BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 3485 of 2020
First date of hearing: 08.01.2021
Date of decision : 07.07.2021

Silverglades Infrastructure Private Limited
Address: 5th floor, Time square building, Sushant lok-1, B-block, Gurugram, Haryana - 122002.

Complainant

Versus

Aditya Vardhan Tiberwala
Address: 1200, South Rani Sati Nagar, Nimran Nagar, Jaipur-302019

Respondent

CORAM
Dr. K.K. Khandelwal — **Chairman**
Shri Samir Kumar — **Member**
Shri V.K. Goyal — **Member**

APPEARANCE
Shri Suresh Rohilla, Aishwarya Sinha & Subhi Sharma — Advocates for the complainant
Shri Sourav Sharma — Advocate for the respondent

ORDER

1. The present complaint dated 16.10.2020 has been filed by the complainant/promoter against the allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and

Development) Rules, 2017 (in short, the Rules) for violation of section 19(6) and (7) of the Act wherein it is prescribed that the allottee shall make necessary payments in the manner and within time as specified in the agreement for sale and to pay interest, at such rate as may be prescribed, for any delay in payments.

A. Unit and project related details

2. The particulars of project, unit, sale consideration, the amount paid by the respondent/allottee, date of proposed handing over of the possession, delay period, if any, have been detailed in the following tabular form:

S. No	Heads	Information
1.	Name and location of the project	"The Merchant Plaza", Village-Hayatpur, Sector 88, Gurugram, Haryana.
2.	Nature of the project	Commercial complex
3.	DTCP license no.	1 of 2013 dated 07.01.2013
	License valid up to	06.01.2023
	Name of licensee	Magnitude Pvt. Ltd.
4.	RERA registered/not registered	**Registered**
	HARERA registration no.	340 of 2017 dt 27/10/2017
	Validity of registration	20.12.2020
4.	Building plan approval date	30.05.2013
5.	Date of occupation certificate (page 96 of complaint)	11.02.2020
6.	Date of execution of apartment buyer's agreement (page 49 of complaint)	23.07.2014

7.	Unit no. as per allotment letter dated 3.03.2014 on page 46 of complaint)	SA-911, Ninth floor
8.	Unit measuring	770 sq.ft.
9.	Increased unit measuring	806.22 sq.ft.
10.	Allotment letter (page 46 of complaint)	03.03.2014
11.	Payment plan (page 83 of complaint)	Construction linked payment plan
12.	Total consideration as per payment plan (page 83 of complaint)	Rs. 60,75,527/-
13.	Total amount paid by the respondent as per SOA (page 116 of complaint)	Rs. 41,28,297/-
14.	Due date of delivery of possession (As per clause 11.1 of the buyer's agreement: within a period of 4 years from the date of approval of building plans for the project or within such other timelines as may be directed by the competent authority & further entitled to a grace period of a maximum of 180 days for issuing the possession notice)	30.5.2017 (Grace period is not allowed)
15.	Date of offer of possession (page 98 of complaint)	24.02.2020
16.	Delay in handing over possession till date of offer of possession + 2months i.e.. 24.04.2020	2 years 10 months 25 days

B. Facts of the complaint: -

3. The complainant has submitted that respondent, a resident of 1200 South Rani Sati Nagar, Nirman Nagar, Jaipur-302019, booked a unit

admeasuring 700 sq. ft. in "The Merchant Plaza" project through application form dated 01.06.2013 for basic sale consideration of Rs. 7000/- per sq. ft for the total consideration of Rs 60,75,527/-. He was allotted a unit no SA-911 admeasuring 770 Sq. Ft. situated on ninth floor of the project vide allotment letter dated 03.03.2014 to the respondent. The respondent also executed apartment buyer agreement for service apartment with the complainant on 23.07.2014. The ABA was executed between the parties by the Act, 2016 came into force with free will without any coercion or undue influence, therefore the provisions of pre-RERA, ABA were binding therefore the provisions of pre-RERA, ABA were binding on the parties thereto. It is pertinent to state that, as per section 19(6) of the Act, the respondent was under obligation and responsible to make necessary payments in the manner and within the time as specified in the said ABA, at the proper time and place. In event of the default thereof, the respondent was liable to pay interest, at the rate of 15% as prescribed in the ABA, for any delay in payment towards any amount or charges to be paid under sub-section (6). The said project has already been completed and the complainant has already obtained occupancy certificate on 11.02.2020.

4. The complainant further submitted that the offer of possession in terms of apartment buyer agreement was given to the respondent, wherein he was invited to take possession of unit no SA-911 as allotted to him vide allotment letter dated 03.03.2014 in the said project. However, in contravention and violation of the apartment buyer's agreement, the respondent failed to take possession of the unit, till the date of filing of present complaint.

5. That till the date of filing the present complaint, the respondent has paid Rs 41,28,297/ to the complainant. As per statement of account of the complainant, an amount of Rs 25,49,619/- is outstanding towards installment and an amount of Rs 13,53,941/- is outstanding towards interest as on 31.07.2020.
6. The respondent has been continuously defaulting in making payments of his instalment's dues. As per last payment request dated 17.02.2020 sent by the complainant to respondent an amount of Rs 25,49,619/- plus interest was due and payable by him.
7. That the complainant has duly complied with all provisions of the Real Estate (Regulations and development) Act, 2016 and rules made thereunder and that of agreement for sale qua the respondent and other allottees. Since starting of the development of the project, the complainant has been sending updates about the progress of the project regularly from time to time mostly on monthly basis to all the buyers including the respondent and the customer care department of the complainant was regularly in touch with the buyers for giving updates on the progress of the project. The complainant craves leave of this hon'ble authority to exempt the complainant from attaching all the updates sent to the each of the respondent, as the same are voluminous. However, it was submitted that as and when required by the hon'ble authority, the complainant will submit remaining copies of updates sent by the complainant to flat buyers including the respondent.
8. The complainant has submitted that despite hurdles, hindrance, escalation in cost of material and equipments, stay imposed by Apex Court and National Green Tribunal, the complainant has been able to

complete the project in time, on the faith and trust of the buyers including respondent. However, the faith and trust has been crushed by the buyers including the respondent by making default in taking possession of the unit. Also, the respondent agreed under the payment plan signed by him, to pay the instalments on time. The complainant also informed the respondent, through various demand/payment request letters, that home loan facility was available by leading banks/NBFCs such as HDFC, ICICI, SBI, Central Bank of India, Reliance Home Finance Limited, Tata Capital Home Loan at good rate of interest. Further, as a goodwill gesture, the complainant, vide reminder letter dated 19.12.2018 offered the respondent a one-time settlement to waive off all the interest charges amounting to Rs.4,98,454/-. But the respondent did not avail the offer and continued to make default.

9. In terms of ABA, the respondent was responsible and obligated to pay the instalments within the time agreed there in and any delay in making payment shall be chargeable with 15 % simple interest. It is pertinent to note that in terms of clause 13.5 of ABA the respondent has no right to withhold the due payments for any reason whatsoever.

10. It was submitted that the complainant has already suffered huge financial loss in lieu of non-payment of instalments by buyers. In spite of default of non-payment of instalments by the buyers, the complainant has competed the project and offered possession thereof to the respondent. However, the respondent has neither made timely payment nor came forward to take possession of unit offered to him. Therefore, default by the respondent has forced the complainant to

file the present complainant before this hon'ble authority and request for passing an order instructing the respondent to clear the outstanding dues and take possession of their unit.

11. It is also submitted that the respondent is an under obligation and responsible to pay and the complainant is entitled to recover the due amount along with interest agreed in terms of the ABA under section 19 (6) and (7) of the Act and Rule 15 of the rules and to take the possession under section 19(10). In view of the forgoing, it was clear that respondent committed breach of the said ABA as well violation of the provisions of the Act.

12. It was submitted that under section 31 (1) of the Act, the hon'ble authority is empowered to adjudicate the present complaint being filed by the complainant as promoter of the project against the respondent being an allottee of the project.

C. Relief sought by the complainant: -

13. The complainant has sought following reliefs:

    i. The respondent be directed to make payment of outstanding dues of Rs 25,49,619/- under the apartment buyer's agreement read with other provisions of the Real Estate (Regulations and Development), Act 2016.

    ii. The respondent be directed to take possession of unit under the provision's apartment buyers' agreement.

    iii. The respondent be directed to pay interest of Rs 13,53,941/- calculated upto 31.07.2020 as per apartment buyers' agreement

and read with other provisions of the Real Estate (Regulation and Development), Act 2016.

14. 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 to plead guilty or not to plead guilty.

D. Reply by the respondent

15. That the respondent had booked a commercial space in the project, "The Merchant Plaza" situated at sector 88, Gurgaon, Haryana vide application form dated 01.06.2013 and by making payment of booking amount of Rs 5,00,000. It is submitted that even though the application form was signed on 20.05.2013, the respondent had already paid the booking amount vide cheque dated 04.09.2012. In pursuant to the booking, the complainant without even allotting a unit/commercial space to the respondent or executing any agreement had collected an amount of Rs 16,75,343/-from the respondent.

16. That it was only after a delay on 10 months from the date of booking, the opposite party vide allotment letter dated 03.03.2014 allotted a unit bearing no SA-911, located at 9th floor, having total super area of 770 sq.ft. to the respondent. Subsequently, an apartment buyer's agreement dated 23.07.2014 was executed between the complainant and respondent after a delay of 23 months from the date of paying the booking amount which contained absolutely one sided and arbitrary terms and conditions which the respondent could not negotiate as any dispute would have led to the cancellation of allotment letter dated 03.03.2013 issued by complainant in favour of the respondent.

17. That the respondent had opted for construction linked payment plan wherein the payments were supposed to be made to the complainant as per the stage of construction. As per schedule III and IV of the agreement, the total consideration of the unit was Rs 60,75,527/ and as per clause 11.1 of the agreement, the possession of the unit was supposed to be offered within 4 years from the date of approval of building plans along with an additional grace period of 180 days. Clause 11.1 of the agreement was reproduced herein below for the sake of inconvenience:

> *11.1 subject to the terms hereof and to the buyer having complied with all the terms and conditions of the agreement, the company proposes to handover possession of the apartment within a period of 4 years from the date of approval of the building plans for the project or within such other timelines as may be directed by the competent authority ("Commitment period"). The buyer further agrees that even after expiry of the commitment period, the company shall be entitled to a grace period of a maximum of 180 days for issuing the possession notice (Grace period").*

18. It is pertinent to mention here that as per recital clause F of the agreement, the building plans for the project vide its approval memo no *ZP-867/SD(BS)/2013/41292 dated 30.05.2013.* Therefore, combined reading of clause 11 of the agreement and recital clause F of the agreement together, the possession of the unit was supposed to be offered by Nov,2017.

19. That the complainant had nowhere in its complaint disclosed the aforesaid fact and is trying to mislead this hon'ble authority by stating that the possession was offered to the respondent in terms of the agreement. It was submitted that there has been an inordinate delay of 27 months in offering possession to the respondent. Further, despite delay in offering possession, the complainant had by January

2016 had collected an amount of Rs. 41,28,297/- from the respondent. That in order to make timely payments to the demands raised by the complainant, the respondent had availed home loan facility from ICIA bank for an amount of Rs 42,00,000/- sanctioned on 19.06.2014 out of which an amount of Rs 24,33,025/- had been disbursed. That the possession of the unit was supposed to be offered by November 2017, however the complainant miserably failed to offered possession within that time. The complainant offered possession to the respondent only on 24.02.2020 wherein as in the possession notice it has been specifically mentioned that the occupation certificate with respect to the project was received on 11.02.2020. The complainant with the possession notice had also sent a statement of account wherein it had sought payment of Rs. 33,29,974/- from the respondent. It is pertinent to state that the complainant has arbitrarily increased the area of the unit from 770 sq. ft. to 806 sq. ft. and has demanded additional amount Rs. 3,09,148/- @ Rs. 8,587/- per. sq. ft. whereas the booking of the unit was done @ Rs. 7,000/- per sq. ft. Further, the complainant also arbitrarily charged delayed payment @15% of per Sq. Ft. interest of Rs. 7,76,919/- from the respondent as has always made timely payments to the demands raise by it has been seeking demand arbitrarily and not as per the stage of construction linked payment plan whereby the complainant was supposed to raise by the complainant until January 2016, however construction was not going at the place at which it should have been offered after a delay of 27 months.

20. It was submitted that respondent has requested the complainant several times seeking refund of the amount paid by it, however it did not pay any heed to the same. It was pertinent to mention here that the complainant has used its dominant position in dictating the terms and conditions of the agreement which are highly arbitrary, one-sided, and unreasonable. Thus, the respondent had no other choice but to accept the unfair and abusive terms of the agreement. In this regard, the judgment of the Hon'ble Supreme Court in ***Pioneer Urban Land and Infrastructure Limited v. Geetu Gidwani & Anr. (2019) 5 SCC 725*** was relevant wherein the Hon'ble Court as under:

> *"6.8. A term of a contract will not be final and binding if it is shown that the flat purchasers had no option but to sign on the dotted line, on a contract framed by the builder. The contractual terms of the agreement dated 8-5-2012 28-02-2014 are ex-facie one-sided, unfair and unreasonable. The incorporation of such one-sided clauses in an agreement constitutes an unfair trade practice as per Section 2(1)(r) of the Consumer Protection Act, 1986 since it adopts unfair methods or practices for the purpose of selling the flats by the builder."*

21. It was further submitted that, the Haryana Real Estate Appellate Tribunal in the matter of ***M/s Pivotal Infrastructure Pvt. Ltd. vs Prakash Chand Arohi, Appeal No. 21 / 2019***, decided on 20.05.2020 has already upheld that the developer cannot charge interest on delayed payments at unreasonable and arbitrary terms and observed the below mentioned fact:

> *"In the instant case also, there are various clauses in the Act which are ex facie one sided unfair and unreasonable. There are two agreements for sale executed into between the parties. The first agreement was executed on 14.02.2011 and the second agreement was executed on 29.03.2013. There are almost the similar terms and conditions in both the agreements. As per Clause 7.2 of the second agreement, the appellant/promoter has been invested with the powers to cancel the allotment and forfeit the earnest money along with interest on delayed payments, interest on instalments, brokerage etc. in the event of default by the allottee. Events of defaults has been detailed in Clause 7.1 of the agreement dated 29.03.2013. Some of the*

indicative events of default are failure to make payments within the time as stipulated in the schedule of payments, failure to pay the stamp duty, legal, registration, any incidental charges, any increases, including but not limited to IFMS as demanded by the promoter, failure to perform any or all the obligations by the allottee, failure to take possession within the stipulated period, failure to execute the maintenance agreement or to pay on or before its due date the maintenance charges, security deposits, deposits/charges for bulk supply of electricity energy or any increases in respect thereof, failure to become a member of the association of apartment owners, assignment of the agreement or any interest without prior consent of the Company, dishonour of any cheque, any other acts, deeds or things which the allottee may commit, omit or fail to perform in terms of the agreement. Thus, the appellant/promoter has invested in itself vast powers to cancel the allotment, to forfeit the earnest money along with the interest on delayed payments, interest on instalments, brokerage and any amount of fine and penalty without giving any opportunity of being heard to the allottee."

22. It was pertinent to mention that the offer of possession was not complete in all respects, the construction of the project was still ongoing. Further, the possession of the unit was supposed to be offered by November 2017, however the complainant offered possession respondent in February 2020 i.e. after a delay of 27 (twenty seven) months from the promised date of offer of possession. But from the bare perusal of the statement of account, the complainant has not offered any compensation to the respondent for the delay in handing over possession of the unit. The complainant has charged interest from the respondent @ 15% p.a. for the delay in making payments which is false, baseless as the respondent has made payments to it as and when the demands were raised. It was pertinent to mention that the complainant has charged interest from the respondent for the period of delay as well i.e., 27 (twenty-seven) months as well. It was submitted that the complainant cannot charge interest from the respondent for the period of delay as it was itself in default of its obligation under the agreement and therefore it cannot

enrich itself with interest on one hand and delaying the possession of the unit on another. Further, in the instant complaint filed by the complainant, it has nowhere mentioned any reason for the delay in timely completing the construction of the project and handing over of possession thereafter.

23. That the complainant has not approached this hon'ble authority with clean hands rather, it has filed the present complaint based on false and frivolous allegations and averments as well as by concealing the material facts and as such was not entitled for any relief in the present complaint on the well settled principles. It was submitted that the complainant has rushed into filing this present complaint without providing sufficient opportunity to the respondent to accept possession of the unit as he was ready to take possession of the unit provided that the unit was offered at the original consideration at which the same was booked by the respondent along with delay possession charges. It was submitted that the total consideration of the unit as per agreement was Rs. 60,75,257/- out of which the respondent had already paid an amount of Rs. 4,128,297/- by January 2016. Therefore, the respondent was only liable to pay 19,46,960/- after adjusting the aforesaid amount with the delay possession charges which the complainant was liable to pay.

24. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided based on these undisputed documents.

E. Jurisdiction of the authority

25. The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligation by the promoter as held in *Simmi Sikka v/s M/s EMMAR MGF Land Ltd.* (complaint no 7. Of 2018) leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage. The said decision of the authority has been upheld by the Haryana Real estate Appellate Tribunal in its judgement dated 03.11.2020, in appeal nos. 52 & 64 of 2018 titles as ***Emaar MGF Land Ltd. B. Simmi Sikka and Anr.***

F. Finding on the relief sought by the complainant

Relief sought by the complainant:

i. The respondent be directed to make payment of outstanding dues of Rs 25,49,619/- under the apartment buyer's agreement read with other provisions of the Real Estate (Regulation and Development), Act 2016.

ii. The respondent be directed to take possession of unit under the provision's apartment buyers' agreement.

iii. The respondent be directed to pay interest of Rs. 13,53,941/- calculated upto 31.07.2020 as per apartment buyers' agreement and read with other provisions of the Real Estate (Regulations and Development), Act 2016.

26. The above-mentioned reliefs are interrelated, and their findings will effect on another therefore, they are dealt together in succeeding paragraphs.

27. In the present complaint, it is an obligation on the part of the respondent allottee to make timely payment under section 19(6) and 19(7) of the Act. The authority has observed that the total consideration of the apartment is Rs. Rs. 60,75,527/- and the respondent has paid only Rs. 41,28,297.94/-. The respondent allottee has failed to make payments despite several demand letters and reminder issued by the complainant promoter. As per clause 7of apartment buyer agreement, it is the obligation of the allottee to make timely payments and the relevant clause of apartment buyer agreement is reproduced as under:

> ***7. Time is the essence: Buyer's Obligation***
> ***7.1*** *Time is the essence with respect to the obligations of the Buyer to pay the Total Sale Consideration as provided in Schedule – III along with other payments such as applicable stamp duty, registration fee, Taxes and other charges stipulated under this Agreement or as otherwise may be demanded of the Company by any Competent Authority for any purpose or reason and all payments shall be made by the Buyer on or before the due date(s) . It is clearly agreed and understood by the Buyer that except for a demand notice for payments, it shall not be obligatory on the part of the Company to send any reminders regarding payments required to be made by the Buyer to the Company as per the Payment Plan in Schedule - IV or for the performance of any other obligations by the Buyer.*

28. The respondent/allottee has failed to abide by the terms of agreement by not making the payments in timely manner and take the possession of the unit in question as per the terms and conditions of the apartment buyer's agreement and the payment plan opted by the respondent/allottees. Further cause of action also arose when despite repeated follow-ups by the complainant and it is having performed its contractual obligations the respondent/allottee withheld his contractual obligation. The respondent/allottee shall make the

requisite payment as per the provision of section 19(6) of the Act and as per section 19(7) to pay the interest at such rate as may be prescribed for any delay in payments towards any amount or charges to be paid under sub-section (6). Section 19(6), (7) proviso read as under.

> ***"Section 19: - Right and duties of allottees.-***
>
> .....
>
> *Section 19(6) states that every allottee, who has entered into an agreement for sale to take an apartment, plot or building as the case may be, under section 13[1], shall be responsible to make necessary payments in the manner and within the time as specified in the said agreement for sale and shall pay at the proper time and place, the share of the registration charges, municipal taxes, water and electricity charges, maintenance charges, ground rent, and other charges, if any.*
>
> *Section 19(7) states that the allottee shall be liable to pay interest, at such rate as may be prescribed, for any delay in payment towards any amount or charges to be paid under sub-section (6).*

29. It has been contended by the complainant that as per apartment buyer agreement, the respondent/allottee is under statutory obligation to pay the instalments within the time agreed therein and to bear 15% simple interest on dues. The relevant clause 7.3 of apartment buyer agreement is reproduced below:

> *7.3 In case of any delay beyond a period 60(sixty) days in making the payment of any amount payable by the buyer to the company as per the Payment Plan specified in Schedule -IV, the company may either terminate this agreement or charge interest @15% per annum from the due date of the payment as per the payment plan, till the date of payment. Notwithstanding the application and/or payment of interest on any delayed payment, it is hereby expressly understood that any delay in making any payment due on a particulate date shall mean and will be deemed to mean an event of default providing rights in terms hereof to the company to cancel this agreement and to appropriate from the sums paid by the buyer in relation to the unit, the earnest money, interest paid/due on delayed payments, taxes paid/due and any brokerage/commission paid to any broker, if engaged by the buyer in relation to the unit and refund the*

balance, if any, to the buyer following which the buyer shall cease to have any lien, right or claim against the unit and the company shall be free to deal with the unit in any manner at its sole and absolute discretion.

30. However, section 19(6) and (7) of the Act states that the allottee shall make necessary payments in the manner and within time as specified in the agreement for sale and to pay interest, at such rate as may be 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.*

31. 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. The Haryana Real Estate Appellate Tribunal in Emaar MGF Land Ltd. vs. Simmi Sikka (Supra) observed as under:

> *"64. Taking the case from another angle, the allottee was only entitled to the delayed possession charges/interest only at the rate of Rs.15/- per sq. ft. per month as per clause 18 of the Buyer's Agreement for the period of such delay; whereas the promoter was entitled to interest @ 24% per annum compounded at the time of every succeeding instalment for the delayed payments. The functions of the Authority/Tribunal are to safeguard the interest of the aggrieved person, may be the allottee or the promoter. The rights of the parties are to be balanced and must be equitable. The promoter cannot be allowed to take undue advantage of his dominate position and to exploit the needs of the homer buyers. This Tribunal is duty bound to take into consideration the legislative intent i.e., to protect the interest of the consumers/allottees in the real estate sector.*

The clauses of the Buyer's Agreement entered into between the parties are one-sided, unfair and unreasonable with respect to the grant of interest for delayed possession. There are various other clauses in the Buyer's Agreement which give sweeping powers to the promoter to cancel the allotment and forfeit the amount paid. Thus, the terms and conditions of the Buyer's Agreement dated 09.05.2014 are ex-facie one-sided, unfair and unreasonable, and the same shall constitute the unfair trade practice on the part of the promoter. These types of discriminatory terms and conditions of the Buyer's Agreement will not be final and binding."

32. 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., 07.07.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e. 9.30% per annum.

33. 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 und 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;"

34. Therefore, the respondent-allottee shall be charged interest at the prescribed rate i.e., 9.30% per annum by the complainant-promoter towards the default in making payment.

G. Findings on delay possession charges as claimed by the respondent

35. In the present complaint, the respondent intends to continue with the project and is seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Section 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."*

36. Clause 11.1 of the apartment buyer agreement dated 23.07.2014 provides time period for handing over the possession and the same is reproduced below:

> ***11. Completion of the project and possession***
> *11.1 Subject to the terms hereof and to the buyer having complied with all the terms and conditions of this agreement, the company proposes to hand over possession of the unit within a period of 4 years from the date of approval of the building plans for the project or within such other timelines as may be directed by any competent authority. The buyer further agrees that even after expiry of the commitment period, the company shall be further entitled to a grace period of a maximum of 180 days for issuing the possession notice ("Grace period").*

37. At the outset it is relevant to comment on the present possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and barring force majeure conditions, and the respondent not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are 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 documentation etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee the committed time period for handing over possession losses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. Thus is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the doted lines.

38. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within 4 years from the date of approval of the building plans for the project or within such other timelines as may be directed by any competent authority and the buyer further agrees that even after expiry of the commitment period, the company shall be further entitled to a grace period of a maximum of 180 days for issuing the possession notice. The date of building plan approval is 30.05.2013. The period of 4 years expired on 30.05.2017. As a matter of fact, the promoter has not issued possession notice within the time limit prescribed by the promoter in the buyer's agreement. Accordingly, the benefit of grace period of 180 days cannot be allowed to the promoter at this stage. The same view has been upheld by the hon'ble Haryana Real Estate Appellate Tribunal in appeal nos. 52 & 64 of 2018 case titled as ***Emaar MGF Land Ltd. VS Simmi Sikka*** case and observed as under:

68. As per the above provisions in the Buyer's Agreement, the possession of Retail Spaces was proposed to be handed over to the allottees within 30 months of the execution of the agreement. Clause 16(a)(ii) of the agreement further provides that there was a grace period of 120 days over and above the aforesaid period for applying and obtaining the necessary approvals in regard to the commercial projects. The Buyer's Agreement has been executed on 09.05.2014. The period of 30 months expired on 09.11.2016. But there is no material on record that during this period, the promoter had applied to any authority for obtaining the necessary approvals with respect to this project. The promoter had moved the application for issuance of occupancy certificate only on 22.05.2017 when the period of 30 months had already expired. So, the promoter cannot claim the benefit of grace period of 120 days. Consequently, the learned Authority has rightly determined the due date of possession.

39. **Admissibility of delay possession charges at prescribed rate of interest:** The respondent/allottee is seeking delay possession charges at the rate of 10.5% p.a. however, proviso to section 18 provides that where an allottees 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]

(2) 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.

40. Therefore, interest on the delay payments from the allottee shall be charges at the prescribed rate i.e. 9.30% by the complainant/promoter which is the same as is being granted to the complainant in case of delay possession charges.

41. The respondent has contended that the complainant/builder has also raised an arbitrary and illegal demand of Rs 7,76,919/- towards increase in super area along with the letter of possession, whereas no revised sanction plan has ever been obtained by it for an increase in super area from the concerned authorities neither a copy of the same if any obtained have been provided to the respondent. Whether as per apartment buyer agreement dated 23.07.2014 the complainant builder is entitled to charge for increased in super area.

42. The authority observes that as per buyer's agreement, the respondent was allotted the said unit measuring 770.34 sq.ft. but subsequently, vide offer of possession letter dated 24.02.2020, the area of the unit was increased to 806.22 sq.ft. Therefore, the area of the said unit can be said to be increased by 35.88 sq.ft. In other words, the area of the said unit has increased by 4.65%. The relevant clause of buyer agreement has been reproduced below:

> *4.6 The buyer acknowledges and understands that the total sale consideration of the apartment is calculated on the basis of its super area, which is tentative and may increase or decrease, which shall be communicated to the buyer during or after the construction of the commercial complex is complete and the occupation certificate in respect of the same has been received from the competent authority. In terms hereof, the buyer agrees and undertakes to pay for increase, if any, in the super area of the apartment on demand by the company and in the event of any reduction in the super area, the refundable amount due to the buyer shall be adjusted by the company in the last payment due from the buyer as set forth in the payment plan in schedule iv.*
> *4.12.3 If any increase/reduction is beyond 10% of the super area of the apartment and the buyer declines to accept such increase of beyond 10%, then the company shall, at its discretion, offer an alternate apartment anywhere in the commercial complex to the buyer and of similar specification as the apartment including such alternate apartment having a super area of +/- 10%. Such alternate apartment, if offered to the buyer, shall be mandatorily acceptable to the buyer and this agreement shall mean and shall be deemed to refer to the alternative apartment and payment made/as may be due in relation to*

the apartment shall be deemed to have been made/due for such alternate apartment for all purpose and the buyer shall execute necessary documents as may be required by the company for allotment of such alternate apartment. The allotment of the apartment shall be cancelled and the same shall thereafter belong absolutely and entirely to the company with right or lien of the buyer on such apartment.

43. It is evident from a perusal of above-mentioned clause of apartment buyer agreement that the builder is entitled to charge for increase in super area either before or after completion of the project. The fact is evident from occupation certificate dated 11.02.2020 as well as offer of possession dated 24.02.2020 respectively vide which the allottee was informed about increase in super area.

44. The complainant, therefore, is entitled to charge for the same at the agreed rated since the increase in super area is far less than 10%. This, however, will remain subject to the condition that the apartment other components of the super area in the project have been constructed in accordance with the plans approved by the competent authority.

45. On consideration of the documents available on record and submission made by the party regarding contravention of provisions of the Act, the authority is satisfied that the respondent/allottee is in contravention of the section 19(6) and (7) of the Act. By virtue of clause 7 of the apartment buyer's agreement, it is the buyer's obligation to timely give timely payments for the total sale consideration. The respondent has paid only ₹ 41,28,297.94/- out of ₹ 60,75,527/- which is the total sale consideration Accordingly, the non-compliance of the mandate contained in section 19(6) and (7) of the Act is on the part of the respondent is established. The authority is satisfied that the complainant 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 11 of the agreement executed between the parties on 23.07.2014, the possession of the subject apartment was to be delivered within stipulated time i.e., by 30.05.2017. As far as grace period is concerned, the same is disallowed for the reasons quoted above. The complainant has failed to handover possession of the subject apartment till date of this order. Accordingly, it is the failure of the complainant/promoter to fulfil its obligations and responsibilities as per the agreement to hand over the possession within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with proviso to section 18(1) of the Act on the part of the complainant is established. As such the allottee shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 30.05.2017 till the handing over of the possession i.e. 24.02.2020 at the prescribed rate i.e., 9.30% p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules.

46. 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 which was granted by the competent authority on 11.02.2020. The complainant offered the possession of the unit in question to the respondent came to know about the occupation certificate only on the date of offer of possession. Therefore, in the interest of natural justice, the respondent should be given in 2 months' time is being given to the respondent keeping in mind that even after intimation of possession practically he has to arrange to lot of logistic 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 habitual conditions. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e. 30.05.2017 till the expiry of 2 months from the date of offer of possession (24.02.2020) which comes out to be 24.04.2020.

H. Directions of the authority

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

i. The respondent/allottee shall make the requisite payments and take the possession of the subject apartment from the date of offer of possession 24.02.2020 + 2 months i.e. 24.04.2020 as per the provisions of section 19(6), (7) & (10) of the Act, within a period of 30 days.

ii. The respondents/allottees shall charge interest at the prescribed rate of interest @9.30% p.a. by the promoter which is the same as is being granted to the complainants in case of delayed possession charges.

iii. The respondent/allottee shall be charges interest at the prescribed rate of interest @9.30% p.a. for outstanding payments by the promoter which is the same as is being granted to the complainant in case of delayed possession charges.

iv. The complainant/promoter shall not charge anything from the respondent/allottee which is not the part of the agreement, the

complainant would not be entitled to claim holding charges at any point of time even after being part of agreement as per law settled by hon'ble Supreme Court in civil appeal no. 3864-3899/2020 decided on 14.12.2020.

v. The promoter is directed to provide the possession with all amenities and specifications as per the ABA.

48. Complaint stands disposed of.

49. File be consigned to registry.

(Samir Kumar)
Member

(Vijay Kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman
Haryana Real Estate Regulatory Authority, Gurugram
Dated: 07.07.2021

Judgement uploaded on 07.09.2021.