BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. :	**962/2021**
Date of filing complaint:	**01.03.2021**
First date of hearing:	**05.04.2021**
Date of decision :	**20.09.2023**

	Mr. Rahul Raj Gogna **Resident of:** Flat No. 20112, Tower-20, Prestige Shantiniketan, ITPL Main road, Whitefield, Bangalore, Karnataka-560048.	**Complainant**
	Versus	
	M/s Silverglades Infrastructure Pvt. Ltd. **Regd. office:** C-8/1a, Vasant Vihar, New Delhi-110057	**Respondent**

CORAM:	
Shri Ashok Sangwan	**Member**
APPEARANCE:	
Shri Sukhbir Yadav Advocate	Complainant
Shri Lokesh Kumar Advocate	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 provisions 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 the project, the details of sale consideration, the amount paid by the complainants, the date of proposed handing over the possession, and the delay period, if any, have been detailed in the following tabular form:

S.No.	Heads	Information
1.	Project name and location	Merchant Plaza, Sector-88, Gurugram
2.	Project area	2.75 acres
3.	Nature of the project	Commercial
4.	DTCP License	1 of 2013 dated 07.01.2013
5.	Name of the licensee	Magnitude Properties Pvt Ltd
6.	RERA Registered/ not registered	Registered 340 of 2017 dated 27.10.2017 valid upto 20.12.2020
7.	Unit location	SF-09 [page no. 33 of complaint]
8.	Unit measuring (carpet area)	755.63 sq. ft. (page no. 33 of complaint]
9.	Endorsement form	26.06.2015 (page no. 67 of complaint)
10.	Building plan	30.05.2013 (Page no. 55 of reply)
11.	Environmental clearance	28.02.2014 (page no. 61 of reply)
12.	Date of allotment	24.10.2013

		(Page no. 24 of complaint)
13.	Date of execution of Builder buyer agreement	15.09.2014. (page no. 27 of complaint)
14.	Possession clause	**11.1 Possession** Subject to the terms hereof and to the Buyer having complied with all the terms and conditions of this Agreement, the Company proposes to hand over possession of the Apartment within a period of 4 (four) years from the date of approval of the Building Plans or other such approvals required, whichever is later to commence construction of the Project or within such other timelines as may be directed by the Competent Authority ("Commitment Period"). The Buyer further agrees that even after expiry of the Commitment Period, the Company shall be further entitled to a grace period of a maximum of 180 days for issuing the Possession Notice ("Grace Period").
15.	Due date of possession	30.05.2017 (Calculated from the date of approval of building plans)
16.	Total sale consideration	Rs. 48,36,175/- (As per page no. 59 of complaint)
17.	Total amount paid by the complainants	Rs. 43,44,072/- (As per page no. 73 of complaint)
18.	Occupation Certificate	11.02.2020 (As per DTCP)
19.	Offer of possession	17.03.2020 (page no. 79 of complaint)

20.	Grace period	Not allowed

B. Facts of the complaint:

3. The complainant received a marketing call from the office of the respondent regarding the prospects of the project above. The complainant and his two friends namely S. Sundaram and Ankit Dutt visited the sales office of the respondent along with a real estate agent and consulted with the marketing staff of the respondent. The marketing staff of the respondent showed a rosy picture of the project and allured the complainant with proposed specifications and assured of the timely delivery of the service apartment. It was promised by the respondent that the service apartments would be operated by the world-renowned hospitality management company "Bridgestreet". The marketing staff of the respondent gave a pre-printed application form and assured that possession of the service apartment would be delivered within 3 years from the date of booking.

4. On 06.09.2012, being impressed by the presentation and assurances made by the respondent, the complainant and his two friends purchased one shop ad measuring 756 sq. ft. bearing shop no. SF 09 in the project and paid Rs. 4,00,000/- (Four Lakh) towards the booking amount and signed a pre-printed application form. The shop was purchased under the construction-linked plan for a sale consideration of Rs. 48,36,175 (Forty-Eight Lakh Thirty-Six Thousand One Hundred Seventy-Five).

5. On 24.10.2013, the respondent issued an allotment letter in favor of the complainant and the other two allottees, confirming the allotment of unit no. SF -09 on the second floor having a super area of 756 sq. Ft.

6. That on 14.09.2014 after a long follow-up, a pre-printed, arbitrary, one-sided, and ex-facie apartment buyer agreement was executed inter-se the allottees and respondent.

7. As per clause F of the apartment buyer agreement "The Chief Town Planner-cum-Chairman, building plan approval committee, Town and country planning department, Haryana has also approved the Building Plans for the Project vide its approval Memo no. ZP- 867/SD(BS)/2013/41292 dated 30.05.2013. The building Plans were approved on 30.05.2013 and therefore, the due date of possession was 30.05.2017.

8. On 07.05.2015, the co-allottees of the unit namely S. Sundaram and Ankit Dutt transferred their respective rights in the property in favor of the complainant with the permission of the respondent. The respondent accepted the application of the co-allottees and endorsed the full rights in favor of the complainant and sent a confirmation email on 29.05.2015.

9. That respondent kept raising the demands as per the stage of construction and the complainant kept paying the demands and till 09.08.2017, the complainant has been paid Rs. 43,44,072/- (Forty-Three Lakh Forty-Four Thousand Seventy- Two) i.e. 88% of total the sale consideration. Further, the complainant has availed a loan on the said shop and till 11.02.2021 has paid Rs. 12,36,675/- (Twelve Lakh Thirty-Six Thousand Six Hundred Seventy-Five) in interest.

10. On 17.03.2020, the respondent sent an email with the offer of possession of the unit and asked to take possession by 13.04.2020. It is pertinent to mention here that the said offer of possession did not contain the details of the allotted unit or changes in the unit.

11. On 01.08.2020, the complainant sent an e-mail to the respondent and asked for the "latest till date payments ledger and latest area statement". Thereafter, on 23.11.2020, the complainant again sent an email and requested to share the statement of account, the offer of possession, the area statement, and changes that have happened in it. To the utter shock of the respondent, the area of the said unit had been reduced from 755.63sq. ft. to 635.87 sq. ft (a decrease of 15.84%). No clarifications on the same have been provided.

12. On 21.01.2021, the complainant sent an email to the respondent and asked for a letter of possession (demand letter) containing allotted unit information as shared with other allottees.

13. Thereafter, another email was sent to the respondent on 28.01.2021 and asked for another unit with the same specification as originally booked or refund the paid amount along with interest. On 06.02.2021, the respondent replied and asked to contact Mr. Sanjeev Mishra. Thereafter, the complainant contacted Mr. Sanjeev Mishra and reiterated his request, but there was no solution to the grievance of the complainant.

14. That 11.02.2020, the respondent received an occupation certificate from the Town & Country planning department for the ground floor to the 2nd floor, 4th floor (part), and 5th floor (part). and 6th floor to 11th floor, vide Memo No. ZP- 867/AD(RA)/2020/3936 dated 11.02.2020.

15. Since 2017, the complainant has regularly visited the office of the respondent as well as the construction site and made efforts to get possession of the unit but all in vain. The complainant was never able to know the actual state of construction.

C. Relief sought by the complainant:

16. The complainant has sought the following relief(s):

    i. Pass an order directing the respondent to refund the paid money and interest.

    ii. The respondent party may kindly be directed to refrain from giving effect to unfair clauses unilaterally incorporated in the builder-buyer agreement.

D. Reply by the respondent

17. The complainant along with two other buyers namely Mr. Ankit Dutt and Mr. S. Sundaram approached the respondent and submitted an application for booking a retail Shop under construction Link Payment Plan and paid a sum of Rs. 4,00,000/- (Rupees Four Lacs Only) as booking amount. The complainant had agreed that payment of installment/dues shall be paid timely and promptly as per the construction-linked plan.

18. Subsequently a shop bearing unit No. SF-9 on the second floor with an approximate super area of 755.63 sq. ft. was allotted to the complainant vide allotment letter dated 24.10.2013 for the total sales consideration of Rs. 48,36,175/- (Rupees Forty-Eight Lakh Thirty Six Thousand One Hundred Seventy-Five Only) plus tax levies as the case may be. An apartment buyer's agreement was also executed on 15.09.2014.

19. That vide a request letter dated 07.05.2015 the ownership of the unit was transferred in the sole name of the complainant.

20. That construction of the project was completed in Sep 2018 whereupon the respondent obtained an occupancy certificate from the concerned

department vide Memo. No. ZP-867/AD (RA)/2020/3936 dated 11.02.2020 and offered possession of the unit to the complainant vide possession Notice dated 12.03.2020 and requested him to take possession thereof.

21. That there is no delay in handing over the offer of possession by the Respondent. Clause no. 11.1 of the agreement states that the company will hand over the possession within 48 months from the date of the approval of the building plan for the project or within such other timeline as may be directed by any competent authority. The Company is further entitled to a further "Grace Period of 180 days" after the expiry of the commitment Period for unforeseen delays beyond the reasonable control of the Company. This would work out to 48 + 6 months i.e. 54 months.

22. That sanction of the building Plan was accorded by the DTCP, Govt. of Haryana vide memo no. ZP-867/SD/(BS)/2013/41292 dated 30.05.2013. The sanctioned plan contained statutory and mandatory pre-conditions to be complied before the commencement of construction works. Clause 3 of the sanctioned Plan stipulated that the developer shall obtain clearance/NOC from the fire department, Gurugram before starting the construction/execution of development works at the site. The fire clearance/NOC was obtained by the company on date 26.09.2013 and the same was submitted to DTCP Haryana.

23. Clause 16 (xii) of the sanctioned building plan stipulates that the developer shall obtain a NOC from the Ministry of Environment & Forests before

starting the construction/execution of development works at the site. The environment clearance was obtained on 28.02.2014. Furthermore, clause 1 of the environment clearance stipulates that the developer shall obtain "consent to establish" from the Haryana Pollution Control Board under the Air and Water Act, and a copy shall be submitted to the SEIAA before the start of any construction works at the site. The consent to establish was obtained on 16.06.2014

24. All other statutory clearances such as the approvals for storage of diesel from the Chief Controller of Explosive, Fire Department, Civil Aviation Department, Forest Conservation Act, 1980 and Wildlife (Protection) Act, 1972, Forest Act, 1927, PLPA 1900, etc. were obtained as applicable by project exponents from the respective authorities before construction of the Merchant Plaza project.

25. Given the mandatory requirements under the Haryana Fire Safety Act, Environment Protection Act 1986 to obtain the Fire NOC, Environment Clearance, and "Consent to Establish" before commencement of construction activity, as stipulated in the sanctioned Building Plans, the 54 months specified in clause 11.1 of the Agreement, for handing over possession of the apartments, would have to be computed from the date on which "Consent to Establish" was obtained, and not from the date of the Building Plans being sanctioned.

26. The parties to the agreement were well aware that the reasonable delay in handing over possession may be caused. The terms of the agreement stipulate that the date of possession shall get further extended if the completion of the Project is delayed by any reason of Force Majeure. The buyer agreed to the same and confirmed not to claim any compensation of any nature whatsoever. The construction of the project was intermittently stopped many times for almost 03 months by orders/directions of the National Green Tribunal, EPCA and Supreme Court, etc., which was neither anticipated at the time of execution of the agreement nor is within the control of the Respondent.

Dated	Authority	Order	Days
04.11.2019 To 16.12.2019	Supreme Court in CWP no. 13029/1985	All the construction activity in the entire NCR is to remain closed	42 days
01.11.2018 To 10.11.2018	EPCA	All the construction activity in the entire NCR is to remain closed	10 days

24.12.2018 To 26-12-2018	Environment Pollution Control Authority	Construction activities in Delhi, Gurugram, Ghaziabad and Noida to remain closed till 26.12.2018	03 days
09.11.2017 To 17.11.2017	OA 21/2014 National Green Tribunal	All the construction (structural) activity in the entire NCR is hereby prohibited till the next date of hearing	09 days
08.11.2016	Newspaper Report	Ban on construction in NCR	07 days
16.12.2015	CWP 817/2015	To enforce CPCB norms at the construction site.	20 days
Total no's of days			**91 days**

Given the above, the 48+6 (54) months ("Commitment Period") would commence only on 16.06.2014 and expire on 16.12.2018. The Force Majeure period of 91 days, during which the construction activities are stopped, after

including the above-said period, the due date would come to 16.03.2019. This period shall also include the default period, as per the Agreement.

27. That the answering respondent has already offered possession of the alternate units to the complainants herein vide its email dated 19.04.2021.

28. For the intervening period, the respondent has been saddled with the administrative cost of holding the said unit until possession thereof is duly taken. Furthermore, during the said period until possession is taken by the allottee, or surrendered, no third-party rights can be created and therefore the respondent builder is further incurring the cost of retaining the said unit and maintaining the same. It is pertinent to point out that in such a circumstance wherein the buyer fails to take possession of the unit as per the agreement, has been duly contemplated under the Apartment Buyers' Agreement under clause 14 thereof whereby certain charges are levied upon the Buyer for the period during which possession was not taken.

29. As per clause 4.22 of the agreement, certain areas, facilities, and amenities are excluded from the scope of this Agreement in which the buyer is not entitled to any ownership rights, title, interest, etc. in any form or manner whatsoever. The area of these facilities and amenities are neither included in the common area nor in the computation of the Super Area for calculating the total sale consideration as per the deed of declaration dated 07.05.2020. Therefore, the Buyer has no right to claim an interest concerning such areas, facilities, and amenities. The areas under these facilities are under the sole

ownership of the Respondent/Developer and subject to payment of one-time charges like club charges.

30. As per clauses 4.1, 6.1, and 7.3 of the agreement, the buyer has agreed to make total sale consideration, and other charges as per the "Payment Plan" shown in "schedule-III & schedule-IV" and to pay interest @15% on delayed payment. A careful perusal of Schedule IV makes it clear that the buyer had agreed to pay club /conveyance charges for those facilities and amenities as specified in clause 4.22 of the agreement. The terms are executed by mutual consent and are not declared to be void or voidable under any provision of the Indian Contract Act, of 1872.

31. As per Clauses 12.2, 12.3, 14, 15.4, and 15.8 read with Clause 1(aa), the buyer has agreed that within a maximum period of 30 (thirty) days from the possession notice and the fulfillment of the conditions, the buyer shall take possession and execute the conveyance deed for the unit. The company shall be entitled to holding charges and maintenance charges if the Buyer fails to take possession of the unit within the stipulated period of 30 days from the date of the offer of possession.

E. Jurisdiction of the authority:

32. 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 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, 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.

33. 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.

34. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in **Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. 2021-2022(1) RCR(C), 357** and reiterated in case of **M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022** wherein it has been laid down as under:

> *"86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is that although the Act indicates the distinct expressions like 'refund', 'interest', 'penalty' and 'compensation', a conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest thereon, it is the regulatory authority which has the power to examine and determine the outcome of a complaint. At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of Section 71 read with Section 72 of the Act. if the adjudication under Sections 12, 14, 18 and 19 other than compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating officer under Section 71 and that would be against the mandate of the Act 2016."*

35. The application for refund was filed in the form CAO with the adjudicating officer and on being transferred to the authority in view of the judgement titled as **M/s Newtech Promoters and Developers Pvt Ltd. Vs State of UP & Ors. (supra),** the issue before authority is whether the authority should proceed further without seeking fresh application in the form CRA for cases of refund along with prescribed interest in case the allottee wishes to withdraw from the project on failure of the promoter to give possession as

per agreement for sale irrespective of the fact whether application has been made in form CAO/ CRA. It has been deliberated in the proceedings dated 10.5.2022 in CR No. 3688/2021 titled Harish Goel Versus Adani M2K Projects LLP and observed that there is no material difference in the contents of the forms and the different headings whether it is filed before the adjudicating officer or the authority.

36. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the cases mentioned above, the authority has the jurisdiction to entertain a complaint seeking a refund of the amount and interest on the refund amount.

F. Findings on the objections/prayers raised by the respondents.

F.I Prayer of the respondent regarding the applicability of holding charges.

37. The respondent issued the letter of offer of possession on 17.03.2020 upon which the complainant protested to the respondent over the lack of details in the said offer of possession regarding the unit. The complainant approached the respondent company to inspect his unit as to whether it was in accordance with the specifications as per the agreement. However, the respondent vide email dated 23.11.2020 informed the complainant that the unit now allotted to him has an area admeasuring 635.87 sq. ft. instead of the earlier promised 755.63 sq. ft. (a reduction of 15.84%). This led the complainant to not accept the said offer of possession and asked for an alternate unit of the same specifications. To date, no such offer has been made that is acceptable to the complainant. Therefore, the complainant has

disputed the demand raised by the respondent developer on account of holding charges in their complaint. With regards to the same, it has been observed that as per clause 14 of the apartment buyer's agreement, in the event the allottee fails to take possession of the unit within the time limit prescribed by the company in its intimation/offer of possession, then the promoter shall be entitled to charge holding charges. The relevant clauses from the builder buyer's agreement are reproduced hereunder:

> ***"14. Holding charges***
> *The buyer agrees and accepts that in the event of failure to take possession of the Apartment in the manner as aforesaid or in case where possession of the Apartment is not handed over to the HMC in terms hereof, then the Company shall have the option to cancel this agreement or the Company may, without prejudice to its rights under law and equity and at its sole discretion, condone such failure of the Buyer to take possession of the Apartment on the condition that the Buyer shall pay to the Company holding charges @ Rs. 10 (Rupees Ten only) per sq. ft. of the Super Area of the Apartment per month or part thereof for the entire period of delay (Holding Charges) and to withhold the execution of the Conveyance Deed in respect of the Apartment till the Holding charges with the applicable overdue interest as prescribed in this Agreement, if any, are fully paid."*

38. It is interesting to note that the term holding charges has not been clearly defined in the apartment buyer's agreement and or any other relevant document submitted by the respondent promoter. Therefore, it is firstly important to understand the meaning of holding charges which is generally used in common parlance. The term holding charges also synonymously referred to as non-occupancy charges become payable or applicable to be paid if the possession has been offered by the builder to the owner/allottee and physical possession of the unit has not been taken over by the allottee and the flat/unit is lying vacant even when it is in a ready-to-move condition. Therefore, it can be inferred that holding charges are something that an

allottee has to pay for his unit for which he has already paid the consideration just because he has not physically occupied or moved into the said unit.

39. The Hon'ble NCDRC in its order dated 03.01.2020 in the case titled Capital Greens Flat Buyer Association and Ors. Vs. DLF Universal Ltd., Consumer case no. 351 of 2015 held as under:

> *"36. It transpired during arguments that the OP has demanded holding charges and maintenance charges from the allottees. As far as maintenance charges are concerned, the same should be paid by the allottee from the date the possession is offered to him unless he was prevented from taking possession solely on account of the OP insisting upon execution of the Indemnity-cumUndertaking in the format prescribed by it for the purpose. If maintenance charges for a particular period have been waived by the developer, the allottee shall also be entitled to such a waiver. As far as holding charges are concerned, the developer having received the sale consideration has nothing to lose by holding possession of the allotted flat except that it would be required to maintain the apartment. Therefore, the holding charges will not be payable to the developer. Even in a case where the possession has been delayed on account of the allottee having not paid the entire sale consideration, the developer shall not be entitled to any holding charges though it would be entitled to interest for the period the payment is delayed."*
>
> *(Emphasis supplied)*

40. The said judgment of Hon'ble NCDRC was also upheld by the Hon'ble Supreme Court vide its judgment dated 14.12.2020 passed in the civil appeal filed by DLF against the order of Hon'ble NCDRC (supra). The authority earlier, in view of the provisions of the rules in a lot of complaints decided in favour of promoters that holding charges are payable by the allottee. However, in the light of the recent judgment of the Hon'ble NCDRC and Hon'ble Apex Court (supra), the authority concurring with the view taken therein decides that a developer/ promoter/ builder cannot levy holding charges on a homebuyer/ allottee as it does not suffer any loss on account of

the allottee taking possession at a later date even due to an ongoing court case.

41. As far as holding charges are concerned, the developer having received the sale consideration has nothing to lose by holding possession of the allotted flat except that it would be required to maintain the apartment. Therefore, the holding charges will not be payable to the developer. Even in a case where the possession has been delayed on account of the allottee having not paid the entire sale consideration, the developer shall not be entitled to any holding charges though it would be entitled to interest for the period the payment is delayed.

F.II Prayer of the respondent for the computation of the due date of possession.

42. The respondent contends that as per clause 11.1 of the apartment buyer agreement, the due date of possession shall be within 4 years from the date of approval of building plans or such other approvals required, whichever is later to commence construction of the project. The said clause is reproduced below:

> *Subject to the terms hereof and to the Buyer having complied with all the terms and conditions of this Agreement, the Company proposes to hand over possession of the Apartment within a period of 4 (four) years from the date of approval of the Building Plans or other such approvals required, whichever is later to commence construction of the Project or within such other timelines as may be directed by the Competent Authority ("Commitment Period"). The Buyer further agrees that even after expiry of the Commitment Period, the Company shall be further entitled to a grace period of a maximum of 180 days for issuing the Possession Notice ("Grace Period").*

In the context of this aforesaid clause, the respondent states that the last approval that was necessary for the commencement of construction was an

NOC from the Ministry of Environment & Forests (Environmental clearance) which was obtained on 28.02.2014, and as per clause 1 of the environment clearance, the developer was to obtain "consent to establish" from the Haryana Pollution Control Board under the Air and Water Act, and a copy had to submitted to the SEIAA before the start of any construction works at the site. The said consent to establish was obtained only on 16.06.2014. Therefore, the period of computing the due date of possession should be calculated from this date. Furthermore, the respondent reserved for itself a grace period of six months for issuing the possession notice, and thereafter, the respondent prayed that a period of 91 days during which the construction activities were stopped on account of force majeure shall also be added in the computation of the due date of possession. Hence, as per the respondent, the due date would come to 16.03.2019.

43. It is the view of the Authority that the drafting of this clause 11.1 is not only vague and uncertain but so heavily loaded in favor of the promoter and against the allottee that the due date of possession can be delayed massively by the promoter and thus may make the possession clause irrelevant for the allottee and the commitment date for handing over possession loses its meaning. From the said clause it is extremely difficult to ascertain what approvals are required for construction to start, the wording is extremely random. For a contract to be binding it must be in clear terms as to what it includes and implies. The incorporation of such clause in the builder buyer's agreement by the promoter is just to evade the liability towards timely delivery of the subject unit and to deprive the allottee of his right accruing after the delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such a mischievous clause in

the agreement and the allottee is left with no option but to sign on the dotted lines.

44. Therefore, it can be stated with reasonable certainty that the period for computation of the due date of possession shall be initiated from the date of approval of the building plans i.e. 30.05.2013.

45. Furthermore, the prayer of the respondent that the grace period must be included in computing the due date of possession is flawed and has no basis for it. It is a well-settled principle of law that for providing a grace period there must be well enumerated reason for it. It is the view of the Authority that in this case no reasoning is provided for availing grace period. It is important to mention sec-17(1) and sec-19(10) of the Real Estate (Regulations and Development) Act, 2016. These are reproduced below:

> *Sec-17(1)....Provided that, in the absence of any local law, conveyance deed in favour of the allottee or the association of the allottees or the competent authority, as the case may be, under this section shall be carried out by the promoter within three months from date of issue of occupancy certificate.*
>
> *Sec-17 (10) Every allottee shall take physical possession of the apartment, plot, or building as the case may be, within two months of the occupancy certificate issued for the said apartment, plot, or building, as the case may be*

As per the aforesaid provisions, it is evident that the possession and conveyance deed shall be offered to the allottee within 2 months and 3 months respectively. In clause 11.1 of the apartment buyer agreement, the grace period for issuing the notice of possession is 180 days, thus violative of the provisions of the Act of 2016. Furthermore, since the occupation certificate was obtained on 11.02.2020 and the offer of possession was made on 17.03.2020, no question of allowing a 180-day grace period for issuing possession notice arises. Hence, the grace period is disallowed.

46. On the question of the respondent's prayer that a period of 91 days during which the construction activities were stopped on account of force majeure shall also be added to the computation of the due date of possession, it is the view of the Authority that the pleas advanced in this regard are devoid of merit. First of all, the possession of the unit in question was to be offered by 30.05.2017. Hence, events alleged by the respondent do not have any impact on the project being developed by the respondent. Moreover, some of the events mentioned above are routine in nature happening annually and the promoter is required to take the same into consideration while launching the project. Thus, the promoter respondent cannot be given any leniency on the basis of aforesaid reasons and it is a well-settled principle that a person cannot take benefit of his own wrong.

47. Therefore, the due date of possession comes out to be 30.05.2017.

G. Findings on the relief sought by the complainant.

G.I To refund the entire amount deposited i.e., Rs. 43,44,072/- by the complainant with the prescribed rate of interest.

48. The complainant was allotted unit no. SF-09 on the 2nd floor, in the project "Merchant Plaza", Sector 88, Gurugram, Haryana by the respondent/builder for a total consideration of Rs.48,36,175/-. An apartment buyer agreement was signed on 15.09.2014. The possession of the unit was to be offered within 48 month plus (6) month grace period from the date of the approval of building plans or obtaining approvals for commencement of construction of the unit whichever was later. Therefore, the due date of possession comes out to be 30.05.2017. It has come on record that against the total sale consideration of Rs.48,36,175/-, the complainant has paid a sum of Rs. 43,44,072/- to the respondent. However, the complainant contended that

despite paying about 88% of the total sale consideration, the unit offered for possession was not of the specification that was agreed on in the apartment buyer agreement. The offer of possession dated 17.03.2020 issued by the respondent lacked any detail as to the specifications of the unit hence the complainant rejected the offer of possession and sought clarifications regarding the exact specifications of the unit offered. On further inquiries, it came to the knowledge of the complainant that the unit being offered to him was merely 635.87 sq. ft. as against the agreed 755.63 sq. ft. (a decrease of 15.84%). Since this decrease was more than 10%, the same was violative of clause 4.12.3 of the agreement between the complainant and the buyer, and hence the allottee/complainant rejected the offer of possession. The said clause mandates that in case the size of the offered unit is +/-10% of the agreed-upon Super area, then an alternate unit was to be offered. The said clause is reproduced below:

> *"4.12.3 If any increase / reduction is beyond 10% of the Super Area of the Unit and the Buyer declines to accept such increase of beyond 10%, then the Company shall, at its discretion, offer an Alternate Unit anywhere in the Commercial Complex (if available) to the Buyer and of similar specification as the Unit including such Alternate Unit having a Super Area of +/- 10%. Such Alternate Unit, if offered to the Buyer, shall be mandatorily acceptable to the Buyer and this Agreement shall mean and shall be deemed to refer to the Alternate Unit and payments made/as may be due in relation to the Unit shall be deemed to have been made/due for such Alternate Unit for all purposes and the Buyer shall execute necessary documents as may be required by the Company for allotment of such Alternate Unit. The allotment of the Unit shall be canceled and the same shall thereafter belong absolutely and entirely to the Company with right or lien of the Buyer on such Unit;"*

49. In this case, the respondent failed to make available an alternate unit until the current complaint was filed by the allottee/complainant on 01.03.2021. The offer of an alternate unit was only made on 19.04.2021. Hence said offer

cannot be termed good in law and cannot be forced upon the allottee/complainant. Further in the course of proceedings dated 05.07.2023, the complainant/allottee conceded that if the alternate unit is offered on the same floor and is of the same specifications, then the same shall be acceptable. However, the unit being offered by the respondent is neither on the same floor nor is it of the same specifications. Hence the said offer is not acceptable to the complainant/allottee. Therefore, the complainants requested that they still want to withdraw from the project and do not intend to continue with the same.

50. Hence, in case allottees wish to withdraw from the project, the promoter is liable on demand to return the amount received by the promoter with interest at the prescribed rate if it fails to complete or is unable to give possession of the unit in accordance with the terms of the agreement for sale. This view was taken by the Hon'ble Supreme Court of India in the cases of ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (supra)*** *reiterated in the case of* ***M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) (supra)*** wherein it was observed as under: -

> *"The unqualified right of the allottees to seek refund referred Under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof. It appears that the legislature has consciously provided this right of refund on demand as an unconditional absolute right to the allottees, if the promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement regardless of unforeseen events or stay orders of the Court/Tribunal, which is in either way not attributable to the allottees/home buyer, the promoter is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the Act with the proviso that if the allottees does not wish to withdraw from the*

project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed".

51. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016 or the rules and regulations made thereunder or to the allottees as per the agreement for sale under section 11(4)(a) of the Act. The promoter has failed to complete or is unable to give possession of the unit in accordance with the terms of the agreement for sale or duly completed by the date specified therein. Accordingly, the promoter is liable to the allottees, as he wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by respondents/promoter in respect of the unit with interest at such rate as may be prescribed.

52. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such, the complainants are entitled to a refund of the entire amount paid by him at the prescribed rate of interest i.e., @ 8.75% p.a. (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as of date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 ibid.

H. Directions of the Authority

53. 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/promoters are directed to refund the amount received by them i.e., Rs.43,44,072/- from the complainants along with interest at the rate of 10.75% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the deposited amount, after adjusting the amount paid by respondent under subvention scheme from the above refundable amount.

ii. A period of 90 days is given to the respondents to comply with the directions given in this order failing which legal consequences would follow.

54. Complaint stands disposed of.

55. File be consigned to the registry.

(Ashok Sangwan)
Member
Haryana Real Estate Regulatory Authority, Gurugram
Date: 20.09.2023