

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

Order pronounced on: 27.09.2023

Name of the Builder		SS Group Pvt. Ltd.	
Project Name		The Leaf, Sector 85, Gurugram, Haryana	
S. No.	Complaint No.	Complaint Title	Attendance
1.	5593/2022	Amit Malik Vs SS Group Pvt. Ltd.	Shri KK Kohli Shri Rahul Bhardwaj
2.	5644/2022	Dharamvir Khurana Vs SS Group Pvt. Ltd.	Shri KK Kohli Shri Rahul Bhardwaj

CORAM	
Shri Ashok Sangwan	Member

ORDER

1. This order shall dispose 2 complaints titled as above filed before this authority in form CRA under section 31 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred as "the Act") read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (hereinafter referred as "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 its obligations, responsibilities and functions to the allottees as per the agreement for sale executed inter se between parties.

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2. The core issues emanating from them are similar and the complainant in the above-referred matters had executed a BBA with the respondent for the purchase of units in the project, namely, The Leaf being developed by the same respondent/promoter i.e., SS Group Pvt. Ltd. The terms and conditions of the BBA form the fulcrum of the issue involved in all these cases about failure on the part of the promoter to issue timely possession of the units in question and seeking award of delayed possession charges.
3. The details of the complaints, reply status, unit no., date of BBA, possession clause, the due date of possession, the offer of possession, total sale consideration, the amount paid up, and reliefs sought are given in the table below:

Sr. no	Complaint no./title/ date of filing the complaint	Reply status	Unit No. and area admeasuring (Carpet area)	Date of execution of apartment buyer's agreement.	Due date of possession & occupation certificate date & offer of possession	Total sale consideration and amount paid by the Complainant (s) and amount waived off.	Relief Sought
1.	CR/5593/2022 titled "Amit Malik Vs SS Group Pvt. Ltd." Date of filing complaint: 29.08.2022	Reply received on: 28.02.2023	21D, 21 st Floor, Tower 2. 1575 Sq. Ft.	08.08.2013	Due date: 08.08.2016 Occupation Certificate: 09.05.2022 Offer of possession: 13.05.2022	Total sale consideration: Rs. 86,33,700/- Amount paid: Rs. 77,40,173/-	i. Possession & DPC. ii. Adjust the payment of DP towards dues form the complainant.

2.	CR/5644/2022 Titled "Dharamvir Khurana Vs SS Group Pvt Ltd." Date of filing complaint: 29.08.2022	Reply received on: 28.02.20 23	21A, 21 st Floor, Tower 2. 1620 Sq. Ft.	23.09.2013	Due date: 23.09.2016 Occupation Certificate: 09.05.2022 Offer of possession: 13.05.2022	Total sale considerati on: Rs. 88,67,720/- Amount paid: Rs. 79,68,093/-	i. Possession & DPC ii. Adjust the payment of DPC towards dues form the complainan t.
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4. The aforesaid complaints were filed by the complainant against the promoter on account of violation of BBAs, executed between the parties inter se in respect of the purchase of units for seeking award of delayed possession charges.
5. It has been decided to treat the said complaints as an application for non-compliance of statutory obligations on the part of the promoter/respondent in terms of section 34(f) of the Act which mandates the authority to ensure compliance with the obligations cast upon the promoters, the allottee(s) and the real estate agents under the Act, the rules and the regulations made thereunder.
6. The facts of both the complaints filed by the complainant(s)/allottee(s) are also similar. Out of the above-mentioned case, the particulars of lead case CR/5593/2022 titled "Amit Malik Vs SS Group Pvt. Ltd." are being taken into



consideration for determining the rights of allottee(s) qua delay possession charges inter alia.

A. Unit and project-related details

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

CR/5593/2022 titled "Amit Malik Vs SS Group Pvt. Ltd.

Sr. No.	Particulars	Details
1.	Name of the project	"The Leaf", Sector 85, Gurugram
2.	Project area	11.093 acres
3.	Nature of the project	Group Housing Complex
4.	DTCP license no. and validity status	81 of 2011 dated 16.09.2011 valid up to dated 16.09.2011
5.	Name of licensee	M/S Shiva Profins Pvt Ltd
6.	RERA Registered/ not registered	Registered 23 of 2019 dated 01.05.2019
7.	Unit no.	21D, 21 st floor, Tower No. 2 [page no. 40 of reply]
8.	Unit area measuring	1575 Sq. Ft. (page no. 40 of reply)
9.	Date of execution of agreement to sell	08.08.2013. (page no. 24 of complaint)

10.	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, for applying and obtaining an occupation certificate in respect of the Group Housing Complex.
12.	Due date of possession	08.08.2016 (calculated from the date of signing of buyer agreement) Grace period not allowed
13.	Total sale consideration	Rs. 86,33,700/- (Page no. 41 of reply)
14.	Amount paid by the complainants	Rs. 77,40,173/- (Page no. 64 of reply)
15.	Occupation certificate /Completion certificate	09.05.2022 (Page no. 93 of reply)
16.	Offer of possession	13.05.2022

(As per page no. 96 of reply)

B. Facts of the complaint:

8. The complainant is an allottee within the meaning of section 2(d) of the Real estate (Regulation and Development) Act 2016.
9. In 2012, the respondent advertised about its new group housing complex namely "THE LEAF", in Sector 85, Gurgaon, Haryana.
10. Believing the representations of the respondent, the complainant booked an apartment in the project of the respondent and paid an amount of Rs. 7,50,000 dated 05 July 2012, towards the booking of the said apartment bearing no. 21D, Tower-2, 21st Floor, measuring 1575 sq. feet super area.
11. To finance the purchase of the said unit, the complainant availed a home loan of Rs. 69,00,000/- from Housing Development Finance Corporation Ltd.
12. That, after executing the flat buyer agreement, the respondent kept on demanding money on account of the purchase of the said unit upon which the complainant requested the respondent either to give possession or to refund the deposited amount, left with no other option, the complainant kept on making the payments as per the demands raised with the hope that the respondent would construct the said project and would handover the possession as per the time schedule.
13. During the period of 2016-17, the complainant approached the project site in order to see the status of the construction of the project but the project was nowhere near completion. The complainant then contacted the respondent to know about the completion of the project upon which the

respondent kept on saying that the project would be ready within a period of 1 year.

14. That, thereafter the complainant kept making calls and through personal visits, meetings, and telephonic conversations kept requesting the respondent to complete the construction of the project but all in vain.
15. The respondent after 9 years i.e., much after the due date of possession, on 13 May 2022 executed the offer of possession after so many calls and e-mails.
16. The respondent duped the complainant of his hard-earned money and life savings. The aforesaid arbitrary and unlawful act on the part of the respondent has resulted in extreme kind of financial hardships, mental stress, pain, and agony to the complainant.
17. The respondent retained the hard-earned money of the complainant for so many years beyond the due date of possession, thereby highlighting unfair trade practice on their part and also a breach of terms and conditions of the agreement and deficiency in the service on the part of the respondent.
18. As per section 11 (4) of the Real Estate (Regulation and Development) Act, 2016, the promoter is liable to pay delayed possession interest to the allottees of an apartment, building, or project for a delay or failure in handing over such possession as per the terms and agreement of the sale.
19. That, as per Section 18 of the Real Estate (Regulation and Development) Act, 2016, the promoter is liable to pay interest to the allottees of an apartment, or building project for a delay or failure in handing over of such possession as per terms and agreements of the sale.

20. The respondent raised several unjust demands in the offer of possession dated 13.05.2022:

- i. Electricity and backup charges of Rs. 3,44,400/-
- ii. GST.
- iii. Increase of 65 sq. ft. in Super area.

C. The relief sought by the complainants:

21. The complainants have sought the following relief(s):

- i. Direct the respondent to hand over the possession.
- ii. Direct the Respondent to pay the interest on the total amount paid by the Complainants at the prescribed rate of interest as per RERA from the due date of possession till the date of actual physical possession.

D. Reply by the respondent

22. That the present petition is not maintainable as the complainant has failed to disclose any maintainable cause of action under the said provisions of the Act as alleged. The present complaint does not pertain to the compensation and interest for the delay in the completion of the project under Section 18 of the Real Estate (Regulation and Development) Act, 2016 as the project has already been completed and the respondent has already received the occupational certificate from the competent authority and is required to be filed before the civil court as the agreement is civil in nature and not before this Hon'ble Regulatory Authority. It is stated that this Hon'ble Authority does not have the jurisdiction to entertain the

present complaint as it has been wrongly filed and shall be filed with the appropriate authority for the proper adjudication.

23. The complainant after checking the veracity of the project approached the respondent and expressed an interest in booking a unit in the residential project developed by the respondent known as "The LEAF".
24. Thereafter the complainant booked a unit on 05.07.2012 by paying a booking amount of Rs. 7,50,000/-. Thereafter the complainant was allotted a unit bearing no. 21 D, 21st Floor located on Tower-2, measuring 1,575 sq. ft. in the project vide an allotment letter dated 10.09.2012. The complainant willfully opted for a down payment plan and further represented to the respondent that he shall remit every installment on time as per the payment schedule.
25. The flat buyer's agreement dated 08.08.2013 was executed between the complainant and the respondent and contained the final understandings between the parties stipulating all the rights and obligations.
26. It is submitted the total sale consideration of the flat booked by the complainant was Rs. 86,33,700/-. However, the sale consideration amount was exclusive of the registration charges, stamp duty charges, service tax, and other charges that were to be paid by the complainant at the applicable stage. Further, the complainant defaulted in making payments towards the agreed sale consideration of the flat from the very inception, i.e., after signing the allotment letter.

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27. The complainant is an investor and has 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. Moreover, the complainant himself has delayed the payment towards the installment of the unit and only cleared the payments after continuous efforts made by the respondent after sending numerous reminder and demand letters to the complainant.
28. It is submitted that as per clause 1.2(a) of the Flat Buyer Agreement dated 08.08.2013, the external development costs and infrastructure development costs shall be paid by the allottee(s) along with the taxes, fees, and other charges levied by the government. The charges which the complainant is being called upon to dispose of their responsibility were always known to them by the way of the flat buyer agreement dated 08.08.2013. Further, the increase in area is within the permissible limits of the Directorate of Town & Country Planning, Haryana, and the provisions of the Real Estate (Regulation & Development) Act, 2016.
29. Furthermore, the allegations levied against the respondent with respect to the levying of unqualified electricity charges and power backup charges as well as charges with respect to the increase in area are grossly misconceived. Moreover, in the payment plan which has been mentioned in the offer of possession letter dated 13.05.2022, it can be clearly observed that no

amount per se has been levied against the increase in the super area of the unit.

30. It is submitted that the respondent has not raised any unjustified demands at the time of the offer of possession, the respondent has asked the complainant to make the payment of the balance amount from their basic sale price along with the GST @ 5% in accordance with clause 2, electricity and power backup connection charges in accordance with clause 1.7, charges in connection with the increased area of the unit in accordance with clause 7.2 (a), the payment of all above-mentioned charges are responsibility/ liability of complainant, which they cannot evade by disputing them, demand raised by the respondent at the time of offer of possession are in consonance with the builder buyer agreement dated 08.08.2013.
31. Furthermore, the respondent in consonance with the builder-buyer agreement dated 08.08.2013 calculated and adjusted the delay compensation for the unit in question for the period of delay.
32. Further, the project got delayed on account of various force majeure conditions such as orders of the Hon'ble Supreme Court, NGT, the Covid-19 pandemic, labor shortage, building material shortage, demonetization, GST implementation, payment defaults by allottees, farmers protest.
33. Several allottees defaulted in timely remittance of payment of installments which was an essential requirement for conceptualisation and development

of the project in question. Despite there being a number of defaulters in the project, the respondent infused a huge amount of funds into the project and diligently developed the project.

34. The project at the present date stands completed and has received the occupational certificate (OC) from the competent authority on date 09.05.2022. Therefore, it will be difficult for the respondent to pay any interest on the delayed possession at this stage. Further, the respondent has already sent the offer of possession letter dated 13.05.2022. At this point, when the project already stands completed any relief cannot be given to the complainant as it will be detrimental to the interest of the respondent as well as all the other investors who have invested in the project.
35. That the compensation in the form of interest on delayed possession to be paid by the respondent to the complainant is unjust and improper as the respondent itself has infused a 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.

E. Jurisdiction of the authority:

36. The plea of the respondent regarding the rejection of the complaint on the grounds of jurisdiction stands rejected. The authority observes that it has territorial and 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, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be the entire Gurugram District for all purposes with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram district. Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

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 the 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;

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance with the obligations cast upon the promoters, the allottees, and the real estate agents under this Act and the rules and regulations made thereunder.

37. So, given 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 objections raised by the respondent.

F.I Objection regarding the entitlement of DPC on the grounds of the complainant being an investor.

38. The respondent has taken a stand that the complainant is the investor and not consumer, therefore, he is not entitled to the protection of the Act thereby not entitled to file the complaint under section 31 of the Act. The respondent also submitted 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 a settled principle of interpretation that a preamble is an introduction of a statute and states the main aims & objects of enacting a statute but at the same time 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 the promoter 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 builder buyer's agreement, it is revealed that the complainant is a buyer and he has paid a total price of Rs. 77,40,173/- to the promoter towards the purchase of an apartment in its project, At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

"2(d) "allottee" about 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;"

39. In view of the above-mentioned definition of "allottee" as well as all the terms and conditions of the space buyer's agreement executed between promoter and complainant, it is crystal clear that the complainant is allottee as the subject unit was allotted to him by the promoter. The concept of investor is not defined or referred to in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having the 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. Anr.** has also held that the concept of investors is not defined or referred to in the Act. Thus, the contention of a promoter that the allottee being an investor is not entitled to the protection of this act also stands rejected.

F.II Objections regarding force Majeure

40. The respondent-promoter has raised the contention that the construction of the tower in which the unit of the complainant is situated, has been delayed due to force majeure circumstances such as orders passed by the Hon'ble SC, National Green Tribunal to stop construction during, Covid-19, Labor and material shortage, non-payment of installment by allottees and demonetization, GST, farmer's protest, etc. The plea of the respondent regarding various orders of the NGT and demonetization and all the pleas advanced in this regard are devoid of merit. The orders passed by SC, and NGT banning construction in the NCR region were for a very short period of time and thus, cannot be said to impact the respondent-builder leading to such a delay in the completion. Further, the respondent-promoter must have foreseen such events. Also, there may be cases where allottees have not paid

instalments regularly but all the allottees cannot be expected to suffer because of few allottees. Thus, the promoter respondent cannot be given any leniency on the basis of aforesaid reasons and it is well well-settled principle that a person cannot take benefit of his own wrong.

G. Findings on the relief sought by the complainant:

G.1 Direct the respondent to hand over the possession.

41. In the instant case, the space buyer agreement was executed between the complainant and the respondent on 08.08.2013, and as per clause 8.1(a) of the said agreement, the possession was to be handed over within 3 years. The said clause 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, for applying and obtaining an occupation certificate in respect of the Group Housing Complex.

Therefore the due date of possession comes out to be 08.08.2016.

42. **Admissibility of grace period:** the promoter in clause 8.1(a) of the agreement between the parties has stated that an additional grace period of 90 days shall be available to it for applying and obtaining the occupation certificate in respect of the group housing complex. The respondent-promoter contended that it shall be provided the grace period of 90 days. However, the Authority is of the view that the grace period shall not be available to it as there has been a massive delay in the completion of the

project and the same period was not utilized in obtaining the completion certificate.

43. There has been a delay in obtaining the occupation certificate by the respondent, the said OC was obtained only on 09.05.2022. Thereafter the respondent issued an offer of possession on 13.05.2022 that contained several demands including payment of balance dues on the part of the complainant. After this, the complainant filed a complaint with this Authority on 29.08.2022.
44. As the occupation certificate has been obtained by the respondent, the offer of possession can be made by the respondent. As per section 19(10) of the Act, the complainant/allottee is duty-bound to take possession within two months of the occupancy certificate issued for the said unit.
45. On the issue of unjust additional demands, the said issue has been dealt with in detail in succeeding paras.
46. The complainant contended that the letter for the offer of possession is bad in law as it has raised several illegal demands that are not listed in the flat buyer agreement. The demands raised illegally as per the complainant are as follows: Electric and power backup charges (EPBC), GST at the rate of 5%, and demand on account of increased super area.
47. On the issue of electricity and power backup charges, clause 1.7(a) states that the cost of electric wiring and power backup charges shall be included in the total sale price. The said clause is reproduced below:

"1.7 The total Sale Price of the said Flat mentioned in the Schedule of Payments in Annexure I of this Agreement includes the proportionate cost of providing electric wiring and switches in each unit and fire fighting and fire safety equipment as required by the existing code/regulations and power back up

not exceeding 5 KVA for 2 BHK, 8 KVA for 3 BHK, 9 KVA for 4, and 12 KVA for 5 BHK after accounting for an overall suitable diversity of 70% per apartment in addition to that for the common area and services, but is exclusive of cost of electric fittings, fixtures, electric and water meter etc. which shall be got installed by the Flat Buyer(s) at his/her their own cost as well as charges for water and electricity connection. If, however due to any subsequent legislation/Government order, directives, guidelines or changes/amendments in Fire Codes including the National Building Code or if deemed necessary by the Developer at its sole discretion, additional fire safety measures are undertaken, then the Flat Buyer(s) undertakes to pay within thirty (30) days from the date of written demand by the Developer, the additional expenditure incurred thereon along with other Flat Buyer(s) prorate basis, in proportion to the super area of his/her/their FLAT to the total super area of all the flats in the said Group Housing Complex as determined by the Developer in its absolute discretion.

The Flat Buyer(s) agrees to pay any additional deposits, charges for bulk supply of electrical energy, any amount spent towards additional transformers, sub-stations or any transmission line to the 'Group Housing Complex' as may be demanded by the Developer from time to time."

In the context of the aforesaid clause, it becomes evident that the further demand of Rs. 3,44,400 in the head of electricity and power backup charges raised upon the complainant is unjust and illegal. Hence said demand cannot be raised upon the complainant.

48. On the issue of demand for GST, it is evident that the goods and services tax was enacted only in the year 2017, so it is a fresh tax. The possession of the apartment was supposed to be delivered in August 2016, therefore, the tax which has come into existence after the due date of delivery should not be levied being unjustified since the same would not have fallen on the allottees had the same been delivered within the time stipulated in the builder buyer's agreement. The authority is of the view that admittedly, the due date of possession of the unit was 08.08.2016 but the offer of possession was made only on 13.05.2022. Had the unit been delivered within the due date or even

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with some justified delay, the incidence of GST would not have fallen on the allottee. Therefore, an additional tax burden with respect to GST was enforced upon the buyer for no fault of his and is due to the wrongful act of the promoter.

49. The authority has also perused the judgement dated 04.09.2018 in complaint no. 49/2018, titled as **Parkash Chand Arohi Vs. M/s Pivotal Infrastructure Pvt. Ltd.** of the Haryana Real Estate Regulatory Authority, Panchkula wherein it has been observed that the possession of the flat in term of buyer's agreement was required to be delivered on 1.10.2013 and the incidence of GST came into operation thereafter on 01.07.2017. So, the complainant cannot be burdened to discharge a liability which had accrued solely due to respondent's own fault in delivering timely possession of the flat. The relevant portion of the judgement is reproduced below:

"8. The complainant has then argued that the respondent's demand for GST/VAT charges is unjustified for two reasons: (i) the GST liability has accrued because of respondent's own failure to handover the possession on time and (ii) the actual VAT rate is 1.05% instead of 4% being claimed by the respondent. The authority on this point will observe that the possession of the flat in term of buyer's agreement was required to be delivered on 1.10.2013 and the incidence of GST came into operation thereafter on 01.07.2017. So, the complainant cannot be burdened to discharge a liability which had accrued solely due to respondent's own fault in delivering timely possession of the flat. Regarding VAT, the Authority would advise that the respondent shall consult a service tax expert and will convey to the complainant the amount which he is liable to pay as per the actual rate of VAT fixed by the Government for the period extending up to the deemed date of offer of possession i.e., 10.10.2013."

50. In appeal no. 21 of 2019 titled as **M/s Pivotal Infrastructure Pvt. Ltd. Vs. Prakash Chand Arohi**, Haryana Real Estate Appellate Tribunal, has upheld

the Parkash Chand Arohi Vs. M/s Pivotal Infrastructure Pvt. Ltd. (supra). The relevant para is reproduced below:

"93. This fact is not disputed that the GST has become applicable w.e.f. 01.07.2017. As per the first Flat Buyer's Agreement dated 14.02.2011, the deemed date of possession comes to 13.08.2014 and as per the second agreement dated 29.03.2013 the deemed date of possession comes to 28.09.2016. So, taking the deemed date of possession of both Page 146 of 205 Complaint No. 4031/2019 and others the agreements, GST has not become applicable by that date. No doubt, in Clauses 4.12 and 5.1.2 the respondent/allottee has agreed to pay all the Government rates, tax on land, municipal property taxes and other taxes levied or leviable now or in future by Government, municipal authority or any other government authority. But this liability shall be confined only up to the deemed date of possession. The delay in delivery of possession is the default on the part of the appellant/promoter and the possession was offered on 08.12.2017 by that time the GST had become applicable. But it is settled principle of law that a person cannot take the benefit of his own wrong/default. So, the appellant/promoter was not entitled to charge GST from the respondent/allottee as the liability of GST had not become due up to the deemed date of possession of both the agreements."

51. After taking into consideration all the material facts as adduced and produced by both parties, the authority hereby concludes: No doubt as per the builder buyer's agreement, the complainant/allottee has agreed to pay all the Government rates, tax on land, municipal property taxes, and other taxes levied or leviable now or in the future by the Government, municipal authority, or any other government authority, but this liability shall be confined only up to the due date of possession. The delay in delivery of possession is the default on the part of the respondent/promoter and the possession was offered on 09.05.2022 by that time the GST had become applicable. But it is a settled principle of law that a person cannot take the

benefit of his own wrong/default. So, the respondent/promoter was not entitled to charge GST from the complainant/allottee as the liability of GST had not become due up to the due date of possession as per the agreement.

52. Therefore the demand on account of GST is illegal.
53. On the issue of demand on account of increase of 65 sq. ft. in Super area. Clause 1.2(d) of the agreement between the parties, it is mentioned that any increase in the Super area shall be payable by the allottee. The said clause is reproduced below:

"It is made clear that the super area of the Flat as defined in Annexure -II is tentative and subject to change till the construction of the 'Group Housing Complex' is complete. The Sale Price payable shall be recalculated upon confirmation by the Developer of the final super area of the said FLAT and any increase or reduction in the super area of the said FLAT shall be payable or refundable, without any interest, at the same rate per square feet as agreed herein above. If there shall be an increase in super area, the Flat Buyer(s) agrees and undertakes to pay for the increase in super area immediately on demand by the Developer and if there shall be a reduction in the super area, then the refundable amount due to the Flat Buyer(s) shall be adjusted by the Developer from the final installment as set forth in the schedule of payments appended in Annexure I."

54. Furthermore, clause 7.2 states that if the alteration in size of the unit is in excess of 10%, then the developer shall obtain the written consent of the allottee. The said clause is reproduced below:

"In case of any major alteration/modification resulting in excess of 10% change in the super area of the Flat in the sole opinion of the Developer any time prior to and upon the grant of occupation certificate, the Developer shall intimate the Flat Buyer(s) in writing the changes thereof and the resultant change, if any, in the Sale Price of the Flat to be paid by him/her and the Flat Buyer(s) agrees to deliver to the Developer in writing his/her/their consent or objections to the changes within thirty (30) days from the date of dispatch by the Developer of such notice failing which the Flat Buyer(s) shall be deemed to have given his/her/their full consent to

all such alterations/modifications and for payments, if any, to be paid in consequence thereof. If the written notice of the Flat Buyer(s) is received by the Developer within thirty (30) days of intimation in writing by the Developer indicating his/her/their non-consent/objections to such alterations/modifications as intimated by the Developer to the Flat Buyer(s), then in such case alone this Agreement shall be cancelled without further notice and the Developer shall refund the money received from the Flat Buyer(s) within sixty (60) days from the date of intimation received by the Developer from the Flat Buyer(s). On payment of the money after making deductions as stated above the Developer shall be released and discharged from all its obligations and liabilities under this Agreement. In such a situation, the Developer shall have an absolute and unfettered right to allot, transfer, sell and assign the Flat and all attendant rights and liabilities to a third party. It being specifically agreed that irrespective of any outstanding amount payable by the Developer to the Flat Buyer(s), the Flat Buyer(s) shall have no right, lien or charge on the Flat in respect of which refund as contemplated by this clause is payable."

55. A combined reading of both the aforesaid clauses shows that the increase of 65 sq ft in the Super area is valid as the increase is less than 10% and therefore the demand raised is also valid. Hence, the complainant is duty-bound to pay the same.
56. In view of the above discussion, it is evident that the offer of possession dated 13.05.2022 had several invalid demands, and hence the said offer is invalid.
- F.2 Direct the respondent to pay the balance amount due to the complainants from the respondent on account of the interest.**
57. In the present complaint, the complainants intend to continue with the project and are 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."

58. Clause 8 of the buyer's agreement provides for the handing over of possession and 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, for applying and obtaining an occupation certificate in respect of the Group Housing Complex. "

59. **Admissibility of delay possession charges at prescribed rate of interest:**

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.

60. 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.
61. Consequently, as per the 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., 13.09.2023 is 8.75%. Accordingly, the prescribed rate of interest will be the marginal cost of lending rate +2% i.e., 10.75%.
62. The definition of term 'interest' as defined under section 2(za) of the Act provides that 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 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—*
- (1) 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;*
- (II) 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;"*
63. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 10.75% by the respondent/ promoter

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which is the same as is being granted to it in case of delayed possession charges.

64. On consideration of the circumstances, the documents, submissions made by the parties and based on the findings of the authority regarding contravention as per provisions of rule 28(2), the Authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of clause 8 of the agreement executed between the parties on 08.08.2013, the possession of the subject apartment was to be delivered within 36 months from the date of execution of buyer's agreement. Therefore, the due date of handing over possession was 08.08.2016. The respondent has failed to handover possession of the subject apartment till date of this order. Accordingly, it is the failure of the respondent/promoter to fulfil its obligations and responsibilities as per the agreement to hand over the possession within the stipulated period. The authority is of the considered view that there is delay on the part of the respondent to offer of possession of the allotted unit to the complainants as per the terms and conditions of the buyer's agreement dated 08.08.2013 executed between the parties.
65. The respondent/promoter is under an obligation as per section 17 of Act to get the conveyance deed executed in favour of the complainants. Hence, respondent is directed to execute the conveyance deed in favour of complainants within three months from the date of issuance of occupation certificate.

66. Accordingly, it is the failure of the promoter to fulfil its obligations and responsibilities as per the agreement dated 08.08.2013 to hand over the possession within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with proviso to section 18(1) of the Act on the part of the respondent is established. As such, the allottees shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 08.08.2016 till the date of offer of possession plus 2 months or actual handing over of possession, whichever is earlier; at prescribed rate i.e., 10.75 % p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules.

F. Directions issued the Authority:

67. Hence, the Authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the functions entrusted to the Authority under section 34(f) of the Act of 2016:

- i. The respondent is directed to pay interest to the complainant against the paid-up amount at the prescribed rate of 10.75% p.a. for every month of a delay from the due date of possession i.e., 08.08.2016 till offer of possession plus two months, as per section 18(1) of the Act of 2016 read with rule 15 of the rules.
- ii. The respondent is directed to hand over physical possession of the unit to the complainant.
- iii. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period;

- iv. The arrears of such interest accrued from 08.08.2016 till the date of order by the authority shall be paid by the promoter to the allottees within a period of 90 days from the date of this order and interest for every month of delay shall be paid by the promoter to the allottee before 10th of the subsequent month as per rule 16(2) of the rules;
- v. The rate of interest chargeable from the allottee by the promoter, in case of default, shall be charged at the prescribed rate i.e., 10.75% 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.
- vi. The respondent shall not charge anything from the complainant which is not part of the buyer's agreement.
68. This decision shall mutatis mutandis apply to cases mentioned in para 3 of this order.
69. Complaint stands disposed of.
70. File be consigned to the Registry.

HARERA
GURUGRAM

Ashok Sangwan
(Member)

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 27.09.2023