



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

Complaint no. : 1706 of 2022
Date of filing complaint : 20.04.2022
First date of hearing : 08.07.2022
Date of decision : 14.02.2023

	Sumit Dahiya Both R/O: -DP_223, Pitampura, Delhi	Complainant
Versus		
1 2	M/s SS Group Pvt. Limited M/s Shiva Profins Pvt. Ltd Regd. Office at: 4th floor, The Plaza, IFFCO Chowk, M.G. Road	Respondents

CORAM:	
Shri Vijay Kumar Goyal	Member
Shri Ashok Sangwan	Member
APPEARANCE:	
Sh. Sanjeev Sharma	Advocate for the complainants
Ms. Rahul Bhardwaj	Advocates for the respondents

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.	4C, 4 th floor, Building No. 1 [page no. 33 of reply]
6.	Unit measuring	1695 Sq. Ft. (Page no. 33 of reply)
7.	Date of Allotment	08.09.2012 (Page no. 23 of reply)
8.	Date of execution of floor agreement buyer's	17.10.2013. (Page no. 32 of reply)
9.	Possession clause	8. Possession



8.1 Time of handing over the possession

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.

10.	Due date of possession	17.10.2016 (Calculated from the date of signing of buyer agreement) Grace period not allowed
11.	Total sale consideration	Rs. 91,10,925/- (Page no. 34 of reply)
12.	Total amount paid by the complainant	Rs. 68,19,794/- (As alleged by the complainant)
13.	Occupation certificate	09.05.2022

	dated	(Page no. 71 of reply)
14.	Offer of possession	12.05.2022 (As per page no. 74 of reply)

B. Facts of the complaint

3. That the complainant booked a residential flat bearing unit no. 4C, 4th Floor, Tower/Building T-1, admeasuring 1645 Sq. ft. along with one reserved car parking in the said project floated by the respondents and on the inducement that the possession of the unit purchased shall be handed over on time with all amenities as promised. whereby the complainant had paid booking amount of Rs. 7,50,000/-.
4. That the complainant and the respondents entered into the buyer's agreement on 17.10.2013. However, as per clause 8.1 of the buyer's agreement, the possession of the unit was to be handed over 36 months from the date of signing of the agreement, i.e., September 2016.
5. That the total sale consideration for the unit no. 4C, 4th Floor, tower/building T-1, admeasuring 1645 Sq. ft. in the project i.e., "**THE LEAF**" was fixed at Rs. 91,10,925/-. The point of consideration in the buyer's agreement is the sale price which the respondents had fixed wherein the respondents have charged complainant fraudulently twice in the name of preferential location charges under clause 1.2 (a) which is equivalent to Rs. 3,70,125/-. It is submitted that the complainant never requested the respondent for any particular location or floor and based on the inventory available with the respondents, the unit in question was allotted to the complainants and when the complainant questioned about

the difference between the two PLCs, the response which was received by the complainant was that one PLC is **Park or Corner** and the other is **Park and Corner**.

6. That is submitted that the possession was to be handed over to the complainant by October 2016 but the same did not happen even till today, being delay of more than 5 years despite the fact that the complainants have made a total payment of Rs. 68,19,794/- from July 2012 to March 2018 itself based on the demands raised by the respondents.

C. Relief sought by the complainant.

7. 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.

8. That, the complainant was allotted the unit bearing no. 4-C, 4th floor located on the Tower-1 having an approximate super area of 1741 sq.ft. of the project "The Leaf" at the basic price of Rs. 4800 per sq.ft. and preferential location charges (PLC) of Rs. 150/- per sq.ft., additional preferential location charges (APLC) of Rs. 75/- external development charges (EDC) of Rs. 355/- per sq.ft., infrastructure development charges (IDC) of Rs 35/- per sq.ft. to be payable as per the payment plan. It is submitted the total sale consideration of the flat booked by the complainant was Rs. 91,10,925/-. However, it is submitted that the sale consideration amount was extensive of the registration charges, stamp duty charges, service tax and other charges which were to be paid by the complainant at the applicable stage. It is submitted that complainant

defaulted in making payments towards the agreed sale consideration of the flat from the very inception, i.e., after signing the allotment letter.

9. That the complainant has no cause of action to file the present complaint as the same is based on an erroneous interpretation of the provisions of the act as well as an incorrect understanding of the terms and conditions of the flat buyer's agreement dated 17.10.2013. It is further submitted that the complainant is an investor and have booked the unit in question to yield gainful returns by selling the same in the open market; however, due to the ongoing slump in the real estate market, the complainant has filed the present purported complaint to wriggle out of the agreement.
10. The respondents have 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 respondents have already offered the possession of the unit to the complainant after the receipt of occupation certificate subject to the payment of the remaining dues by the complainant vide offer of possession letter dated 16.05.2022. The complainant has failed to clear the demand raised qua offer of possession as on date.
11. It is pertinent to note that the construction of the project was stopped on account of the NGT order prohibiting construction (structural) activity of any kind in the entire NCR by any person, private or government authority. It is submitted that vide order dated 20.07.2016 NGT placed sudden ban on the entry of diesel trucks more than ten years old and said that no vehicle from outside or within Delhi will be permitted to transport any construction material. Since the construction activity was suddenly stopped, after the lifting of the ban it took some time for mobilization of the work by various agencies employed with the respondents. The date of

the completion of the project therefore comes out to be 04.01.2017. In addition to this, the date of possession as per the Flat Buyers agreement further increased to grace months of 3 months. The date of the completion of the project was further pushed due to the force majeure conditions i.e., due to the NGT orders and the lockdown imposed because of the worldwide Covid-19 pandemic, by which the construction work all over the NCR region came to halt. That DTCP, Haryana vide its notification no. 27 of 2021 dated 25.06.2021, gave a relaxation of 6 months to all the builders in view of the hurdles faced by them due to covid-19.

12. It is pertinent to note that the compensation in the form of interest on delayed possession to be paid by the respondents to the complainant is unjust and improper as the respondent itself has infused huge sum of funds into the project through SWAMIH Loan sanctioned by the Ministry of Finance, Government of India for completing the stalled project in the interest of the buyers, so that the project could be completed on time. Despite force majeure conditions the respondents had completed the project well before the expected time despite the defaults of numerous allottees.
13. All other averments made in the complaint were denied in toto.
14. 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.

15. 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 objections raised by the respondent.

F. I Objection regarding the complainants being investor and delay due to force majeure.

16. It is pleaded on behalf of respondent that complainants are an investor and not consumer. So, she is entitled to any protection under the Act and the complaint filed by her under Section 31 of the Act, 2016 is not maintainable. It is pleaded that the preamble of the Act, states that the Act is enacted to protect the interest of consumers of the real estate sector. The Authority observes that the respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states the main aims and objects of enacting a statute but at the same time, the preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if he contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the buyer's agreement, it is revealed that the complainants are buyers and paid considerable amount towards purchase of subject unit. At this stage, it is important to stress upon the definition of the term allottee under the Act, and the same is reproduced below for ready reference:

"Z(d) 'allottee' in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold(whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent."

17. In view of above-mentioned definition of allottee as well as the terms and conditions of the buyer's agreement executed between the parties, it is crystal clear that the complainants are an allottees as the subject unit allotted to them by the respondent/promoter. The concept of investor is

not defined or referred in the Act of 2016. As per definition under section 2 of the Act, there will be 'promoter' and 'allottee' and there cannot be a party having a status of 'investor'. The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal No.0006000000010557 titled as *M/s Srushti Sangam Developers Pvt Ltd. Vs Sarvapriya Leasing (P) Ltd. and anr.* has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottee being an investor is not entitled to protection of this Act also stands rejected.

18. Further, the respondent-promoters raised the contention that the construction of the project was delayed due to force majeure conditions such as commonwealth games held in Delhi, shortage of labour due to implementation of various social schemes by Government of India, slow pace of construction due to a dispute with the contractor, demonetisation, lockdown due to covid-19 various orders passed by NGT and weather conditions in Gurugram and non-payment of instalment by different allottees of the project but all the pleas advanced in this regard are devoid of merit. The flat buyer's agreement was executed between the parties on 20.03.2012 and the events taking place such as holding of commonwealth games, dispute with the contractor, implementation of various schemes by central govt. etc. do not have any impact on the project being developed by the respondent. Though some allottees may not be regular in paying the amount due but whether the interest of all the stakeholders concerned with the said project be put on hold due to fault of on hold due to fault of some of the allottees. Thus, the promoter respondent cannot be given any leniency on based of aforesaid reasons and it is well settled principle that a person cannot take benefit of his own wrong.

G. Findings on the relief sought by the complainant.

G.I Direct the respondent to pay delay possession charge along with prescribed rate of interest.

19. In the present complaint, the counsel for the complainant states that the offer of possession of unit was made on 12.05.2022 after obtaining occupation certificate on 09.05.2022 with undue demands. Further even prior to above offer of possession, there is delay in making the offer as the due date of handing over of possession was 17.10.2016. The complaint was filed on 20.04.2022 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., 17.10.2016 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."

20. 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. .."

21. 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.
22. **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 17.10.2013. So, the due date is calculated from the date of execution of buyer's agreement i.e., 17.10.2016. 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.

23. **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.

24. 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.
25. 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%.
26. 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;”

27. 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.
28. Further, the complainant has pleaded that the respondent builder raised undue demands w.r.t. the PLC which is not justified and be struck off. The respondents in this regard took a plea that the demand of PLC charges are as per buyers agreement and allottee is required to make outstanding dues alongwith interest. From the above stated facts, the respondent is directed to issue a revised statement of account after adjusting the delay possession charges and justification of additional PLC charges shall be given, if the same is not part of buyer's agreement then it shall not be included and possession shall be handed over after payment of outstanding dues.

G. Directions of the authority

29. 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., 17.10.2016 till the offer of possession i.e., 12.05.2022 plus two months i.e., 12.07.2022 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

30. Complaint stands disposed of.

31. File be consigned to registry.


(Ashok Sangwan)
Member


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 14.02.2023