BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**:**	**920 of 2020**
First date of hearing	**:**	**03.03.2020**
Date of decision	**:**	**31.03.2021**

1. Anil Kumar Yadav
2. Rajesh Yadav
R/o-H.No- 4/51, Shivaji Nagar
Gurugram **Complainants**

Versus

M/s SS Group Private Limited
Address: 77, SS House, Sector 44,
Gurugram-122003, Haryana. **Respondent**

CORAM:
Shri Samir Kumar **Member**
Shri Vijay Kumar Goyal **Member**

APPEARANCE:
Shri Puneet Nahar Advocate for the complainants
Shri C.K. Sharma and Shri Dhruv Dutt Sharma Advocates for the respondent

ORDER

1. The present complaint dated 19.02.2020 has been filed by the complainants/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations,

responsibilities and functions under the provision of the Act or the rules and regulations made there under or to the allottee as per the agreement for sale executed inter se.

A. Unit and project related details

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

1.	Name and location of the project	"The Coralwood and Almeria", Sector 84, Gurugram, Haryana.
2.	Nature of the project	Group housing complex
3.	Project area	15.275 acres
4.	Registered/not registered	Registered
5.	HRERA registration number	381 of 2017 dated 12.12.2017
	HRERA registration certificate valid up to	31.12.2019
6.	DTCP license no.	59 of 2008 dated 19.03.2008
	Validity status	18.03.2025
7.	Flat/unit no.	15B,1st Floor. [Page 31 of complaint]
8.	Flat measuring	2000 sq. ft.
9.	Allotment letter	07.02.2012 [Page 27 of complaint]
10.	Date of execution of flat buyer's agreement	29.05.2012
11.	Payment plan	Construction linked payment plan

12.	Total consideration amount	Rs. 98,00,000/- [As per payment plan on page no. 38 of complaint]
13.	Total amount paid by the complainants till date	Rs.1,10,84,059/- [As per applicant ledger dated 11.03.2020 at page 23 of reply]
14.	Due date of delivery of possession as per clause 8.1 (a) of the said agreement i.e., 36 months from the date of signing of this agreement (29.05.2012) plus 90days grace period [Page 33 of complaint]	29.05.2015 [Note: - Grace period is not allowed]
15.	Date of offer of possession for fit outs	25.08.2018 [Page 48 of complaint]
16.	Delay in handing over possession from due date of possession till date of this order i.e., 31.03.2021	5 years 10 months 2 days
17.	Occupation certificate	17.10.2018 [Page no. 24 of reply]

A. Brief facts of the complaint

3. The complainants submitted the following facts:

4. That on 31.01.2012, Smt. Rajesh & Sh. Anil Kumar Yadav booked a unit at first floor in building no. 15 B having an approximate super area of 2000 sq. ft at basic rate of Rs.4900/- per sq. ft. and PLC location charges of Rs.0/- per sq. ft. and handed over a cheque bearing no. of Rs. 10,00,000/ for booking amount along with application form in favor of the payment made by the respondent, issued a payment receipt

no. 23 against the booking of above said unit the abovementioned unit was purchased under the payment link plan for a total sale consideration of Rs. 98,00,000/- and on 07.02.2012 a provisional allotment letter was issued by the respondent.

5. That on 17.02.2012, one cheque of Rs.10,00,000/- bearing no. 275596, on dated 21.02.2012, a cheque of Rs. 5,235/- bearing no.275599, on dated 16.05.2012 a cheque of Rs.10,10,282 bearing cheque no.275558 was drawn in favour of the respondent as booking amount for the said apartment. A sum of Rs. 20,15,517/- was paid through three cheques and receipt was issued by the opposite party.

6. That on 29.05.2012 complainant entered into an agreement with the respondent and an agreement was issued between the parties for flat no. 15-B, FF sum of Rs. 86,10,338/- was paid by complainants to the respondent cheques and receipt were issued by the respondent. A total sum of Rs. 1,17,91,974/- was paid by complainant to the opposite party.

7. On dated 25.08.2018 the opposite party sent the offer of possession for fit outs of unit no. 15 B FF in ALMERIA at sector-84, Gurugram which amount due and payable on offer of possession after that complainant sent several mails to opposite party and asked to adjust the amount of 10,00,000

which is due towards of 109 B S.S Plaza, and also about GST and reserve car parking space price etc, after that opposite party gives compensation @ Rs. 5 for 12 months only and the delay is of 39 months and as per judgments of HRERA the commutative interest should be @ Rs. 10.75 per annum.

8. That the cause of action for the present complaint arose on 22.08.2018 when opposite party sent offer of possession letter and demanded remaining amount. The cause of action again arose on various occasions, including on: 16.01.2019, when the respondent party sent a mail to inspect the flat.

B. Relief sought by the complainants

9. The complainants are seeking the following relief:

   a) Direct the respondent to deposit/pay amount for delay in possession.

C. Reply by the respondent.

10. The respondent contests the complaint on the following grounds:

   i. That the complaint filed by the complainant before this authority, besides being misconceived and erroneous, was untenable in the eyes of law. The complainant has misdirected herself in filing the above captioned complaint before this authority as the reliefs being

claimed by the complainant, besides being illegal, misconceived and erroneous, cannot be said to even fall within the realm of jurisdiction of this authority.

ii. That the provisions of the Real Estate (Regulation and Development) Act, 2016 and the Haryana Real Estate (Regulation and Development) Rules, 2017, made by the Government of Haryana in exercise of powers conferred by sub-section 1 read with sub-section 2 of section 84 of 2016 Act. Section 31 of 2016 Act provides for filing of complaints with this authority or the Adjudicating Officer. Sub-Section (1) thereof provides that any aggrieved person may file a complaint with the authority or the adjudicating officer, as the case may be, for any violation or contravention of the provisions of 2016 Act or the rules and regulations made there under against any promoter, allottee or real estate agent, as the case may be. Sub-section (2) provides that the form, manner and fees for filing complaint under sub-section (1) shall be such as may be prescribed. Rule 28 of 2017 Haryana Rules provides for filing of complaint with this authority, in reference to section 31 of 2016 Act. Sub-clause (1) *inter alia*, provides that any aggrieved person may file a complaint with the authority for any violation of the provisions of 2016 Act or the rules and regulations made

thereunder, *save as those provided to be adjudicated by the Adjudicating Officer*, in Form 'CRA'. Significantly, reference to the "authority", which is this authority in the present case and to the "Adjudicating Officer", is separate and distinct. "Adjudicating Officer" has been defined under section 2(a) to mean the Adjudicating Officer appointed under sub-section (1) of section 71, whereas the "authority" has been defined under Section 2(i) to mean the Real Estate Regulatory Authority, established under sub-section (1) of section 20.

iii. That under section 71, the Adjudicating Officer is appointed by the authority in consultation with the appropriate Government for the purpose of adjudging compensation under sections 12, 14, 18 and 19 of the 2016 Act and for holding an enquiry in the prescribed manner. A reference may also be made to section 72, which provides for factors to be taken into account by the Adjudicating Officer while adjudging the quantum of compensation and interest, as the case may be, under Section 71 of 2016 Act. The domain of the Adjudicating Officer cannot be said to be restricted to adjudging only compensation in the matters which are covered under sections 12, 14, 18 and 19 of the 2016 Act. The inquiry, as regards the compliance with the provisions of sections 12,

14, 18 and 19, is to be made by the Adjudicating Officer. This submission find support from reading of section 71(3) which *inter alia*, provides that the Adjudicating Officer, while holding inquiry, shall have power to summon and enforce the attendance of any person and if on such inquiry he is satisfied that the person had failed to comply with the provisions of any of the sections specified in sub-section (1) he may direct to pay such compensation or interest, as the case may be, as he thinks fit in accordance with the provisions of any of those sections. Suffice it is to mention that the sections specified in sub-section (1) of Section 71 are sections 12, 14, 18 and 19.

iv. That the buyer's agreement which has been referred here for the purpose of getting the adjudication of the complaint, though without jurisdiction was executed much prior to coming into force of 2016 Act.

v. That the complainant is seeking interest which, from reading of the provisions of the 2016 act and 2017 rules, especially those mentioned hereinabove, would be liable for adjudication, if at all, by the Adjudicating Officer and not this authority. Thus, on this ground alone the complaint is liable to be rejected.

vi. That further, without prejudice to the aforementioned, even if it was to be assumed though not admitting that the filing of the complaint is not without jurisdiction, even then the claim as raised cannot be said to be maintainable and is liable to be rejected for the reasons as ensuing.

vii. That apparently, the complaint filed by the complainant is abuse and misuse of process of law and the reliefs claimed as sought for, are liable to be dismissed. no relief much less any interim relief, as sought for, is liable to be granted to the complainant.

viii. That the complainants have miserably and wilfully failed to make payments in time or in accordance with the terms of the allotment/ flat buyer's agreement. it is submitted that the complainant has frustrated the terms and conditions of the flat buyer's agreement, which were the essence of the arrangement between the parties and therefore, the complainant now cannot invoke a particular clause, and therefore, the complaint is not maintainable and should be rejected at the threshold. that the complainant has also misdirected in claiming interest on account of alleged delayed offer for possession. besides the fact that this authority cannot be said to have any jurisdiction to award/grant such relief to the complainant,

it is submitted that there cannot be said to be any alleged delay in offering of the possession.

ix. That it is to be appreciated that a builder constructs a project phase wise for which it gets payment from the prospective buyers and the money received from the prospective buyers are further invested towards the completion of the project. It is important to note that a builder is supposed to construct in time when the prospective buyers make payments in terms of the agreement. It is important to understand that one particular buyer who makes payment in time can also not be segregated, if the payment from other prospective buyer does not reach in time. It is relevant that the problems and hurdles faced by the developer or builder have to be considered while adjudicating complaints of the prospective buyers. It is relevant to note that the slow pace of work affects the interests of a developer, as it has to bear the increased cost of construction and pay to its workers, contractors, material suppliers, statutory renewals etc. It is most respectfully submitted that the irregular and insufficient payment by the prospective buyers such as the complainants freezes the hands of developer/builder in proceeding towards timely completion of the project.

x. That the respondent, after having applied for grant of occupation certificate in respect of the project, which had thereafter been even issued through memo dated 17.10.2018 had offered possession to the complainant vide letter dated 25.08.2018 and e-mail dated 23.10.2018. The complainant has till date not taken the possession of their flat. It is pertinent to mention here that as per clause 9 of the flat buyer's agreement the complainants are liable to pay the holding charges @ Rs. 5/- per sq. ft. of the super area for the entire period of such delay. In the present case the complainants are liable to pay the holding charges amounting to Rs. 2,20,000/- (pending as on 23.09.2020) as per the flat buyer's agreement from 23.11.2018 till the taking over of possession. It is pertinent to mention here that the complainants in order to escape his liability to pay the holding charges has filed this false and frivolous complaint.

D. Jurisdiction of the authority

11. The preliminary objection raised by the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observed that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

D.I. Territorial jurisdiction

12. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram District, therefore this authority has complete territorial jurisdiction to deal with the present complaint.

D.II Subject matter jurisdiction

13. The respondent has contended that the complainants are seeking interest which, from reading of the Act and the rules, would be liable for adjudication, if at all, by the adjudicating officer and not this ld. Authority. The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as held in ***Simmi Sikka v/s M/s EMAAR MGF Land Ltd.*** **(complaint no. 7 of 2018)** leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants 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 titled as ***Emaar MGF Land Ltd. V. Simmi Sikka and anr.***

E. Findings of the authority on objections raised by the respondent.

E.1 Objection regarding format of the compliant

14. The respondent has further raised contention that the present complaint is not maintainable as the complainant have filed the present complaint before the adjudicating officer and the same is not in amended CRA format. The reply is patently wrong as the complaint has been addressed to the authority and not to the adjudicating officer. The authority has no hesitation in saying that the respondent is trying to mislead the authority by saying that the said complainant is filed before adjudicating officer. There is a prescribed proforma for filing complaint before the authority under section 31 of the Act in form CRA. There are 9 different headings in this form (i) particulars of the complainants- have been provided in the complaint (ii) particulars of the respondent- have been provided in the complaint (iii) is regarding jurisdiction of the authority- that has been also mentioned in para 14 of the complaint (iv) facts of the case have been given at page no. 5 to 8 (v) relief sought that has also been given at page 10 of complaint (vi) no interim order has been prayed for (vii) declaration regarding complaint not pending with any other court- has been mentioned in para 15 at page 8 of complaint

(viii) particulars of the fees already given on the file (ix) list of enclosures that have already been available on the file. Signatures and verification part is also complete. Although complaint should have been strictly filed in proforma CRA but in this complaint all the necessary details as required under CRA have been furnished along with necessary enclosures. Reply has also been filed. At this stage, asking complainant to file complaint in form CRA strictly will serve no purpose and it will not vitiate the proceedings of the authority or can be said to be disturbing/violating any of the established principle of natural justice, rather getting into technicalities will delay justice in the matter. Therefore, the said plea of the respondent w.r.t rejection of complaint on this ground is also rejected and the authority has decided to proceed with this complaint as such.

E.2 Objection regarding jurisdiction of authority w.r.t. buyer's agreement executed prior to coming into force of the Act

15. Another contention of the respondent is that authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the apartment buyer's agreement executed between the parties and no agreement for sale as referred to under the provisions of the Act or the said rules has been executed inter se parties. The

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

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

larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."

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

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

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

statutes, instructions, directions issued thereunder and are not unreasonable or exorbitant in nature.

E.3 Whether the promoter can sell open car parking spaces and if no, refund/ adjust the amount so paid by the complainant?

18. The respondent has charged an amount of Rs. 2,00,000/- for reserved open car parking space which is mentioned in 'Annexure-A' of builder buyer agreement titled as "amount due and payable on offer of possession". But there is no clause in the builder buyer agreement dealing with it. The complainant has raised an issue with regard to open car parking which is not covered as per the provisions of builder buyer agreement. The question is whether open car parking space can be sold by the promoter being part of the common area.

19. Section 3(f) of the Haryana Apartment Ownership Act, 1983 provides the definition of common areas and facilities wherein except sub-clause (vii) i.e., such commercial activities as may be provided in the declaration, rest of the items shall form part of the common area and facilities. Section 3(f)(iii) provides that the basement parking areas, garden and storage spaces have been included in the common area and facilities apart from other parts. Section 3(f)(i) provides that land on which

the building is located is also included in the definition of common area and facilities. From the definition of the common areas and facilities, it is clear that the builder has a choice to declare or not to declare community and commercial facilities in the declaration, but rest of the items are part of the common areas and facilities.

20. With regard to instance wherein it has been charged separately post coming into force of the Act, the authority places reference on the Hon'ble Supreme Court judgement in **Nahalchand Laloochand Private Limited Vs. Panchali Co-operative Housing Societies Limited (2010)9 SCC 536**, wherein while interpreting para-materia definition of common areas and facilities held that parking area, common area and facilities and that even the factum of not having taken money from the apartment owners could not change the character and nature of common area even though the builder may not have charged. The Apex Court further ruled that builders or promoters cannot sell parking spaces as independent units or flats as these are areas to be extended as common areas. A similar view was also taken in **DLF Ltd. Vs. Manmohan Lowe and others [2014(12) SCC 231]**. The **MahaRERA in the matter of Mahesh Shah & Meena Shah Vs. Sunny Vista Realtors Pvt. Ltd. & Persipina Developers Pvt. Ltd. vide order dated 20th January 2020**, has ruled that

open parking spaces fall within the definition of common areas in the Real Estate (Regulation and Development) Act, and hence developers cannot charge homebuyers for open parking spaces.

21. Reference may also be drawn to the recent judgement passed by the Hon'ble Supreme Court in **Wg. Cdr. Arifur Rahman Khan** wherein it was held as under:

> *"Parking*
>
> *52 The appellants seek a refund of an amount of Rs. 2.25 lacs collected from each buyer towards car parking. The submission is that under Section 3(f) of the Karnataka Apartment Ownership Act, 1972, common areas and facilities include parking areas. According to the appellants, the flat buyers had already paid for the super area in terms of clause 1.6 of ABA including common areas and facilities which would be deemed to include car parking under the KAO Act. The relevant portion of clause 1.6 is extracted below:*
>
> *"1.6. The Allottee agrees that the Total price of the said Apartment is calculated on the basis of its Super Area only (as indicated in clause 1.1.) except the parking space, additional car parking space which are based on fixed valuation...."*
>
> *(emphasis supplied)*
>
> *53 We are unable to accede to the above submission. The ABA contained a break-up of the total price of the apartment. Parking charges for exclusive use of earmarked parking spaces were separately included in the break-up. The parking charges were revealed to the flat buyers in the brochure. The charges recovered are in terms of the agreement.*
>
> *54 The decision of this Court in Nahalchand Laloochand Private Limited v. Panchali Cooperative Housing Society Limited turned on the provisions of the Maharashtra Ownership Flats Act 1971, as explained in the subsequent decision of this Court in DLF Limited v. Manmohan Lowe. The demand of parking charges is in terms of the ABA and*

hence it is not possible to accede to the submission that there was a deficiency of service under this head."

22. Further, in case titled as **DLF Home Developers Ltd. (Earlier known as DLF Universal Ltd.) and another Vs. Capital Greens Flat Buyers Association etc. [civil appeal nos. 3864-3889 of 2020]** vide order dated 14.12.2020, the Hon'ble Supreme Court while dismissing the appeal arising out of the NCDRC matter wherein one of the issue which arose before the Hon'ble Supreme Court was whether a promoter can charge car parking from an allottee in pursuance to a stipulation made in the builder buyer's agreement executed between the promoter and an allottee in respect of a unit in a project before the coming into force of the RERA Act, the Hon'ble NCDRC had in its judgement dated 03.01.2020 held that the promoter was not entitled to demand car parking charges from the allottee. However, in the appeal, the Hon'ble Supreme Court while setting aside the NCDRC order in this regard held that the promoter in such a case was entitled to raise a demand in respect of car parking charges being justifiable.

23. With regard to the same, the authority is of the opinion that open parking spaces cannot be sold/charged by the promoter both before and after coming into force of the Act since it is the part of basic sale price charged against the apartment as a part

of common areas. As far as issue regarding parking is concerned, the matter is to be dealt with as per the provisions of the builder buyer's agreement wherein the said agreement has been entered into before coming into force of the Act. Naturally, the open space on which car parking has been planned is also part of the common areas and by no stretch of imagination, the same can be sold by the builder to any allottee although resident welfare association for the convenience and orderly management may earmark part of the open areas as surface parking. If the car parking is covered from the three sides, then the respondent builder is justified in charging the car parking amount.

24. The authority is of the opinion that no such provision for the car parking is present in the builder buyer agreement, and so, such amount should be refunded to the complainant which is paid in the name of car parking.

E.4 Whether the promoter can claim holding charges from the complainants?

25. The respondent is contending that the complainants are liable to pay holding charges as per the flat buyer's agreement for the reason that they have delayed in taking possession even after offer of possession being made by it. Clause 9 of the agreement is reproduced below: -

"9. Holding Charges

Further it is agreed by the Flat Buyer(s) that in the event of the failure of the Flat Buyer(s) to take the possession of the said FLAT in the manner as aforesaid in Clause 8.2, then the Developer shall have the option to cancel this Agreement and avail of the remedies as stipulated in Clause 15 of this Agreement or the Developer may, without prejudice to its rights under any of the clauses of this Agreement and at its sole discretion, decide to condone the delay by the Flat Buyer(s) in taking over the said FLAT in the manner as stated in this clause on the condition that the Flat Buyer(s) shall pay to the Developer holding charges @ Rs. 5/- (Rupees Five only) per sq. ft. of the super rea of the said FLAT per month for the entire period of such delay and to withhold conveyance or handing over for occupation and use of the said FLAT till the holding charges with applicable overdue interest as prescribed in this Agreement, if any, are fully paid It is made clear and the Flat Buyer(s) agrees that the holding charges as stipulated in this clause shall be a distinct charge not related to and shall be in addition to maintenance charges or any other outgoing cess, taxes, levies etc which shall be at the risk, responsibility and cost of the Flat Buyer(s). Further the Flat Buyer(s) agrees that in the event of his/her/their failure to take possession of the said FLAT within the time stipulated by the Developer in its notice, the Flat Buyer(s) shall have no right or any claim in respect of any item of work in the said FLAT which the Flat Buyer(s) may allege not to have been carried out or completed or in respect of any design specifications, building materials, use or any other reason whatsoever and that the Flat Buyer(s) shall be deemed to have been fully satisfied in all matters concerning construction work related to the said Flat/said Block/said Group Housing Complex."

26. The authority observes that the respondent has offered the possession of the unit vide offer of possession dated 25.08.2018 whereas the occupation certificate which is attached by the respondent is dated 17.10.2018 the date of OC being later than the date of offer of possession clearly implies that the possession was offered without obtaining the OC as

OC is mandatory for offering possession of the unit , therefore, it can be concluded that the offer of possession offered by the respondent is not a valid offer of possession as it has been offered without obtaining the OC. Therefore, the respondent cannot be said to have offered the possession of the unit on 25.08.2018 and is thus not entitled to claim the relief of grant of the holding charges. As per clause 9 of the agreement detailed above, in the event the flat buyer delays to take the possession of the unit within the time limit prescribed by the company in its intimation/offer of possession then the promoter shall be entitled to holding charges. However, it is interesting to note that the term holding charges has not been clearly defined in the flat buyer's agreement or any other relevant document submitted by the respondent/promoter. Therefore, it is firstly important to understand the meaning of holding charges which is generally used in common parlance. The term holding charges or also synonymously referred to as non-occupancy charges become payable or applicable to be paid by the allottee if the possession has been offered by the builder to the owner/allottee and physical possession of the unit has not been taken over by the allottee and the flat/unit is lying vacant even when it is in a ready-to-move condition. Therefore, it can be inferred that holding charges is something which an allottee has to pay for his own unit for which he has

already paid the consideration just because he has not physically occupied or moved in the said unit.

27. The hon'ble NCDRC in its order dated 03.01.2020 in case titled as "**Capital Greens Flat Buyer Association and Ors. V. DLF Universal Ltd.**, Consumer case no. 351 of 2015" held as under:

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

28. The said judgment of NCDRC was also upheld by the Hon'ble Supreme Court vide its judgement dated 14.12.2020 passed in the civil appeal filed by DLF against the order of NCDRC. The authority earlier, in view of the provisions of the Rules, 2017 in a number of complaints decided in favour of promoters observed that holding charges are payable by the allottee. However, in the light of the recent judgement of the NCDRC and hon'ble Apex Court, the authority concurring with the view taken therein decides that a developer/ promoter/

builder cannot levy holding charges on a homebuyer/allottee as it does not suffer any loss on account of the allottee taking possession at a later date even due to an ongoing court case.

29. As far as holding charges are concerned, the developer having received the sale consideration has nothing to lose by holding possession of the allotted flat except that it would be required to maintain the apartment which it would be legally entitled to claim common maintenance charges from an allottee after the expiry of statutory period of 2 months after offer of possession as per the provisions of section 19(10) of the Act, 2016. Therefore, the holding charges will not be payable to the developer. Even in a case where the possession has been delayed on account of the allottee having not paid the entire sale consideration, the developer shall not be entitled to claim any holding charges though it would be entitled to interest for the period the payments were delayed at the prescribed rate.

F. Findings on the relief sought by the complainants.

Relief sought by the complainants: - Direct the respondent to deposit/pay amount for delay in possession.

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

"Section 18: - Return of amount and compensation

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

.....

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

31. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges as per the Act. Proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

> ***Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]***
> *(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.:*
> *Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.*

32. 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 appeal tiled as **Emaar MGF Land Ltd. vs. Simmi Sikka in appeal nos. 52 & 64 of 2018** 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."*

33. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the apartment within 36 months from the date of signing of the flat buyer's agreement. This period of 36 months expires on 29.05.2015. Further the flat buyer's agreement provides that promoter shall be entitled to a grace period of 90 days for applying and obtaining

occupation certificate in respect of group housing complex. As a matter of fact, the promoter has not applied for occupation certificate within the time limit prescribed by the promoter in the flat buyer's agreement. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 90 days cannot be allowed to the promoter at this stage. 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."*

34. 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., 31.03.2021 is 7.30% per annum. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e.,9.30% per annum.

35. 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;*

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

37. On consideration of the circumstances, the documents and submissions made by the parties regarding contravention as per provisions of rule 28(2), the authority is satisfied that the respondent is in contravention of the provisions of the Act. As per clause 8.1(a) of the said agreement, the possession of the

unit in question was to be handed over within a period of 36 months from the date of signing of flat buyer's agreement dated 29.05.2012 plus 90 days grace period, which comes out to be 29.05.2015. The grace period is not included in it for the reasons mentioned above. The respondent offered possession for fits out of the subject unit to the complainants on 25.08.2018 before the receipt of occupation certificate dated 17.10.2018. Therefore, the said offer of possession dated 25.08.2018 is not valid in eyes of law. However, there is nothing on record to show that the respondent has offered possession of the subject unit after the receipt of occupation certificate. Since, the promoter has not offered the possession of the subject unit to the complainant till date. Accordingly, it is the failure of the promoter to fulfil its obligations, responsibilities as per the agreement dated 29.05.2012 to hand over the possession within the stipulated period.

38. Section 19(10) of the Act obligates the allottees to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 17.10.2018. However, the respondent offered the possession of the unit in question to the complainant only on 25.08.2018, so it can be said that this offer of possession was not a valid offer of possession as it was made before obtaining

the occupation certificate. These 2 months' of reasonable time is being given to the complainants keeping in mind that even after intimation of possession practically he has to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e. 29.05.2015 till a valid offer of possession is made plus statutory period of 2 months as per the provision of section 19(10) of the Act.

39. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such complainant is entitled to delayed possession charges at prescribed rate of interest i.e., @ 9.30% p.a. w.e.f. 29.05.2015 till a valid offer of possession is made plus statutory period of 2 months as per the provision of section 19(10) of the Act.

E. Directions of the authority.

40. 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 is directed to pay the interest at the prescribed rate i.e., 9.30 % per annum for every month of delay on the amount paid by the complainants from due date of possession i.e., 29.05.2015 till a valid offer of possession is made plus statutory period of 2 months as per the provision of section 19(10) of the Act.

ii. The arrears of interest accrued so far shall be paid to the complainants within 90 days from the date of this order as per Rule 16(2) of rules and thereafter monthly payment of interest till offer of possession shall be paid before 10th of each subsequent month.

iii. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.

iv. The rate of interest chargeable from the allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.30% by the respondent/ promoter which is same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

v. The respondent shall not charge anything from the complainants which is not part of the buyer's agreement. Moreover, holding charges shall not be charged by the promoter at any point of time even after being part of the agreement as per law settled by the hon'ble Supreme

Court in civil appeal no. 3864-3889/2020 decided on 14.12.2020. However, common maintenance charges shall be payable by the complainant to the promoter builder after valid offer of possession is made of the allotted unit plus 2 months of the expiry of statutory period as per the provision of section 19(10) of the Act.

vi. Interest on the due payments from the complainants shall be charged at the prescribed rate i.e., 9.30% by the promoter which is the same as is being granted to the complainant in case of delayed possession charges.

41. Complaints stands disposed of.

42. File be consigned to the registry.

(Samir Kumar)
Member

(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 31.03.2021