

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

Complaint no.: 4863 of 2022
Complaint filed on: 11.07.2022
Date of decision: 15.02.2024

1. Siddharth Maheshwari
2. Priyanka Aggarwal

Both RR/o - Tower 8, flat 1201, Palm Terraces Select,
Sector 66, Gurugram- 122018, Haryana

Complainants

Versus

M/s S.S. Group Pvt. Ltd.

Registered Office at: - SS house, plot no.77, Sector-44,
Gurugram-122003

Respondent

CORAM:

Shri Vijay Kumar Goyal

Member

APPEARANCE:

Sh. Harshit Batra (Advocate)

Sh. Rahul Bhardwaj (Advocate)

Complainants
Respondent

ORDER

1. The present complaint has been filed by the complainant/allottees 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 as provided under the provision of the Act or the Rules and regulations made there under or to the allottees as per the agreement for sale executed inter se.

A. Unit and project related details

2. The particulars of unit details, sale consideration, the amount paid by the complainants, 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 85, Gurugram
2.	Nature of project	Residential
3.	RERA Registration	Registered 23 of 2019 dated 01.05.2019
4.	DTCP License No	81 of 2011 dated 16.09.2011
	Validity upto	15.09.2024
	Licensed area	11.9 Acre
5.	Unit no.	11D, 11 th floor, tower-2 (page no. 69 of complaint)
	Unit admeasuring	1575 sq. ft. (super area) 1640 sq. ft. (revised super area)
6.	Date of allotment	28.01.2013 (page no. 60 of complaint)
7.	Date of execution of floor buyer's agreement	21.08.2013. (Page no. 68 of complaint)
8.	Possession clause	<p>8. Possession</p> <p>8.1 Time of handing over the possession</p> <p>8.1 (a) subject to terms of this clause and subject to the flat buyer(s) having complied with all the terms and conditions of this agreement and not being in default under any of the provisions of this agreement and complied with all provisions, formalities, documentation etc. as prescribed by the developer, the developer proposes to handover the possession of the flat within a period of thirty-six (36) months from the date of signing of this agreement. The flat buyer(s) agrees and understands that the developer shall be entitled to a grace period of 90 days, after the expiry of thirty-six months or such extended period, for applying and obtaining occupation certificate in respect of the Group Housing Complex.</p>

9.	Due date of possession	19.11.2016 (Calculated from the date of signing of buyer agreement including grace period of 90 days) <i>(*Note: inadvertently mentioned due date 21.11.2016 vide proceedings dated 15.02.2024)</i>
10.	Total sale consideration	Rs.97,81,875/- (page no. 70 of complaint)
11.	Total amount paid by the complainant	Rs.88,63,300/- (As alleged by the complainant)
12.	Occupation certificate	09.05.2022 (page no. 95 of reply)
13.	Notice for Offer of possession	12.05.2022 (page no. 100 of reply)

B. Facts of the complaint

3. The complainants have pleaded the following facts:

- a. That the respondent made advertisement in the newspapers and billboards with regard to the location, amenities and specifications of the project under the name "The Leaf at SS City", Sector - 85, Gurugram, Haryana. Following which the complainants approached the respondent for booking of unit in the respondent's project.
- b. That the respondent through its authorised representative executed a one-sided builder buyer agreement with complainant on 28.08.2013 (*sic i.e. 21.08.2013*) to create a false belief that the project will be completed in time bound manner and in the garb of this agreement respondent persistently raised demands due to which respondent was able to extract huge amount of money from the complainants. Total consideration of the unit was Rs.97,81,875/- plus taxes and other charges as per the buyer's agreement.
- c. That the complainants paid all the demands as raised by the respondent. As per the clause 8.1 of the buyer's agreement the respondent was liable to handover the possession of the allotted unit within 36 months from the date

of execution of buyer's agreement. However, the respondent delayed in offering the possession of subject unit.

- d. That respondent has charged interest on delayed instalment @ 18% p.a. as per clause 6 of buyer's agreement from the complainants, but as per clause 8.3 the liability of delay as mentioned is only Rs.5/- sq. ft. for maximum period of 12 months. Every clause of the agreement was drafted in a one-sided way, a single breach by complainants of unilateral terms of buyer's agreement, will cost them forfeiting of earnest money.
- e. That due to the malafide intentions of the respondent and non-delivery of the unit the complainants in time have accrued huge losses on account of the career plans of their family members. Also, the future of the complainants and their family are rendered dark as the planning with which the complainants invested their hard-earned money resulted in sub-zero results and borne thorns instead of bearing fruits.

C. Relief sought by the complainants:

4. The complainants have sought following reliefs:
- Direct the respondent to handover the physical possession and pay delay possession charges.
 - Direct the respondent to waive off the demand raised by the respondent for unilateral increase in super area of the unit.
 - Direct the respondent to refund the amount collected for increase in basic sale price.
 - Direct the respondent to waive off the charges of GST.
 - To waive off the demand of club charges.
5. On the date of hearing, the authority explained to the respondents /promoter about the contravention as alleged to have been committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent:

6. The respondent has contested the complaint on the following grounds:

- a. That the present complaint, so preferred under the Real Estate Regulation and Development Act 2016, is not maintainable as the complainants have failed to disclose any maintainable cause of action under the said provisions of the Act as alleged. Section 19 of the real estate regulation and development Act 2016 clearly prescribes the rights and duties of the allottees. Further, the present complaint does not pertain to the compensation and interest for the delay in completion of the project under section 18 of the Real Estate (Regulation and Development) Act, 2016 as the project has already been completed and the respondent has already received the occupational certificate from the competent authority. So, the complainant is required to be filed before the civil court not before the Authority as the agreement is civil in nature and Authority does not have the jurisdiction to entertain the present complaint as it has been wrongly filed and shall be filed with the appropriate authority for the proper adjudication.
- b. That the complainants after checking the veracity of the project approached the respondent and expressed their interest in booking a unit in the residential project developed by the respondent The Leaf, Sector 83, Village Sihi, Tehsil Manesar & District Gurugram, Haryana. The complainants prior booking conducted extensive and independent enquiries with regard to the project through a real estate agent Property Junction Realtors Pvt. Ltd. and the complainants were fully satisfied about all aspects of the project and took an independent and informed decision, un-influenced in any manner by the respondent, to book the unit in question.
- c. That the complainants vide an application form dated 19.01.2013 booked a unit in respondent's residential complex. The complainants accepted the

allotment of the said unit vide allotment letter dated 28.01.2013 along with broad terms & conditions and a payment plan. The complainants, in pursuance of the aforesaid advance registration form, were allotted a unit no.11 D, 11th floor, tower-1 admeasuring 1,575 sq. ft. super area The complainants consciously and willfully opted for a down payment plan for remittance of the sale consideration for the unit in question and further represented to the respondent that they will remit every instalment on time as per the payment schedule. The respondent had no reason to suspect the bonafide of the complainants and proceeded to allot the unit in question in their favour.

- d. That the buyer's agreement was executed on 21.08.2013 for the total sale Rs. 97,81,875/- between the parties which contained the final understandings between the parties stipulating all the rights and obligations. The sale consideration amount was extensive of the registration charges, stamp duty charges, service tax and other charges which were to be paid by the complainants at the applicable stage.
- e. That the complainants have no cause of action to file the present complaint as the same is based on an erroneous interpretation of the provisions of the Act as well as an incorrect understanding of the terms and conditions of the buyer's agreement. The complainants are investor and have booked the unit in question to yield gainful returns by selling the same in the open market. However, due to the ongoing slump in the real estate market, the complainants have filed the present purported complaint to wriggle out of the agreement. Moreover, the complainants themselves have delayed the payment towards the installment of the unit and only cleared the payments after continuous efforts made by the respondent after sending numerous reminder and demand letters.

- f. That the possession of the unit as per clause 8.1 of the buyer agreement was to be handed over within 36 months (plus the grace period of 90 days, i.e., 3 months) from the date of the execution of the buyer agreement and not from the date of terms and conditions as stated by the complainants who is trying to confuse the Authority with false, frivolous and moonshine contentions. In addition, the date of possession as per the Flat buyer's agreement further increases to grace months of 3 months. The date of the completion of the project was further pushed due to the force majeure conditions i.e. due to the NGT orders and the lockdown imposed because of the worldwide Covid-19 pandemic, by which the construction work all over the NCR region came to halt. That DTCP, Haryana vide its notification no. 27 of 2021 dated 25.06.2021, gave a relaxation of 6 months to all the builders in view of the hurdles faced by them due to Covid-19.
- g. That several allottees, have defaulted in timely remittance of payment of installments which was an essential, crucial and an indispensable requirement for conceptualisation and development of the project in question. That despite there being a number of defaulters in the project, the respondent itself infused huge amount of funds into the project and is diligently developing the project in question.
- h. That the subject project stands completed and has received the occupational certificate (OC) from the competent authority on 09.05.2022. Therefore, it will be difficult for the respondent to pay any interest on the delayed possession at this stage as the respondent have already sent the offer of possession letter dated 12.05.2022 & email dated 17.05.2022 to the complainants. At this point, when the project already stands completed, any relief cannot be given to the complainants as it will be detrimental to the

interest of the respondent as well as all the other investors who have invested in the project.

i. That the entire sequence of events evidents, that no illegality can be attributed to the respondent. The allegations levelled by the complainants are totally baseless. Thus, it is most respectfully submitted that the present complaint deserves to be dismissed at the very threshold.

7. Copies of all the documents have been filed and placed on record. The authenticity is not in dispute. Hence, the complaint can be decided on the basis of theses undisputed documents.

8. That the complainants filed an application for amendment in relief on 31.08.2023 seeking delay possession interest from the due date of possession till the actual handover of the possession, to waive off the demand raised by respondent for increase in super area, to refund the amount collected by respondent for unilateral increase in rate of basic sale price, to waive off the charges of GST and direction to the respondent to handover the possession. The same was heard on 16.11.2023 and was allowed vide proceedings dated 16.11.2023.

E. Jurisdiction of the authority

9. 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

10. 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 entire Gurugram District for all purpose 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

11. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

Section 11

.....

(4) 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.

12. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

F. Findings on the objections raised by the respondent:

F.I Objection regarding the complainants being investors.

13. The respondent has taken a stand that the complainants are the investors and not consumers, therefore, they are not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. The respondents also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority observed that the respondents are correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is



settled principle of interpretation that preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if the promoter contravenes or violates any provisions of the Act or rules or regulations made thereunder. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

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

14. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment buyer's agreement executed between promoter and complainants, it is crystal clear that the complainants are allottee(s) as the subject unit was allotted to them by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". Thus, the contention of promoter that the allottee being an investor is not entitled to protection of this Act also stands rejected.

F.II Objection regarding delay in completion of construction of project due to force majeure conditions.

15. The respondent-promoter alleged that grace period on account of force majeure conditions be allowed to it. It raised the contention that the construction of the project was delayed due to force majeure conditions such as demonetization, and the orders of the Hon'ble NGT prohibiting



construction in and around Delhi and the Covid-19, pandemic among others, but all the pleas advanced in this regard are devoid of merit. The flat buyer's agreement was executed between the parties on 21.08.2013 and as per terms and conditions of the said agreement the due date of handing over of possession comes out to be 19.11.2016. The events such as and various orders by NGT in view of weather condition of Delhi NCR region, were for a shorter duration of time and were not continuous. Hence, in view of aforesaid circumstances, no period grace period can be allowed to the respondent/builder. Though some allottees may not be regular in paying the amount due but whether the interest of all the stakeholders concerned with the said project be put on hold due to fault of some of the allottees. Thus, the promoter-respondent cannot be granted any leniency for aforesaid reasons. It is well settled principle that a person cannot take benefit of his own wrongs.

16. As far as delay in construction due to outbreak of Covid-19 is concerned, 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 IAs 3696-3697/2020*** dated 29.05.2020 has observed that:

69. The past non-performance of the Contractor cannot be condoned due to the COVID-19 lockdown in March 2020 in India. The Contractor was in breach since September 2019. Opportunities were given to the Contractor to cure the same repeatedly. Despite the same, the Contractor could not complete the Project. 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."

17. The respondent was liable to complete the construction of the project and the possession of the said unit was to be handed over by 19.11.2016 and is claiming benefit of lockdown which came into effect on 23.03.2020 whereas the due date of handing over of possession was much prior to the event of



outbreak of Covid-19 pandemic. Therefore, the authority is of the view that 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.

G. Findings on the relief sought by the complainant.

G.I. Direct the respondent to handover the possession and pay the delay period interest from the due date of possession till the date of actual possession.

18. In the present complaint, the complainants intend to continue with the project and are seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec 18(1) proviso reads as under.

"Section 18: - Return of amount and compensation

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

.....

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

19. Clause 8 of apartment buyer's agreement provides for handing over of possession and is reproduced below:

"8.1 (a) subject to terms of this clause and subject to the flat buyer(s) having complied with all the terms and conditions of this agreement and not being in default under any of the provisions of this agreement and complied with all provisions, formalities, documentation etc. as prescribed by the developer, the developer proposes to handover the possession of the flat within a period of thirty-six months from the date of signing of this agreement. 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

20. The authority has gone through the possession clause of the agreement. At the outset, it is relevant to comment on the pre-set possession clause of the



agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and the complainants not being in default under any provision of this agreement and in compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions is not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning.

21. The buyer's agreement is a pivotal legal document which should ensure that the rights and liabilities of both builder/promoter and buyer/allottee are protected candidly. The flat agreement lays down the terms that govern the sale of different kinds of properties like residentials, commercials etc. between the builder and the buyer. It is in the interest of both the parties to have a well-drafted buyer's agreement which would thereby protect the rights of both the builder and buyer in the unfortunate event of a dispute that may arise. It should be drafted in the simple and unambiguous language which may be understood by a common man with an ordinary educational background. It should contain a provision with regard to stipulated time of delivery of possession of the unit, plot or building, as the case may be and the right of the buyer/allottee in case of delay in possession of the unit.
22. **Admissibility of grace period:** The respondent promoter has proposed to handover the possession of the unit within a period of 36 months from the date of signing of the agreement. In the present case, the promoter is seeking 90 days as grace period for applying and obtaining occupation certificate. The Authority relying on the judgement of the *Hon'ble Appellate Tribunal*



in appeal no. 433 of 2022 tilted as Emaar MGF Land Limited Vs Babia Tiwari and Yogesh Tiwari, wherein it has been held that if the allottee wishes to continue with the project, he accepts the term of the agreement regarding grace period of 90 days for applying and obtaining the occupation certificate. The relevant para of the above-mentioned judgement is reproduced below:

As per section 18 of the Act, if the project of the promoter is delayed and if the allottee wishes to withdraw then he has the option to withdraw from the project and seek refund of the amount or if the allottee does not intend to withdraw from the project and wishes to continue with the project, the allottee is to be paid interest by the promoter for each month of the delay. In our opinion if the allottee wishes to continue with the project, he accepts the term of the agreement regarding grace period of three months for applying and obtaining the occupation certificate. So, in view of the above said circumstances, the appellant-promoter is entitled to avail the grace period so provided in the agreement for applying and obtaining the Occupation Certificate.

23. Therefore, in view of the above judgement and considering the provisions of the Act, the authority is of the view that, the promoter is entitled to avail the grace period so provided in the agreement for applying and obtaining the occupation certificate. Thus, the due date of handing over of possession comes out to be 19.11.2016.

24. **Admissibility of delay possession charges at prescribed rate of interest:**
The complainants are seeking delay possession charges. However, proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoters, 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.

25. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.
26. 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., 15.02.2024 is 8.85%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.85%.
27. 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;"

28. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 10.85% by the respondents/ promoters



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

29. On consideration of the documents available on record and submissions made by both the parties, 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 of the agreement, the possession of the subject apartment was to be delivered within 36 months from the date of execution of agreement. For the reasons quoted above, the due date of possession is to be calculated from the date of execution of buyer's agreement i.e., 21.08.2013. Therefore, the due date of possession is calculated from the date of execution of buyer's agreement and the said time period of 36 months expired on 21.08.2016. As far as grace period of 90 days is concerned, the same is allowed for the reasons quoted above. Therefore, the due date of handing over possession is 19.11.2016.
30. The respondent has obtained the occupation certificate on 09.05.2022. Copies of the same have been placed on record. 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 complainants as per the terms and conditions of the buyer's agreement dated 21.08.2013 executed between the parties. It is the failure on part of the promoter to fulfil its obligations and responsibilities as per the buyer's agreement dated 21.08.2013 to hand over the possession within the stipulated period.
31. 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 09.05.2022. The respondent offered the possession of the unit in question to the complainants only on 12.05.2022.



So, it can be said that the complainants came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the complainants should be given 2 months' time from the date of offer of possession. This 2 month of reasonable time is being given to the complainants keeping in mind that even after intimation of possession practically he 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 possession i.e. 19.11.2016 till the date of offer of possession (12.05.2022) plus two months i.e., 12.07.2022.

32. 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 delay possession charges at rate of the prescribed interest @ 10.85% p.a. w.e.f. 19.11.2016 till the date of offer of possession (12.05.2022) plus two months i.e., 12.07.2022; as per provisions of section 18(1) of the Act read with rule 15 of the Rules.

G. II To refrain the respondent to charge on account of increase in super area.

33. The complainants states that there is a unilateral increase in super area of the said unit and was increased from 1575 sq. ft. to 1640 sq. ft. vide offer of possession dated 12.05.2022. The respondent in its defence submitted that increase in super area was duly agreed by the complainant at the time of agreement and the same was incorporated in the buyer agreement. Relevant clause of the agreement is reproduced hereunder:



1.2(d)

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

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

"In case of any major alteration/modification resulting in excess of 10% change in the super area of the Flat in the sole opinion of the Developer any time prior to and upon the grant of occupation certificate, the Developer shall intimate the Flat Buyer(s) in writing the changes thereof and the resultant change, if any, in the Sale Price of the Flat to be paid by him/her and the Flat Buyer(s) agrees to deliver to the Developer in writing his/her/their consent or objections to the changes within thirty (30) days from the date of dispatch by the Developer of such notice failing which the Flat Buyer(s) shall be deemed to have given his/her/their full consent to all such alterations/modifications and for payments, if any, to be paid in consequence thereof. If the written notice of the Flat Buyer(s) is received by the Developer within thirty (30) days of intimation in writing by the Developer indicating his/her/their non-consent/objections to such alterations/modifications as intimated by the Developer to the Flat Buyer(s), then in such case alone this Agreement shall be cancelled without further notice and the Developer shall refund the money received from the Flat Buyer(s) within sixty (60) days from the date of intimation received by the Developer from the Flat Buyer(s). On payment of the money after making deductions as stated above the Developer shall be released and discharged from all its obligations and liabilities under this Agreement. In such a situation, the Developer shall have an absolute and unfettered right to allot, transfer, sell and assign the Flat and all attendant rights and liabilities to a third party. It being specifically agreed that irrespective of any outstanding amount payable by the Developer to the Flat Buyer(s), the Flat Buyer(s) shall have no right, lien or charge on the Flat in respect of which refund as contemplated by this clause is payable."



35. Considering combined reading of both the aforesaid clauses, the authority observes that the respondent has increased the super area of the flat from 1575 sq. ft. to 1640 sq. ft. vide offer of possession dated 12.05.2022 with increase in area of 65 sq. ft. i.e. below 10%. Therefore, the demand raised is also valid. Hence, the complainants are duty-bound to pay the same.

G.III. To refrain the respondent to charge 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 21.08.2016. Therefore, the tax which came into existence after the due date of possession and this extra cost should not be levied on the complainant. 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.

37. In the present complaint, the possession of the subject unit was required to be delivered by 19.11.2016 and the incidence of GST came into operation thereafter on 01.07.2017. So, the complainants 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 liable to bear the difference of government taxes levied upon after the due date of possession till the date of offer of possession and the promoter is only entitled to charge ^{rate of} taxes fixed by the government effective only upto the due date of possession. Therefore, difference between post GST and pre GST shall be borne by the promoter.



G.IV Direct the respondent to refund the amount collected for increase in basic sale price.

38. The allotment letter and the Buyer's Builder Agreement (BBA) clearly specify that the Basic Sale Price (BSP) was set at Rs.5,335/- per sq. ft. However, discrepancies arise as various demand letters and application ledger dated 13.02.2023 indicates a unit price calculation based on a BSP rate of Rs.5,500/- per sq. ft, which will lead to an apparent increase of Rs.2,70,600/- in the basic sale price. The Authority firmly upholds that the respondent is bound by the original BSP rate agreed upon and cannot modify it at a later stage. This deviation from the agreed terms is in contravention of the 2016 Act and is deemed unacceptable. The respondent is hereby directed to ensure that the cost of the flat is computed solely at Rs.5,335/- per sq. ft., as stipulated in the buyer's agreement. Any potential excess amount charged beyond the agreed BSP should be refunded to the complainants promptly. Furthermore, vide proceedings dated 15.02.2024, the respondent explicitly affirmed that there has been no alteration in the basic sale price, reaffirming its consistency with the terms outlined in the buyer's agreement.

G.V Direct the respondent to waive off club membership charges.

39. Perusal of case file itself reveals that club membership charges amounting to Rs.1,00,000/- were payable by the complainants. This understanding was explicitly agreed upon between the parties as specified in clause 1.2(a) the apartment buyer agreement.
40. However, the Authority in *Complaint Case no. 4031 of 2019 titled as "Varun Gupta vs Emaar MGF Land Limited" decided on 12.08.2021*, had already decided that if the club has come into existence and the same is operational or is likely to become operational soon, i.e., within reasonable period of around 6 months, the demand raised by the respondent for the said amenity shall be discharged by the complainants as per the terms and



conditions stipulated in the builder buyer's agreement. However, if the club building is yet to be constructed, the respondent should prepare a plan for completion of the club and demand money regarding club charges and its membership from the allottees only after completion of the club.

H. Directions of the authority

41. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations casted upon the promoter as per the functions entrusted to the authority under section 34(f) of the Act:

- I. The respondent is directed to pay interest to the complainants against the paid-up amount at the prescribed rate i.e., 10.85% per annum for every month of delay on the amount paid by the complainants from due date of possession i.e., 19.11.2016 till 12.07.2022 i.e., expiry of 2 months from the date of offer of possession (12.05.2022) or till actual handover of possession whichever is earlier as per provisions of section 18(1) of the Act read with rule 15 of the rules and section 19(10) of the Act. Also, an amount of Rs.98,400/- already adjusted by the respondent towards compensation for delay in handing over possession shall be deducted/adjusted towards the delay possession charges to be paid by the respondent.
- II. The arrears of such interest accrued from due date of possession till its admissibility as per direction (i) above shall be paid by the promoters to the allottee within a period of 90 days from date of this order as per rule 16(2) of the rules.
- III. The respondent is directed to issue a revised account statement after adjustment of delayed possession charges as per above within 30 days and thereafter the complainants are directed to pay outstanding dues, if



any, within next 30 days and the respondent shall handover the physical possession of the allotted unit in terms of Section 19(10), 2016 Act within 30 days from date of this order.

- IV. The rate of interest chargeable from the allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 10.85% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.
- V. The respondent shall not charge anything from the complainants which is not the part of the flat buyer's agreement.
42. Complaint stands disposed of.
43. File be consigned to registry.

Date: 15.02.2024

v.) - 
(Vijay Kumar Goyal)

Member
Haryana Real Estate Regulatory
Authority, Gurugram