

**BEFORE THE HARYANA REAL ESTATE REGULATORY
AUTHORITY, GURUGRAM**

Complaint no. : 1184 of 2022
Date of filing complaint : 12.04.2022
Date of Order : 21.02.2023

Mohit Makkar & Bhaskar Makkar R/O: - 301, Tower-8, Bollywood Heights 1, Peer Mushalla, Dhakoli, Zirakpur	Complainants
Versus	
M/s SS Group Pvt. Limited Regd. Office at: - SS House, Plot no.77, Sector-44, Gurugram, Haryana-122003	Respondent

CORAM:

Shri Vijay Kumar Goyal	Member
Shri Ashok Sangwan	Member
Shri Sanjeev Kumar Arora	Member

APPEARANCE:

Sh. Chetan Yadav	Advocate for the complainant
Ms. Priyanka Aggarwal	Advocate for the respondent

ORDER

1. The present complaint has been filed by the complainant/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 under the provision of the Act or the rules and regulations made there under or to the allottee as per the agreement for sale executed inter se.

A. Unit and project related details

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

S.N.	Particulars	Details
1.	Name of the project	"The Leaf", Sector 85, Gurugram
2.	Nature of project	Group Housing Complex
3.	RERA Registered/ Not Registered	Registered 23 of 2019 dated 01.05.2019
4.	DTPC License no.	81 of 2011 dated 16.09.2011
	Validity upto	15.09.2024
	Licensed area	11.9 Acre
7.	Unit no.	8A, 8 th floor, Building No. T-3 [page no. 24 of complaint]
8.	Unit measuring	1620 Sq. Ft. (page no. 24 of complaint]

9	Date of Allotment	10.09.2012 (page no. 16 of complaint)
10	Date of execution of floor buyer's agreement	11.09.2013. (page no. 28 of complaint)
11.	Possession clause	<p>8. Possession</p> <p>8.1 Time of handing over the possession</p> <p>8.1 (a) subject to terms of this clause and subject to the flat buyer(s) having complied with all the terms and conditions of this agreement and not being in default under any of the provisions of this agreement and complied with all provisions, formalities, documentation etc. as prescribed by the developer, the developer proposes to handover the possession of the flat within a period of thirty six months from the date of signing of this agreement. 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 months or such extended period , for applying and obtaining occupation certificate in respect of the Group Housing Complex.</p>

12.	Due date of possession	11.09.2016 (calculated from the date of signing of buyer agreement) Grace period not allowed
13.	Total consideration sale	Rs. 89,79,300/- (page no. 24 of complaint)
14.	Total amount paid by the complainant	Rs. 76,62,811 till 08.02.2022 (page no. 46 of complaint)
15.	Occupation certificate dated	09.05.2022 (page no. 90 of reply)
16.	Notice for Offer of possession	14.05.2022 (As per page no. 96 of reply)

B. Facts of the complaint

3. That the complainants had booked one flat i.e., 2BHK bearing Unit No. 8-A, Tower-3, in project namely The Leaf, Sector-85, Gurgaon, Haryana.
4. That the flat in question was booked by paying Rs. 7,50,000/- towards booking amount on 29.06.2012 vide cheque No. 504829 duly acknowledged by the respondent and they were allotted flat in question having an approximate super area of 1620 sq.ft. at the basic rate of Rs. 4,650.00/sq.ft and preferential location charges (PLC) of Rs. 225/sq.ft., external development charges (EDC) of Rs. 355/sq.ft. and infrastructure development charges (IDC) of Rs. 35/sq.ft to be

payable as per the payment plan attached with allotment letter dated 10.09.2012. The total sale consideration of the flat in question was Rs. 85,29,300/-.

5. That thereafter, builder-buyer agreement was executed between the parties for the flat in question on 11.10.2013. It is further pertinent to mention that the complainants have taken a housing loan of Rs. 50 lacs for purchase of flat in question from HDFC Bank vide loan agreement dated 06.01.2016.
 6. It is submitted that the complainants have already paid more than 80% of the total sale consideration and that too as per the payment schedule prescribed by the respondent. But till date neither the possession of the flat has been offered nor the occupation certificate has been applied by the respondent. This conduct of the respondent is itself sufficient to prove that its intention is only to unduly enrich from the money belonging to innocent buyers. The respondent has kept the hard-earned money of the complainants for almost a decade and using it for own personal enrichment.
 7. That the cause of action for filing present complaint first arose when the respondent failed to offer possession of the said unit after delay of almost 6 years and obtaining occupancy certificate and is still continuing and subsisting one as it failed to handover the possession of the unit after obtaining the OC from the concerned authorities.
- C. Relief sought by the complainants.**
8. The complainants have sought following relief:

- Where is relief of OPC 2)*
- (i) To handover the possession of the flat in question to the complainant.
- (ii) Direct the respondent to pay litigation cost @Rs. 1,00,000/- to the complainants.

D. Reply by the respondent.

9. That the construction of the unit of the complainants have been completed by the respondent in terms of the FBA. Subsequently, an application for the grant of occupation certificate ("OC") has been applied by the respondent to the Department of Town and Country Planning ("DTCP"), Haryana, and received the OC on 09.05.2022.
10. That the agreements which were executed prior to implementation of RERA Act and Rules shall be binding on the parties and cannot be reopened. Thus, both the parties being signatory to a duly documented flat buyer agreement (hereinafter referred to as the "FBA") dated 31.10.2013 executed by the complainants out of their own free will and without any undue influence or coercion are bound by the terms and conditions so agreed between them.
11. That the proposed timelines for possession have been diluted due to serious payment defaults in making payment of instalments by various allottees of the project "The Leaf". It is submitted that with respect to Tower-3 where the unit of the complainants exists, there stand a large number of dues pending payment of instalment resulting in excessive burden on the respondent. There had been huge defaults in making payments of various instalments by large

number of applicants in the Tower-3 amounting to Rs. 16,94,02,866/- as on 15.04.2021.

12. That after the halt in work due to various reasons and not limited to delay on the part of the allottees, NGT Notifications, Covid-19 pandemic, etc., the work had re-started and is going on in full swing and would be completed very soon and within the timeline committed before RERA Gurugram.
13. It is humbly submitted that despite all aforesaid force majeure circumstances, the respondent has duly completed the construction of project as well as of the tower in which the unit is located has been completed and offered the possession of the said unit vide Offer of possession letter dated 14.05.2022 and email dated 19.05.2022.
14. All the averments made in the complaint were denied in toto.
15. 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 on the basis of those undisputed documents and submission made by the parties.

E. Jurisdiction of the authority

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

E. I Territorial jurisdiction

As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana, the jurisdiction of Haryana Real Estate Regulatory Authority, Gurugram shall be entire

Gurugram district for all purposes. In the present case, the project in question is situated within the planning area of Gurugram district. Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

E. II Subject-matter jurisdiction

Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottees as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

Section 11(4)(a)

Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be.

So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

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

16. Another contention of the respondent is that authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the apartment buyer's agreement executed between the parties and no agreement for sale as referred

to under the provisions of the Act or the said rules has been executed inter se parties. The authority is of the view that the act nowhere provides nor can be so construed that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. The numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of **Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)** decided on 06.12.2017 which provides as under:

"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the floor purchaser and the promoter.....

122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting /

existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."

17. Further, in appeal no. 173 of 2019 titled as ***Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya***, in order dated 17.12.2019 the Haryana Real Estate Appellate Tribunal has observed as under-

"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."

18. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no scope left to the allottees to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective

departments/competent authorities and are not in contravention of any other Act, rules, statutes, instructions, directions issued thereunder and are not unreasonable or exorbitant in nature.

F.II Objection regarding delay in possession due to Covid.

19. As far as delay in construction due to outbreak of Covid-19 is concerned, Hon'ble Delhi High Court in case titled as *M/s Halliburton Offshore Services Inc. V/S Vedanta Ltd. & Anr. bearing no. O.M. P (I) (Comm.) no. 88/ 2020 and I.As 3696-3697/2020* dated 29.05.2020 has observed that-

"69. The past non-performance of the Contractor cannot be condoned due to the COVID-19 lockdown in March 2020 in India. The Contractor was in breach since September 2019. Opportunities were given to the Contractor to cure the same repeatedly. Despite the same, the Contractor could not complete the Project. The outbreak of a pandemic cannot be used as an excuse for non- performance of a contract for which the deadlines were much before the outbreak itself."

20. In the present complaint also, the respondent was liable to complete the construction of the project in question and handover the possession of the said unit by 28.11.2018. The respondent is claiming benefit of lockdown which came into effect on 23.03.2020 and whereas the due date of handing over of possession was much prior to the event of outbreak of Covid-19 pandemic. Therefore, the authority is of the view that outbreak of a pandemic cannot be used as an excuse for non- performance of a contract for which the deadlines were much before the outbreak itself and for the said reason, the said time period is not excluded while calculating the delay in handing over possession.

G. Findings on the relief sought by the complainant.

G.I To handover the possession of the flat in question to the complainant.

Delay Possession Charge

21. The complainants intend to continue with the project and is seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under.

"Section 18: - Return of amount and compensation

*18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building, —
.....*

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."

22. Clause 8.1 of the buyer's agreement provides the time period of handing over possession and the same is reproduced below:

" 8.1 (a) subject to terms of this clause and subject to the flat buyer(s) having complied with all the terms and conditions of this agreement and not being in default under any of the provisions of this agreement and complied with all provisions, formalities, documentation etc. as prescribed by the developer, the developer proposes to handover the possession of the flat within a period of thirty six months from the date of signing of this agreement. 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 months or such extended period, for applying and obtaining occupation certificate in respect of the Group Housing Complex. "

23. At the inception, it is relevant to comment on the pre-set possession clause of the buyer's agreement wherein the possession has been subjected to numerous terms and conditions and force majeure circumstances. The drafting of this clause is not only vague but so heavily loaded in favour of the promoter that even a single default by the allottee in fulfilling obligations, formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottees and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee 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 allottee is left with no option but to sign on the dotted lines.
24. **Admissibility of grace period:** The promoter proposed to hand over the possession of the unit within a period of 36 months from the date of signing of this agreement and it executed on 11.10.2013. So, the due date is calculated from the date of execution of buyer's agreement i.e., 11.10.2016. Further, it was provided in the buyer's agreement that promoters would be entitled to a grace period of 180 days after the expiry of the said committed period for making offer of possession of the said unit. In other words, the respondent is claiming this grace period of 90 days for making offer of possession of the said unit. There is no material evidence on record that the respondent-

promoter had completed the said project within this span of 36 months and started the process of issuing offer of possession after obtaining the occupation certificate. As a matter of fact, the promoter has not obtained the occupation certificate and offered the possession within the time limit prescribed by him in the buyer's agreement. As per the settled law, one cannot be allowed to take advantage of his own wrongs. Accordingly, this grace period of 90 days cannot be allowed to the promoter.

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

Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]

- (1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.

Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.

26. 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.
27. 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., 24.11.2022 is 8.70%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.70%.
28. 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 promoters, 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 allottee, as the case may be.

Explanation. — For the purpose of this clause— the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default.

the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"

29. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 10.35% by the

respondents/promoters which is the same as is being granted to the complainant in case of delayed possession charges.

F.II That this Hon'ble Authority may direct the respondent to pay litigation cost @Rs. 1,00,000/- to the complainants.

30. The complainant in the aforesaid relief are seeking relief w.r.t compensation. Hon'ble Supreme Court of India in civil appeal titled as *M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP & Ors.* has held that an allottee is entitled to claim compensation under sections 12, 14, 18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation. Therefore, the complainants are advised to approach the adjudicating officer for seeking the relief of compensation

G. Directions of the authority

31. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

- I. The respondent is directed to pay interest at the prescribed rate of 10.70% p.a. for every month of delay from the due date of possession i.e., 11.10.2016 till the offer of possession

i.e., 14.05.2022 plus two months i.e., 14.07.2022 to the complainant(s).

- II. A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.
 - III. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 10.70% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act
 - IV. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period against their unit to be paid by the respondent and on clearance of outstanding amount, the respondent is directed to handover the possession of the allotted unit to them.
32. Complaint stands disposed of.
33. File be consigned to registry.


Sanjeev Kumar Arora
Member


Ashok Sangwan
Member


Vijay Kumar Goyal
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 21.02.2023