HARERA
GURUGRAM

Corrected Judgement

Complaint No. 1643 of 2018

BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : **1643 of 2018**
Date of first hearing : **07.03.2019**
Date of decision : **20.03.2019**

Ms. Komal Jain
R/o : H.No – A-65, Block-A,
Swasthya Vihar, Delhi

Complainant

Versus

M/s SS Group Private Limited
Regd. Office: 77, SS House, Sector-44,
Gurugram, Haryana

Respondent

CORAM:
Dr. K.K. Khandelwal — **Chairman**
Shri Samir Kumar — **Member**
Shri Subhash Chander Kush — **Member**

ORDER

1. A complaint dated 19.11.2018 was filed under section 31 of the Real Estate (Regulation and Development Act, 2016 read with rule 28 of The Haryana Real Estate (Regulation and Development) rules, 2017 by the complainant Ms. Komal Jain, against the promoter M/s SS Group Private Limited., on account of violation of clause 8.1(a) of flat buyer agreement executed on 04.10.2012, in respect of apartment described as

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Member
Member

below for not handing over the possession on due date ie. 04.10.2015 which is an obligation under section 11 (4) (a) of the Act ibid.

2. The particulars of the complaint are as under: -

1.	Name and location of the project	"The Coralwood", Sector-84, Gurugram
2.	Flat no.	103-B, 1st floor, tower-D
3.	Registered/ un registered	**Registered (381 of 2017)**
4.	DTCP license no.	59 of 2008
5.	Nature of real estate project	Groups Housing complex
6.	Total area of the allotted unit no.	1890 sq. ft'
7.	Date of flat buyer agreement	04.10.2012
8.	Total consideration amount	Rs. 65,03,840/- (Annexure-6)
9.	Total amount paid by the complainant	Rs. 61,19,066/- (Annexure – 5)
10.	Due date of delivery of possession Clause 8.1(a)- 36 months+ 90 days grace period from the date of execution of the agreement.	04.01.2016
11.	~~Offer of possession~~ offer for fit outs	17.10.2018 (as stated in reply)
12.	Delay for number of months/ years till date	2 years 9 months 13 days
13.	Penalty clause as per flat buyer	Clause 8.3(a) i.e. Rs.5/-

Corrected vide order dated 31/05/19.

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	agreement	per sq.ft. per month of the super area for a period of 12 months or till the handing over of the possession, whichever is later.

3. The details provided above have been checked on the basis of the record available in the case file which have been provided by the complainant and the respondent. A flat buyer agreement dated 04.10.2012 is available on record for the aforementioned apartment according to which the possession of the aforesaid unit was to be delivered on 04.01.2016. The promoter has neither fulfilled his committed liability by not giving possession as per the terms of the flat buyer agreement. Neither paid any compensation i.e. @ Rs. 5/- per sq. ft. per month for the period of delay as per flat buyer agreement which is in violation of section 11(4)(a) of the Act ibid.

4. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance. The reply has been filed by the respondent.

Facts of the complaint

5. The respondent M/s SS Group Pvt. Ltd. (formerly known as M/s North Star Apartment Pvt. Ltd) had launched and solicited for project by the name and style of "The Coralwood by SS Group" for providing comfortable and affordable housing in Sector 84 of Gurugram.

6. The complainant was persuaded to invest in the project by various retailers and agencies of the project and also from various pamphlets and posters found in daily newspapers showcasing a very rosy picture of the project. That as per the brochure of the respondent company the housing project was to include Children's Park, Basketball court, Tennis court, Aesthetic landscaping with water bodies, trellises, walkways, stone seats, jogging park, compounded complex with round the clock security with an intercom system, 24x7 treated water supply, 100% power backup and a Clubhouse having gym, swimming pool, party lawn and a sports centre. That the location of the project was to have easy connectivity and proximity to airport, railway station and NH8 and a proposed metro station. Therefore, in the given circumstances complainant was allured to purchase one apartment and one Sh. Anil Goel (Original allottee) s/o Sh. G.D. Goel r/o H.no.

451, Sector 14, Gurugram wanted to sell unit/flat no. 103, tower/building no. D allotted to him vide allotment letter no. CW/00422 dated 4.9.2012.

7. The above named original allottee after negotiations agreed to sell the said unit and in that way the complainant acquired the said unit on payment of Rs. 19,03,203/-. The original allottee delivered all receipts and other documents qua said unit and the complainant came into his shoes for all intents and purposes. Said nomination / transfer of rights were endorsed by the company.

8. It is pertinent to mention here that as per flat buyer agreement the possession of the said unit was to be handed over within 36 months from the date of signing of the said agreement dated 04.10.2012 as provided under clause 8 of the agreement i.e. lastly by October 2015.

9. In terms of endorsement form dated 09.12.2012 the unit/plot in question was endorsed in the name of the complainants herein and the endorsement to which effect was also made on the original flat buyer's agreement by the respondent. That even at that time of making the endorsement the respondent assured that the possession of the flat in question would be given as per the terms of agreement.

10. The respondent after inordinate delay of almost three years offered possession vide letter dated 17.08.2018 without the offer for interest for delayed possession and in turn wrongly claimed GST on the due amount which would not have been payable had the respondent not delayed delivery of possession. The illegal demand of GST is in violation of the directive of CBEC vide memo no. 296/07/2017-CX.9 dated 15.06.2017 whereby the booking done before 1st July, 2017 would be chargeable under old tax rate and not as per GST. The same would amount to profiteering u/s 171 of GST law.

11. The offer of possession vide letter dated 17.08.2018 is illegal as it is not complete as per the terms of agreement. The respondent has not offered possession with complete amenities as per the brochure. It is settled law that the offer of possession should be after completion of project as per terms of agreement. Also, clause 8.2 of the flat buyer's agreement states that "*Upon the flat buyer taking possession of the flat, the buyer shall have no claim against the Developer in respect of any item of work in the said premises which may be alleged not to have been carried out or completed or for any design, specifications, building material used or any reason whatsoever*". In light of the above stated circumstances it is inherently illegal to offer possession without the advertised

amenities like children's park, basketball court, tennis court etc. That the location of the project as per the brochure was to have easy connectivity and proximity to airport, railway station and NH8 and a proposed metro station but the ground situation is far from satisfactory as there is not even a proper approach road to reach the site.

12. The offer of possession vide letter dated 17.08.2018 is only for fit-outs and it is well settled that possession for fit-outs without the occupation certificate (for brevity "OC") would constitute a breach of contractual and legal obligations on the part of the builder. That a letter of fit-out is an offer from the developer which allows flat owners to carry out fit-out/furnishing, whilst they are not allowed to occupy the flats. Generally, it is the case that the developers do not procure OC and give out fit out possession, which causes lot of practical difficulties for the home buyers. In such cases, there are high chances that the OC is not granted on account of possible gross violations/deviations from the approved building lay out plan on the part of the builder. That the complainant after paying all their hard-earned money is left with the risk of staying in an unsafe building and also bears the brunt of the regulatory authorities, who may possibly take action for having illegally occupied premises without OC.

13. The respondent has tried to play truant with the complainant by offering possession without obtaining the occupation certificate. That as per Real Estate (Regulation and Development) Act, 2016 the respondent is duty bound to obtain the occupation certificate before offering possession. The respondent by shirking off from his responsibility has put the complainant in a precarious position who has already waited long enough for possession.

14. The preferential location charges (for brevity PLC) of Rs. 3,78,000/- @ 200 per sq. ft. are illegal. PLC charges are an additional burden put upon the complainant even though there is nothing unique about the location such as a park facing or corner unit/flat and natural justice requires that the same be reversed.

15. That the respondent has wrongly and illegally claimed reserve car parking slot charges amounting to an exorbitant amount of Rs. 3 lacs. The reserve car parking charge is part of common area for which the builder cannot seek any cost from the complainant.

16. The electricity connection charges amounting to Rs. 1,29,181/- are exorbitant in nature. The complainant is

willing to pay charges as per the norms of DHBVN otherwise such charges are taken in the cost price already.

17. That the unit has been sold on basis of super area as opposed to carpet area which is unlawful after the enactment of the Real Estate (Regulation and Development) Act, 2016.

18. That the respondent has illegally demanded interest on delayed payments amounting to Rs. 1,62,983/- @ 18% p.a (excluding GST) . The payment was construction linked and the respondent company was itself in default as it did not raise construction as per the scheme. Thus, the demand is unjustified taking into consideration the fact that the complainants has made all payments of instalments as and when demanded and no notice of default of payment was received by the complainant.

19. That the complainant aggrieved by the fact that offer of possession was delayed by almost 3 years and not receiving any interest for delayed possession is filing the present complaint before this hon'ble authority.

20. **Issues raised by the complainant**

I. Whether the promoter is liable to get itself registered with this hon'ble authority under the RERA Act, 2016.

II. Whether the respondent has caused exorbitant delay in handing over the possession of the units to the complainant and for which the respondent is liable to pay interest @ 18 % p.a (i.e. at the same rate of interest which the Respondents use to charge on delay in payments by the allottees) to the complainant on amount received by the respondent from the complainant and which interest should be paid on the amount from the date when the respondent received the said amount?

III. Whether open parking space and parking in common basements be sold to the allottees as separate unit by the promoter, which the respondent has sold as separate unit at a cost of Rs. 3,00,000/- and if not then whether the amount so collected be returned back to the allottees from whom charged?

IV. Whether the respondent can legally sell super area instead of carpet area?

V. Whether the respondent is liable to refund the monies so collected by it from the complainant toward the goods and service tax which came on statute and implemented from 01.07.2017 as the said tax became payable only due to delay in handing over the possession by the respondent, as if the possession was given by the respondent on time then the question of GST would never have arose?

VI. Whether payment of VAT at higher rate than the lump sum tax @ 1% as per the scheme of Government of Haryana should not have been paid?

VII. Whether the complainant is liable to pay preferential location charges with the same being unjustified for majority of flat owners are being charged PLC making the imposition worthless and there being nothing unique about the location vis-à-vis other flats?

21. **Relief sought**

I. That the respondent/ promoter be ordered to make refund of the excess amount collected on account of any area in excess of carpet area as the respondent has sold the super area to the complainant which also includes the common areas and which sale of

common area is in total contradiction of the Act, for the reason as per the Act the monetary consideration can only be for the carpet area.

II. The respondent/promoter be ordered to make payment of interest accrued on amount collected by the respondent from the complainant, on account of delayed offer for possession and which interest should be @18% p.a from the date as and when the amount was received by the respondent from the complainant.

III. Direct the respondent to refund the amount of GST service tax etc if collected from the complainant, which had to be paid by the complainant only for the reason of delayed offer of possession, as, if the offer of possession was given on time, then no question of GST service tax would have arisen as on such date GST service tax was not in existence.

IV. Refund of higher rate of VAT charged from the complainant.

V. Any common area car parking including basement car park, which is not garage, if sold then the money collected on such account shall be refunded along with interest.

VI. That the preferential location charges be reversed and the amount collected from the complainant till date be refunded.

VII. That the electricity connection charges be reversed and the amount collected from the complainant till date be refunded.

VIII. That the club membership charges be made optional with the same being a luxury.

IX. That this hon'ble authority may direct the respondent to pay litigation cost @ Rs. 50,000/- to the complainant.

X. That orders may be passed against the respondent in terms of section 59 of the RERA Act, 2016 for the failure on part of the respondent to register itself with this hon'ble authority under the RERA Act, 2016.

Respondent's reply

22. At the outset, respondent humbly submits that each and every averment and contention, as made/raised in the complaint, unless specifically admitted, be taken to have been categorically denied by respondent and may be read as travesty of facts.

23. The respondent submitted that North Star Apartment Pvt. Ltd. has amalgamated into S.S. Group Pvt. Ltd., (hereinafter referred to as 'SS Group' or 'respondent') through a scheme of amalgamation approved by the hon'ble Punjab and Haryana High Court, through its orders dated September 30, 2014 and November 10, 2014, passed in company petition nos.155 of 2003 and 203 of 2013, w.e.f. March 7, 2015.

24. The respondent submitted that the complaint filed by the complainant before the Ld. authority, besides being misconceived and erroneous, is untenable in the eyes of law. The complainant has misdirected herself in filing the above captioned complaint before this Ld. authority as the reliefs being claimed by the complainants, besides being illegal, misconceived and erroneous, cannot be said to even fall within the realm of jurisdiction of this Ld. authority.

25. the respondent submitted that it would be pertinent to make reference to some of the provisions of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as '2016 Act') and the Haryana Real Estate (Regulation and Development) Rules, 2017 (hereinafter referred to as '2017 Haryana Rules'), made by the Government of Haryana in exercise of powers conferred by

sub-section 1 read with sub-section 2 of section 84 of 2016 Act. Section 31 of 2016 Act provides for filing of complaints with this Ld. authority or the adjudicating officer. Sub-section (1) thereof provides that any aggrieved person may file a complaint with the authority or the adjudicating officer, as the case may be, for any violation or contravention of the provisions of 2016 Act or the rules and regulations made thereunder against any promoter, allottee or real estate agent, as the case may be. Sub section (2) provides that the form, manner and fees for filing complaint under sub-section (1) shall be such as may be prescribed. Rule 28 of 2017 Haryana rules provides for filing of complaint with this Ld. authority, in reference to section 31 of 2016 Act. Sub-clause (1) *inter alia*, provides that any aggrieved person may file a complaint with the authority for any violation of the provisions of 2016 Act or the rules and regulations made thereunder, *save as those provided to be adjudicated by the adjudicating officer*, in Form 'CRA'. Significantly, reference to the "authority", which is this Ld. authority in the present case and to the "adjudicating officer", is separate and distinct.

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"adjudicating officer" has been defined under section 2(a) to mean the adjudicating officer appointed under sub-section (1) of section 71, whereas the "authority" has been defined under section 2(i) to mean the Real Estate Regulatory Authority, established under sub-section (1) of section 20.

26. Apparently, under section 71, the adjudicating officer is appointed by the authority in consultation with the appropriate government for the purpose of adjudging compensation under sections 12, 14, 18 and 19 of the 2016 Act and for holding an enquiry in the prescribed manner. A reference may also be made to section 72, which provides for factors to be taken into account by the adjudicating officer while adjudging the quantum of compensation and interest, as the case may be, under section 71 of 2016 Act. The domain of the adjudicating officer cannot be said to be restricted to adjudging only compensation in the matters which are covered under Sections 12, 14, 18 and 19 of the 2016 Act. The inquiry, as regards the compliance with the provisions of Sections 12, 14, 18 and 19, is to be made by the Adjudicating Officer. This submission find support from reading of section

71(3) which *inter alia*, provides that the adjudicating officer, while holding inquiry, shall have power to summon and enforce the attendance of any person and if on such inquiry he is satisfied that the person had failed to comply with the provisions of any of the sections specified in sub-section (1) he may direct to pay such compensation or interest, as the case may be, as he thinks fit in accordance with the provisions of any of those sections. Suffice it is to mention that the sections specified in sub-section (1) of section 71 are sections 12, 14, 18 and 19. Thus, this Ld. authority cannot assume the powers of the Ld. adjudicating officer, especially keeping in view the nature of reliefs sought by the complainant, as such, on this ground alone the complaint is liable to be rejected.

27. The respondent submitted that the complainant has given a declaration before this Ld. authority for supplementing the complaint and also amending the same, as mentioned in the declaration itself. Vide the said declaration, the complainant has shown her intention not to withdraw from the project and rather claimed purported interest for every month of alleged delay, till the handing over of the possession, by

alleging that they are entitled to the same as per the proviso of section 18(1). As submitted hereinabove, the adjudication even in respect of the claim of interest and/or the complainant's entitlement thereof, under section 18, is to be carried out by the adjudicating officer. Without prejudice, to the said submission, it is submitted that filing of the declaration and/or supplementing/amending the complaint, is a procedure alien to the provisions of 2016 Act and 2017 Haryana rules and cannot be allowed to be carried out and as such, the complainant cannot maintain the complaint in present form.

28. Further, without prejudice to the aforementioned, even if it was to be assumed though not admitting that the filing of the complaint is not without jurisdiction, even then the claim as raised cannot be said to be maintainable and is liable to be rejected for the reasons as ensuing.

29. The reliefs sought by the complainant appears to be on misconceived and erroneous basis. The complainant has misdirected herself in seeking refund of the alleged excess amount collected on account of the area in excess of carpet area. Concededly, the complainant had purchased the rights of her predecessor-in-interest namely Anil Goyal, who had

executed flat buyer's agreement with the respondent on October 4, 2012. The said agreement, which even stands endorsed on December 9, 2013, in favour of the complainant on account of transfer of the rights thereunder, by her predecessor-in-interest, in her favour, categorically provides that the developer had agreed to sell and the flat buyer(s) had agreed to purchase the flat no. 103, type B, located in tower no. D, on the 1st floor, having super area of 1890 sq. ft' (175.58 sq. mts.) approximately. In the agreement, the sale price of Rs.65,03,840/- is payable, which is sum total of different amounts reflected against different components, as mentioned therein.

30. Further, super area has been defined in annexure-II to the agreement. It provides that the super area of the premises shall be the sum of specific area of the said premises and its non-exclusive pro-rata share of common areas in the said complex and its periphery. The common area would mean all such parts/areas in the complex, which the allottee(s) of the said premises shall use by sharing with other occupants of the said complex including corridors land passage, atrium, common toilet, lift and lift lobby, escalators, area of cooling towers, AHU rooms, security/fire control rooms, staircases, mumties, lift machine rooms and water tanks. In addition,

entire services area in the basement including but not limited to electric substation, transformers, D.G. set rooms, underground water and other storage tanks, AC plant room pump rooms, ,maintenance and services rooms, fan rooms and circulation areas etc., shall be counted towards common areas. The said definition even provides as to what has not been included while computing the super area.

31. As such, the complainant has been aware not only of the sale price but also the fact that the same has been calculated by taking into account various components and as against the super area, which even stood defined in the agreement. Further, the complainant was even aware that the said super area was tentative and has been mentioned in the agreement for the purpose of computing sale price in respect of the said flat only and the inclusion of common areas within the said building/block for the purpose of calculating super area does not give any right, title or interest in common areas.

32. Thus, not only the complainant has concealed this material aspect but, is even estopped from raising the pleas, as raised in respect thereof, besides the said pleas being illegal, misconceived and erroneous.

33. The complainant has also misdirected in claiming payment of interest much less on the rate as claimed, on the amount collected by the respondent, on account of alleged delayed offer for possession. Besides the fact that this Ld. authority cannot be said to have any jurisdiction to award/grant such relief to the complainant, it is submitted that there cannot be said to be any alleged delay in offering of the possession.

34. It had been categorically agreed between the parties that subject to the complainant having complied with all the terms and conditions of the flat buyer's agreement and not being in default under any of the provisions of the said agreement and having complied with all provisions, formalities, documentation etc., the developer proposed to handover the possession of the unit in question within a period of 36 months from the date of signing of the agreement, which period would automatically stand extended for the time taken in getting the building plan sanctioned. It had been agreed that the respondent would also be entitled to a further grace period of 90 days after expiry of 36 months or such extended period for want of building sanction plans. Reference may be made to clause 8.1(a) of the flat buyer's agreement.

"8.1 time of handling over the Possession

(a) Subject to terms of this clause and subject to the Flat Buyer(s) having complied with all the terms and condition of this Agreement and not being in default under any if the provisions of this Agreement and complied with all the provisions, formalities, documentation etc., as prescribed by the Developer, the Developer proposes to handover the the possession of the Flat within a period of thirty six (36) months from the date of signing of this Agreement. However, this period will be automatically stand extended for the time taken in getting the building plans sanctioned. The Flat Buyer(s) agrees and understands that the Developer shall be entitled to a grace period of 90 days, after the expiry of thirty-six (36) months or such extended period (for want of building sanctioned plans), for applying and obtaining the Occupation Certificate in respect of the group housing complex."

35. Further, it had been also agreed and accepted that in case of any default/delay in payment as per the schedule of payments as provided in Annexure 1 to the flat buyer's agreement, the date of handing over of the possession shall be extended accordingly. Reference may be made to clause 8.1(b)(iii) of the flat buyer's agreement.

"8.1(b) (iii) The Flat Buyer(s) agrees and accepts that in case of any default/ delay in payment as per the Schedule of Payments as provided in Annexure I, the date of handling over of the possession shall be extended accordingly solely

on Developer's discretion till the payment of all outstanding amounts to the satisfaction of the Developer."

36. Furthermore, even in the affidavit filed by the complainant alongwith the endorsement form as annexure 2, the complainant had stated that they undertake to pay balance sale consideration (outstanding amount payable by the nominee/joint nominee to the company) as per buyer's agreement/ allotment letter directly to the company.

37. In the present case, it is a matter of record that the complainant have not fulfilled their obligation and have not even paid the instalments that had fallen due. Accordingly, no relief for alleged delayed offer for possession can be said to be maintainable.

38. The aforementioned submission is without prejudice to the submission that from perusal of the provisions of 2016 Act and/or the 2017 Haryana rules and conjoint reading of the same, it is evident that the 'Agreement for Sale' that has been referred to under the provisions of 2016 Act and 2017 Haryana rules, is the 'Agreement for Sale', as prescribed in Annexure 'A' of 2017 Haryana rules. Apparently, in terms of section 4(1), a promoter is required to file an application to the 'Authority' for registration of the real estate project in

such form, manner, within such time and accompanied by such fee as may be prescribed. The term 'prescribed' has been defined under section 2(z)(i) to mean prescribed by rules made under the Act. Further, section 4(2)(g) of 2016 Act provides that a promoter shall enclose, alongwith the application referred to in sub-section 1 of section 4, a proforma of the allotment letter, agreement for sale, and conveyance deed proposed to be signed with the allottees. section 13 (1) of 2016 Act *inter alia,* provides that a promoter shall not accept a sum more than 10% of the cost of the apartment, plot or building as the case may be, as an advance payment or an application fee, from a person, without first entering into a written agreement for sale with such person and register the said agreement for sale, under any law for the time being in force. Sub-Section 2 of Section 13, *inter alia,* provides that the agreement for sale referred to in sub-section (1) shall be in such form as may be prescribed and shall specify certain particulars as mentioned in the said sub-section. Rule 8 of 2017 Haryana rules categorically lays down that the agreement for sale shall be as per Annexure 'A'. Suffice it is to mention that annexure 'A' forms part of the 2017 Haryana rules and is not being reproduced herein for

the sake of brevity, though reliance is being placed upon the same.

39. Besides the aforementioned sections, a reference may be made to rule 5 of 2017 Haryana rules, which *inter alia,* provides that the authority shall issue a registration certificate with a registration number in form 'REP-III' to the Promoter. Clause 2(i) of form 'REP-III' provides that the promoter shall enter into agreement for sale with the allottees as prescribed by the government.

40. From the conjoint reading of the aforementioned sections/ rules, form and annexure 'A', it is evident that the 'Agreement for Sale', for the purposes of 2016 Act as well as 2017 Haryana rules, is the one as laid down in annexure 'A', which is required to be executed *inter se* the promoter and the allottee.

41. It is a matter of record and rather a conceded position that no such agreement, as referred to under the provisions of 2016 Act and 2017 Haryana rules, has been executed between respondent and the complainant. Rather, the agreement that has been referred to, for the purpose of getting the adjudication of the complaint, though without jurisdiction, is

the flat buyer's agreement, executed much prior to coming into force of 2016 Act.

42. The adjudication of the complaint for interest and compensation, as provided under sections 12, 14, 18 and 19 of 2016 Act, if any, has to be in reference to the agreement for sale executed in terms of 2016 Act and 2017 Haryana rules and no other agreement. This submission of the respondent *inter alia,* finds support from reading of the provisions of 2016 Act as well as 2017 Haryana rules, including the aforementioned submissions.

43. Thus, in view of the submissions made above, no relief much less as claimed can be granted to the complainant. It is reiterated at the risk of repetition that this is without prejudice to the submission that in any event, the complaint, as filed, is not maintainable before this Ld. authority.

44. The complainant has further misdirected in claiming the relief for refund of amount of GST, Service Tax etc. on a misconceived premise that no question of GST, Service Tax would have arisen, as on the purported date of offer of possession, no GST, Service Tax was in existence. Even the plea for refund of alleged higher rate of VAT is erroneous and misconceived.

45. It is submitted that broadly there are 2 facets of taxation – one being *'direct tax'* i.e. tax/levy which is payable on the income /profit of the assessee, example income tax and second being *'indirect tax'* i.e. tax which is payable on supply of goods and services, and on the value addition made thereon, example GST, service tax, VAT, etc. Indirect taxes by their very nature are consumption-based value added taxes which are charged on each stage of manufacturing/ supplying, and ultimately affect the price of goods/services sold in the market.

46. There is no provision under the 2016 Act, which empowers this Ld. authority to pass an order on the taxability of an event and/or to change in the incidence of tax. It is further submitted that any alteration in the tax scheme would be against the constitution of India, which bestows with the power to the legislature to make laws with respect to taxation. Article 265 of the constitution states that *"No tax shall be collected except by authority of law"*. Once a tax/levy is imposed by an authority of law, the same has to be collected in accordance with that law and incidence of tax cannot be arbitrarily changed.

47. It is additionally submitted that allowing such a relief would even amount to re-writing the contract between parties. The relief being claimed runs contrary to the contractual understanding of the parties, as provided in the flat buyer's agreement. As such, no relief much less as claimed in relation to non-payment and/or refund of GST, Service Tax etc. is liable to be granted.

48. That without prejudice to the aforementioned submissions, it is submitted that even otherwise, the complainant cannot invoke the jurisdiction of this Ld. authority in respect of the unit allotted to the complainant, especially when there is an arbitration clause provided in the flat buyer's agreement, whereby all or any disputes arising out of or touching upon or in relation to the terms of the said agreement or its termination and respective rights and obligations, is to be settled amicably failing which the same is to be settled through arbitration. Once the parties have agreed to have adjudication carried out by an alternative dispute redressal forum, invoking the jurisdiction of this Ld. authority, is misconceived, erroneous and misplaced.

49. Apparently, the complaint filed by the complainant is abuse and misuse of process of law and the reliefs claimed as sought for, are liable to be dismissed.

50. Without prejudice to the submissions made hereinabove, it is submitted that the complainant herself is not entitled to be granted any relief from this Ld. authority since the reciprocal obligations casted upon the complainant have not been fulfilled by them and they have failed to make due payments towards the consideration of the flat allotted to them.

51. It is pertinent to mention here that the respondent, after having applied for grant of occupation certificate in respect of the project, which had thereafter been even issued through memo dated 17.10.2018 had offered possession to the complainant. The complaint filed by the complainant, being in any case belated, is even subsequent to the date of grant of occupation certificate. No indulgence much less as claimed by the complainant is liable to be shown to them.

Determination of issues

52. With respect to the **first issue**, the project is already registered with the authority vide registration no. 381 of 2017.

53. With respect to the **second issue,** the authority came across clause 8.1 of the agreement which is reproduced hereunder:

> *"Clause 8.1(a)- 36 months+ 90 days grace period from the date of execution of the agreement."*

The flat buyer's agreement was executed on 04.10.2012 and therefore, as per this clause the due date comes out to be 04.01.2016 and the possession was offered on 17.10.2018. So, there has been a delay of 2 years 9 months 13 days in handing over the possession to the complainant. The respondent is directed to provide delay possession charges from the due date of possession i.e. 04.01.2016 till the date of offer of possession i.e. 17.10.2018 at the prescribed rate of interest i.e. 10.75% p.a.

54. With respect to **third issue** raised by the complainant, the open parking spaces cannot be sold separately by the promoter to the allottees as it comes under the definition of "common areas" under section 2(n) of RERA Act, 2016.

55. With respect to the **fourth issue**, as the buyer's agreement was executed on 04.10.2012 i.e. prior to the commencement of RERA Act, 2016. So the act will not apply retrospectively

and the developer can sell the unit at super area instead of carpet area.

56. With respect to the **fifth and sixth issue**, this authority does not have jurisdiction to entertain issues relating to GST and VAT and the complainant is at liberty to approach the appropriate forum.

57. With respect to the **seventh issue**, the authority came across clause 1.2(b) of flat buyer's agreement as per which the complainant has agreed to pay PLC of Rs. 3,78,000/- at the rate of Rs. 200/- per sq. ft' of super area.

Findings of the authority

58. The respondent admitted the fact that the project The Coralwood is situated in sector-84, Gurugram, therefore, the hon'ble authority has territorial jurisdiction to try the present complainant. As the project in question is situated in planning area of Gurugram, therefore the authority has complete territorial jurisdiction vide notification no.1/92/2017-1TCP issued by Arun Kumar Gupta, Principal Secretary (Town and Country Planning) dated 14.12.2017 to entertain the present complaint. As the nature of the real

estate project is commercial in nature so the authority has subject matter jurisdiction along with territorial jurisdiction.

59. **Jurisdiction of the authority**- The preliminary objections raised by the respondent regarding jurisdiction of the authority stands rejected. The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as held in ***Simmi Sikka V/s M/s EMAAR MGF Land Ltd***. leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

60. The delay compensation payable by the respondent @ Rs.5/- per sq.ft. per month for the period of delay as per clause 8.3(a) of the flat buyer agreement is held to be very nominal and unjust. The terms of the agreement have been drafted mischievously by the respondent and are completely one sided as also held in para 181 of ***Neelkamal Realtors Suburban Pvt Ltd Vs. UOI and ors. (W.P 2737 of 2017)***, wherein the Bombay HC bench held that:

"...Agreements entered into with individual purchasers were invariably one sided, standard-format agreements prepared by the builders/developers and which were overwhelmingly in their favour with unjust clauses on delayed delivery, time for conveyance to the society, obligations to obtain occupation/completion certificate etc. Individual purchasers had no scope or power to

negotiate and had to accept these one-sided agreements."

61. The complainant by an application for amendment of complaint reserve their right to seek compensation from the promoter for which he shall make separate application to the adjudicating officer, if required.

62. The amendment of Sec. 8 of the Arbitration and conciliation act does not have the effect of nullifying the ratio of catena of judgments of the Hon'ble Supreme Court, particularly in ***National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506***, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, consequently the Authority would not eb bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause.

63. Further, in ***Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015***, it was held that the arbitration clause in agreements between the complainants and builders could not circumscribe jurisdiction of a consumer.

Decision and directions of the authority

64. The authority, exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issue the following directions to the respondent:

(i) As per clause 8.1 (a) of the flat buyer agreement dated 4.10.2012 for unit no.103-B, 1st floor, tower-D, in project "The Coralwood", Sector-84, Gurugram, possession was to be handed over to the complainant within a period of 36 months from the date of execution of buyer's agreement + 90 days grace period which comes out to be 04.01.2016. However, the respondent has not delivered the unit in time. Complainant has already paid Rs.61,19,066/- to the respondent against a total sale consideration of Rs.65,03,840/-. As such, complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.75% per annum w.e.f 04.01.2016 as per the provisions of section 18 (1) of the Real Estate (Regulation and Development) Act, 2016 till offer of possession.

(ii) The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this

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Chairman
Member
Member

order and thereafter monthly payment of interest till offer of possession shall be paid before 10th of subsequent month.

(iii) Both the parties are directed to adjust each other regarding payment. Complainant is equally liable to pay interest at the prescribed rate for any delay in making due payment towards demand raised by the respondent/promoter.

65. The complaint is disposed of accordingly.

66. The order is pronounced.

67. Case file be consigned to the registry. Copy of this order be endorsed to the registration branch.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

HARYANA REAL ESTATE REGULATORY AUTHORITY
Chairman
Member
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 20.03.2019

Corrected judgement uploaded on 10.06.2019

BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 1643 of 2018
Date of first hearing : 07.03.2019
Date of decision : 20.03.2019

Ms. Komal Jain
R/o : H.No – A-65, Block-A,
Swasthya Vihar, Delhi **Complainant**

Versus

M/s SS Group Private Limited
Regd. Office: 77, SS House, Sector-44,
Gurugram, Haryana **Respondent**

CORAM:
Dr. K.K. Khandelwal **Chairman**
Shri Samir Kumar **Member**
Shri Subhash Chander Kush **Member**

ORDER

1. A complaint dated 19.11.2018 was filed under section 31 of the Real Estate (Regulation and Development Act, 2016 read with rule 28 of The Haryana Real Estate (Regulation and Development) rules, 2017 by the complainant Ms. Komal Jain, against the promoter M/s SS Group Private Limited., on account of violation of clause 8.1(a) of flat buyer agreement executed on 04.10.2012, in respect of apartment described as

below for not handing over the possession on due date ie. 04.10.2015 which is an obligation under section 11 (4) (a) of the Act ibid.

2. The particulars of the complaint are as under: -

1.	Name and location of the project	"The Coralwood", Sector-84, Gurugram
2.	Flat no.	103-B, 1st floor, tower-D
3.	Registered/ un registered	**Registered (381 of 2017)**
4.	DTCP license no.	59 of 2008
5.	Nature of real estate project	Groups Housing complex
6.	Total area of the allotted unit no.	1890 sq. ft'
7.	Date of flat buyer agreement	04.10.2012
8.	Total consideration amount	Rs. 65,03,840/- (Annexure-6)
9.	Total amount paid by the complainant	Rs. 61,19,066/- (Annexure – 5)
10.	Due date of delivery of possession Clause 8.1(a)- 36 months+ 90 days grace period from the date of execution of the agreement.	04.01.2016
11.	Offer of possession	17.10.2018 (as stated in reply)
12.	Delay for number of months/ years till date	2 years 9 months 13 days
13.	Penalty clause as per flat buyer	Clause 8.3(a) i.e. Rs.5/-

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Chairman
Member
Member

	agreement	per sq.ft. per month of the super area for a period of 12 months or till the handing over of the possession, whichever is later.

3. The details provided above have been checked on the basis of the record available in the case file which have been provided by the complainant and the respondent. A flat buyer agreement dated 04.10.2012 is available on record for the aforementioned apartment according to which the possession of the aforesaid unit was to be delivered on 04.01.2016. The promoter has neither fulfilled his committed liability by not giving possession as per the terms of the flat buyer agreement. Neither paid any compensation i.e. @ Rs. 5/- per sq. ft. per month for the period of delay as per flat buyer agreement which is in violation of section 11(4)(a) of the Act ibid.

4. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance. The reply has been filed by the respondent.

Facts of the complaint

5. The respondent M/s SS Group Pvt. Ltd. (formerly known as M/s North Star Apartment Pvt. Ltd) had launched and solicited for project by the name and style of "The Coralwood by SS Group" for providing comfortable and affordable housing in Sector 84 of Gurugram.

6. The complainant was persuaded to invest in the project by various retailers and agencies of the project and also from various pamphlets and posters found in daily newspapers showcasing a very rosy picture of the project. That as per the brochure of the respondent company the housing project was to include Children's Park, Basketball court, Tennis court, Aesthetic landscaping with water bodies, trellises, walkways, stone seats, jogging park, compounded complex with round the clock security with an intercom system, 24x7 treated water supply, 100% power backup and a Clubhouse having gym, swimming pool, party lawn and a sports centre. That the location of the project was to have easy connectivity and proximity to airport, railway station and NH8 and a proposed metro station. Therefore, in the given circumstances complainant was allured to purchase one apartment and one Sh. Anil Goel (Original allottee) s/o Sh. G.D. Goel r/o H.no.

451, Sector 14, Gurugram wanted to sell unit/flat no. 103, tower/building no. D allotted to him vide allotment letter no. CW/00422 dated 4.9.2012.

7. The above named original allottee after negotiations agreed to sell the said unit and in that way the complainant acquired the said unit on payment of Rs. 19,03,203/-. The original allottee delivered all receipts and other documents qua said unit and the complainant came into his shoes for all intents and purposes. Said nomination / transfer of rights were endorsed by the company.

8. It is pertinent to mention here that as per flat buyer agreement the possession of the said unit was to be handed over within 36 months from the date of signing of the said agreement dated 04.10.2012 as provided under clause 8 of the agreement i.e. lastly by October 2015.

9. In terms of endorsement form dated 09.12.2012 the unit/plot in question was endorsed in the name of the complainants herein and the endorsement to which effect was also made on the original flat buyer's agreement by the respondent. That even at that time of making the endorsement the respondent assured that the possession of the flat in question would be given as per the terms of agreement.

10. The respondent after inordinate delay of almost three years offered possession vide letter dated 17.08.2018 without the offer for interest for delayed possession and in turn wrongly claimed GST on the due amount which would not have been payable had the respondent not delayed delivery of possession. The illegal demand of GST is in violation of the directive of CBEC vide memo no. 296/07/2017-CX.9 dated 15.06.2017 whereby the booking done before 1st July, 2017 would be chargeable under old tax rate and not as per GST. The same would amount to profiteering u/s 171 of GST law.

11. The offer of possession vide letter dated 17.08.2018 is illegal as it is not complete as per the terms of agreement. The respondent has not offered possession with complete amenities as per the brochure. It is settled law that the offer of possession should be after completion of project as per terms of agreement. Also, clause 8.2 of the flat buyer's agreement states that "*Upon the flat buyer taking possession of the flat, the buyer shall have no claim against the Developer in respect of any item of work in the said premises which may be alleged not to have been carried out or completed or for any design, specifications, building material used or any reason whatsoever".* In light of the above stated circumstances it is inherently illegal to offer possession without the advertised

amenities like children's park, basketball court, tennis court etc. That the location of the project as per the brochure was to have easy connectivity and proximity to airport, railway station and NH8 and a proposed metro station but the ground situation is far from satisfactory as there is not even a proper approach road to reach the site.

12. The offer of possession vide letter dated 17.08.2018 is only for fit-outs and it is well settled that possession for fit-outs without the occupation certificate (for brevity "OC") would constitute a breach of contractual and legal obligations on the part of the builder. That a letter of fit-out is an offer from the developer which allows flat owners to carry out fit-out/furnishing, whilst they are not allowed to occupy the flats. Generally, it is the case that the developers do not procure OC and give out fit out possession, which causes lot of practical difficulties for the home buyers. In such cases, there are high chances that the OC is not granted on account of possible gross violations/deviations from the approved building lay out plan on the part of the builder. That the complainant after paying all their hard-earned money is left with the risk of staying in an unsafe building and also bears the brunt of the regulatory authorities, who may possibly take action for having illegally occupied premises without OC.

13. The respondent has tried to play truant with the complainant by offering possession without obtaining the occupation certificate. That as per Real Estate (Regulation and Development) Act, 2016 the respondent is duty bound to obtain the occupation certificate before offering possession. The respondent by shirking off from his responsibility has put the complainant in a precarious position who has already waited long enough for possession.

14. The preferential location charges (for brevity PLC) of Rs. 3,78,000/- @ 200 per sq. ft. are illegal. PLC charges are an additional burden put upon the complainant even though there is nothing unique about the location such as a park facing or corner unit/flat and natural justice requires that the same be reversed.

15. That the respondent has wrongly and illegally claimed reserve car parking slot charges amounting to an exorbitant amount of Rs. 3 lacs. The reserve car parking charge is part of common area for which the builder cannot seek any cost from the complainant.

16. The electricity connection charges amounting to Rs. 1,29,181/- are exorbitant in nature. The complainant is

willing to pay charges as per the norms of DHBVN otherwise such charges are taken in the cost price already.

17. That the unit has been sold on basis of super area as opposed to carpet area which is unlawful after the enactment of the Real Estate (Regulation and Development) Act, 2016.

18. That the respondent has illegally demanded interest on delayed payments amounting to Rs. 1,62,983/- @ 18% p.a (excluding GST) . The payment was construction linked and the respondent company was itself in default as it did not raise construction as per the scheme. Thus, the demand is unjustified taking into consideration the fact that the complainants has made all payments of instalments as and when demanded and no notice of default of payment was received by the complainant.

19. That the complainant aggrieved by the fact that offer of possession was delayed by almost 3 years and not receiving any interest for delayed possession is filing the present complaint before this hon'ble authority.

20. **Issues raised by the complainant**

I. Whether the promoter is liable to get itself registered with this hon'ble authority under the RERA Act, 2016.

II. Whether the respondent has caused exorbitant delay in handing over the possession of the units to the complainant and for which the respondent is liable to pay interest @ 18 % p.a (i.e. at the same rate of interest which the Respondents use to charge on delay in payments by the allottees) to the complainant on amount received by the respondent from the complainant and which interest should be paid on the amount from the date when the respondent received the said amount?

III. Whether open parking space and parking in common basements be sold to the allottees as separate unit by the promoter, which the respondent has sold as separate unit at a cost of Rs. 3,00,000/- and if not then whether the amount so collected be returned back to the allottees from whom charged?

IV. Whether the respondent can legally sell super area instead of carpet area?

V. Whether the respondent is liable to refund the monies so collected by it from the complainant toward the goods and service tax which came on statute and implemented from 01.07.2017 as the said tax became payable only due to delay in handing over the possession by the respondent, as if the possession was given by the respondent on time then the question of GST would never have arose?

VI. Whether payment of VAT at higher rate than the lump sum tax @ 1% as per the scheme of Government of Haryana should not have been paid?

VII. Whether the complainant is liable to pay preferential location charges with the same being unjustified for majority of flat owners are being charged PLC making the imposition worthless and there being nothing unique about the location vis-à-vis other flats?

21. **Relief sought**

I. That the respondent/ promoter be ordered to make refund of the excess amount collected on account of any area in excess of carpet area as the respondent has sold the super area to the complainant which also includes the common areas and which sale of

common area is in total contradiction of the Act, for the reason as per the Act the monetary consideration can only be for the carpet area.

II. The respondent/promoter be ordered to make payment of interest accrued on amount collected by the respondent from the complainant, on account of delayed offer for possession and which interest should be @18% p.a from the date as and when the amount was received by the respondent from the complainant.

III. Direct the respondent to refund the amount of GST service tax etc if collected from the complainant, which had to be paid by the complainant only for the reason of delayed offer of possession, as, if the offer of possession was given on time, then no question of GST service tax would have arisen as on such date GST service tax was not in existence.

IV. Refund of higher rate of VAT charged from the complainant.

V. Any common area car parking including basement car park, which is not garage, if sold then the money collected on such account shall be refunded along with interest.

VI. That the preferential location charges be reversed and the amount collected from the complainant till date be refunded.

VII. That the electricity connection charges be reversed and the amount collected from the complainant till date be refunded.

VIII. That the club membership charges be made optional with the same being a luxury.

IX. That this hon'ble authority may direct the respondent to pay litigation cost @ Rs. 50,000/- to the complainant.

X. That orders may be passed against the respondent in terms of section 59 of the RERA Act, 2016 for the failure on part of the respondent to register itself with this hon'ble authority under the RERA Act, 2016.

Respondent's reply

22. At the outset, respondent humbly submits that each and every averment and contention, as made/raised in the complaint, unless specifically admitted, be taken to have been categorically denied by respondent and may be read as travesty of facts.

23. The respondent submitted that North Star Apartment Pvt. Ltd. has amalgamated into S.S. Group Pvt. Ltd., (hereinafter referred to as 'SS Group' or 'respondent') through a scheme of amalgamation approved by the hon'ble Punjab and Haryana High Court, through its orders dated September 30, 2014 and November 10, 2014, passed in company petition nos.155 of 2003 and 203 of 2013, w.e.f. March 7, 2015.

24. The respondent submitted that the complaint filed by the complainant before the Ld. authority, besides being misconceived and erroneous, is untenable in the eyes of law. The complainant has misdirected herself in filing the above captioned complaint before this Ld. authority as the reliefs being claimed by the complainants, besides being illegal, misconceived and erroneous, cannot be said to even fall within the realm of jurisdiction of this Ld. authority.

25. the respondent submitted that it would be pertinent to make reference to some of the provisions of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as '2016 Act') and the Haryana Real Estate (Regulation and Development) Rules, 2017 (hereinafter referred to as '2017 Haryana Rules'), made by the Government of Haryana in exercise of powers conferred by

sub-section 1 read with sub-section 2 of section 84 of 2016 Act. Section 31 of 2016 Act provides for filing of complaints with this Ld. authority or the adjudicating officer. Sub-section (1) thereof provides that any aggrieved person may file a complaint with the authority or the adjudicating officer, as the case may be, for any violation or contravention of the provisions of 2016 Act or the rules and regulations made thereunder against any promoter, allottee or real estate agent, as the case may be. Sub section (2) provides that the form, manner and fees for filing complaint under sub-section (1) shall be such as may be prescribed. Rule 28 of 2017 Haryana rules provides for filing of complaint with this Ld. authority, in reference to section 31 of 2016 Act. Sub-clause (1) *inter alia*, provides that any aggrieved person may file a complaint with the authority for any violation of the provisions of 2016 Act or the rules and regulations made thereunder, *save as those provided to be adjudicated by the adjudicating officer*, in Form 'CRA'. Significantly, reference to the "authority", which is this Ld. authority in the present case and to the "adjudicating officer", is separate and distinct.

"adjudicating officer" has been defined under section 2(a) to mean the adjudicating officer appointed under sub-section (1) of section 71, whereas the "authority" has been defined under section 2(i) to mean the Real Estate Regulatory Authority, established under sub-section (1) of section 20.

26. Apparently, under section 71, the adjudicating officer is appointed by the authority in consultation with the appropriate government for the purpose of adjudging compensation under sections 12, 14, 18 and 19 of the 2016 Act and for holding an enquiry in the prescribed manner. A reference may also be made to section 72, which provides for factors to be taken into account by the adjudicating officer while adjudging the quantum of compensation and interest, as the case may be, under section 71 of 2016 Act. The domain of the adjudicating officer cannot be said to be restricted to adjudging only compensation in the matters which are covered under Sections 12, 14, 18 and 19 of the 2016 Act. The inquiry, as regards the compliance with the provisions of Sections 12, 14, 18 and 19, is to be made by the Adjudicating Officer. This submission find support from reading of section

71(3) which *inter alia*, provides that the adjudicating officer, while holding inquiry, shall have power to summon and enforce the attendance of any person and if on such inquiry he is satisfied that the person had failed to comply with the provisions of any of the sections specified in sub-section (1) he may direct to pay such compensation or interest, as the case may be, as he thinks fit in accordance with the provisions of any of those sections. Suffice it is to mention that the sections specified in sub-section (1) of section 71 are sections 12, 14, 18 and 19. Thus, this Ld. authority cannot assume the powers of the Ld. adjudicating officer, especially keeping in view the nature of reliefs sought by the complainant, as such, on this ground alone the complaint is liable to be rejected.

27. The respondent submitted that the complainant has given a declaration before this Ld. authority for supplementing the complaint and also amending the same, as mentioned in the declaration itself. Vide the said declaration, the complainant has shown her intention not to withdraw from the project and rather claimed purported interest for every month of alleged delay, till the handing over of the possession, by

alleging that they are entitled to the same as per the proviso of section 18(1). As submitted hereinabove, the adjudication even in respect of the claim of interest and/or the complainant's entitlement thereof, under section 18, is to be carried out by the adjudicating officer. Without prejudice, to the said submission, it is submitted that filing of the declaration and/or supplementing/amending the complaint, is a procedure alien to the provisions of 2016 Act and 2017 Haryana rules and cannot be allowed to be carried out and as such, the complainant cannot maintain the complaint in present form.

28. Further, without prejudice to the aforementioned, even if it was to be assumed though not admitting that the filing of the complaint is not without jurisdiction, even then the claim as raised cannot be said to be maintainable and is liable to be rejected for the reasons as ensuing.

29. The reliefs sought by the complainant appears to be on misconceived and erroneous basis. The complainant has misdirected herself in seeking refund of the alleged excess amount collected on account of the area in excess of carpet area. Concededly, the complainant had purchased the rights of her predecessor-in-interest namely Anil Goyal, who had

executed flat buyer's agreement with the respondent on October 4, 2012. The said agreement, which even stands endorsed on December 9, 2013, in favour of the complainant on account of transfer of the rights thereunder, by her predecessor-in-interest, in her favour, categorically provides that the developer had agreed to sell and the flat buyer(s) had agreed to purchase the flat no. 103, type B, located in tower no. D, on the 1st floor, having super area of 1890 sq. ft' (175.58 sq. mts.) approximately. In the agreement, the sale price of Rs.65,03,840/- is payable, which is sum total of different amounts reflected against different components, as mentioned therein.

30. Further, super area has been defined in annexure-II to the agreement. It provides that the super area of the premises shall be the sum of specific area of the said premises and its non-exclusive pro-rata share of common areas in the said complex and its periphery. The common area would mean all such parts/areas in the complex, which the allottee(s) of the said premises shall use by sharing with other occupants of the said complex including corridors land passage, atrium, common toilet, lift and lift lobby, escalators, area of cooling towers, AHU rooms, security/fire control rooms, staircases, mumties, lift machine rooms and water tanks. In addition,

entire services area in the basement including but not limited to electric substation, transformers, D.G. set rooms, underground water and other storage tanks, AC plant room pump rooms, ,maintenance and services rooms, fan rooms and circulation areas etc., shall be counted towards common areas. The said definition even provides as to what has not been included while computing the super area.

31. As such, the complainant has been aware not only of the sale price but also the fact that the same has been calculated by taking into account various components and as against the super area, which even stood defined in the agreement. Further, the complainant was even aware that the said super area was tentative and has been mentioned in the agreement for the purpose of computing sale price in respect of the said flat only and the inclusion of common areas within the said building/block for the purpose of calculating super area does not give any right, title or interest in common areas.

32. Thus, not only the complainant has concealed this material aspect but, is even estopped from raising the pleas, as raised in respect thereof, besides the said pleas being illegal, misconceived and erroneous.

33. The complainant has also misdirected in claiming payment of interest much less on the rate as claimed, on the amount collected by the respondent, on account of alleged delayed offer for possession. Besides the fact that this Ld. authority cannot be said to have any jurisdiction to award/grant such relief to the complainant, it is submitted that there cannot be said to be any alleged delay in offering of the possession.

34. It had been categorically agreed between the parties that subject to the complainant having complied with all the terms and conditions of the flat buyer's agreement and not being in default under any of the provisions of the said agreement and having complied with all provisions, formalities, documentation etc., the developer proposed to handover the possession of the unit in question within a period of 36 months from the date of signing of the agreement, which period would automatically stand extended for the time taken in getting the building plan sanctioned. It had been agreed that the respondent would also be entitled to a further grace period of 90 days after expiry of 36 months or such extended period for want of building sanction plans. Reference may be made to clause 8.1(a) of the flat buyer's agreement.

"8.1 time of handling over the Possession

(a) Subject to terms of this clause and subject to the Flat Buyer(s) having complied with all the terms and condition of this Agreement and not being in default under any if the provisions of this Agreement and complied with all the provisions, formalities, documentation etc., as prescribed by the Developer, the Developer proposes to handover the the possession of the Flat within a period of thirty six (36) months from the date of signing of this Agreement. However, this period will be automatically stand extended for the time taken in getting the building plans sanctioned. The Flat Buyer(s) agrees and understands that the Developer shall be entitled to a grace period of 90 days, after the expiry of thirty-six (36) months or such extended period (for want of building sanctioned plans), for applying and obtaining the Occupation Certificate in respect of the group housing complex."

35. Further, it had been also agreed and accepted that in case of any default/delay in payment as per the schedule of payments as provided in Annexure 1 to the flat buyer's agreement, the date of handing over of the possession shall be extended accordingly. Reference may be made to clause 8.1(b)(iii) of the flat buyer's agreement.

"8.1(b) (iii) The Flat Buyer(s) agrees and accepts that in case of any default/ delay in payment as per the Schedule of Payments as provided in Annexure I, the date of handling over of the possession shall be extended accordingly solely

on Developer's discretion till the payment of all outstanding amounts to the satisfaction of the Developer."

36. Furthermore, even in the affidavit filed by the complainant alongwith the endorsement form as annexure 2, the complainant had stated that they undertake to pay balance sale consideration (outstanding amount payable by the nominee/joint nominee to the company) as per buyer's agreement/ allotment letter directly to the company.

37. In the present case, it is a matter of record that the complainant have not fulfilled their obligation and have not even paid the instalments that had fallen due. Accordingly, no relief for alleged delayed offer for possession can be said to be maintainable.

38. The aforementioned submission is without prejudice to the submission that from perusal of the provisions of 2016 Act and/or the 2017 Haryana rules and conjoint reading of the same, it is evident that the 'Agreement for Sale' that has been referred to under the provisions of 2016 Act and 2017 Haryana rules, is the 'Agreement for Sale', as prescribed in Annexure 'A' of 2017 Haryana rules. Apparently, in terms of section 4(1), a promoter is required to file an application to the 'Authority' for registration of the real estate project in

such form, manner, within such time and accompanied by such fee as may be prescribed. The term 'prescribed' has been defined under section 2(z)(i) to mean prescribed by rules made under the Act. Further, section 4(2)(g) of 2016 Act provides that a promoter shall enclose, alongwith the application referred to in sub-section 1 of section 4, a proforma of the allotment letter, agreement for sale, and conveyance deed proposed to be signed with the allottees. section 13 (1) of 2016 Act *inter alia,* provides that a promoter shall not accept a sum more than 10% of the cost of the apartment, plot or building as the case may be, as an advance payment or an application fee, from a person, without first entering into a written agreement for sale with such person and register the said agreement for sale, under any law for the time being in force. Sub-Section 2 of Section 13, *inter alia*, provides that the agreement for sale referred to in sub-section (1) shall be in such form as may be prescribed and shall specify certain particulars as mentioned in the said sub-section. Rule 8 of 2017 Haryana rules categorically lays down that the agreement for sale shall be as per Annexure 'A'. Suffice it is to mention that annexure 'A' forms part of the 2017 Haryana rules and is not being reproduced herein for

the sake of brevity, though reliance is being placed upon the same.

39. Besides the aforementioned sections, a reference may be made to rule 5 of 2017 Haryana rules, which *inter alia,* provides that the authority shall issue a registration certificate with a registration number in form 'REP-III' to the Promoter. Clause 2(i) of form 'REP-III' provides that the promoter shall enter into agreement for sale with the allottees as prescribed by the government.

40. From the conjoint reading of the aforementioned sections/ rules, form and annexure 'A', it is evident that the 'Agreement for Sale', for the purposes of 2016 Act as well as 2017 Haryana rules, is the one as laid down in annexure 'A', which is required to be executed *inter se* the promoter and the allottee.

41. It is a matter of record and rather a conceded position that no such agreement, as referred to under the provisions of 2016 Act and 2017 Haryana rules, has been executed between respondent and the complainant. Rather, the agreement that has been referred to, for the purpose of getting the adjudication of the complaint, though without jurisdiction, is

the flat buyer's agreement, executed much prior to coming into force of 2016 Act.

42. The adjudication of the complaint for interest and compensation, as provided under sections 12, 14, 18 and 19 of 2016 Act, if any, has to be in reference to the agreement for sale executed in terms of 2016 Act and 2017 Haryana rules and no other agreement. This submission of the respondent *inter alia,* finds support from reading of the provisions of 2016 Act as well as 2017 Haryana rules, including the aforementioned submissions.

43. Thus, in view of the submissions made above, no relief much less as claimed can be granted to the complainant. It is reiterated at the risk of repetition that this is without prejudice to the submission that in any event, the complaint, as filed, is not maintainable before this Ld. authority.

44. The complainant has further misdirected in claiming the relief for refund of amount of GST, Service Tax etc. on a misconceived premise that no question of GST, Service Tax would have arisen, as on the purported date of offer of possession, no GST, Service Tax was in existence. Even the plea for refund of alleged higher rate of VAT is erroneous and misconceived.

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Member

45. It is submitted that broadly there are 2 facets of taxation – one being *'direct tax'* i.e. tax/levy which is payable on the income /profit of the assessee, example income tax and second being *'indirect tax'* i.e. tax which is payable on supply of goods and services, and on the value addition made thereon, example GST, service tax, VAT, etc. Indirect taxes by their very nature are consumption-based value added taxes which are charged on each stage of manufacturing/ supplying, and ultimately affect the price of goods/services sold in the market.

46. There is no provision under the 2016 Act, which empowers this Ld. authority to pass an order on the taxability of an event and/or to change in the incidence of tax. It is further submitted that any alteration in the tax scheme would be against the constitution of India, which bestows with the power to the legislature to make laws with respect to taxation. Article 265 of the constitution states that "*No tax shall be collected except by authority of law*". Once a tax/levy is imposed by an authority of law, the same has to be collected in accordance with that law and incidence of tax cannot be arbitrarily changed.

47. It is additionally submitted that allowing such a relief would even amount to re-writing the contract between parties. The relief being claimed runs contrary to the contractual understanding of the parties, as provided in the flat buyer's agreement. As such, no relief much less as claimed in relation to non-payment and/or refund of GST, Service Tax etc. is liable to be granted.

48. That without prejudice to the aforementioned submissions, it is submitted that even otherwise, the complainant cannot invoke the jurisdiction of this Ld. authority in respect of the unit allotted to the complainant, especially when there is an arbitration clause provided in the flat buyer's agreement, whereby all or any disputes arising out of or touching upon or in relation to the terms of the said agreement or its termination and respective rights and obligations, is to be settled amicably failing which the same is to be settled through arbitration. Once the parties have agreed to have adjudication carried out by an alternative dispute redressal forum, invoking the jurisdiction of this Ld. authority, is misconceived, erroneous and misplaced.

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Member

49. Apparently, the complaint filed by the complainant is abuse and misuse of process of law and the reliefs claimed as sought for, are liable to be dismissed.

50. Without prejudice to the submissions made hereinabove, it is submitted that the complainant herself is not entitled to be granted any relief from this Ld. authority since the reciprocal obligations casted upon the complainant have not been fulfilled by them and they have failed to make due payments towards the consideration of the flat allotted to them.

51. It is pertinent to mention here that the respondent, after having applied for grant of occupation certificate in respect of the project, which had thereafter been even issued through memo dated 17.10.2018 had offered possession to the complainant. The complaint filed by the complainant, being in any case belated, is even subsequent to the date of grant of occupation certificate. No indulgence much less as claimed by the complainant is liable to be shown to them.

Determination of issues

52. With respect to the **first issue**, the project is already registered with the authority vide registration no. 381 of 2017.

53. With respect to the **second issue,** the authority came across clause 8.1 of the agreement which is reproduced hereunder:

"Clause 8.1(a)- 36 months+ 90 days grace period from the date of execution of the agreement."

The flat buyer's agreement was executed on 04.10.2012 and therefore, as per this clause the due date comes out to be 04.01.2016 and the possession was offered on 17.10.2018. So, there has been a delay of 2 years 9 months 13 days in handing over the possession to the complainant. The respondent is directed to provide delay possession charges from the due date of possession i.e. 04.01.2016 till the date of offer of possession i.e. 17.10.2018 at the prescribed rate of interest i.e. 10.75% p.a.

54. With respect to **third issue** raised by the complainant, the open parking spaces cannot be sold separately by the promoter to the allottees as it comes under the definition of "common areas" under section 2(n) of RERA Act, 2016.

55. With respect to the **fourth issue**, as the buyer's agreement was executed on 04.10.2012 i.e. prior to the commencement of RERA Act, 2016. So the act will not apply retrospectively

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and the developer can sell the unit at super area instead of carpet area.

56. With respect to the **fifth and sixth issue**, this authority does not have jurisdiction to entertain issues relating to GST and VAT and the complainant is at liberty to approach the appropriate forum.

57. With respect to the **seventh issue**, the authority came across clause 1.2(b) of flat buyer's agreement as per which the complainant has agreed to pay PLC of Rs. 3,78,000/- at the rate of Rs. 200/- per sq. ft' of super area.

Findings of the authority

58. The respondent admitted the fact that the project The Coralwood is situated in sector-84, Gurugram, therefore, the hon'ble authority has territorial jurisdiction to try the present complainant. As the project in question is situated in planning area of Gurugram, therefore the authority has complete territorial jurisdiction vide notification no.1/92/2017-1TCP issued by Arun Kumar Gupta, Principal Secretary (Town and Country Planning) dated 14.12.2017 to entertain the present complaint. As the nature of the real

estate project is commercial in nature so the authority has subject matter jurisdiction along with territorial jurisdiction.

59. **Jurisdiction of the authority**- The preliminary objections raised by the respondent regarding jurisdiction of the authority stands rejected. The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as held in ***Simmi Sikka V/s M/s EMAAR MGF Land Ltd***. leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

60. The delay compensation payable by the respondent @ Rs.5/- per sq.ft. per month for the period of delay as per clause 8.3(a) of the flat buyer agreement is held to be very nominal and unjust. The terms of the agreement have been drafted mischievously by the respondent and are completely one sided as also held in para 181 of ***Neelkamal Realtors Suburban Pvt Ltd Vs. UOI and ors. (W.P 2737 of 2017)***, wherein the Bombay HC bench held that:

> *"...Agreements entered into with individual purchasers were invariably one sided, standard-format agreements prepared by the builders/developers and which were overwhelmingly in their favour with unjust clauses on delayed delivery, time for conveyance to the society, obligations to obtain occupation/completion certificate etc. Individual purchasers had no scope or power to*

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negotiate and had to accept these one-sided agreements."

61. The complainant by an application for amendment of complaint reserve their right to seek compensation from the promoter for which he shall make separate application to the adjudicating officer, if required.

62. The amendment of Sec. 8 of the Arbitration and conciliation act does not have the effect of nullifying the ratio of catena of judgments of the Hon'ble Supreme Court, particularly in ***National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506***, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, consequently the Authority would not eb bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause.

63. Further, in ***Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015***, it was held that the arbitration clause in agreements between the complainants and builders could not circumscribe jurisdiction of a consumer.

Decision and directions of the authority

64. The authority, exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issue the following directions to the respondent:

(i) As per clause 8.1 (a) of the flat buyer agreement dated 4.10.2012 for unit no.103-B, 1st floor, tower-D, in project "The Coralwood", Sector-84, Gurugram, possession was to be handed over to the complainant within a period of 36 months from the date of execution of buyer's agreement + 90 days grace period which comes out to be 04.01.2016. However, the respondent has not delivered the unit in time. Complainant has already paid Rs.61,19,066/- to the respondent against a total sale consideration of Rs.65,03,840/-. As such, complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.75% per annum w.e.f 04.01.2016 as per the provisions of section 18 (1) of the Real Estate (Regulation and Development) Act, 2016 till offer of possession.

(ii) The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this

order and thereafter monthly payment of interest till offer of possession shall be paid before 10th of subsequent month.

(iii) Both the parties are directed to adjust each other regarding payment. Complainant is equally liable to pay interest at the prescribed rate for any delay in making due payment towards demand raised by the respondent/promoter.

65. The complaint is disposed of accordingly.

66. The order is pronounced.

67. Case file be consigned to the registry. Copy of this order be endorsed to the registration branch.

(Samir Kumar) Member

(Subhash Chander Kush) Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 20.03.2019

Judgement uploaded on 12.04.2019