BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**:**	**1153 of 2021**
First date of hearing:		**01.07.2021**
Date of decision	**:**	**01.07.2021**

1. Mr. Aseem Ahuja
2. Mrs. Varsha Ahuja
Both RR/o- E-37, 1st floor, Hauz khas, New Delhi — **Complainants**

Versus

M/s Ansal Phalak Infrastructure Pvt. Ltd.
Office at- 1202 Antriksh Bhawan 16, Kasturba Gandhi Marg, New Delhi-110001 — **Respondent**

CORAM:

Dr. K.K. Khandelwal	**Chairman**
Shri Samir Kumar	**Member**
Shri Vijay Kumar Goyal	**Member**

APPEARANCE:

Sh. Rijumani Taluakdar	Advocate for the complainants
None	Advocate for the respondent

Ex-PARTE ORDER

1. The present complaint dated 10.03.2021 has been filed by the complainants/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and

Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions to the allottees as per the flat buyer's agreement executed inter se them.

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

1.	Name and location of the project	"Esencia", Sector-67A, Gurugram
2.	Project area	28.556 acres
3.	RERA Registered/ not registered.	**Registered vide registration no. 336 of 2017 dated 27.10.2017**
4.	RERA registration valid up to	**31.12.2019**
5.	Nature of the project	Residential plotted colony
6.	DTCP license no.	21 of 2011 dated 24.03.2011
	DTCP license validity status	23.03.2019
	Name of licensee	Mangat Ram and others
7.	Unit no.	D1574GF, Sector/block- D [page 50 of complaint]
8.	Apartment measuring	3674 sq. ft.
9.	Revised area as per statement of accounts dated 20.01.2021	3845 sq. ft.
10.	Date of execution of floor buyer's agreement	**01.05.2013 [page 46 of complaint]**

11.	Payment plan	Construction linked plan [page 76 of complaint]
12.	Total consideration	Rs. 1,98,26,650/- [page 76 of complaint]
13.	Total amount paid by the complainants till date	Rs. 1,67,18,795.59/- [as alleged by the complainant on page 5]
14.	Due date of delivery of possession as per clause *"5.1, Possession of floor Subject to clause 5.2 and further subject to all the buyers of the dwelling units in the said sovereign floors, Escencia, making timely payment, the company shall endeavour to complete the development of residential colony and the dwelling unit as far as possible within 36 months with an extended period of 6 months from the date of execution of this agreement or the date of sanction of the building plan whichever falls later"*	01.05.2016 [NOTE-: As date of sanction of building plan is not placed of record, due date is calculated from the date of agreement i.e. 01.05.2013]
15.	Delay in handing over possession till date of order dated 01.07.2021	5 years 2 months
16.	Part Completion Certificate	Not obtained
17.	Offer of possession	28.12.2020 [page 77 of complaint]

A. Facts of the complaint.

3. The complainants submitted that in the year 2011-12, the respondent has launched a group housing colony in the name and style of "ESENCIA" located at Sector - 67, Golf Course

Extension Road, Gurugram. The respondent was developing independent floors (GG, FF & SF) with 4 BHK pattern on each floor over a piece and parcel of land within Escenia known as "SOVEREIGN FLOORS, ESENCIA".

4. That the project was claimed to be greenest apartments in the NCR. Some of the exclusive features that were promised by the respondent included Green Rating for Integrated Habitat Assessment (GRIHA), incorporate recommendations from ADaRSH, heavy emphasis on green living with abundance of green spaces like hyde park, eco grove, tranquil grove and use of renewable sources of energy, equipped with creche, nursery school, primary school etc

5. That the complainants were looking for a residential apartment/floors in the Delhi NCR and during this time, the representatives of the respondent approached them and informed about the project and made various false and incorrect representations about the construction and delivery of possession. The representatives assured the complainants that the plan have been approved by the DTCP, Haryana and the respondent has obtained all the other requisite sanctions and approvals from all competent authorities for starting constructions at the project site and the construction at the

project site shall start soon. Also, the possession will be delivered in next 3-4 years and promises.

6. That in the month of March 2013, the complainants made an application for booking an independent residential floor in the SOVEREIGN FLOORS in ESENCIA and paid the necessary booking amount. At the time of booking, the complainants opted for construction linked payment plan for payment of total consideration under which the respondent was supposed to demand instalments from the complainants upon start of particular construction/development stage as per the payment plan. The respondent issued an allotment letter dated 30.03.2013 to the complainants whereby the unit bearing no. D1574GF on ground flood of sector/ block admeasuring 3674 sq. ft. was allotted to them.

7. That on 01.05.2013, a floor buyer agreement was executed between the complainants and respondent. Vide the said buyer's agreement, the allotment of the subject unit to the complainants was confirmed for a basic price of Rs. 1,90,00,000/- (Rs. 5171.48/sq. ft.) and the total price after including EDC was Rs. 1,98,26,650/-.

8. That as per the clause 5.1 of the buyer's agreement, the possession of the unit was to be handed over within 36 months

from the date of execution of the floor buyer agreement with an extended period of 6 months. the floor buyer agreement was executed between the parties on 01.05.2013. Therefore, the possession of the unit was to be delivered by 01.05.2016 and maximum by 01.11.2016 (with 6 months grace period after 36 months). The respondent failed to deliver possession by the promised date.

9. That the respondent got the project registered in two phases with the Haryana Real Estate Regulatory Authority at Gurugram vide registration nos. 336 of 2017 dated 27.10.2017 (valid up to 31.12.2019) and 313 of 2017 dated 17.10.2017 (valid up to 31.10.2018).

10. That the complainants have already paid a sum of Rs. 1,67,18,795.59/- to the respondent which is around 85% of the total consideration of Rs. 1,98,26,650/-. But despite paying such huge sum of money to the respondent i.e. 85% of the total consideration, the respondent failed to deliver possession of the unit to the complainants.

11. That after a delay of 4 years 7 months, the respondent sent a letter dated 28.12.2020 offering possession to the complainants with a copy of the final statement of account. As per the final statement of account, the total outstanding

amount of Rs. 37,32,193/- was to be paid by 20.01.2021. It is pertinent to mention that even though the possession was offered, the complainants were not informed whether the respondent have received necessary completion certificate from the competent authority. It is submitted that as per the details available in the website of https://tcpharyana.gov.in/WebAdmin/License/LicenseDetails, the completion/ occupancy certificate has not been issued yet. The complainants have apprehensions that the respondent has not obtained the necessary completion/ occupancy certificate from the competent authority and the offer of possession is sent without obtaining necessary certificates.

12. That upon perusal of the final statement of account, the complainants noted various discrepancies and various charges which were beyond the agreed consideration between the parties. The complainants noted that the respondent has unilaterally and illegally increased the area of the floor by 171 sq. ft. i.e. from 3674 sq. ft. to 3845 sq. ft. and charged an additional sum of Rs. 3,44,736/- (excluding taxes) over and above the agreed consideration from the complainants. Further, apart from the illegal and unilateral increase in area

of the floor, the respondent charged Rs. 59,000/- including GST @18% towards electric meter fitting charges; Rs. 59,000/- including GST @18% towards registration and legal documentation and Rs. 6,45,960/- including GST @18% towards cost of escalation.

13. That it is pertinent to mention that as per the agreement, the possession of the unit was supposed to be delivered by 01.05.2016. However, the possession was offered in 28.12.2020. It is submitted that between 01.05.2016 to 28.12.2020, there were changes in taxation policy in India by the Government and the Goods and Services Tax was implemented with effect from 01.07.2017. Hence, due to deliberate and wilful negligence of the respondent leading to failure in handing over possession within promised time period, the complainants had to suffer further losses due to increase in service tax as well as implementation of GST and had to pay more amount than usual at the time of final payment. Hence the respondent should compensate the complainants by waiving off the GST charged on the outstanding consideration.

14. That it is pertinent to mention that in the final statement of account, the respondent has charged an exorbitant sum of Rs.

6,45,960/- including GST of Rs 69,210/- towards cost of escalation. However, no calculation or basis was given by the respondent for such increase in cost. It is submitted that as per the clause 3.5 of the agreement, the respondent was entitled to charge escalation cost but those escalation in cost were applicable only till date of possession of 01.05.2016 as per the clause 5.1 of the agreement. The respondent was not entitled to charge escalation in cost of construction for any increase after 01.05.2016 i.e. beyond the due date of possession as per the agreement. The respondent should be directed to provide the basis and calculation for charging such exorbitant sum towards cost of escalation.

15. That the complainants also wish to bring it to the kind attention of this hon'ble authority, that for a long and inordinate delay of 4 years 7 months, the respondent has only paid a compensation of Rs. 18,24,753/- to the complainants as penalty for the delay in a case where the complainants have paid Rs. 1,67,07,050/- to the respondent. Even though no basis was given for such compensation, it is assumed that the compensation was paid as per the clause 5.4 of the agreement i.e. Rs. 10 per sq. ft. per month whereas the respondent ought to have compensated the complainants at the same rate (i.e.

18%) at which they charged from the complainants on delayed payment.

16. That in view of the offer of possession being sent without any OC/CC enclosed with it and unit being incomplete and in inhabitable conditions was illegal and invalid. It was being sent with malafide intentions of extract money from the complainants and the alleged adjusted delay compensation being inadequate and unjustified.

17. That the complainants decided not to complete the possession formalities and decided not to make the final payment to the respondent unless the same is demanded after completing the unit in all aspects and as per specifications charged and paid for and making it habitable and payment of compensation as per the Act of 2016. It is pertinent to mention that to date, the respondent has not completed the unit in all aspects and as per specifications charged and paid for.

18. That it is also pertinent to mention that the floor buyer agreement drawn by the respondent is an unfair, one-sided and arbitrary contract. The respondent drew all the provisions in their favour especially those related to the possession, delay compensation etc. and the complainants were denied fair scope of compensation in case of delay of possession and were

burdened with heavy interest rates in case of delay in payment of instalments. That fearing the forfeiture of the entire amount in the event of cancellation of the allotment, the complainants had no other options but to sign on the dotted lines. The unfairness of the agreement can be measured from the clause 4.3 which give right to the respondent to terminate the agreement had the right to accept the delay payment with an interest @18% p.a. / @21% p.a. compounded quarterly whereas as per the clause 5.4(a), in the case of delay in completion of the project, the complainants were entitled to get a compensation @ Rs. 10/- per sq. ft. only for every month of delay beyond prescribed time.

19. That the Hon'ble Supreme Court of India in the matter of ***"Pioneer Urban Land and Infrastructure Limited versus Govindan Raghavan, [Civil Appeal No. 12238/2018]***, after going through one such arbitrary, unfair and one-sided agreement had held such agreements to be one-sided, unfair, and unreasonable and it constitutes unfair trade practice as per section 2 (r) of the Consumer Protection Act, 1986 and the builder cannot seek to bind the buyer with such one-sided contractual terms.

20. That the respondent offered possession after a delay of 4 years 7 months whereas the respondent ought to have delivered possession within reasonable time. It is settled law that the developer cannot expect the buyers to wait endlessly for the possession and that the developers need to complete the contract within a reasonable time period. The delay of 4 years 7 months is no way reasonable. Reliance is placed on the judgment of the hon'ble Supreme Court in ***Fortune Infrastructure and Ors. V. Trevor D'Lima and Ors.*** wherein the hon'ble Supreme Court has held that a time period of 3 years is reasonable time to complete a contract.

21. That the respondent was bound to abide by the provisions & terms and conditions of the agreement and deliver possession of the unit within the time prescribed in the allotment letter. However, the respondent has miserably failed to complete the project and offer legal possession of the booked unit complete in all aspects and free from all encumbrances along with promised amenities within prescribed time-period. It is clear that there is deficiency of service on the part of the respondent in delivering the possession of the unit. Reliance is placed on the judgment of the ***Hon'ble Supreme Court in Lucknow***

Development Authority v. M.K. Gupta [1994 AIR 787, 1994 SCC (1) 243].

22. That the respondent miserably failed to do so and failed to do even after lapse of considerable amount of time after scheduled time. In the meantime, the Government of India increased the service tax rate from 12.36% to 15% (including Swatch Bharat Cess @0.5% and Krishi Kalyan Cess @0.5%) and 01.07.2017 onwards, Service Tax was merged with Goods & Service Tax @18%. Hence, due to deliberate and wilful negligence of the respondent leading to failure in handing over possession within promised time period, the complainants had to suffer further losses due to increase in Service Tax/GST rate as well as imposition of Swatch Bharat Cess and Krishi Kalyan Cess and had to pay more amount than usual at the time of final payment. Hence the respondent should compensate the complainants by paying the extra amount paid in service tax/GST.

23. That there is delay of more than 4 years 7 months (and the physical possession) from the scheduled time. During these 4 year 7 months, the registration of the property by the Government of Haryana have increased and the respondent are solely responsible for the same. In view of the wilful and

deliberate negligence and ignorance of the respondent in completion of the project, the respondent should compensate the complainants and pay the increased registration fees to the appropriate government authorities during the registration of the unit.

24. That the respondent has failed to abide by their promise and failed to deliver the possession of the apartment within the promised time of 01.05.2016 and offered incomplete possession after 4 years 7 months. Therefore, as per the principal of parity and provisions of the Act of 2016 i.e. as per definition of interest in section 2(za), it will be justified if the complainants are compensated by the respondent for the delay in handing over the possession at the rate at which they have been charged for delay in payment of instalments i.e. 18% per annum or at prescribed rate of interest.

B. Relief sought by the complainants

25. The complainants have sought following relief:

a) Direct the respondent to deliver the immediate peaceful possession of the unit as per the specification in the agreement.

b) Direct the respondent to compensate the complainants for the delay in delivery of possession in the form of

interest @18% p.a. on the total amount paid by the complainants from the promised date of delivery (i.e. 01.05.2016) till the actual delivery of physical possession.

c) Direct the respondent to clear all the statutory dues so that the complainants are not held responsible for any unpaid due by the respondent for the unit or the project.

d) Direct the respondent to cancel the offer of possession letter dated 28.12.2020 being incomplete, invalid and illegal.

e) Direct the respondent to cancel/waive off the escalation cost on account of default on the part of the respondent.

f) Direct the respondent to cancel/waive off the increase in super area being illegal and arbitrary along with proportionate increase in electric meter charges etc.

g) Direct the respondent to not to levy any other charges which are not part of the buyer agreement in final demand letter

h) Direct the respondent to issue a fresh statement of account/final demand letter after adjustment of the delay compensation and other compensation as directed by the hon'ble authority, and other illegal charges such

as escalation cost, cost towards increase in area of the unit and all other dues payable by the respondent.

i) Direct the respondent to pay the increased registration fees, if any, between 01.05.2016 till the actual registration of the unit to the complainants.

j) Direct the respondent to refund the increased service tax component from 12.36% to 15% and GST component.

26. The authority issued a notice dated 31.05.2021 of the complaint to the respondent by speed post and also on the give email address at **esenciagrievancesgurgaon@ansalapi.com and ansalapireraharyana@gmail.com**. The delivery reports have been placed in the file. Thereafter, a reminder notice dated 17.06.2021 for filing reply was sent to the respondent on email address at **esenciagrievancesgurgaon@ansalapi.com and ansalapireraharyana@gmail.com**. Despite service of notice, the respondent has preferred neither to put in appearance nor file reply to the complaint within the stipulated period. Accordingly, the authority is left with no other option but to decide the complaint ex-parte against the respondent.

27. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided based on these undisputed documents and submission made by the complainants.

C. Jurisdiction of the authority

28. The authority has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

C.I Territorial jurisdiction

29. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. 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.

C.II Subject matter jurisdiction

The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as per the provisions of section 11(4) (a) of the act

of 2016 leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

D. Findings on the relief sought by the complainants

D.I Admissibility of delayed possession charges

Direct the respondent to compensate the complainants for the delay in delivery of possession in the form of interest @18% p.a. on the total amount paid by the complainants from the promised date of delivery (i.e. 01.05.2016) till the actual delivery of physical possession.

30. In the present complaint, the complainants intends to continue with the project and is seeking delayed 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 allottees 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."*

31. Clause (5.1) of the flat buyer agreement (in short, agreement) provides for handing over of possession and is reproduced below: -

"5.1, Possession of floor
Subject to clause 5.2 and further subject to all the buyers of the dwelling units in the said sovereign floors, Escencia, making timely payment, the company shall endeavour to complete the development of residential colony and the dwelling unit as far as possible within 36 months with an extended period of 6 months from the date of execution of this agreement or the date of sanction of the building plan whichever falls later"

32. 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 application, 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 favour 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 flat buyer agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottees of his right accruing after

delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottees is left with no option but to sign on the dotted lines.

33. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the flat within 36 months, with an extended period of 6 months, from the date of execution of this agreement or from the date of sanction of the building plan whichever falls later. The respondent has not stated any reason as to justification of the grace period. However, the respondent has neither obtained the required sanction nor offered the valid possession. Moreover, in the present case as per the averments of the complainants, possession of the subject unit is offered without obtaining required sanctions and has also chosen not to file any reply. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 6 months cannot be allowed to the promoter at this stage.

34. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges at the rate of 18% p.a. however, Proviso to section 18 provides that where an allottees 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.*

35. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.

36. Consequently, as per website of the State Bank of India i.e., https://sbi.co.in, the marginal cost of lending rate (in short, MCLR) as on date i.e., **01.07.2021** is 7.30%. Accordingly, the

prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

37. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottees by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottees, in case of default. The relevant section is reproduced below:

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

38. 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.

D.II Liability to pay increased registration fees

39. The complainants have raised the plea that the respondent be directed to pay the increased registration fees, if any, between 01.05.2016 till the actual registration of the unit to the complainants. As per buyer's agreement dated 01.05.2013, the respondent-builder was required to complete construction of the project of the allotted unit within a period of 36 months from the date of agreement i.e. 01.05.2013. The due date of handing over possession comes out to be 01.05.2016. But the subject unit was not delivered within the stipulated period and rather, the respondent offered the possession of the unit on 28.12.2020 without obtaining the required sanctions and thus it cannot be said a valid possession. If the possession of the allotted unit had been offered within the stipulated period as per buyer's agreement, then the allottees would not have been burdened with additional liability.

40. It is observed that clause 6.2 of the buyer's agreement dated 01.05.2013 provides for execution of sale deed in favor of an allottees within 6 months from the date of receipt of occupation certificate. The relevant clause of the buyer's agreement reads under:

> *"6.2. OWNERSHIP AND TRANSFER*
> *That all costs, charges and expenses towards execution of sale deed/ conveyance deed including any duties, taxes, or other*

additional or related charges, if any, payable under law or demanded by any government authority/ officials shall be paid and borne by the buyer only.

41. It is specifically provided in the aforesaid clause that costs, charges and expenses towards execution of sale deed/ conveyance deed including any duties, taxes, or other additional or related charges, will be borne by the allottees in addition to the total sale consideration of the unit. It is important to note that the state government collects stamp duty to validate the registration agreement. A registration document with a stamp duty paid on it acts as a legal document to prove the ownership of the property in the court. Without paying stamp duty charges, one cannot claim the property to be his/her own legally. Thus, it is very important to pay the full stamp duty charge. A stamp duty is a mandatory payment and usually has to be borne by the buyer. So, as per the stipulation as agreed upon between the parties at the time of execution of buyer's agreement, the complainants-allottees is liable to get the conveyance deed/ sale deed executed on payment of the requisite stamp duty charges at the rate applicable on the date of registration as per the policy of the state government.

D.III Whether increase in the super area is justified without giving any justification?

42. The complainants in the complaint contended that the respondent increased the super area along with proportionate increase in electric meter charges and other charges which are illegal and arbitrary. The super area of the floor has been increased from 3674 sq. ft. to 3845 sq. ft. In this context, a reference be made to clause no. 2.3 of the FBA which is reproduced below:

> *"Clause 2.3*
> *The Buyer agrees and understands that the Plans and Specifications of Sovereign Floors, Esencia, which includes the Dwelling Unit drawn up by the Company are tentative and are subject to change, if deemed necessary in the interest of Sovereign Floors, Esencia by the Company at its sole discretion, or as may be required by the relevant governmental authorities including but not limited to the DTCP, and the Company shall be entitled to effect such suitable alterations in the lay out plan, as may be required in accordance therewith, including changes in the area, location and distinct number of the Dwelling Unit. In regard to the suitability of such changes the opinion of the Company and its architects shall be final and binding on the Buyer. Further, the Buyer undertakes that if as a consequence of such changes, there is any increase/decrease in the area of the Dwelling Unit or the Dwelling Unit becomes preferentially located, revised price and/or applicable Preferential Location Charges (PLC") shall be payable and/or adjustable (without any interest accruing thereon) from the original price at which the Dwelling Unit has been booked for allotment by the Buyer. In the eventuality of the Plans being revised, the charges towards basic sale price and other charges for area of increase/ decrease upto 10% shall be payable/ adjustable at the rate agreed hereto while the charges towards basic sale price and other charges for area of increase/ decrease beyond 10 % shall be payable/ adjustable at the then prevailing company's price."*

From the bare perusal of clause 2.3 of the FBA, it becomes very clear that the area described herein was tentative and subject

to change till the completion of the construction of the project. The complainants have also been made to understand and agreed to the super area mentioned in the FBA, only a tentative area which was subject to alteration till the completion of the construction of the floor.

43. In a judgement passed by the NCDRC in ***Capital Greens Flat Buyer Association Vs. DLF Universal Limited & Anr.*** along with connected matters on 03.01.2020, the commission held that the additional demand on account of increase in the super area, has been restricted to 15% of the super area as stated in the agreements, is justified and the relevant paras are reproduced as under:

> *In terms of Annexure-II of the Agreements executed between the developer and the allottees, the price of the apartments was to be calculated on the basis of its super area. It was also noted in the above referred clause that the super area mentioned in clause 1.1 was only tentative and could change. The allottees had agreed not to object to the change of the super area. However, if the super area was to increase/decrease by more than 15% on account of any alteration/modification/change, the allottees were required to be intimated in writing before carrying out the proposed change and had an option to take refund of the payment which they had made to the developer along with interest.*
>
> *The super area in terms of Annexure-II of the Agreements was to consist of the apartment area, pro-rata share of the common areas of the building and pro-rata share of other common areas outside the building, as defined therein.*
>
> *14. In the project subject matter of these complaints, the developer has not sought additional payment for increase in the super area beyond 15%. Therefore, no prior notice to the*

allottees was required before increasing the super area and to the extent there has been actual increase in the super area, as defined in Annexure-II of the Agreements, the allottees are required to pay for such an increase. The allottees had also agreed that not only the super area but even the percentage of the apartment area to the super area could change and they would have no objection to change of the said ratio, though the case of the OP is that the ratio has not changed and the same continues to be 78.5% of the super area.

Therefore, I have no hesitation in holding that the additional demand on account of increase in the super area, which has been restricted to 15% of the super area stated in the agreements, is justified. Though, the ratio of the apartment area to the super area could also change, it is stated in the affidavit of Mr. Mukul Gupta that the final percentage of the apartment area to the super area of the apartment is not less than 78.5% and there is no material to the contrary filed by the allottees. Therefore, I find no justification in the grievance with respect to the demand on account of increase in the super area of the apartments

37. For the reasons stated hereinabove, the complaints are disposed of with the following directions:

(0) The OP is entitled to the additional demand on account of increase in the super area of the apartments.....

The said judgement of NCDRC was upheld by the Supreme Court vide judgment dated 14.12.2020 in a civil appeal no. 3864-3889/2020 filed by ***DLF Home Developers Ltd. vs. Capital Greens Flat Buyers Association.***

44. There is no harm in charging for the extra area, if justifiable, at the final stage. But for the sake of transparency, the respondent must share the calculations for increase in the super area based on the comparison of the originally approved building plans and finally approved building plans. The premise behind this is that the allottees must know the change

in the finally approved lay-out and areas of common spaces viz-a-viz the originally approved lay out plans and common areas.

45. The authority therefore opines that until the justification/basis is given by the promoter for increase in super area, the promoter is not entitled for payment of any excess super area over and above what has been initially mentioned in the floor buyer agreement, least in the circumstances where such demand has been raised by the builder without giving supporting documents and justification. The Act has made it compulsory for the builders/developers to indicate the carpet area of the floor, and the problem of super area has been addressed but regarding on-going projects where builder buyer agreements were entered into prior to coming into force of the Act of 2016, the same are to be examined on case-to-case basis.

46. In view of the above discussion, the authority holds that the demand for extra payment on account of increase in the super area from 3674 sq. ft. to 3845 sq. ft. by the promoter is subject to condition that before raising such demand, details have to be given to the allottees. In the present case, the respondent didn't take any pain to intimate the complainants and give the

justification of such increase. Thus, the promoter/respondent shall not be allowed to charge such extra demand on account of increase in super area of the subject unit concerned.

47. On consideration of the documents available on record and submissions made regarding contravention of provisions of the Act, 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 5.1 of the agreement executed between the parties on 01.05.2013, the possession of the subject apartment was to be delivered within 36 months from the date of commencement of agreement i.e. 01.05.2013. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over possession is 01.05.2016. The respondent has failed to handover the valid possession of the subject floor till date of this order. Accordingly, it is the failure of the respondent/promoter to fulfil their obligations and responsibilities as per the agreement to hand over the possession within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with proviso to section 18(1) of the Act on the part of the

respondent is established. As such the allottees shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 01.05.2016 till the handing over of the possession, at prescribed rate i.e., 9.30 % p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules.

E. Directions of the authority

48. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligations casted upon the promoter as per the functions 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., 01.05.2016 till the date of handing over of possession after obtaining part completion certificate.

ii. The arrears of such interest accrued so shall be paid by the promoter to the allottees within a period of 90 days from date of this order and interest for every month of delay shall be paid by the promoter to the allottees before 10th of the subsequent month as per rule 16(2) of the rules.

iii. The promoter is directed to furnish to the allottees statement of account within one month of issue of this order. If there is any objection by the allottees on statement of account, the same be filed with promoter after fifteen days thereafter. In case the grievance of the allottees relating to statement of account is not settled by the promoter within 15 days thereafter then the allottees may approach the authority by filing separate application.

iv. The respondent is directed to not to charge anything from the complainant on the account of increase in super area and on account of parking charges, which are not duly intimated and specified under said agreement.

v. The respondent shall not charge anything from the complainant which is not the part of the agreement.

vi. The complainants shall pay the stamp duty charges/ registration charges at the relevant rates.

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

viii. 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.

49. Complaint stands disposed of.

50. File be consigned to registry.

(Samir Kumar)
Member

(Vijay Kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 01.07.2021

Judgement uploaded on 28.10.2021.

Corrected vide order dated 29.08.2022 qua to 02.09.2022

HARERA
GURUGRAM

Complaint No.1153 of 2021

BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**:**	**1153 of 2021**
First date of hearing:		**01.07.2021**
Date of decision	**:**	**01.07.2021**

1. Mr. Aseem Ahuja
2. Mrs. Varsha Ahuja

Both RR/o- E-37, 1st floor, Hauz khas, New Delhi **Complainants**

Versus

M/s New look Builders and Developers Private Ltd. earlier known as M/s Ansal Phalak Infrastructure Pvt. Ltd. qua to 21/9/2022

Office at- 1202 Antriksh Bhawan 16, Kasturba Gandhi Marg, New Delhi-110001 **Respondent**

CORAM:

Dr. K.K. Khandelwal	**Chairman**
Shri Samir Kumar	**Member**
Shri Vijay Kumar Goyal	**Member**

APPEARANCE:

Sh. Rijumani Taluakdar	Advocate for the complainants
None	Advocate for the respondent

Ex-PARTE ORDER

1. The present complaint dated 10.03.2021 has been filed by the complainants/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and

Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions to the allottees as per the flat buyer's agreement executed inter se them.

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

1.	Name and location of the project	"Esencia", Sector-67A, Gurugram
2.	Project area	28.556 acres
3.	RERA Registered/ not registered.	**Registered vide registration no. 336 of 2017 dated 27.10.2017**
4.	RERA registration valid up to	**31.12.2019**
5.	Nature of the project	Residential plotted colony
6.	DTCP license no.	21 of 2011 dated 24.03.2011
	DTCP license validity status	23.03.2019
	Name of licensee	Mangat Ram and others
7.	Unit no.	D1574GF, Sector/block- D [page 50 of complaint]
8.	Apartment measuring	3674 sq. ft.
9.	Revised area as per statement of accounts dated 20.01.2021	3845 sq. ft.
10.	Date of execution of floor buyer's agreement	**01.05.2013 [page 46 of complaint]**

11.	Payment plan	Construction linked plan [page 76 of complaint]
12.	Total consideration	Rs. 1,98,26,650/- [page 76 of complaint]
13.	Total amount paid by the complainants till date	Rs. 1,67,18,795.59/- [as alleged by the complainant on page 5]
14.	Due date of delivery of possession as per clause *"5.1, Possession of floor Subject to clause 5.2 and further subject to all the buyers of the dwelling units in the said sovereign floors, Escencia, making timely payment, the company shall endeavour to complete the development of residential colony and the dwelling unit as far as possible within 36 months with an extended period of 6 months from the date of execution of this agreement or the date of sanction of the building plan whichever falls later"*	01.05.2016 [NOTE-: As date of sanction of building plan is not placed of record, due date is calculated from the date of agreement i.e. 01.05.2013]
15.	Delay in handing over possession till date of order dated 01.07.2021	5 years 2 months
16.	Part Completion Certificate	Not obtained
17.	Offer of possession	28.12.2020 [page 77 of complaint]

A. Facts of the complaint.

3. The complainants submitted that in the year 2011-12, the respondent has launched a group housing colony in the name and style of "ESENCIA" located at Sector - 67, Golf Course

Extension Road, Gurugram. The respondent was developing independent floors (GG, FF & SF) with 4 BHK pattern on each floor over a piece and parcel of land within Escenia known as "SOVEREIGN FLOORS, ESENCIA".

4. That the project was claimed to be greenest apartments in the NCR. Some of the exclusive features that were promised by the respondent included Green Rating for Integrated Habitat Assessment (GRIHA), incorporate recommendations from ADaRSH, heavy emphasis on green living with abundance of green spaces like hyde park, eco grove, tranquil grove and use of renewable sources of energy, equipped with creche, nursery school, primary school etc

5. That the complainants were looking for a residential apartment/floors in the Delhi NCR and during this time, the representatives of the respondent approached them and informed about the project and made various false and incorrect representations about the construction and delivery of possession. The representatives assured the complainants that the plan have been approved by the DTCP, Haryana and the respondent has obtained all the other requisite sanctions and approvals from all competent authorities for starting constructions at the project site and the construction at the

project site shall start soon. Also, the possession will be delivered in next 3-4 years and promises.

6. That in the month of March 2013, the complainants made an application for booking an independent residential floor in the SOVEREIGN FLOORS in ESENCIA and paid the necessary booking amount. At the time of booking, the complainants opted for construction linked payment plan for payment of total consideration under which the respondent was supposed to demand instalments from the complainants upon start of particular construction/development stage as per the payment plan. The respondent issued an allotment letter dated 30.03.2013 to the complainants whereby the unit bearing no. D1574GF on ground flood of sector/ block admeasuring 3674 sq. ft. was allotted to them.

7. That on 01.05.2013, a floor buyer agreement was executed between the complainants and respondent. Vide the said buyer's agreement, the allotment of the subject unit to the complainants was confirmed for a basic price of Rs. 1,90,00,000/- (Rs. 5171.48/sq. ft.) and the total price after including EDC was Rs. 1,98,26,650/-.

8. That as per the clause 5.1 of the buyer's agreement, the possession of the unit was to be handed over within 36 months

from the date of execution of the floor buyer agreement with an extended period of 6 months. the floor buyer agreement was executed between the parties on 01.05.2013. Therefore, the possession of the unit was to be delivered by 01.05.2016 and maximum by 01.11.2016 (with 6 months grace period after 36 months). The respondent failed to deliver possession by the promised date.

9. That the respondent got the project registered in two phases with the Haryana Real Estate Regulatory Authority at Gurugram vide registration nos. 336 of 2017 dated 27.10.2017 (valid up to 31.12.2019) and 313 of 2017 dated 17.10.2017 (valid up to 31.10.2018).

10. That the complainants have already paid a sum of Rs. 1,67,18,795.59/- to the respondent which is around 85% of the total consideration of Rs. 1,98,26,650/-. But despite paying such huge sum of money to the respondent i.e. 85% of the total consideration, the respondent failed to deliver possession of the unit to the complainants.

11. That after a delay of 4 years 7 months, the respondent sent a letter dated 28.12.2020 offering possession to the complainants with a copy of the final statement of account. As per the final statement of account, the total outstanding

amount of Rs. 37,32,193/- was to be paid by 20.01.2021. It is pertinent to mention that even though the possession was offered, the complainants were not informed whether the respondent have received necessary completion certificate from the competent authority. It is submitted that as per the details available in the website of https://tcpharyana.gov.in/WebAdmin/License/LicenseDetails, the completion/ occupancy certificate has not been issued yet. The complainants have apprehensions that the respondent has not obtained the necessary completion/ occupancy certificate from the competent authority and the offer of possession is sent without obtaining necessary certificates.

12. That upon perusal of the final statement of account, the complainants noted various discrepancies and various charges which were beyond the agreed consideration between the parties. The complainants noted that the respondent has unilaterally and illegally increased the area of the floor by 171 sq. ft. i.e. from 3674 sq. ft. to 3845 sq. ft. and charged an additional sum of Rs. 3,44,736/- (excluding taxes) over and above the agreed consideration from the complainants. Further, apart from the illegal and unilateral increase in area

of the floor, the respondent charged Rs. 59,000/- including GST @18% towards electric meter fitting charges; Rs. 59,000/- including GST @18% towards registration and legal documentation and Rs. 6,45,960/- including GST @18% towards cost of escalation.

13. That it is pertinent to mention that as per the agreement, the possession of the unit was supposed to be delivered by 01.05.2016. However, the possession was offered in 28.12.2020. It is submitted that between 01.05.2016 to 28.12.2020, there were changes in taxation policy in India by the Government and the Goods and Services Tax was implemented with effect from 01.07.2017. Hence, due to deliberate and wilful negligence of the respondent leading to failure in handing over possession within promised time period, the complainants had to suffer further losses due to increase in service tax as well as implementation of GST and had to pay more amount than usual at the time of final payment. Hence the respondent should compensate the complainants by waiving off the GST charged on the outstanding consideration.

14. That it is pertinent to mention that in the final statement of account, the respondent has charged an exorbitant sum of Rs.

6,45,960/- including GST of Rs 69,210/- towards cost of escalation. However, no calculation or basis was given by the respondent for such increase in cost. It is submitted that as per the clause 3.5 of the agreement, the respondent was entitled to charge escalation cost but those escalation in cost were applicable only till date of possession of 01.05.2016 as per the clause 5.1 of the agreement. The respondent was not entitled to charge escalation in cost of construction for any increase after 01.05.2016 i.e. beyond the due date of possession as per the agreement. The respondent should be directed to provide the basis and calculation for charging such exorbitant sum towards cost of escalation.

15. That the complainants also wish to bring it to the kind attention of this hon'ble authority, that for a long and inordinate delay of 4 years 7 months, the respondent has only paid a compensation of Rs. 18,24,753/- to the complainants as penalty for the delay in a case where the complainants have paid Rs. 1,67,07,050/- to the respondent. Even though no basis was given for such compensation, it is assumed that the compensation was paid as per the clause 5.4 of the agreement i.e. Rs. 10 per sq. ft. per month whereas the respondent ought to have compensated the complainants at the same rate (i.e.

18%) at which they charged from the complainants on delayed payment.

16. That in view of the offer of possession being sent without any OC/CC enclosed with it and unit being incomplete and in inhabitable conditions was illegal and invalid. It was being sent with malafide intentions of extract money from the complainants and the alleged adjusted delay compensation being inadequate and unjustified.

17. That the complainants decided not to complete the possession formalities and decided not to make the final payment to the respondent unless the same is demanded after completing the unit in all aspects and as per specifications charged and paid for and making it habitable and payment of compensation as per the Act of 2016. It is pertinent to mention that to date, the respondent has not completed the unit in all aspects and as per specifications charged and paid for.

18. That it is also pertinent to mention that the floor buyer agreement drawn by the respondent is an unfair, one-sided and arbitrary contract. The respondent drew all the provisions in their favour especially those related to the possession, delay compensation etc. and the complainants were denied fair scope of compensation in case of delay of possession and were

burdened with heavy interest rates in case of delay in payment of instalments. That fearing the forfeiture of the entire amount in the event of cancellation of the allotment, the complainants had no other options but to sign on the dotted lines. The unfairness of the agreement can be measured from the clause 4.3 which give right to the respondent to terminate the agreement had the right to accept the delay payment with an interest @18% p.a. / @21% p.a. compounded quarterly whereas as per the clause 5.4(a), in the case of delay in completion of the project, the complainants were entitled to get a compensation @ Rs. 10/- per sq. ft. only for every month of delay beyond prescribed time.

19. That the Hon'ble Supreme Court of India in the matter of ***"Pioneer Urban Land and Infrastructure Limited versus Govindan Raghavan, [Civil Appeal No. 12238/2018]***, after going through one such arbitrary, unfair and one-sided agreement had held such agreements to be one-sided, unfair, and unreasonable and it constitutes unfair trade practice as per section 2 (r) of the Consumer Protection Act, 1986 and the builder cannot seek to bind the buyer with such one-sided contractual terms.

20. That the respondent offered possession after a delay of 4 years 7 months whereas the respondent ought to have delivered possession within reasonable time. It is settled law that the developer cannot expect the buyers to wait endlessly for the possession and that the developers need to complete the contract within a reasonable time period. The delay of 4 years 7 months is no way reasonable. Reliance is placed on the judgment of the hon'ble Supreme Court in ***Fortune Infrastructure and Ors. V. Trevor D'Lima and Ors.*** wherein the hon'ble Supreme Court has held that a time period of 3 years is reasonable time to complete a contract.

21. That the respondent was bound to abide by the provisions & terms and conditions of the agreement and deliver possession of the unit within the time prescribed in the allotment letter. However, the respondent has miserably failed to complete the project and offer legal possession of the booked unit complete in all aspects and free from all encumbrances along with promised amenities within prescribed time-period. It is clear that there is deficiency of service on the part of the respondent in delivering the possession of the unit. Reliance is placed on the judgment of the ***Hon'ble Supreme Court in Lucknow***

Development Authority v. M.K. Gupta [1994 AIR 787, 1994 SCC (1) 243].

22. That the respondent miserably failed to do so and failed to do even after lapse of considerable amount of time after scheduled time. In the meantime, the Government of India increased the service tax rate from 12.36% to 15% (including Swatch Bharat Cess @0.5% and Krishi Kalyan Cess @0.5%) and 01.07.2017 onwards, Service Tax was merged with Goods & Service Tax @18%. Hence, due to deliberate and wilful negligence of the respondent leading to failure in handing over possession within promised time period, the complainants had to suffer further losses due to increase in Service Tax/GST rate as well as imposition of Swatch Bharat Cess and Krishi Kalyan Cess and had to pay more amount than usual at the time of final payment. Hence the respondent should compensate the complainants by paying the extra amount paid in service tax/GST.

23. That there is delay of more than 4 years 7 months (and the physical possession) from the scheduled time. During these 4 year 7 months, the registration of the property by the Government of Haryana have increased and the respondent are solely responsible for the same. In view of the wilful and

deliberate negligence and ignorance of the respondent in completion of the project, the respondent should compensate the complainants and pay the increased registration fees to the appropriate government authorities during the registration of the unit.

24. That the respondent has failed to abide by their promise and failed to deliver the possession of the apartment within the promised time of 01.05.2016 and offered incomplete possession after 4 years 7 months. Therefore, as per the principal of parity and provisions of the Act of 2016 i.e. as per definition of interest in section 2(za), it will be justified if the complainants are compensated by the respondent for the delay in handing over the possession at the rate at which they have been charged for delay in payment of instalments i.e. 18% per annum or at prescribed rate of interest.

B. Relief sought by the complainants

25. The complainants have sought following relief:

a) Direct the respondent to deliver the immediate peaceful possession of the unit as per the specification in the agreement.

b) Direct the respondent to compensate the complainants for the delay in delivery of possession in the form of

interest @18% p.a. on the total amount paid by the complainants from the promised date of delivery (i.e. 01.05.2016) till the actual delivery of physical possession.

c) Direct the respondent to clear all the statutory dues so that the complainants are not held responsible for any unpaid due by the respondent for the unit or the project.

d) Direct the respondent to cancel the offer of possession letter dated 28.12.2020 being incomplete, invalid and illegal.

e) Direct the respondent to cancel/waive off the escalation cost on account of default on the part of the respondent.

f) Direct the respondent to cancel/waive off the increase in super area being illegal and arbitrary along with proportionate increase in electric meter charges etc.

g) Direct the respondent to not to levy any other charges which are not part of the buyer agreement in final demand letter

h) Direct the respondent to issue a fresh statement of account/final demand letter after adjustment of the delay compensation and other compensation as directed by the hon'ble authority, and other illegal charges such

as escalation cost, cost towards increase in area of the unit and all other dues payable by the respondent.

i) Direct the respondent to pay the increased registration fees, if any, between 01.05.2016 till the actual registration of the unit to the complainants.

j) Direct the respondent to refund the increased service tax component from 12.36% to 15% and GST component.

26. The authority issued a notice dated 31.05.2021 of the complaint to the respondent by speed post and also on the give email address at **esenciagrievancesgurgaon@ansalapi.com and ansalapireraharyana@gmail.com**. The delivery reports have been placed in the file. Thereafter, a reminder notice dated 17.06.2021 for filing reply was sent to the respondent on email address at **esenciagrievancesgurgaon@ansalapi.com and ansalapireraharyana@gmail.com**. Despite service of notice, the respondent has preferred neither to put in appearance nor file reply to the complaint within the stipulated period. Accordingly, the authority is left with no other option but to decide the complaint ex-parte against the respondent.

27. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided based on these undisputed documents and submission made by the complainants.

C. Jurisdiction of the authority

28. The authority has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

C.I Territorial jurisdiction

29. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. 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.

C.II Subject matter jurisdiction

The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as per the provisions of section 11(4) (a) of the act

of 2016 leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

D. Findings on the relief sought by the complainants

D.I Admissibility of delayed possession charges

Direct the respondent to compensate the complainants for the delay in delivery of possession in the form of interest @18% p.a. on the total amount paid by the complainants from the promised date of delivery (i.e. 01.05.2016) till the actual delivery of physical possession.

30. In the present complaint, the complainants intends to continue with the project and is seeking delayed 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 allottees 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."*

31. Clause (5.1) of the flat buyer agreement (in short, agreement) provides for handing over of possession and is reproduced below: -

"5.1, Possession of floor
Subject to clause 5.2 and further subject to all the buyers of the dwelling units in the said sovereign floors, Escencia, making timely payment, the company shall endeavour to complete the development of residential colony and the dwelling unit as far as possible within 36 months with an extended period of 6 months from the date of execution of this agreement or the date of sanction of the building plan whichever falls later"

32. 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 application, 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 favour 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 flat buyer agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottees of his right accruing after

delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottees is left with no option but to sign on the dotted lines.

33. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the flat within 36 months, with an extended period of 6 months, from the date of execution of this agreement or from the date of sanction of the building plan whichever falls later. The respondent has not stated any reason as to justification of the grace period. However, the respondent has neither obtained the required sanction nor offered the valid possession. Moreover, in the present case as per the averments of the complainants, possession of the subject unit is offered without obtaining required sanctions and has also chosen not to file any reply. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 6 months cannot be allowed to the promoter at this stage.

34. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges at the rate of 18% p.a. however, Proviso to section 18 provides that where an allottees 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.*

35. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.

36. Consequently, as per website of the State Bank of India i.e., https://sbi.co.in, the marginal cost of lending rate (in short, MCLR) as on date i.e., **01.07.2021** is 7.30%. Accordingly, the

prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

37. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottees by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottees, in case of default. The relevant section is reproduced below:

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

38. 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.

D.II Liability to pay increased registration fees

39. The complainants have raised the plea that the respondent be directed to pay the increased registration fees, if any, between 01.05.2016 till the actual registration of the unit to the complainants. As per buyer's agreement dated 01.05.2013, the respondent-builder was required to complete construction of the project of the allotted unit within a period of 36 months from the date of agreement i.e. 01.05.2013. The due date of handing over possession comes out to be 01.05.2016. But the subject unit was not delivered within the stipulated period and rather, the respondent offered the possession of the unit on 28.12.2020 without obtaining the required sanctions and thus it cannot be said a valid possession. If the possession of the allotted unit had been offered within the stipulated period as per buyer's agreement, then the allottees would not have been burdened with additional liability.

40. It is observed that clause 6.2 of the buyer's agreement dated 01.05.2013 provides for execution of sale deed in favor of an allottees within 6 months from the date of receipt of occupation certificate. The relevant clause of the buyer's agreement reads under:

> *"6.2. OWNERSHIP AND TRANSFER*
> *That all costs, charges and expenses towards execution of sale deed/ conveyance deed including any duties, taxes, or other*

additional or related charges, if any, payable under law or demanded by any government authority/ officials shall be paid and borne by the buyer only.

41. It is specifically provided in the aforesaid clause that costs, charges and expenses towards execution of sale deed/ conveyance deed including any duties, taxes, or other additional or related charges, will be borne by the allottees in addition to the total sale consideration of the unit. It is important to note that the state government collects stamp duty to validate the registration agreement. A registration document with a stamp duty paid on it acts as a legal document to prove the ownership of the property in the court. Without paying stamp duty charges, one cannot claim the property to be his/her own legally. Thus, it is very important to pay the full stamp duty charge. A stamp duty is a mandatory payment and usually has to be borne by the buyer. So, as per the stipulation as agreed upon between the parties at the time of execution of buyer's agreement, the complainants-allottees is liable to get the conveyance deed/ sale deed executed on payment of the requisite stamp duty charges at the rate applicable on the date of registration as per the policy of the state government.

D.III Whether increase in the super area is justified without giving any justification?

42. The complainants in the complaint contended that the respondent increased the super area along with proportionate increase in electric meter charges and other charges which are illegal and arbitrary. The super area of the floor has been increased from 3674 sq. ft. to 3845 sq. ft. In this context, a reference be made to clause no. 2.3 of the FBA which is reproduced below:

> *"Clause 2.3*
> *The Buyer agrees and understands that the Plans and Specifications of Sovereign Floors, Esencia, which includes the Dwelling Unit drawn up by the Company are tentative and are subject to change, if deemed necessary in the interest of Sovereign Floors, Esencia by the Company at its sole discretion, or as may be required by the relevant governmental authorities including but not limited to the DTCP, and the Company shall be entitled to effect such suitable alterations in the lay out plan, as may be required in accordance therewith, including changes in the area, location and distinct number of the Dwelling Unit. In regard to the suitability of such changes the opinion of the Company and its architects shall be final and binding on the Buyer. Further, the Buyer undertakes that if as a consequence of such changes, there is any increase/decrease in the area of the Dwelling Unit or the Dwelling Unit becomes preferentially located, revised price and/or applicable Preferential Location Charges (PLC") shall be payable and/or adjustable (without any interest accruing thereon) from the original price at which the Dwelling Unit has been booked for allotment by the Buyer. In the eventuality of the Plans being revised, the charges towards basic sale price and other charges for area of increase/ decrease upto 10% shall be payable/ adjustable at the rate agreed hereto while the charges towards basic sale price and other charges for area of increase/ decrease beyond 10 % shall be payable/ adjustable at the then prevailing company's price."*

From the bare perusal of clause 2.3 of the FBA, it becomes very clear that the area described herein was tentative and subject

to change till the completion of the construction of the project. The complainants have also been made to understand and agreed to the super area mentioned in the FBA, only a tentative area which was subject to alteration till the completion of the construction of the floor.

43. In a judgement passed by the NCDRC in ***Capital Greens Flat Buyer Association Vs. DLF Universal Limited & Anr.*** along with connected matters on 03.01.2020, the commission held that the additional demand on account of increase in the super area, has been restricted to 15% of the super area as stated in the agreements, is justified and the relevant paras are reproduced as under:

> *In terms of Annexure-II of the Agreements executed between the developer and the allottees, the price of the apartments was to be calculated on the basis of its super area. It was also noted in the above referred clause that the super area mentioned in clause 1.1 was only tentative and could change. The allottees had agreed not to object to the change of the super area. However, if the super area was to increase/decrease by more than 15% on account of any alteration/modification/change, the allottees were required to be intimated in writing before carrying out the proposed change and had an option to take refund of the payment which they had made to the developer along with interest.*
>
> *The super area in terms of Annexure-II of the Agreements was to consist of the apartment area, pro-rata share of the common areas of the building and pro-rata share of other common areas outside the building, as defined therein.*
>
> *14. In the project subject matter of these complaints, the developer has not sought additional payment for increase in the super area beyond 15%. Therefore, no prior notice to the*

allottees was required before increasing the super area and to the extent there has been actual increase in the super area, as defined in Annexure-II of the Agreements, the allottees are required to pay for such an increase. The allottees had also agreed that not only the super area but even the percentage of the apartment area to the super area could change and they would have no objection to change of the said ratio, though the case of the OP is that the ratio has not changed and the same continues to be 78.5% of the super area.

Therefore, I have no hesitation in holding that the additional demand on account of increase in the super area, which has been restricted to 15% of the super area stated in the agreements, is justified. Though, the ratio of the apartment area to the super area could also change, it is stated in the affidavit of Mr. Mukul Gupta that the final percentage of the apartment area to the super area of the apartment is not less than 78.5% and there is no material to the contrary filed by the allottees. Therefore, I find no justification in the grievance with respect to the demand on account of increase in the super area of the apartments

37. For the reasons stated hereinabove, the complaints are disposed of with the following directions:

(0) The OP is entitled to the additional demand on account of increase in the super area of the apartments.....

The said judgement of NCDRC was upheld by the Supreme Court vide judgment dated 14.12.2020 in a civil appeal no. 3864-3889/2020 filed by ***DLF Home Developers Ltd. vs. Capital Greens Flat Buyers Association.***

44. There is no harm in charging for the extra area, if justifiable, at the final stage. But for the sake of transparency, the respondent must share the calculations for increase in the super area based on the comparison of the originally approved building plans and finally approved building plans. The premise behind this is that the allottees must know the change

in the finally approved lay-out and areas of common spaces viz-a-viz the originally approved lay out plans and common areas.

45. The authority therefore opines that until the justification/basis is given by the promoter for increase in super area, the promoter is not entitled for payment of any excess super area over and above what has been initially mentioned in the floor buyer agreement, least in the circumstances where such demand has been raised by the builder without giving supporting documents and justification. The Act has made it compulsory for the builders/developers to indicate the carpet area of the floor, and the problem of super area has been addressed but regarding on-going projects where builder buyer agreements were entered into prior to coming into force of the Act of 2016, the same are to be examined on case-to-case basis.

46. In view of the above discussion, the authority holds that the demand for extra payment on account of increase in the super area from 3674 sq. ft. to 3845 sq. ft. by the promoter is subject to condition that before raising such demand, details have to be given to the allottees. In the present case, the respondent didn't take any pain to intimate the complainants and give the

justification of such increase. Thus, the promoter/respondent shall not be allowed to charge such extra demand on account of increase in super area of the subject unit concerned.

47. On consideration of the documents available on record and submissions made regarding contravention of provisions of the Act, 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 5.1 of the agreement executed between the parties on 01.05.2013, the possession of the subject apartment was to be delivered within 36 months from the date of commencement of agreement i.e. 01.05.2013. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over possession is 01.05.2016. The respondent has failed to handover the valid possession of the subject floor till date of this order. Accordingly, it is the failure of the respondent/promoter to fulfil their obligations and responsibilities as per the agreement to hand over the possession within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with proviso to section 18(1) of the Act on the part of the

respondent is established. As such the allottees shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 01.05.2016 till the handing over of the possession, at prescribed rate i.e., 9.30 % p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules.

E. Directions of the authority

48. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligations casted upon the promoter as per the functions 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., 01.05.2016 till the date of handing over of possession after obtaining part completion certificate.

ii. The arrears of such interest accrued so shall be paid by the promoter to the allottees within a period of 90 days from date of this order and interest for every month of delay shall be paid by the promoter to the allottees before 10th of the subsequent month as per rule 16(2) of the rules.

iii. The promoter is directed to furnish to the allottees statement of account within one month of issue of this order. If there is any objection by the allottees on statement of account, the same be filed with promoter after fifteen days thereafter. In case the grievance of the allottees relating to statement of account is not settled by the promoter within 15 days thereafter then the allottees may approach the authority by filing separate application.

iv. The respondent is directed to not to charge anything from the complainant on the account of increase in super area and on account of parking charges, which are not duly intimated and specified under said agreement.

v. The respondent shall not charge anything from the complainant which is not the part of the agreement.

vi. The complainants shall pay the stamp duty charges/ registration charges at the relevant rates.

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

viii. 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.

49. Complaint stands disposed of.

50. File be consigned to registry.

(Samir Kumar)
Member

(Vijay Kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 01.07.2021