

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

Complaint no. : 1374 of 2022
Date of filing complaint : 30.03.2022
First date of hearing : 27.04.2022
Date of decision : 14.02.2023

Bhishan Das Nayar and Sons Both R/O: -370-R, Model Town, Yamunanagar, Haryana	Complainant
Versus	
M/s SS Group Pvt. Limited Regd. Office at: 4th floor, The Plaza, IFFCO Chowk, M.G. Road	Respondent

CORAM:	
Shri Vijay Kumar Goyal	Member
Shri Ashok Sangwan	Member
APPEARANCE:	
Sh. Ravi Rao Proxy Counsel	Advocate for the complainant
Ms. Priyanka Agarwal	Advocates for the respondent

ORDER

1. The present complaint has been filed by the complainant/allottee 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 complainant, 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
5.	Unit no.	2B, 2 nd floor, Building No. T-2 [page no. 16 of complaint]
6.	Unit measuring	1620 Sq. Ft. (page no. 16 of complaint)
7.	Date of execution of floor buyer's agreement	04.10.2013. (Page no. 14 of complaint)
8.	Possession clause	8. Possession 8.1 Time of handing over the possession 8.1 (a) subject to terms of this



		<p>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>
9.	Due date of possession	04.10.2016 (calculated from the date of signing of buyer agreement) Grace period not allowed
10.	Total sale consideration	Rs. 92,62,800/- (page no. 16 of complaint)
11.	Total amount paid by the complainant	Rs. 74,43,355/- (page no. 9 of complaint)
12.	Occupation certificate dated	09.05.2022 (page no. 50 of reply)
13.	Notice for Offer of	13.05.2022

possession

(As per page no. 56 of reply)

B. Facts of the complaint

3. That the complainant was allotted a unit/flat bearing No 2B, on 2nd floor of Tower no. 2 having super area of 1620 sq. ft in the project of the respondent namely, "The Leaf", Sector-85", Gurgaon for total sale consideration of Rs.9262800/- which includes BSP, car parking, IFMS, club membership, PLC etc. and the complainant paid Rs.74,34,355/- to the respondent till date.
4. That the buyers' agreement executed between the parties on 04.10.2013 and as per para no.8.1(a) of the buyer agreement, the respondent had agreed to deliver the possession of the flat within 36 months from the date of signing the agreement.
5. That complainant regularly visited the site but was surprised to see that construction work is not in progress and no one was present at the site to address the queries of the complainant. It appears that respondent has played fraud upon the complainant. The only intention of the respondent was to take payments for the Tower without completing the work. The respondent mala- fide and dishonest motives and intention cheated and defrauded the complainant. That despite receiving of 95% payment of all the demands raised by the respondent for the said flat and despite repeated requests and reminders over phone calls and personal visits of the complainant, the respondent has failed to deliver the possession of the allotted flat to the complainant within stipulated period.

6. That due to omission on the part of the respondent, the complainant has been suffering from disruption on his living arrangement, mental torture, agony and also continues to incur severe financial losses. As per clause 8.3 of the flat buyer agreement dated 04.10.2013 it was agreed by the respondent that in case of any delay, the respondent shall pay to the complainant a compensation@ Rs5/- per sq. Ft per month of the super area of the apartment/flat. It is however, pertinent to mention here that a clause of compensation at a such of nominal rate of Rs.5/- per sq.ft per month for the period of delay is unjust and the respondent has exploited the complainant by not providing the possession of the flat even after a delay from the agreed possession plan. The respondent cannot escape the liability merely by mentioning a compensation clause in the agreement. It could be seen here that the respondent has incorporated the clause in one sided buyers agreement and offered to pay a sum of Rs.5/- per sq.ft for every month of delay.
7. That on the ground of parity and equity the respondent also be subjected to pay the same rate of interest. Hence the respondent is liable to pay interest on the amount paid by the complainant @18% per annum to be compounded from the promise date of possession till the flat is actually delivered to the complainant.

C. Relief sought by the complainant.

8. The complainant has sought following relief:
- (i) *Direct the respondent to pay delay possession charge at the prescribed rate of interest.*

D. Reply by the respondent.

9. That the original allottee was allotted a residential unit in the project developed by the Respondent namely 'The Leaf' situated at Sector-85, Gurugram (tentatively admeasuring about 1620 sq.ft.). On account of fulfilment of the requisite eligibility for the allotment. The original allottee vide its Request Letter dated 06.10.2012 requested for transfer of the said allotment of the unit in favour of M/s. Bishan Dass Nayar & Sons (hereinafter "**the Complainant**"). Thereafter the allotment of the flat was endorsed in the favour of the complainant.
10. That the complainant opted a construction-link payment plan and was supposed to make payments as and when demands were raised by the respondent. It is pertinent to mention here that as per the records maintained by the respondent, the complainant has not fulfilled his obligation and has not paid the installments on time that had fallen due, despite receipt of repeated demand letters and reminder letters. It is submitted that till date the total delay in rendering the payment towards due installments by the complainant is approx. **1645 days** on various occasions under different installments. The following payment sheet as on 30.05.2022 clearly shows the delay in number of days in making payment by the complainants:

S:N	Installment	Dues	Demand date	Due Date	Payment date	Delay
1.	At the time of notice for handing over of Possession	935166	13/05/2022	30/05/2022	Unpaid	13
2.	On Completion Finishing works in the Flat including wooden flooring	462666	13/05/2022	30/05/2022	Unpaid	13
3.	On completion of Internal and external paint works fixing of doors and window	462666	17/02/2022	05/03/2022	Unpaid	98
4.	On completion of external plaster	463433	17-06-2021	07/07/2021	Unpaid	341



5.	Demand Notice For VAT	26749	04-07-2019		Unpaid	1074
6.	Demand Notice For VAT	9253	09-10-2018	09/10/2018	19/11/2018	41
7.	On completion of Internal plaster Electrical conduiting	493563		05/02/2018	03/02/2018	0
8.	On completion of Brick Work	493528	22-11-2017	22-11-2017	21/11/2017	0
9.	On completion of final slab		19/02/2018			0
10.	On completion of 15 th Floor	454851		05/12/2016	31/01/2016	57
11.	On completion of 10 th Floor	458370		5/07/2016	04/07/2016	0
12.	On completion of 6 th Floor			27/02/2016		0
13.	On completion of 3rd Floor	451691	20/11/2015	20/11/2015	28/11/2015	8
14.	On completion of 1 st Floor	433335	20/04/2015	31/08/2015	31/08/2015	0
15.	On completion of Lower Basement Slab	908514		21/07/2014	19/07/2014	0
16.	On commencement of construction work	908514	3/07/2014	15/07/2014	13/07/2013	0
17.	On Before 45 th day of Allotment	908514	29/09/2012	29/10/2012	03/10/2012	0
18.	At the time of Allotment	158515	8/09/2012	14/09/2012	16/09/2012	0
19.	At the Time of Booking	750000			28/05/2012	1645

11. The respondent has already completed the construction and already obtained the occupation certificate of the said tower in which the unit allotted to the complainants is located. The respondent has already offered the possession of the unit to the complainants after the receipt of occupation certificate subject to the payment of the remaining dues by the complainants vide offer of possession letter dated 13.05.2022 and email dated 17.05.2022. The complainant has failed to clear the demand raised qua offer of possession as on date.
12. All other averments made in the complaint were denied in toto.
13. 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 allottee 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 complainant at a later stage.

F. Findings on the relief sought by the complainant.

F.I Direct the respondent to refund amount paid by the complainant along with prescribed rate of interest.

14. In the present complaint, the offer of possession of unit was made on 13.05.2022 after obtaining occupation certificate on 09.05.2022. The complaint was filed on 30.03.2022 after the demand for outstanding dues were made to the allottee to take possession. Accordingly, the allottee from the due date of delivery of possession i.e., 04.10.2016 till date of offer of possession never intended to withdraw from the project, accordingly entitled for 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.”

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

"Clause 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. However, this period will 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 months or such extended period, for applying and obtaining occupation certificate in respect of the Group Housing Complex. .."

16. 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 promoters 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 allottee 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 builders have 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.

17. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the unit within a period of 36 months from the date signing of flat buyer's agreement, whichever is later, the buyer's agreement was executed on 04.10.2013. So, the due date is calculated from the date of execution of buyer's agreement i.e., 04.10.2016. Further it was provided in the flat buyer's agreement that promoters would be entitled to a grace period of 90 days after the expiry of the said committed period for applying and obtaining occupation certificate. There is no material evidence on record that the respondent-promoter had completed the said project within this span of 36 months and had started the process of applying and obtaining 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 them in the flat 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.
18. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges at the prescribed rate of interest on the amount already paid by him. 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.

19. 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.
20. 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., 14.02.2023 is 8.6%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.60%.
21. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottees by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottees, in case of default. The relevant section is reproduced below:

"(za) "interest" means the rates of interest payable by the promoter or the 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;"

22. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 10.60% by the respondent/promoter which is the same as is being granted to the complainants in case of delayed possession charges.

G. Directions of the authority

23. 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 10.60% p.a. for every month of delay from the due date of possession i.e. 04.10.2016 till the offer of possession i.e., 13.05.2022 plus two months i.e. 13.07.2022 to the complainant(s).
 - II. The arrears of such interest accrued from due date of possession till its admissibility as per direction (i) above shall be paid by the promoters to the allottee within a period of 90 days from date of this order as per rule 16(2) of the rules.




- III. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period against his unit to be paid by the respondent.
- IV. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 10.60% 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

24. Complaint stands disposed of.

25. File be consigned to registry.


(Ashok Sangwan)
Member


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 14.02.2023