has occurred to the extent of nearly 4 years and 4 months.

It is to be noted that Real Estate Regulatory Authority (Development & Regulation) Act, 2016 came into force w.e.f. 1st May, 2017. The Act as well as the Rules framed by the State Government provides for creating a level playing field between the buyers and sellers in respect of compensation for late delivery of possession of the apartments by sellers and the late payment of the dues by the buyers. Rule 15 provides "…. The rate of interest payable by the promoter to the allottee or by the allottee to the promoter as the case may be shall be the

State Bank of India highest marginal cost of lending rate + 2%."

After coming into force of the Act, the Clause 3.3 of the agreement shall stands amended to the extent that both the parties will compensate each other in respect of their default equivalent to SBI MCLR+2%. The Rules framed by the State government can came into force only with prospective effect. The said Rule, therefore, shall be effective with prospective effect. Prior to that, provisions of the agreement shall be applicable. Accordingly, the respondents shall compensate the complainants for the period 01.05.2017 up to date of offer of possession i.e. 21.03.2018 @ the rate of SBI MCLR+2% on the entire basic sale price of the apartment received by them.

However, for the period 06.11.2014 up to 01.05.2017 the rate of compensation shall be equivalent to Rs.5/- per sq.ft. of super area along with simple interest@10% calculated for each year of the period of default starting from 06.11.2014 up to 01.05.2017.

(ix) Regarding the external development charges & IDC a specific provision has been made in sub clause (a) of clause 2.1 of the

agreement by incorporating a provision regarding Development Charges. The term Development Charges used in this clause has been defined in clause 1.17 of the agreement. As per the provisions of the agreement External Development Charge and IDC is payable by the complainant. The complainants have been making payments in this regard in the past also. In the lead case Rs.1,96,004.50 has been demanded by the respondent vide letter dated 21.03.2018 towards "External Development Charges and IDC." The External Development Charges have to be paid to the State Government for providing variety of external services. The IDC, however, is to be used by the developer for providing services within the colony.

It would be appropriate to direct that the respondents shall separate the demands being made on account of EDC and IDC. The basis of calculation of the EDC also shall be conveyed by the respondent to the complaint. Accordingly, the due payable EDC charges as per the calculations shall be paid by the complainant to the respondent for paying to the State Government Authorities.

Separate communication with regard to IDC shall be given by the respondent to the complaints specifying therein the reasons for charging the same.

Regarding the enhanced external development charges (EEDC) the matter is sub-judice before the Hon'ble Punjab & Haryana High Court as to whether the State is justified in levying EEDC. It is ordered that if any amount towards EEDC has already been collected by the respondent, the same shall either be deposited with the State Government or it shall be kept in a separate fixed deposit. If Hon'ble High Court decides against deposition of the EEDC, then the said amount shall be refunded to the complainants, and if the court decides that EDDC is to be paid to the State Government then the respondent shall deposit the same with the State Government. If the money collected on account of EEDC has already been deposited with the State Government, its details will be conveyed to each of the complainants. If no money has been collected as EEDC and the Hon'ble High Court declares it as payable in future then each allottee will deposit the same proportionately.

11. As a consequence of the above orders the Annexure-A annexed with offer of possession letter dated 21.03.2018 is hereby quashed to the extent so ordered. The respondents are directed to recalculate the amounts payable by the complainants in accordance with the aforesaid directions and issue them a fresh offer of possession along with statement of accounts. If the complainants are satisfied with the fresh statement of accounts, the fresh demands made by the respondents they shall deposit the same within 30 days of the receipt of offer of possession. If they are not satisfied, they will have a right to approach this Authority again.

12. Disposed of in above terms. These orders be uploaded on the web portal of the Authority and the files be consigned to the record room.

Dilbag Singh Sihag
Member

A.K. Panwar
Member

Rajan Gupta
Chairman

2018.

The undersigned has the privilege of going through the order authored by the Hon'ble Chairman and is in complete agreement with the findings on all the issues barring issue No. (viii) concerning "Delay compensation " payable to the complainant.

The Hon'ble Chairman has awarded compensation towards delay in handing over possession by the promoter to the complainant @ Rs. 5/- per sq. ft. of the total super area for every month of delay in terms of Clause 3.3 of the buyer's agreement till 01.05.2017, the day of coming into force the Real Estate (Regulation and Development) Act, 2016 (for short RERA) and thereafter @ equivalent to SBI Marginal Cost Landing Rate (MCLR) + 2% as envisaged in Rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (for short HRERA Rules).

The undersigned is unable to reconcile with the findings of awarding compensation @ Rs. 5/- per sq. ft. and is rather is of the considered opinion that such awarding of compensation will be against the mandate of the RERA and tantamount to perpetuation of an unfair trade practice that

was being adopted by the promoters against their allottees prior to the promulgation of RERA. The reasons for taking different view in the matter are as under:-

The legislature while aiming to enact RERA was conscious of the fact that adequate provisions would be required to deal with not only new projects to be set up after coming into force of RERA but also to deal with ongoing projects which had started prior to coming into force of RERA and were not complete by the time the RERA was enforced. That is why the legislature made it mandatory for the promoters even to get their on-going projects registered under Section 3 of the RERA.

Can it be then assumed that the legislature at the time of enacting RERA was oblivion of the agreement for sale executed between promoters and buyers of ongoing projects? Obviously, the answer has to be in the negative. And if so, two conclusions must necessarily follow namely (i) the expression 'agreement for sale' where-ever used in RERA is applicable to new as well as ongoing projects and (ii) the provisions of RERA must be construed and interpreted in the

language used by the legislature without any further addition or deletion of words.

Now deck is clear to discuss everything which is relevant and will have bearing on determination of the question as to what delay compensation the complainants of present case are entitled? The foremost relevant document in this regard is the buyer's agreement entered between the present promoter and the complainants. Said agreement provides that the promoter will charge 18% interest for any default on the part of the buyer to pay installments of sale consideration on time and the promoter for his own default in handing over the possession of purchased apartment on time would compensate the buyer with an amount to be calculated @ Rs. 5/- per sq. ft of super area per month which, on calculation in terms of rate of interest, comes to 2.7 % per annum. The buyer's agreement is, therefore, wholly discriminatory and heavily leans in favour of the promoter with regard to the payment of compensation to the promoter and the buyer for their respective default towards discharge of their obligations.

The question next requiring determination is as to whether above referred discriminatory clauses of agreement for sale entered between the promoter and the buyer are legally tenable and enforceable. The Hon'ble High Court of Bombay in a case bearing Civil Writ Petition No. 2737 of 2017 titled as Neelkamal Realtors Suburban Pvt. Ltd. And another Versus Union of India and others decided on 06.12.2017 has ruled that RERA is not retrospective in nature but is retroactive in operation. So, anything that has already been done in terms of buyers agreement prior to coming into force the RERA cannot be undone but if something in relation to such agreement needs to be done after enforcement of RERA, then such action shall not be contrary to the provisions of RERA and must serve its object rather than vitiating its mandate.

Before proceeding further, it is apt to quote following provisions of RERA:-

> Section 2 (za) –**Ïnterest"** 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

Section 2(zi) – **"Prescribed" means prescribed by rules** made under this Act.

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

a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or

b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,

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

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** or in accordance with the terms of agreement for sale, as the case may be.

Section 19(4) : **Rights and duties of allottees.-**
(4) **The allottee shall be entitled to claim the refund of amount paid alongwith interest at such rate as may be prescribed** and compensation in the manner as provided under this Act, from the promoter, if the promoter fails to comply or is unable to give possession of the apartment, plot or building, as the case may be, in accordance with the terms of agreement for sale or due to discontinuance of his business as a developer on account of suspension or revocation of his registration under the provisions of this Act or the rules or regulations made thereunder.

Last but not the least to quote in the same sequence is Rule 15 and the **Explanation** which the Government of Haryana while exercising powers under Section 84 of RERA has appended to the model form of 'agreement for sale' laid in Annexure-A of HRERA Rules, which read as under:-

Rule 15."**Interest payable by promoter and Allottee, [Section 19].-** An allottee shall be compensated by the promoter for loss or damage sustained due to incorrect or false statement in the notice, advertisement, prospectus or brochure in the terms of section 12. In case, allottee wishes to withdraw from the project due to discontinuance of promoter's business as developers on account of **suspension or revocation of the registration or any**

other reason(s) in terms of clause (b) sub-section (1) of Section 18 or the promoter fails to give possession of the apartment/plot in accordance with terms and conditions of agreement for sale in terms of sub-section (4) of Section 19. The promoter shall return the entire amount with interest as well as the compensation payable. **The rate of interet payable by the promoter to the allottee or by the allottee to the promoter, as the case may be, shall be the State Bank of India marginal cost of lending rate plus two percent.** In case, the allottee fails to pay to the promoter as per agreed terms and conditions, then in such case, the allottee shall also be liable to pay in terms of sub-section (7) of Section 19:

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."

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

b) This is a model form of Agreement, which may be modified and adapted in each case having regard to the facts and circumstances of respected case. But in any event, matter and substance mentioned in those Clauses, **which are in accordance with the Statute and mandatory according to the provisions of the Act shall be retained in each and every**

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agreement executed between the promoter and allottee. Any clause in this agreement found contrary to or inconsistent with any provision of the Act, Rules and Regulation would be void ab-initio."

A close scrutiny of above quoted provisions clearly manifest that the legislature has strongly dis-approved the disparity occurring in agreement for sale about the delay compensation payable by allottee to the promoter and the delay compensation payable by the promoter to the allottee in case of their respective defaults, by ensuring under Section 2(za) of RERA that such compensation liability for both of them shall be equal and further mandating under Explanation (b) of HRERA Rules that such clauses of an agreement for sale as are contrary to the provisions of Act, rules and regulations, would be void ab-initio.

It needs no emphasis that "Void" and "void ab-initio" are two different expressions and they convey different meanings. "Void" means something which on the day when such thing is evaluated on the scale of law, has no legal validity. "Void ab-initio" means something which from its very birth has no legal validity. So, such clauses in buyer's

agreement executed between the promoter and the complainant of the present cases whereby un-equal terms regarding delay compensation were laid for the allottee and promoter in case of their respective default, has to be treated as nonest for having been declared as void ab-initio by the above quoted Explanation of HRERA Rules and cannot be acted upon for any purpose much less for compensating the complainant towards delay occurring on the part of the promoter in handing over timely possession of the apartments in respect of the period prior to coming into force of RERA. Rather, the complainants even for such period deserve to be awarded compensation at the rate equivalent to the State Bank of India MCLR + 2% as prescribed by Rule 15 of the HRERA Rules.

Had there been a legislative intent for providing delay compensation to the buyers of on-going projects only in accordance with the agreement for sale instead of statutory provisions for the period prior to coming into force of RERA, then the existing language of Section 18(1) and Section 19(4) of RERA would have been as under:-

Section	In Existing Form	In Assumed Form
18(1)	**Return of amount and compensation.**- (1) If the promoter fails to complete or is unable to give possession of an apartment, plot or building.- a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason, he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available to return the amount received by him in respect of that apartment, plot, building, as the case may be, **with interest at such rate as may be prescribed in this behalf** including	**Return of amount and compensation.**- (1) If the promoter fails to complete or is unable to give possession of an apartment, plot or building.- a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason, he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available to return the amount received by him in respect of that apartment, plot, building, as the case may be, **with interest at such rate as may be prescribed in this behalf or in accordance with the terms of**

	compensation in the manner as provided under this Act: 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.**	**agreement of sale, as the case may be** including compensation in the manner as provided under this Act; 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** or in accordance with the terms of agreement for sale, as the case may be.
19(4)	**Rights and duties of allottees.-** (1 to 3) xx xx xx (4) The allottee shall be entitled to claim the refund of amount paid **alongwith interest at such rate as may be prescribed** and compensation in the manner as provided under this Act, from the promoter, if the promoter fails to comply or is unable to give possession of the apartment, plot or building, as the case may be, in accordance with the terms of agreement for sale or	**Rights and duties of allottees.-** (1 to 3) xx xx xx (4) The allottee shall be entitled to claim the refund of amount paid **alongwith interest at such rate as may be prescribed or in accordance with the terms of agreement of sale, as the case may be** and compensation in the manner as provided under this Act, from the promoter, if the promoter fails to comply or is unable to give possession of the apartment, plot or building, as the case

	due to discontinuance of his business as a developer on account of suspension or revocation of his registration under the provisions of this Act or the rules or regulations made thereunder.	may be, in accordance with the terms of agreement for sale or due to discontinuance of his business as a developer on account of suspension or revocation of his registration under the provisions of this Act or the rules or regulations made thereunder.

The grant of delay compensation in accordance with the terms of buyer for the period prior to coming into force of RERA would result in addition of extra words, as highlighted in above table, to the existing language of Sections 18(1) and 19(4) of RERA. This Authority must, therefore, avoid such tinkering of statutory provisions for the sake of up-holding the legislative mandate and also for ensuring a fair deal and just decision for the complainants.

Moreover, it is worthwhile to mention that in the case titled as Aashish Oberai Versus Emmar Mgf Land Limited decided on 14.09.2016, National Consumer Disputes Redressal Commission (NCDRC) while dealing with two unequal clauses in the sale agreement, whereby the colonizer

in case of default on the part of buyer had a right to recover interest from him @ 24% per annum and the buyer in case of default on the part of colonizer to deliver possession on time was entitle only to the holding charges calculated @ Rs. 5/- per sq. ft. per month of the super area for the period a possession was delayed, has held that such clauses amount to unfair trade practice since it provided an unfair advantage of the colonizer over the buyer. The decision of NCDRC was challenged by the colonizer in Civil Appeal No. 35562 of 2015 before the Hon'ble Supreme Court but the same was dismissed by the Hon'ble Court vide its order dated 11.12.2015 with the following observations:-

> "We have heard learned counsel for the appellant and perused the record. We do not see any cogent reason to entertain the appeal. The judgment impugned does not warrant any interference. The Civil Appeal is dismissed."

Agreement of sale executed between the present promoter and the buyer in so far as the same provides for unequal level playing for the promoter and the buyer in case of default towards discharge of their responsibility, in view of

affirmative nod accorded by Hon'ble Supreme Court to the above referred view taken by NCDRC is, therefore unsustainable and cannot be acted upon for the purpose of granting delay compensation to the complainants.

So, the undersigned is of the considered opinion that the respondent who has delayed the delivery of possession for more than 4 years and who has been himself charging interest @ 18% per annum from the buyers in case of default on payment of installments, cannot be allowed to indulge in an unfair trade practice of paying compensation just @ Rs. 5/- per sq. ft. per month of the super area. The undersigned will accordingly direct the respondent to calculate the compensation payable to the complainants for the delayed period of possession @ SBI MCLR plus 2% from 06.11.2014 i.e. the date on which the promoter was duty bound to deliver possession to the complainants till the actual date of delivery of possession.

Anil Kumar Panwar
Member-I
HRERA, Panchkula
27.08.2018

Member-II

I undersigned have gone through the orders recorded in this bunch of cases by Hon'ble Chairman and also of the Hon'ble Member-I. After due consideration and comprehension of the same, undersigned endorsed the views of the Hon'ble Chairman on all issues except issue no. (viii). As far as issue no. (viii) is concerned, I do agree with the reasoning and conclusions recorded by Hon'ble Member-I

Dilbag Singh Sihag
Member-II
HRERA, Panchkula
31.08.2018