REAL ESTATE REGULATORY AUTHORITY

HIMACHAL PRADESH

Complaint No. HPRERA2023005/C

IN THE MATTERS OF:-

Reetu wife of Mukesh Kumar, resident of plot no.39,Pooja Printers, Himuda Industrial Area, Batuali Kalan Baddi, Himachal Pradesh,173205

.....Complainant

Versus

Omaxe Limited, Shop no.19-B, First floor, Omaxe celebration mall, Sohna road, Gurgaon, Haryana and corporate office at 7, LSC, Kalkaji, New Delhi.

.....Respondent

Present:- Dr. Sandeep Sachdeva Ld. Advocate along with Sh. Mukesh Singla for Complainant
Sh. Shivank Singh Panta, Ld. Advocate for the respondent promoter, M/s Omaxe Ltd.

Final date of hearing (through WebEx): 02.09.2023
Date of pronouncement of order: 12.09.2023

Order

Coram:- Chairperson and Member

1. Facts of the case –

The complainant and respondent entered into an agreement for sale executed on 16th August 2019 (Annexure 1) for Flat numbered as PWD/JACARANDA-C/414 on 4th floor in the group housing project known as Omaxe Parkwood –I situated at Baddi, Distt, Solan (H.P) (Registration no. RERAHPSOP9170007) and the allotment letter is at Annexure 2 with the complaint. The

total sale consideration for the unit was Rs 10,75,957/- which was to be paid according to the payment schedule C-1 and C-2 of the agreement for sale. The complainant paid more than 90% of the price i.e. 9,90,000/- as per payment schedule. The respondent was to hand over possession of the unit to complainant on or before 20.10.2020. The complainant does not intend to withdraw from the project and claim interest for delayed possession under proviso of clause 9.2. (ii) of agreement. It was contended that there is inordinate delay in delivery of possession. With these pleadings it was prayed that delayed possession interest may kindly be granted and the respondent may be directed to complete the remaining work and deliver the possession of the flat in terms of agreement for sale.

2. Reply

The specifications of the flats and the total price agreed as stated in the complaint have been admitted in reply. The total amount till date which had been deposited by the complainant is Rs. 9,90,000./-. An agreement for sale dated 16.08.2019 was executed between both the parties. The copy of payment schedule is Annexure R-6 with the reply wherein the complete down payment plan was mentioned. The complainant at the time of filing the application form remitted a sum of Rs 1,60,000/- on 10.7.2019 vide bank draft/ cheque no. 008724 drawn on Union Bank of India. Further complainant also paid a sum of Rs 8,30,000/- to respondent company vide cheque no. 10008742 also drawn from Union Bank of India. The copy of the receipts is Annexure R-2 and Annexure R-8 with the reply. As per the decided commitment between the complainant and the respondent company the respondent had been consistently paying the commitment charges @7,500/- per month to the

complainant till 31.03.2023. Therefore, it was contended that there is no reason for the respondent company to pay the delayed possession interest as the same is not applicable in the present case.

3. **Rejoinder**

It is submitted that the remaining amount is to be paid at the offer of possession as per rules and terms set in the agreement for sale. The agreement clearly provides for the date of possession in clause 7.2 of the agreement for sale as 20.10.2020. The commitment charges as being paid by the respondent are not part of the agreement or any others documents. Hence, it cannot be assumed that these commitment charges are being paid qua interest for delayed possession to the complainant.

4. **Arguments by complainant**-

It was argued that the complainant and respondent entered into an agreement for sale on August 16, 2019 for flat PWD/JACARANDA-C/414 on the 4th floor of Omaxe Parkwood – I. The unit was sold for Rs 10,75,957/-, according to payment schedules C-1 and C-2 of the agreement for sale. The complainant paid Rs. 9,90,000/- as scheduled which is over 90% of the total price of the Flat. The complainant was to receive the unit by 20.10.2020. Since the possession of the unit in question has not been delivered in time therefore the complainant is entitled to receive delayed possession charges. The agreement for sale requires the remaining sum to be paid at the time of offer of possession. It was further argued that the agreement and other documents do not mention the respondent's liability to pay commitment charges. Thus, these

commitment charges cannot be considered as interest for delay or refund to the complainant.

5. Arguments by respondent-

It was argued on behalf of the respondent that there is delay in payment of total sale consideration as per the payment schedule. It was further argued that the delay in delivery of possession was due to reasons beyond the control of the respondent. It was emphatically argued that the respondent company is already paying to the complainant commitment charges @ Rs 7500 per month, therefore respondent is not liable to pay any delayed possession interest separately.

6. CONCLUSION/ FINDINGS OF THE AUTHORITY:-

We have heard the arguments advanced by the Ld. Counsels for the complainant & respondent and also perused the record pertaining to the case. We have duly considered the entire submissions and contentions submitted before us during the course of arguments. This Authority is of the view that the issue that requires the consideration and adjudication, namely:-

a. Whether the complainant is entitled to delayed possession charges in terms of proviso to Section 18 (1) of the RERD Act.

7. **Whether the complainant is entitled to delayed possession charges in terms of proviso to Section 18 (1) of the RERD Act.**

The present project is a RERA registered project. The Authority has gone through the record of the case and heard the arguments and is of the considered view that the complainant on 16th August, 2019 was allotted a flat no. PWD JACARANDA – C/414 on the 4th Floor of the group housing project named as Omaxe Parkwood I for a total consideration of Rs.10,75,957/-. A sum of Rs.9,90,000/- has been paid by the complainant to the

respondent company. The receipts qua the aforesaid payments are dated 16.07.2019 and 31.07.2019 appended with the complaint as Annexure-3 starting from the page nos. 32 to 34 of the case which show that approximately more than 90% i.e. Rs 9,90,000/- of the total sale consideration has been paid and a copy of these payment receipts have also been appended by the respondents with their reply and the same have not been disputed at any time. Further the receipts bear the stamps and logo of the respondent company. As per the payment schedule C-2 appended with the agreement for sale an amount of Rs. 1,53,095 was to be paid at the time of booking of the unit, Rs. 8,44,412 was to be paid on 60 days of the booking and Rs. 78,449 was to be paid the time of offer of possession. From the perusal of the receipts appended as annexure C-3 it is clear that an amount of Rs. 9,90,000/- has been paid up to 31st July, 2019, therefore an amount approximately close to the due amount as per payment schedule has been paid by the complainant. Further no protest on the delayed payment if any was ever raised by the respondent company before this complaint was filed by the complainant. Rest of the payment as per the payment plan had to be paid at the time of offer of possession. As per clause 7.2 of the agreement for sale dated 16th August, 2019 which is admitted by both the parties it is mentioned that the respondents shall handover the possession on 20.10.2020 which is the due date of possession. Admittedly the possession has not been handed over till date.

8. The defence of the respondent is that the OC and CC for the unit in question have been applied on 26 July, 2022 and the same are awaited. It was further the defence of the respondent that the complainant defaulted in making the remaining payments as per

the payment plan and therefore the possession of the unit in question was not handed over. From the perusal of the record of the case it transpires that there is no delay in making the payments as per payment plan and therefore this defence of the respondent is liable to be rejected. The respondent has argued that, the promoter is paying the commitment charges, therefore delayed payment interest is not applicable in this case. From the perusal of the record, it is clear that commitment charges being paid by the respondent is not prescribed in the agreement for sale. Further, there is no provision about the payment of the commitment charges, even in the RERD Act. The Section 18 of the RERD Act provides for payment of delayed interest for every month of delay. This is a statutory levy to be paid by the promoter till handing over of possession and this cannot be substituted by any payment like commitment charges. The commitment charges being paid is neither part of the agreement for sale nor there is any such charge provided in the RERD Act. Therefore, payment or non payment of any commitment charges is not in the purview of the RERA and obviously it cannot substituted by the statutory levy under section 18 of the Act. Section 18 (1) of the RERD Act, 2016 reads as under

Section 18 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.

Further the Honb'le Supreme Court in the case of **Newtech Promoters and Developers Pvt. Ltd. Vs. State of U.P. and OrsMANU/SC/1056/2021**

"22. If we take a conjoint reading of Sub-sections (1), (2) and (3) of Section 18 of the Act, the different contingencies spelt out therein, (A) the allottee can either seek refund of the amount by withdrawing from the project; (B) such refund could be made together with interest as may be prescribed; (C) in addition, can also claim compensation payable Under Sections 18(2) and 18(3) of the Act; (D) ***the allottee has the liberty, if he does not intend to withdraw from the project, will be required to be paid interest by the promoter for every months' delay in handing over possession at such rates as may be prescribed.***

23. Correspondingly, Section 19 of the Act spells out "Rights and duties of allottees". Section 19(3) makes the allottee entitled to claim possession of the apartment, plot or building, as the case may be. Section 19(4) provides that if the promoter fails to comply or being unable to give possession of the apartment, plot or building in terms of the agreement, it makes the allottees entitled to claim the refund of amount paid along with interest and compensation in the manner prescribed under the Act.

24. ***Section 19(4) is almost a mirror provision to Section 18(1) of the Act. Both these provisions recognize right of an allottee two distinct***

remedies, viz., refund of the amount together with interest or interest for delayed handing over of possession and compensation.

25. ***The unqualified right of the allottee to seek refund referred Under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof. It appears that the legislature has consciously provided this right of refund on demand as an unconditional absolute right to the allottee, if the promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement regardless of unforeseen events or stay orders of the Court/Tribunal, which is in either way not attributable to the allottee/home buyer, the promoter is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the Act with the proviso that if the allottee does not wish to withdraw from the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed."***

The ratio of the aforesaid judgment is that conjoint reading of Sub-sections (1), (2) and (3) of Section 18 of the RERD Act, 2016, is that the allottee has the liberty, if he does not intend to withdraw from the project to be paid interest by the promoter for every months' delay in handing over possession as may be prescribed. It was further held that that the right of the allottee to seek interest for delayed possession is unqualified and not dependent on any contingencies or stipulations thereof and is also regardless of unforeseen events or stay orders of the Court/Tribunal, which in either way is/are not attributable to the allottee. Further Clause (ii) of 9.2 of the agreement for sale executed interse the parties is as under:

8.2 In case of Default by Promoter under the conditions listed above, Allottee is entitled to the following:

(i) Stop making further payments to Promoter as demanded by the Promoter. If the Allottee stops making payments, the Promoter shall correct the situation by completing the construction milestones and only thereafter the Allottee be required to make the next payment without any interest; or

(ii) The Allottee shall have the option of terminating the Agreement in which case the Promoter shall be liable to refund the tntire money paid by the Allottee under any head whatsoever towards the purchase of the apartment, along with interest at the rate prescribed in the Rules within sixty days of receiving the termination notice:

Provided that where an Allottee does not intend to withdraw from the project or terminate the Agreement, he shall be paid, by the promoter, interest at the rate prescribed in the Rules, for every month of delay till the handing over the possession of the [Apartment / Plot] which shall be paid by the promoter to the allottee within sixty days of it becoming due.

9. Therefore to conclude the respondents have failed to deliver the possession of the unit within the time agreed upon and stipulated in the agreement for sale and are in default even till today. As the possession has not been delivered even till today therefore there has been delay in delivering the possession to the complainant from the due date of possession dated 20.10.2020 despite having received 90% of the total sale consideration of the project. Respondents by doing so have violated the provisions of Section 11(4)(a), 14, 17, 18 and 19 of the RERD Act, 2016.The complainant is seeking charges for delayed possession and the proviso to section 18 read with clause (ii) of 9.2 of the agreement for sale 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. This analogy of the section has been upheld by the Hon'ble Supreme Court in the case of New Tech Promoter. Further rate of interest has been prescribed as under:

> ***Rule 15 of the Himachal Pradesh Real Estate (Regulation and Development) Rules, 2017-***
> ***Interest payable by promoter and allottee-***
> *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 plus two percent as mentioned under Section 12,18 and 19 of the Act:*
> *Provided that in case the State Bank of India marginal cost of lending rate is not in use it would 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.*
> *Provided further if the allottee does not intend to withdraw from the project, he shall be paid by the promoter an interest which shall be the State Bank of India highest marginal cost of lending rate*

The legislature in its wisdom under rule 15 of the rules, has determined the prescribed rates of interest. The rate of interest so determined by the legislature, is reasonable and if said rule is followed to award interest, it will ensure uniform practice in all the cases. The definition of term 'interest' as defined under Section 2 (za) of the RERD Act, 2016 provides that 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:

> *Section 2 (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;*

10. The SBI marginal cost of lending (in short MCLR) as on date of passing of this order is 8.7 % hence the rate of interest would be 8.7 %+2 % i.e.10.7% per annum. Therefore, interest on the delayed payment from the respondent shall be charged at 10.7% per annum at simple rate of interest.

11. Relief-

Keeping in view the above mentioned facts, this Authority in exercise of power vested in it under various provisions of the Act, rules and regulations made there under, issues the following orders/directions:

A. The Complaint is hereby allowed.

B. The respondent is directed to pay the interest for delayed possession, at the SBI highest marginal cost of lending rate plus 2 % as prescribed under Rule 15 of the Himachal Pradesh Real Estate (Regulation and Development) Rules, 2017 to the complainants. The present highest MCLR of SBI is 8.7 % hence the rate of interest would be 8.7%+2 % i.e. 10.7% per annum on the amount paid by the complainant i.e. Rs.9,90,000/- for every month of delay from the due date of possession i.e. 20.10.2020 till handing over of possession.

C. The arrears of interest on delayed possession accrued from 20.10.2020 till the date of passing of this order i.e. 12.09.2023 shall be paid to the complainant by respondent within 60 days from the date of passing of this order and thereafter monthly payments of interest till the handing over of possession shall be paid before 10th of each subsequent month.

B. C. Badalia
MEMBER

Dr. Shrikant Baldi
CHAIRPERSON