

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

Complaint no. : 6526 of 2022
Complaint filed on : 27.09.2022
Date of decision : 14.11.2023

Mrs. Komal Sharma
R/o: 9-C, Neethi Apartment, Plot no. 84,
I.P. Extension Patparganj, Shakarpur,
East Delhi-110092.

Complainant

Versus

M/s SS Group Pvt. Ltd.
Address: 4th floor, The Plaza, M.G. Road,
Gurgaon-122002, Haryana.

Respondent

Coram:

Shri Ashok Sangwan
Shri Sanjeev Kumar Arora

Member
Member

Appearance:

Shri Himanshu Singh
Shri Dhruv Dutt Sharma

Advocate for the complainant
Advocate for the respondent

ORDER

1. The present complaint has been filed by the complainant/allottee in Form CRA 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 to the allottee as per the agreement for sale executed inter se them.

A. Project and unit related details

2. The particulars of the project, the details of 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:

Sr. No.	Particulars	Details
1.	Name of the project	'The Leaf', Sector -84-85, Gurugram
2.	Nature of the project	Group Housing Complex
3.	DTCP License No.	81 of 2011 dated 16.09.2011 Valid up to 15.09.2024
4.	RERA Registered/ Not Registered	Registered vide no. 35 of 2021 dated 14.07.2021
5.	Unit no.	10B, 10 th Floor, Tower-9 (BBA on page no. 16 of complaint)
6.	Unit admeasuring	2280 sq. ft. (BBA on page no. 16 of complaint) Note: Increase in area of the unit to 2408 sq. ft. vide offer of possession dated 30.06.2022
7.	Date of execution of builder buyer agreement executed between the original allottee (Zena Ribeiro) and the respondent	11.09.2013 (on page no. 15 of complaint)
8.	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



		<p>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.</p> <p>(Emphasis supplied).</p>
9.	Due date of delivery of possession	11.09.2016 (Calculated from the date of signing of buyer agreement)
10.	Total sale consideration	Rs. 1,19,41,200/- (As per BBA on page no. 17 of complaint)
11.	Total amount paid by the complainant	Rs. 84,08,972/- (As alleged by the complainant)
12.	Unit was endorsed in favour of Mr. Arun Kumar (Complainant's husband) on	18.02.2015 [Page 38 of complaint]
13.	Mr. Arun Kumar nominated the complainant (Ms. Komal Sharma) as nominee to be substituted in his place vide endorsement	01.02.2021 [Page 39 of complaint]



	to BBA dated	
14.	Transfer letter issued by the respondent in favour of the complainant on	08.04.2021 (As per page no. 72 of complaint)
15.	Occupation Certificate	28.06.2022 (As per page no. 59 of reply)
16.	Notice for offer of possession issued in favour of the complainant on	30.06.2022 (As per page no 62 of reply)

B. Facts of the complaint

3. The complainant has made the following submissions in the complaint:

- i. That relying on the promises and undertakings given by the respondent in various advertisements, the complainant booked an apartment admeasuring 2280 sq. ft. in aforesaid project of the respondent for a total sale consideration of Rs.1,03,04,469/-. The complainant made payment of Rs.84,08,972/- including all taxes to the respondent vide different cheques on different dates.
- ii. That the complainant is a subsequent allottee. That the first allottee i.e., Mrs. Bijimol Mani entered into a flat buyer agreement on 11.09.2013. Thereafter, the unit was endorsed to Mr. Arun Kumar, husband of the complainant on 18.02.2015 and thereafter, name of complainant was substituted in place of her husband vide letter dated 08.04.2021.
- iii. That as pre flat buyer agreement, the respondent had allotted a flat bearing no.10B, 10th floor, tower 9 having super area of 2280 sq. ft.



to the complainant. As per clause 8.1 of the flat buyer agreement, the respondent had agreed to deliver the possession of the flat within 36 months from the date of signing the agreement with an extended period of 90 days.

- iv. That the complainant regularly visited the site but was surprised to see that construction work is not in progress and no one was present at the site to address the queries of the complainant. Despite receiving 80% payment of all demands raised by the respondent and despite repeated requests & reminders, the respondent failed to deliver the possession of the allotted flat to the complainant within time. The subject unit was to be delivered by 11.09.2016 but was not completed within time for the reasons best known to the respondent.
- v. That due to omission on the part of the respondent, the complainant has been suffering from disruption on his living arrangement, mental torture, agony and also continues to incur severe financial losses. As per clause 8.3 of the said agreement, the respondent shall pay to the complainant a compensation @ Rs.5/- per sq. ft. per month of the super area of the flat which is very nominal and unjust whereas the respondent charges 18% per annum interest on delayed payment. The respondent has incorporated such one-sided clauses in the agreement.
- vi. That on 30.06.2022, the respondent sent an offer of possession to the complainant after a delay of approx. 5 years 9 months and 19

days along with many demands which are not payable as per the agreement. The offer of possession was ambiguous as it carried many demands which were not part of the agreement. The complainant was asked to pay an amount of Rs. 1,65,020/- the GST. The respondent charged Rs.5,05,680/- towards electricity and power back up connection charges; Rs. 47,000/- towards PLC and Rs. 6,77,376/- due to increase in super area by 128 sq. ft. The complainant prays the Authority to direct the respondent for removal of such illegal demands which is not part of the agreement.

- vii. That the complainant is in doubt as to whether the offer of possession dated 30.06.2022 is a valid offer of possession or not as the respondent has failed to provide a copy of OC till date.
- viii. That the complainant had requested the respondent several times on making telephonic calls and also personally visiting the office of the respondent to deliver the possession of the subject unit along with interest @ 18% per annum on the amount deposited by the complainant, but the respondent flatly refused to do so. The respondent has defrauded the complainant with her hard earned money and has wrongfully gained itself & caused wrongful loss to the complainant. Thus, the present complaint.

C. Relief sought by the complainant

4. The complainant has filed the present complaint for seeking following reliefs:

- i. Direct the respondent to pay the delay possession charges as per section 18 of the Act and the rules made thereunder.
 - ii. Direct the respondent to withdraw the demand letter dated 30.06.2022 claimed at the time of offer of possession.
 - iii. Direct the respondent to adjust the delayed possession charges and offer fresh demand.
 - iv. Direct the respondent to give justification about increased area.
 - v. Direct the respondent to execute registered conveyance deed in favour of the complainant.
 - vi. Direct the respondent not to charge GST amount the due date of possession was prior to coming into force of GST.
 - vii. Direct the respondent to pay a sum of Rs.5,00,000/- to the complainant towards the cost of litigation and mental agony.
5. On the date of hearing, the authority explained to the respondent/promoter about the contravention as alleged to have been committed in relation to section 11(4)(a) of the Act and to plead guilty or not to plead guilty.

D. Reply by the respondent

6. The respondent has raised certain preliminary objections and has contested the present complaint on the following grounds:
- i. That it is a matter of record and rather a conceded position that no such agreement as referred to under the provisions of 2016 Act and 2017 Haryana Rules, has been executed between respondent and the complainant. Rather, the agreement that has been referred to, for the



purpose of getting the adjudication of the complaint, though without jurisdiction, is the buyer's agreement, executed much prior to coming into force of the Act. The adjudication of the complaint for interest and compensation as provided under sections 12, 14, 18 and 19 of the Act, if any, has to be in reference to the Agreement for Sale executed in terms of the Act and the Haryana Rules and no other agreement. Thus, in view of the submissions made above, no relief much less as claimed can be granted to the complainant.

- ii. That the complainant has miserably and willfully failed to make payments in time or in accordance with the terms of the buyer's agreement. It is pertinent to mention here that as per the records maintained by the respondent, the complainant has not fulfilled her obligation and has not paid the installments on time that had fallen due. The complainant has frustrated the terms and conditions of the buyer's agreement, which were the essence of the arrangement between the parties and therefore, the complainant now cannot invoke a particular clause, and hence, the complaint is not maintainable and should be rejected at the threshold.
- iii. That it has been categorically agreed between the parties as per clause 8.1 of the agreement that subject to the complainant having complied with all the terms and conditions of the flat buyer's agreement and not being in default under any of the provisions of the said agreement and having complied with all provisions, formalities, documentation etc., the developer proposes to handover



the possession of the unit in question within a period of 36 months from the date of signing of the agreement. It had also been agreed that the respondent would also be entitled to a further grace period of 90 days after expiry of 36 months for obtaining occupation certificate. Further, as per clause 8.1(b)(iii) of the agreement it was agreed that in case of any default/delay in payment as per the schedule of payments as provided in Annexure 1 to the buyer's agreement, the date of handing over of the possession shall be extended accordingly. In the present case, it is a matter of record that the complainant has not fulfilled her obligation and has not even paid the installments on time that had fallen due. There is an outstanding amount of Rs. 34,65,408/- excluding interest payable by the complainant as on 21.01.2023. Accordingly, no relief much less as claimed can be granted to the complainant.

- iv. Initially the flat buyer agreement was executed between Ms. Zena Ribeiro and respondent. Thereafter Mr. Arun Kumar, husband of complainant purchased the apartment from Ms. Zena Ribeiro and endorsement to the said effect was done in the name of husband of the complainant on 18.02.2015. Thereafter on 01.02.2021, Mr. Arun Kumar nominated his wife Ms. Komal Sharma, i.e. the complainant in his place and accordingly the endorsement was done in the name of complainant. That the complainant is a subsequent allottee and therefore the period for due date of possession shall be calculated from the date of endorsement in the favour of the complainant (in

the present case in the name of husband of the complainant) and not when the buyer agreement was executed. It is submitted that the complainant and her husband had already condoned the alleged delay and relinquished the claim of delay possession charges and is now estopped from claiming the delay possession charges. Further, the complainant has also admitted that the respondent had satisfied all the claims of the previous allottee with respect to delay possession charges and therefore the respondent now cannot be held liable to pay any interest on account of alleged delay to the complainant. It is further submitted that the complainant and her husband had also given an affidavit whereby they had relinquished the claim for delay possession charges.

- v. That further the Municipal Corporation of Gurugram vide direction dated 14.10.2019 bearing Memo No. MCG/ADMC/2019 imposed a complete ban from 11.10.2019 to 31.12.2019 on the construction activities in Gurugram. Further, Environment Pollution (Prevention and Control) Authority for NCR vide direction dated 01.11.2019 bearing EPCA-R/2019/L-53 imposed a complete ban from 01.11.2019 to 05.11.2019. Further, Hon'ble Supreme Court vide its order dated 04.11.2019 in the matter bearing W.P (C) No. 13029/1985 also banned the construction activities in Delhi NCR till further orders keeping in mind the damage caused to the environment due to construction and demolition activities. It is pertinent to mention here that the Hon'ble Supreme Court has only



on 09.12.2019 partially uplifted the ban on construction activities in Delhi NCR between 6am to 6pm. Thereafter despite facing practical issues in arranging manpower, the respondent had managed to maintain the minimum labour force constantly in the labour camp at the project site to complete the pending work at the earliest. This clearly shows bonafide intention of the respondent to complete the project on time. Even in the year 2018, vide Notification No. EPCA-R/2018/L-91 and EPCA-R/2018/L-100 periodic ban on constructions were imposed. Such bans that have been imposed from time to time in the past years, not only had enormous adverse impact on the construction of infrastructure projects. The adverse effects of banning the construction activity disrupts the arrangement of plant & machinery, supply of raw material and manpower resources as it takes a long time to reorganize the labour force once the ban is lifted. Another factor to be considered is that most of the labour force in NCR hails from Eastern UP/Bihar so during such period wherein the ban remains in effect, the labour force usually heads back to their hometowns, since it becomes difficult for them to sustain here without any source of income. It is an admitted fact, consequently, on an average the construction ban of 1 day culminates into roughly 10 days of delay in overall construction activity. It is also not disputed that due to the outbreak of Covid 19, the entire world went into lockdown and all the construction activities were halted and no labourers were available. Infact all the

developers are still facing hardship because of acute shortage of labourers and even the HRERA, Gurugram has vide order dated 26.05.2020 declared the Covid 19 as a calamity under the Force Majeure clause and therefore there cannot be said to be any delay in delivering the possession by the respondent. Table showing delay in number of days due to above said orders are as follows:

S.No.	Notification Date	Issuing Authority	Period of Ban	No.of days	Impact on construction
1.	27.10.2018	Environment Pollution (Prevention & Control) Authority	1.10.2018-10.10.2018	10	Inordinate delay in construction
2.	12.11.2018	Environment Pollution (Prevention & Control) Authority	6 a.m to 6 p.m (permitted to work)	60 (approx.)	Inordinate delay in construction
3.	14.10.2019	Municipal Corporation of Gurugram	11.10.2019-31.12.2019	81	Inordinate delay in construction
4.	26.05.2020	Haryana RERA Covid First Wave	2020	180 (approx.)	Inordinate delay in construction
5.	-----	Covid Second Wave	2021	90 (approx.)	Inordinate delay in construction
				Total=421	

- vi. It is also submitted that due to the ban imposed by the above said authorities there was no progress at site consequent to which respondent's manpower, plant and machinery and other resources which stood fully mobilized at site were rendered idle thereby casting upon the respondent heavy financial losses due to the

stagnancy of resources. It is also pertinent to mention herein that such bans majorly affect the projects which are near completion like the project in question. Hence, even after putting days and nights in completing the project, the delay occurred due to such circumstances which were beyond the control of the respondent company.

- vii. That the respondent is also entitled for a grace period of 6 months due to Covid-19 in view of the Notification issued by the DTCP, Haryana vide its notification no. 27 dated 25.06.2021 and also held by this Hon'ble Authority in case titled ***Sanjay Lakra Vs SS Group Pvt. Ltd. (4359 of 2021) decided on 28.01.2022.***
- viii. That the Respondent, after having applied for grant of occupation certificate on 09.05.2022 in respect of the building-9, which had thereafter been even issued through Memo dated 28.06.2022 The complaint filed by the complainant, being in any case belated, is even subsequent to the date of grant of occupation certificate offered possession to the complainant vide letter dated 30.06.2022. No indulgence much less as claimed by the complainant is liable to be shown to them.
- ix. That in the present case, the complainant is liable to pay the maintenance charges as per the flat buyer's agreement from 31.07.2022 till date as the complainant was supposed to take over the physical possession latest by 31.07.2022 as per clause 8.2(a) of the agreement. It is pertinent to mention here that the complainant

in order to escape her liability to pay the outstanding dues has filed this false and frivolous complaint. The complainant is also liable to payment of holding charges as per the flat buyer's agreement from 31.07.2022.

- x. That there is a huge outstanding amount to be paid by the allottees, which has resulted in alleged delay in handing over of possession to the allottees. It is submitted that due to the money crunch created by the allottees by not making timely payments and in order to meet the gap for cost of completion of the project arisen on account of non-payment/default in payment of installments by the allottees, the company approached SWAMIH INVESTMENT FUND - I (Special Window for Completion of Construction of Affordable and Mid-Income Housing Projects) which has been formed to complete construction of stalled, RERA registered residential developments that are networth positive and requires last mile funding to complete construction. The SWAMIH INVESTMENT FUND - I vide their letter dated 23.07.2020 has sanctioned an initial amount of Rs. 110 Crores to complete the project. The first trench had already been disbursed and utilised by the respondent company and had been infused into the project for speedy construction. As per the condition of the fund sanctioned, the entire amount of the fund shall be utilized only in completion of the project under the observation and monitoring of the agency deployed by the SWAMIH FUND in the project. If any adverse relief is allowed by this Hon'ble Authority,

then the basic objective of the intervention of the Government of India shall be defeated.

- xi. That the respondent has already completed the construction of the tower in which the unit allotted to the complainant is located. It is submitted that the said flat is complete in all respect as agreed. It is pertinent to mention here that large numbers of families have already shifted after having taken possession in the said project. It is further submitted that the complainant is deliberately dragging and avoiding taking over the possession of the said unit for the reasons best known to her.

E. Jurisdiction of the authority

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

E.I Territorial jurisdiction

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

9. Section 11(4)(a) of the Act 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) The promoter shall-

- (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 of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

10. 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 as per provisions of section 11(4)(a) of the Act 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 jurisdiction of authority w.r.t. buyer's agreement executed prior to coming into force of the Act

11. One of the contentions of the respondent is that the authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the buyer's agreement executed between the parties. The respondent further submitted that the provisions of the Act are not retrospective in nature and the provisions of the Act cannot undo

or modify the terms of buyer's agreement duly executed prior to coming into effect of the Act.

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

- "119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter.....
122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."

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

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

14. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the buyer's agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the buyer's agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of the Act and are not unreasonable or exorbitant in nature.

F.II Objection regarding delay due to force majeure circumstances

15. The respondent-promoter raised a contention that the construction of the project was delayed due to force majeure conditions such as various orders passed by the Haryana State Pollution Control Board from 01.11.2018 to 10.11.2018, lockdown due to outbreak of Covid-19



pandemic which further led to shortage of labour and orders passed by National Green Tribunal (hereinafter, referred as NGT).

16. Further, the authority has gone through the possession clause of the agreement and observed that the respondent-developer proposes to handover the possession of the allotted unit within a period of 36 months from the date of execution of agreement. In the present case, the agreement was executed on 11.09.2013. Therefore, the due date comes out to be 11.09.2016. In the present matter, the due date of completion and handover was much prior to the out break of COVID-19. Furthermore, the outbreak of a pandemic cannot be used as an excuse for non- performance of a contract for which the deadlines were much before the outbreak itself and for the said reason the said time period is not excluded while calculating the delay in handing over possession and in view of the same the authority place reliance on decision of Hon'ble Delhi High Court in case titled as *M/s Halliburton Offshore Services Inc. V/S Vedanta Ltd. & Anr.* bearing no. O.M.P (I) (Comm.) no. 88/ 2020 and I.As 3696-3697/2020 dated 29.05.2020. Therefore, the benefit of **HARERA notification no. 9/3-2020 dated 26.05.2020 where an extension of 6 months is granted for the projects having completion/due date on or after 25.03.2020**, is not applicable to the case in hand.

17. Further in the judgement of the Hon'ble Supreme Court of India in the case of *Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (Civil Appeal no. 6745-6749 of 2021)*, it was observed-

25. The unqualified right of the allottee 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 allottee, 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 allottee/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 allottee 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.

18. In view of the above, the objection raised by the respondent to extend the due date of handing over possession due to force majeure circumstances due to various authorities/tribunals/courts orders and COVID-19 is declined.

G. Findings on the reliefs sought by the complainant

G.I Delay possession charges

19. **Relief sought by the complainant:** Direct the respondent to pay the delay possession charges as per section 18 of the Act and the rules made thereunder.
20. In the present complaint, the complainant intends to continue with the project and is seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under:

"Section 18: - Return of amount and compensation

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

.....

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

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

"8. POSSESSION

8.1 Time of handing over the Possession

(a) Subject 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."

22. **Due date of possession and admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within 36 months from the date of signing of the agreement and it is further provided in agreement that promoter shall be entitled to a grace period of 90 days for applying and obtaining completion certificate/occupation certificate in respect of said project. As a matter of fact, the promoter has not applied to the concerned authority for obtaining completion certificate/occupation certificate within the time limit prescribed by the promoter in the buyer's agreement. As per the settled law one cannot be allowed to take advantage of his own wrong.

Accordingly, this grace period of 90 days cannot be allowed to the promoter at this stage. Therefore, the due date of possession comes out to be 11.09.2016.

23. Entitlement of delay possession charges to the complainant being subsequent allottee w.e.f. due date of handing over possession or w.e.f. the date of nomination letter/endorsement (i.e. date on which he became allottee)-

24. The counsel for the respondent stated that the complainant is a third allottee to whom the unit has been transferred vide assignment dated 01.02.2021 and notice for offer of possession has been made on 30.06.2022 and further that the allottees have relinquished the claim of DPC and has filed citations in support of the same.

25. The counsel for the complainant clarified that the unit was earlier allotted in the name of the husband and now nomination has been made in the name of the wife Mr. Komal Sharma i.e., complainant herein. The second allottee was the husband of the present complainant who had entered into the shoes of the original allottee and is entitled for delay possession charges as per provisions of the Act. The counsel for the complainant is seeking delay possession charges w.e.f. due date as per the buyer's agreement i.e., 11.09.2016.

26. The authority observes that the issue w.r.t. the entitlement of delay possession charges to the allottees being subsequent allottees is concerned, the authority has exhaustively decided the said issue in **CR no. 4031 of 2019 titled as Varun Gupta Vs. Emaar MGF Land Ltd.** wherein



it has been held that where subsequent allottee had stepped into the shoes of original allottee before the due date of handing over possession as per the terms of the agreement, the delayed possession charges shall be granted w.e.f. the due date of handing over the possession in terms of the agreement executed inter se parties.

27. The authority observes that in the present complaint, the flat buyer agreement was executed between the original allottee (Zena Ribeiro) and the respondent on 11.09.2013. Thereafter, the subject unit was endorsed in favour of the complainant's husband (Mr. Arun Kumar) on 18.02.2015. Here it is pertinent to note that the complainant's husband has nominated the complainant and the same was acknowledged by the respondent vide transfer letter dated 08.04.2021. It is substitution of name from the husband's name to the wife's name as the nominee of Mr. Arun Kumar. Therefore, the subject unit has been endorsed in favour of the complainant vide endorsement dated 18.02.2015 i.e., before the due date of handing over possession. Therefore, in furtherance of *Varun Gupta Vs. Emaar MGF Land Ltd. (supra)*, the complainant is entitled to delay possession charges w.e.f., the due date of handing over the possession in terms of the agreement executed inter se parties.

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

29. The legislature in its wisdom in the subordinate legislation under the 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.
30. 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., 14.11.2023 is 8.75%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.75%.
31. **Rate of interest to be paid by complainant/allottee for delay in making payments:** 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—

- (i) 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;"*

32. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 10.75% by the respondent/promoter which is the same as is being granted to the complainant in case of delayed possession charges.
33. On consideration of the documents available on record and submissions made by the parties regarding contravention as per provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 8.1(a) of the buyer's agreement executed between the parties on 11.09.2013, the possession of the said unit was to be delivered within a period of 36 months from the date of signing of the agreement and it is further provided in agreement that promoter shall be entitled to a grace period of 90 days for applying and obtaining completion certificate/occupation certificate in respect of said project. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over possession comes out to be 11.09.2016. The complainant in the present complaint is subsequent allottee and for the reasons cited above, the

complainant is entitled to delayed possession charges w.e.f. the due date of possession as per the agreement. In the present case, the complainant was offered possession by the respondent on 30.06.2022 after obtaining occupation certificate dated 28.06.2022 from the competent authority, therefore, the said offer of possession is valid offer of possession. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the complainant as per the terms and conditions of the buyer's agreement dated 11.09.2013 executed between the parties.

34. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 28.06.2022. However, the respondent offered the possession of the unit in question to the complainant only on 30.06.2022, so it can be said that the complainant came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, she should be given 2 months' time from the date of offer of possession. These 2 months' of reasonable time is being given to the complainant keeping in mind that even after intimation of possession practically she has to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession



charges shall be payable from the due date of handing over possession i.e. 11.09.2016 till the expiry of 2 months from the date of offer of possession (30.06.2022) which comes out to be 30.08.2022. Also, the complainant is directed to take possession of the unit in question within 2 months from the date of this order as per section 19(10) of the Act after clearing outstanding dues, if any.

35. 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 complainant is entitled to delay possession charges at prescribed rate of the interest @ 10.75 % p.a. w.e.f. 11.09.2016 till 30.08.2022 as per provisions of section 18(1) of the Act read with rule 15 of the rules.

G.II Demands raised under different heads at time of offer of possession

• **GST**

36. The counsel for the complainant submitted that GST came into force on 01.07.2017 and the possession was supposed to be delivered by 11.09.2016. Therefore, the tax which came into existence after the due date of possession and this extra cost should not be levied on the complainant. On the other hand, the counsel for the respondent denied that any amount towards GST is liable to be returned to the complainant and the demand towards GST are statutory demands which cannot be evaded.

37. The authority has decided this issue in the complaint bearing no. **4031 of 2019** titled as **Varun Gupta V/s Emaar MGF Land Ltd.** wherein the



authority has held that for the projects where the due date of possession was prior to 01.07.2017 (date of coming into force of GST), the respondent/promoter is not entitled to charge any amount towards GST from the complainant/allottee as the liability of that charge had not become due up to the due date of possession as per the buyer's agreements.

38. In the present complaint, the possession of the subject unit was required to be delivered by 11.09.2016 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 respondents' own fault in delivering timely possession of the subject unit. So, the respondent/promoter is 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 said agreement as has been held by **Haryana Real Estate Appellate Tribunal, Chandigarh in appeal bearing no. 21 of 2019 titled as M/s Pivotal Infrastructure Pvt. Ltd. Vs. Prakash Chand Arohi**. The authority also concurs on this issue and holds that the difference between Post-GST and Pre-GST shall be borne by the promoter. The promoter is entitled to charge from the allottee the applicable combined rate of VAT and service tax fixed by the government.

- **Holding charges**

39. The complainant has also challenged the demand raised by the respondent builder in respect of holding charges.

40. The authority observes that this issue already stands settled by the Hon'ble Supreme Court vide judgment dated 14.12.2020 in civil appeal no. 3864-3889/202, whereby the Hon'ble Court had upheld the order dated 03.01.2020 passed by NCDRC, which lays in unequivocal terms that no holding charges are payable by the allottee to the developer. The relevant para of the committee report is reproduced as under:

"F. Holding Charges: The Committee observes that the issue already stands settled by the Hon'ble Supreme Court vide judgement dated 14.12.2020 in civil appeal no. 3864-3889/2020, hereby the Hon'ble Court had upheld the order dated 03.01.2020 passed by NCDRC, which lays in unequivocal terms that no holding charges are payable by the allottee to the developer. The Hon'ble Authority may kindly issue directions accordingly."

41. The respondent is not entitled to claim holding charges from the complainant at any point of time even after being part of the buyer's agreement as per law settled by Hon'ble Supreme Court in civil appeal nos. 3864-3889/2020 decided on 14.12.2020.

- **Club membership charges**

42. With respect to club membership charges, the authority observes that the complainant had agreed to pay club membership registration charges amounting to Rs.1,00,000/- in terms of clause 1.2(a) of the buyer's agreement. While deciding the issue of club membership charges in CR/3203/2020 titled as Vijay Kumar Jadhav Vs. M/s BPTP Limited and anr. decided on 26.04.2022, the authority has observed as under:

"79. The authority concurs with the recommendation made by the committee and holds that the club membership charges (CMC) shall be optional. The respondent shall refund the CMC if any request is received from the allottee. Provided that if an allottee opts out to avail this facility and later approaches the respondent for membership of the club, then he shall pay the club membership charges as may be decided by the respondent and shall not invoke the terms of flat buyer's agreement that limits CMC to Rs.1,00,000/-."

43. In view of the above, the authority holds that the club membership charges shall be optional. The respondent shall refund the club membership charges if any request is received from the complainant-allottee. Provided that if he opts out to avail this facility and later approaches the respondent for membership of the club, then he shall pay the club membership charges as may be decided by the respondent and shall not invoke the terms of buyer's agreement that limits club membership charges to Rs.1,00,000/-.

- **Increase in super area**

44. In the present complaint, the super area of the unit as per the byer's agreement was 2280 sq. ft. However, at the time of offer of possession, the respondent has intimated increase in area to 2408 sq. ft.
45. The authority has comprehensively decided this issue in the complaint bearing no. **4031 of 2019** titled as **Varun Gupta V/s Emaar MGF Land Ltd.** wherein it was held that the demand for extra payment on account of increase in the super area by the promoter from the complainant is legal but subject to condition that before raising such demand, details have to be given to the allottee and without justification of increase in super area, any demand raised is quashed.
46. The authority observes that in the present complaint, the respondent has increased the super area from 2280 sq. ft. to 2408 sq. ft. However, the respondent has not given any justification for increase in the super area. Thus in view of the above, the respondent shall provide justification for the increase in area of the unit within 2 months from the date of this



order and in case the justification is not given within the specified time, the demand raised on account of increase in area is quashed.

G.III Execution of conveyance deed/sale deed.

47. With respect to the conveyance deed, section 17 (1) of the Act deals with duties of promoter to get the conveyance deed executed and the same is reproduced below:

"17. Transfer of title.-

(1). The promoter shall execute a registered conveyance deed in favour of the allottee along with the undivided proportionate title in the common areas to the association of the allottees or the competent authority, as the case may be, and hand over the physical possession of the plot, apartment of building, as the case may be, to the allottees and the common areas to the association of the allottees or the competent authority, as the case may be, in a real estate project, and the other title documents pertaining thereto within specified period as per sanctioned plans as provided under the local laws:

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."

48. The authority observes that OC in respect of the project where the subject unit is situated was obtained by the respondent promoter on 28.06.2022. The respondent promoter is contractually and legally obligated to execute the conveyance deed upon receipt of the occupation certificate/completion certificate from the competent authority. In view of above, the respondent shall execute the conveyance deed of the allotted unit within 3 months from the date of this order and upon receipt of requisite stamp duty by the complainant as per norms of the state government.



G.IV Compensation

Relief sought by the complainants: Direct the respondent to pay a sum of Rs.5,00,000/- to the complainant towards the cost of litigation and mental agony.

49. Hon'ble Supreme Court of India, in case titled as *M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP & Ors.* (civil appeal nos. 6745-6749 of 2021, decided on 11.11.2021), has held that an allottee is entitled for claiming compensation under sections 12, 14, 18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. Therefore, the complainants are at liberty to approach the adjudicating officer for seeking compensation.

H. Directions of the authority

50. 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):
- The complainant is directed to take possession of the unit in question within 2 months from the date of this order as per section 19(10) of the Act after clearing outstanding dues, if any.
 - The respondent is directed to pay to delay possession charges at prescribed rate of the interest @ 10.75 % p.a. w.e.f. 11.09.2016 till 30.08.2022 as per provisions of section 18(1) of the Act read with



rule 15 of the rules. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order as per rule 16(2) of the rules.

- iii. **GST-** The respondent/promoter is 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. The difference between Post-GST and Pre-GST shall be borne by the promoter. The promoter is entitled to charge from the allottee the applicable combined rate of VAT and service tax fixed by the government.
- iv. **Holding charges-** The respondent is not entitled to claim holding charges from the complainant at any point of time even after being part of the buyer's agreement as per law settled by Hon'ble Supreme Court in civil appeal nos. 3864-3889/2020 decided on 14.12.2020.
- v. **Club membership charges-** The respondent shall refund the club membership charges if any request is received from the complainant-allottee. Provided that if he opts out to avail this facility and later approaches the respondent for membership of the club, then he shall pay the club membership charges as may be decided by the respondent and shall not invoke the terms of buyer's agreement that limits club membership charges to Rs.1,00,000/-.
- vi. **Increase in super area-** The respondent shall provide justification for the increase in area of the unit within 2 months from the date of this order and in case the justification is not given within the

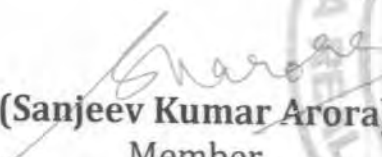
specified time, the demand raised on account of increase in area is quashed.

vii. **Execution of conveyance deed-** The respondent shall execute the conveyance deed of the allotted unit within 3 months from the date of this order and upon receipt of requisite stamp duty by the complainant as per norms of the state government.

viii. The respondent shall not charge anything from the complainant which is not the part of the buyer's agreement.

51. Complaint stands disposed of.

52. File be consigned to registry.


(Sanjeev Kumar Arora)

Member

Haryana Real Estate Regulatory Authority, Gurugram


(Ashok Sangwan)

Member

Dated: 14.11.2023

HARERA
GURUGRAM