

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

Complaint no. : 3560 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

Vipin Kamra

Address: N-948, Mayfield Garden, Sector-51,
Gurgaon-122018

Respondent

CORAM

Dr. K.K. Khandelwal
Shri Samir Kumar
Shri V.K. Goyal

Chairman
Member
Member

APPEARANCE

Shri Suresh Rohilla, Shri Aishwariya Sinha, Ms. Shubhi Sharma
Advocates for the complainant
Shri Sourav Sharma Advocate for the respondent

ORDER

1. The present complaint dated 20.10.2020 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:

	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
5.	Building plan approval date	30.05.2013
6.	Date of occupation certificate (Annexure iv page 85 of complaint)	11.02.2020
7.	Date of execution of apartment buyer's agreement (page 47 of complaint)	11.03.2015
8.	Unit no. as per allotment (page 44 of complaint)	FF-47, first floor

9.	Unit measuring	459 sq.ft.
10.	Increase unit measuring	466.08 Sq.ft.
11.	Allotment letter (page 44 of complaint)	12.07.2013
12.	Payment plan (page 78 of complaint)	Construction linked payment plan
13.	Total consideration as per payment plan (page 78 of complaint)	Rs. 41,40,624/-
14.	Total amount paid by the respondent as per SOA (page 97 of complaint)	Rs. 19,48,320/-
15.	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)
16.	Date of offer of possession (page 87 of complaint)	17.02.2020
17.	Delay in handing over possession till date of offer of possession + 2 months i.e.17.04.2020	2 years 10 months 18 days

B. Facts of the complaint: -

3. The complainant has submitted that respondent a resident of N-48 Mayfield Garden Sector 51, Gurugram Haryana -122018, booked a unit admeasuring 450 sq. ft. in "The Merchant Plaza" project through application form dated 10.05.2013 for basic sale consideration of Rs. 7500/- per sq. ft for the total consideration of Rs 50,07,895/-. He was allotted a unit no FF-47 on first floor of the project vide allotment letter dated 12.07.2013. The respondent also executed apartment buyer agreement for service apartment with the complainant on 11.03.2015. The ABA was executed by the respondent with free will without any coercion or undue influence, therefore the same was binding on the parties thereto. It is pertinent to state that, as per section 19(6) of the act, the respondent was under an 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 section (6). The apartment buyers' agreement was executed before the act, 2016 came into force and therefore, the provision of pre-Rera apartment buyers' agreement is enforceable between the parties. The project has already been completed and the complainant has already obtained occupancy certificate on 11.02.2020.

4. The complainant has 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-910 as allotted to him vide allotment letter dated 23.01.2014 in the above said project. However, in contravention and violation of the apartment buyer's agreement, the respondent failed to take possession of unit, till the date of filing of present complaint.
5. That till the date of filing the present complaint, the respondent has paid Rs 19,48,320/ to the complainant. As per statement of account of the complainant, an amount of Rs 24,86,895/- is outstanding towards instalment and an amount of Rs 11,59,181/- is outstanding towards interest as on 30.06.2020
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 24,86,895/- 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 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. 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 was 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. 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 completed the project and offered possession thereof to the respondent. However, the respondent has neither made timely payment nor come 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.

10. It was submitted that the respondent is under obligation and responsible to pay and complainant was 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 has committed breach of the said ABA as well violation of the provisions of the Act.

11. 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 allottee of the project.

C. Relief sought by the complainant: -

12. The complainant has sought following reliefs:

- i. The respondent be directed to make payment of outstanding dues of Rs 24,86,895/- 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 11,59,181/- calculated upto 30.06.2020 as per apartment buyers' agreement and read with other provisions of the Real Estate (Regulation and Development), Act 2016.

13. 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

- i. The opposite party has received the notice dated 18.11.2020 with complaint on 28.11.2020 on his E-mail under section 31 of the Real Estate (Regulation and Development) Act, 2016 read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules 2017 as amended and compliance of obligation of the promoter under section 34(f) of the Act, with direction to file reply of complain within 10 days from the date of receipt notice.
- ii. The respondent was engaged in providing the consultancy services in the interior designing work and is having only the person to earn money to survive the family members and was run the services from its house at Gurugram and to expand its services to growth in the income in future, has intent to set up an office in the future potential commercial project being developed and or to be developed in the area of Gurugram. To fulfil the above said purpose, the respondent was searching for the suitable location/project for his prospective business and had found the integrated commercial project of complainant in the name of "The Merchant Plaza" comprising of retail shop, retails outlet, shopping plaza, health club, swimming pool, food court etc. situated at sector 88, Gurugram and approached to complainant for booking of retail shop in the said project. the complainant has shown/provided prospectus/ brochure/ site plan of said project advertised by complainant in the market to

the general public including respondent with all general amenities and facilities to be developed and provided in the said project and offered respondent to investment in the project. As per prospectus/brochure/site plan of the said project, the complainant informed to respondent of providing/available access/entry in the project from 24 Mtrs. Motorable access road approaching to said project made available upon completion of the project.

- iii. The complainant after going through the brochure/prospectus/ site plan and relied upon the representation/information/ details/ images of project site/24 mtr. Motorable access road approaching to said project and amenities, as mentioned in the prospectus/ brochure/site plan, has booked the retail shop no FF-47, admeasuring 450 sq.ft. @Basic sale price of 7500/- per sq.ft. in the said project in January, 2013 by submitting application form with complainant along with advance amount of Rs 6,00,000/- vide four number of cheques of January, 2013 and the same was duly acknowledge by complainant vide receipt no. 00008 dated 01.03.2013. the complainant has assured to complainant at the time of booking that complainant company has already obtained the license no. 1 of 2013 on 07.01.2013 from the authority and in terms of license, the complainant shall handover the possession of booked shop within 4 years from the date of approval of license i.e. upto 7th January, 2017 and the standard apartment buyers agreement for execution shall be provided to respondent along with allotment letter.

- iv. The basis of the present complaint filed by complainant to forcefully/compel to respondent to taken over the possession of unit on the basis of occupation certificate received by complainant by making the alleged outstanding amount including alleged interest amount on delayed period of around 5 years w.e.f. 30th April 2015 is directly contrary to the facts and circumstances, terms of the apartment buyer's agreement dated 11.03.2015 and the statutory provision of RERA Act rules and regulations made thereunder. It has been alleged by the complainant in complaint that the due date of possession of unit as per agreement is 20.06.2021. As per clause 11.1 of agreement, the complainant has agreed to handover the possession of unit within a period of 4 years from the date of approval of building plan. Further, in terms of clause 13 of agreement, the complainant has agreed to make delay compensation @10/- per sq.ft. per month of the super area of unit for the period of 12 month, which is very nominal and unjust.
- v. Admittedly, licence no. 1 of 2013 received on 07.01.2013 and the building plan of project approved by Director, Town and Country Planning Department Haryana on 30.05.2013 vide memo no. ZP/867/SD/(3S)/2013/41292 as per detail mentioned in clause F of agreement, page 48 of complaint and complainant has specifically agreed in clause G of agreement, page 48 of complaint that the development and construction of commercial complex "The Merchant Plaza" on the project land be done on the basis of License and approved building plan.

Accordingly, four-year time period of possession shall be computed either from the date of grant of license i.e. w.e.f. 30.05.2013 and accordingly, the due date of possession of unit as per agreement comes to 30.05.2017 if computed from the date of approval of building plan instead of alleged due date 20.06.2021 as per validity period of RERA registration certificate dated 27.10.2017 as per validity period of RERA registration certificate dated 27.10.2017. even otherwise, the time period of due date of possession i.e. 30.05.2017 had expired well before the project was registered under the provisions of the RERA Act on 27.10.2017. The part occupancy certificate received by complainant on 11.02.2020 which clearly proves that there is inordinate delay of 2-year 9 month 11 days in completion and possession in the project on the part of complainant and if the 4-year time period of possession of unit considered from the date of license dated 07 January 2013, the due date of completion and possession of unit comes to 7th January 2017 and there is delay of more than 23 years.

- vi. The complainant has relied upon/link the possession due date 20.06.2021 with the alleged validity period of RERA registration certificate no. 340 of 2017 dated 27.10.2017 upto 20.06.2021, which was granted from the period of 27.10.2017 to 20.06.2020 only and thereafter alleged 6-month extension in the validity period of RERA registration from 20.12.2020 to 20.06.2021 by the RERA authority, Gurugram considered by complainant as per HRERA Gurgaon order no. 9/3-2020 HRERA/GGM/(Admn) dated 26.05.2020. It is submitted that

RERA authority, Gurugram vide its order dated 26.05.2020 has not granted any extension to complainant up to 20.06.2021 qua the said project whereas vide order dated 26.05.2020, the RERA authority Gurugram has automatically extended the registration and completion date for all registered project under the jurisdiction of RERA authority, Gurugram has automatically extended the registration and completion date for all registered project under the jurisdiction of RERA authority, Gurugram for 6 months due to outbreak of covid-19, for which RERA registration certificate expire on or after 25th March, w2020 and revised project registration certificate expire on or after 25th March, 2020 and revised project registration certificate has to be issued by the authority to the project who falls under the ambit of said order. Even otherwise, the time period of due date of possession i.e. 30.05.2017 had expired well before the project was registered under the provisions of the RERA Act on 27.10.2017. the complainant has not place on record the revised project registration certificate valid up to 20.06.2021.

vii. It is settled law that the time period of computation of possession due date shall be considered and computed from the time period mentioned in the pre-RERA agreement entered in to between the parties irrespective of any date mentioned in the RERA registration certificate and extension thereof. The hon'ble Supreme Court vide its order dated 02.11.2020 in civil appeal no. 3581-90 of 2020 titled Imperia Structure Ltd. Vs Anil Patni & Ors held in Para 33 of judgement.

"We may now consider the effect of the registration of the project under the RERA ACT. In the present case the apartments were booked by the complainants in 2011-2012 and the builder buyer agreements were entered into in November 2013. As promised, the construction should have been completed in 42 months. The period had expired well before the project was registered under the provisions of the RERA Act. Merely because the registration under the RERA Act is valid till 31.12.2020 does not mean that the entitlement of the concerned allottee's to maintain an action stands deferred. It is relevant to note that even for the purpose of section 18, the period has to be reckoned in terms of the agreement and not the registration. Conditions no (x) of the letter dated 17.11.2017 also entitles an allottee in same fashion. Therefore, the entitlement of the complainants must be considered in the light of the terms of the builder buyer agreements and was rightly dealt with by the commission.

viii. The hon'ble Supreme Court as well by hon'ble National Commission has settled the law that the property purchaser could not be compelled to take possession of property and purchaser is entitled to seek refund with interest and withdraw from the project, when builder failed to fulfil his contractual obligations of obtaining occupancy certificate and offering the possession of property of RERA Act, rules and regulation made thereon. The condition no (x) of RERA certificate dated 27.10.2017 shall made responsible and obligatory to the complainant for return the amount with interest in case allottee wishes to withdraw from the project due to promoter fails to give possession of the unit in accordance with the terms and condition of agreement for sale in terms of sub section 4 of section 19 of RERA Act and in terms of registration, the complainant shall take all pending approvals from various competent authority on time and shall comply with the provisions of the Act and the rules and regulation made there under. The complainant has agreed in clause 13.3 read with clause 13.1 of agreement, page no 63 of

agreement, that in case complainant fails to issue the possession notice within the agreed time period as mentioned in the agreement, the complainant in addition to pay compensation for delay in possession, had agreed to terminate the agreement and refund all the amount received from respondent within the period of 90 days along with simple interest @15% per annum from the respective date of receipt without receipt of any notice of intention of termination from the respondent. In the present matter, the complainant has failed to issue the possession notice within the agreed time period of 30.01.2017 or 30.05.2017 as per detail above, as the deemed fit by hon'ble authority and the complainant is liable to refund all the amount with interest @15% p.a.

- ix. The complainant has claim in complaint at page no 19 of complaint that the project "The Merchant Plaza" in question has been 100% completed in all respect on the basis of occupancy certificate dated 11.02.2020 granted by Director, General Town and Country Planning, department, Chandigarh. It is submitted that the statement of complainant is wrong and false because the occupancy certificate dated 11.02.2020 is not the full occupation certificate whereas it is the part occupation certificate and the same is clear from the description/details of building/no. of floor mentioned thereon and the agreement defines separately the completion plan/part completion plan in clause 1(m) of agreement at page 50 of complaint and occupation certificate dated 11.02.2020 is not the full occupation certificate whereas it is the part

occupation certificate and the same is clear from the description/details of building/no. of floor mentioned thereon and the agreement defines separately the completion plan/part completion which confirm the laying out of the project as per applicable provisions required for the said project is still pending on the part of complainant and the RERA Act also defines separately the completion certificate in clause 2(a) and occupation certificate in clause 2(zf) of RERA Act 2016 and in absence of full completion certificate, the said project can't be said to 100% completed as per applicable provisions as alleged in complaint. That 100% completed as per applicable provisions as alleged in complaint. That 100% completion of real estate project required to compliance all the obligations and responsibilities cast upon the complainant under the provision of RERA Act, rules and regulation made thereon, However, the complainant has failed to comply the same.

- x. The application with advance money of Rs. 6 lacs had accepted by complainant towards allotment of retail shop in the project in January 2013. The complainant vide its letter dated 12.07.2013 has allotted the retail shop no. FF-47 on first floor having super area of 459sq.ft. @basic sale price of 7500/- per sq.ft. The allotment letter dated 12.07.2013 further mention that the allotment letter is subject to agreeing to all terms and condition of the buyer agreement to be executed by respondent with complainant within stipulated time period, however, it is pertinent to mention here that no such time period has been mentioned anywhere in the documents. In fact, the apartment

buyer agreement was executed by complainant on 11.03.2015 i.e. after around 26 months of accepting the advance amount. It is submitted there was no reason with complainant to delay the execution of agreement for a period of 26 months after receipt of advance amount in January 2013 and demanding the further payment of instalment without execution of agreement, even, the section 13(1) of the RERA Act prohibit promoter to accept more than 10% of cost of unit as advance payment or application money without first entering into a written agreement for sale. In the present matter, the complainant prior to execution of agreement has demanded and collected 4 number of instalments as per construction linked payment plan in view of demand note dated 21st January 2015 (annexure viii, page 103 of complaint, which includes "20% of BSP on application" 10% of BSP on allotment, 10% BSP on start of excavation and 7.5% of BSP on casting of 2nd floor roof slab i.e. total 47.5% payment of sale consideration up to January 2015 the standard buyer agreement dated 11.03.2015 containing one sided terms and condition has been provided by complainant for signature of respondent with instructions and having no option, except to sign the agreement on dotted line/instructions, the respondent has executed the apartment buyer agreement dated 11.03.2015 and the said conduct of complainant is clearly falls under trade practice and restrictive trade practice.

- xi. That from the facts of the case, it is clear that the complainant has failed to complete the project and offer the possession within the agreed time period mentioned in the agreement and the delay in

project causing extreme mental distress, pain and agony to the respondent. The complainant has deliberately delayed the execution of agreement as it is only the documents which contains the possession delivery clause, compensation clause and the complainant to safeguard itself from the liabilities, obligations and future litigation and to grab much hard-earned money up to 50% of sale consideration from the allottees, has delayed the execution of agreement. The intention of complainant was dishonest right from the beginning and for the said reason, the complainant drafted unilateral terms and condition of buyer agreement. The terms and condition of agreement are entirely unfair, unjust, unconscionable, oppressive and one sided. It is held by hon'ble Supreme Court/High Courts/National Commission that agreement entered into individual purchaser were invariable one-sided, standard format agreement prepared by the builder/ developers in their favour with unjust clause on delay delivery, obligation to obtain occupancy/completion certificate and the individual purchaser had no scope or power to negotiate and had to accept the one-sided agreement.

- xii. The complainant has filed the complaint by showing the event of default/breach on the part of respondent of delay/non making the payments of various nos. of instalments as per applicable payment plan due since 30th April 2015 onwards in terms of the clause 7 & 7.3 of agreement at page 59 of complaint and as per admitted fact, the complainant has made the total payment of Rs 19,48,320/- including the last payment of Rs 130,085/- vide

cheque dated 30.04.2015 and thereafter respondent was not make any further payment and also got disturbed due to started family disputed leading to divorce dispute with wife and has left the Gurugram in 2015 and shifted to Bombay to do work to gain earning and before leaving the Gurugram, respondent visited at site to check the status of development in the project as per datil mentioned in brochure and has found there is no such 24 Mtrs. motorable access road approaching to said project is exist as shown in the prospectus/site plan and represented at the time of booking and was telephonically discussed with the complainant company by showing his inability to continue the said booking and requested complainant company to cancel the allotment and refund the deposit amount with interest amount by citing the above said reason and the price pf subject property has already hike/increase and the complainant can sell the property to third buyers on enhance price. The respondent has booked the property @7500/- per sq.ft. and now, as per the information gathered from real estate broker market, the complainant is selling the same property @ minimum 10000-11000 per sq.ft. The respondent is still residing at Bombay and has come to Gurugram only in relation to subject matter.

- xiii. That it is pertinent to mention here that the complainant after receipt of payment of Rs 19,48,320/- which is equivalent to 51% of total sale consideration has issued continuous around 40 number of demand notes and reminders letters from the period of 01.04.2015 to 10.12.2019 i.e., around 4.5 years as details mentioned in list of dated at page no 8 to 13 of complaint to

harass and forcefully compel to handed over the possession to extract/grab the amount with alleged interest @15% p.a. from the respondent, when the complainant was already determined the event if defaults on the part of respondent in 2015 on failure of respondent to pay the due instalment. Clause 7 of agreement states the timely payment of Installment demanded by complainant as per schedule iii on or before due date is the essence of with respect to payment obligation of the respondent in terms of agreement. The event of defaults on the part of respondent has been determined by complainant in 2015 due to non-making the payment of due instalment since 30.04.2015.

xiv. The complainant being the promoter of said project has failed to compliance of its obligations under the provisions of RERA Act, rules, regulations, local law and under the provision of said agreement and hon'ble authority have jurisdiction to direct/ensure to compliance the obligations cast upon the promoter under the provision of section 34(f) of RERA Act, rules and regulations made thereon, local laws and under the provision of said agreement.

a. That upon receipt of part occupation certificate on 11.02.2020, the promoter under the provisions of Haryana Apartment Ownership Act 1983 read with clause 1(d) and 1(p) of agreement has under the obligation to file and compulsory registered the deed of declaration of said project within the period of 90 days of grant of occupation certificate i.e. 11.05.2020, however, as per the knowledge of respondent, the

complainant has not taken any step to fulfil the said obligations in this regards till date. The hon'ble authority be directed complainant to immediately file and registered the deed of declaration of said project in the interest of remaining allottee in the said project.

- b. It is admitted facts by complainant in clause A to C of agreement at page no 48 of complaint that the complainant is not the owner of project land admeasuring 2.75 acres as mentioned in schedule 1 of agreement and the absolute and rightful owner of said project land vest with M/s Magnitude Properties Pvt. Ltd. and the complainant was having the right of marketing, selling and development of said project under the joint development/collaboration agreement executed with said project land owner, the complainant is executing the agreement with buyers including accepting the advance amount, issuing allotment letters etc. in the said project. the details of ownership of and measuring 2.75 acres in favour of said project. the details of ownership of land measuring 2.75 acre in favour of said project landowner on relation to license no 1 of 2013 dated 07.01.2013. As per admitted position of joint development/collaboration agreement executed between said project land owner and complainant, there is change in beneficial interest, change in developer and or assignment/nomination of join development rights or marketing right involved, in a license granted under the HUDA Act, 1975, however complainant or the project land owner has not obtained prior permission/approvals for the same from

Director General, town and Country Planning, Haryana in terms of policy parameter dated 18.02.2015 bearing memo no PF/51A, 2015/2708 and the same is amount to violation/failure of obligations by complainant as per change in beneficial interest policy dated 18.02.2015 issued by Director, Town and Country Planning, Haryana and under the provision of Haryana Development and Regulation of Urban Area Act 1975. In absence of permission, the complainant has no legal authority to deal with the license no.1 of 2013 dated 07.01.2013 and or to book, allot, sell, transfer any unit/flats to any third-party including respondent and the entire transaction made by the complainant is totally illegal and unlawful based on the misrepresentation and false statement. It is submitted that the complainant being a developer in terms of section 4(2)(I) of RERA Act, 2016 was supposed to take all pending approvals on time from the competent authority but in the present case, in compliance of policy dated 18.02.2015, neither any permission for change in beneficial interest/change in developer had ever been apply by the complainant/project land owner before the competent authority i.e. DTCP, Chandigarh nor had ever been any approvals granted in favour of complainant to deal with the project in any manner. The complainant has not place on record the approvals/permission received from DTCP in this regard.

- c. The complainant under section 12 of RERA Act has obligation w.r.t. veracity of the advertisement and prospectus of project

and in case, false and incorrect information provided by promoter in the prospectus/advertisement, the allottee shall have right to withdraw from the project and promoter is liable to refund the invested amount along with prescribed rate of interest. The respondent has made the advance payment of Rs. 6 lacs in January 2013 solely on the basis of details information/images of project site 24 Mtrs wide road approachable/access to the said project made available upon completion of the project as highlighted in the red marker for the reference of hon'ble authority, however as on date, no such 24 Mtrs. Road approachable to said project is existed at project site and respondent has affected/caused the losses by such incorrect and false statement in the prospectus and has right to withdraw from the project and entitled to get refund the amount with prescribed interest.

- d. The terms of agreement have already provided the provision of cancellation of unit and refund the amount in case of breach/defaults of terms of agreement by the respondent, however, the complainant with malafide intention, despite of repeated defaults/breach by the respondent as alleged by complainant for the period of around 4.5 years, has not resorted such action of cancellation of unit and refunded the amount with interest. The joint reading of clause 4.20 at page no. 57, clause 7.3 at page no. 59, clauses 9.1,9.2 at page no.60 of agreement, makes it clear that in case any delay beyond a period of 60 days in making the payment of any instalments amount payable by respondent as per payment plan, the

complainant will cancel the unit and refund the amount to the respondent. In the present matter, the complainant has raised the demand note dated 01.04.2014 (annexure viii, page 104 of complaint for Installment due of Rs. 2,67,809/- on the stage of "on casting of ground floor" payable by respondent on or before 30.04.2015 and in response to said demand note, the respondent has made only part payment of Rs. 130,085/- vide cheque dated 30.04.2015 and thereafter failed to pay the balance amount raised by the complainant. As per terms of clause 7.3 of agreement, in case, respondent failed to pay any due instalment the complainant has under its obligation to declare the respondent as defaulter under the terms of agreement and has to take action of cancellation of allotment and refund the amount as per the terms of agreement instead of continuous raising the demand note for the period of 4-5 year.

- e. The 24 meter motorable access road approaching to said project as promise and show in the site plan/ brochure/ prospectus is not existed at the site/ project and the complainant can't escape from their own wrong. The RERA authority, Gurugram vide its notification dated 05.12.2018 has make the regulation for forfeiture of reasonable earnest amount not exceeding the 10% of basic sale price by the builder in the event of purchaser intends to withdraw from the project and any agreement containing the clause contrary to said regulation shall be void and not binding upon the purchaser.

- xv. The present complaint is not maintainable, either in law or on facts and circumstances filed by complainant before the hon'ble authority for seeking direction to respondent to take possession of unit by making the payment of alleged outstanding amount including alleged interest amount calculated upto 30.06.2020 and impose the penalty of Rs. 50,000/- on respondent. That the complainant is estopped by his own acts, conduct, acquiescence, laches, omissions etc. from filing the present complaint. Since as per complainant the respondent has breach the agreement by delay/non making the payment as per agreement since April 2015 and there is no reason with complainant to wait for the long period of around 4.5 year of making the payment of subsequent Installment with alleged interest by respondent.
- xvi. It is humbly submitted that the present complainant filed by the complainant ought to have been dismissed outrightly for the reason that the complainant has approached this hon'ble authority with unclean hands. As such, the complainants are disentitled to any relief whatsoever. The complainant has no locus to file the complaint. It is settled law that when a litigant suppresses material facts and states false facts before a judicial authority. therefore, such a litigant, who approaches any judicial authority with unclean hands, disentitles himself to any relief whatsoever. On this ground itself, no relief can be given to the complaints and the present complaint ought to be dismissed with exemplary costs. In view of the aforesaid, it is submitted that the relief sought in the present complaint cannot be granted to the complainant, as the same is neither warranted in

facts of the present case, nor in the law applicable. The relief sought is completely inequitable. Moreover, the relief is also contrary to the provisions of the binding agreement between the parties and the provisions of RERA Act, rules and regulation made there under. As such, the relief cannot be granted to the complainant. The present complaint ought to be dismissed outright.

xvii. The respondent respectfully submits that the present complaint is not maintainable as the complainant has failed to show any violation of the section 19(6), (7) & 10(8) RERA Act and rule, 2017 under which the present complaint has been filed. The complaint is liable to be dismissed in view of the preliminary objections/ submissions set out hereinafter. It is submitted that since the preliminary objections are of a jurisdictional nature which go to the root of the matter, and as per settled law, the same should be decided in the first instance. It is only after deciding the question relating to maintainability of the complaint that the matter is to be proceeded with further. The preliminary and jurisdictional objections are being raised for dismissal of the complaint.

xviii. That the Complainant has not approached this Hon'ble Commission with clean hands, rather it has filed the present Complainant 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 the respondent was ready to take possession of the Unit provided that the Unit was offered at the original consideration at which the Unit 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/- (Rupees Forty-One Lakhs Twenty-Eight Thousand Two Hundred and Ninety-Seven Only) by January 2016. Therefore, the complainant was only liable to pay 19,46,960/- (Rupees Nineteen Lakh Forty-Six Thousand Nine Hundred and Sixty Only) after adjusting the aforesaid amount with the delay possession charges which the complainant was liable to pay.

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

E. Jurisdiction of the authority

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 24,86,895/- 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 as on 30.06.2020 of Rs. 11,59,181/- calculated as per apartment buyer's agreement.
15. The above-mentioned reliefs are interrelated, and their findings will affect on another therefore, they are dealt together in succeeding paragraph.
16. 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 of Rs. 41,40,624/- and the respondent has paid only Rs. 19,48,320/-. The respondent allottee has failed to make payments despite several demand letters and reminder issued by the complainant promoter. As per clause 7 of 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.

17. The respondent/allottee have 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 the complainant having performed his contractual obligations the respondent/allottee withheld their 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).

18. In the light of evidence placed on record, the authority is of the view that the respondent allottee is in contravention of section 19(6) and (7) of the Act. The relevant provision of the Act has been reproduced below:

19. Rights and duties of allottees:

(6) Every allottee, who has entered into an agreement or sale to take an apartment, plot or building as the case may be, under Section 13, 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.

(7) 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).

19. It has been contended by the complainant that as per apartment buyer agreement, the respondent/allottee is under statutory obligations 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.

20. 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.

21. 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* 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 home 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."

22. 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.
23. 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;"*

24. Therefore, the respondent-allottee shall be charged 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

25. 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."

26. Clause 11.1 of the apartment buyer agreement dated 11.03.2015 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").

27. 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, 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 documentations 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 loses 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. This is just to comment as to how the builder has misused his dominant position and drafter such mischievous clause in the agreement and the allottee is left with n option but to sign on the dotted lines.

28. **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.

29. **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.

30. 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.
31. 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 payments for the total sale consideration. The respondent has paid only Rs. 19,48,320/- out of Rs. 41,40,624/- 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 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 11.03.2015, 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 given 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 handover 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 complaint 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 date of offer of possession i.e. 17.02.2020 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.

32. 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 only on 17.02.2020. So, it can be said that 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 from the date of offer of possession. This 2 month of reasonable time is being given to the respondent keeping in mind that even after intimation of possession practically he has to arrange a 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 habitable condition. 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 (17.02.2020) which comes out to be 17.04.2020

G. Directions of the authority

33. 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 17.02.2020 + 2 months i.e. 17.04.2020 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 charged 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

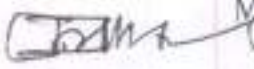
v. The promoter is directed to provide the possession with all amenities and specifications as per the ABA.

34. Complaint stands disposed of.

35. 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.


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