BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 800 of 2021
First date of hearing : 31.03.2021
Date of decision : 25.08.2021

Chetna Lodha
Address:- E 72, Second floor, Bangali Colony, Mahavir Enclave near Sulabh Public School, New Delhi-110045 **Complainant**

Versus

Magic Eye Developers Private Limited
Office address: - G.F. – 09, Plaza M – 6, District Centre, Jasola, New Delhi – 110025 **Respondent**

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

APPEARANCE:
Shri Devender Lodha Advocate for the complainant
Ms. Neelam Gupta Advocate for the respondent

ORDER

1. The present complaint dated 15.02.2021 has been filed by the complainant/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 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 allottees as per the agreement for sale executed inter se them.

A. Unit and project related details

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

S.No.	Heads	Information
1.	Project name and location	The Plaza at 106, Sector-106, Gurgaon
2.	Project area	3.725 acres
3.	Nature of the project	Commercial colony
4.	DTCP license no. and validity status	65 of 2012 dated 21.06.2012 valid upto 21.06.2022
5.	Name of licensee	Magic Eye Developers
6.	RERA Registered/ not registered	Registered No. 72 of 2017 dated 21.08.2017 valid upto 31.12.2021
7.	Unit no.	0808, 8th floor, Tower-B2
8.	Unit measuring	700 sq. ft.
9.	Date of execution of Buyers Agreement with the original allottee	03.06.2013 (Page 11 of the complaint)
10.	**Addendum to agreement**	**19.02.2020 (Page 52 of the reply)**
11.	Payment plan	Construction linked payment plan

12.	Total Sale consideration	Rs. 43,31,719/- (As per applicant ledger dated 12.03.2021 page 64-68 of the reply)
13.	Total amount paid by the complainant	Rs. 43,31,719/- (As per applicant ledger dated 12.03.2021 page 64-68 of the reply)
14.	Due date of delivery of possession as per (As per clause 9.1 within a period of three years from the date of execution of agreement) **Note:- The complainant is the subsequent allottee and she stepped into shoe of the original allottee on 19.02.2020.**	19.08.2020 (Due date of possession is calculated from the date of execution of agreement dated 19.02.2020) **Note:-** Grace period of 6 month is allowed due to covid-19
15.	Offer of possession	07.10.2020 (Page 4 of the written submission made by the complainant)
16.	Delay in handing over possession till 07.12.2020 i.e. date of offer of possession (07.10.2020) plus 2 months	3 months 18 days
17.	Occupation Certificate received on	28.11.2019 for block A, B & C

B. Facts of the complaint

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

(i) The complainant submitted that the said unit B2-808 has been provisionally allotted vide allotment letter dated 04.10.2012 and subsequently originally allotted vide buyer builder agreement dated 03.06.2013 to Smt. Ritu

Batra w/o Kamal Kant Batra and Sh. Sudhir Kumar Bhalla s/o Sh. Surendra Kumar Bhalla for a sale consideration of Rs. 40,58,000 plus taxes of Rs. 2,44,443 i.e. Rs.43,02,443/. The complainant has made application with all required original document for transfer of said unit B2-808 vide letter dated 01.02.2020 and the said unit B2-808 has been transferred vide addendum agreement dated 19.02.2020 to original buyer builder agreement dated 03.06.2013 to the complaint Mrs. Chetna Lodha W/o Devendra Kumar Lodha and now all the right of the unit is existed with the transferee namely Chetna Lodha who is the complainant in this petition. Copy of the addendum agreement dated 19.02.2020 to original buyer builder agreement dated 03.06.2013 along with letter dated 01.02.2020 is enclosed as per annexure no A-2 at page no. 34-37.

(ii) Further it is pertinent to mention here that all payments are matched with the ledger statement of builder. That it is pertinent to mention here that the respondent has committed to deliver the physical possession of the unit within 15 days from the date of submission of all documents vide letter dated 01.02.2020.That builder has offered that if any buyer pay the CAM charges in advance than the builder will waive off 50 % CAM charges. Thus,

originally builder was charged CAM charges @ 5/- per sq. ft. and offered 50% discount on CAM charges i.e. 2.50 per sq. ft. and demanded common area maintenances charges (CAM) for the period from 01.12.2019 to 31.03.2020 @ Rs. 1750 plus GST per month (i.e. 700 sq ft @ Rs. 2.50 per sq ft) and the complainant has paid Rs. 4130/- (Including GST Rs. 630/-) for the two months from 01.02.2020 to 31.03.2020 vide cheque no. 21 dated 01.02.2020 and remaining two months CAM charges of Rs. 4130 (Including GST Rs. 630/-) was paid vide cheque no. 5121 dated 01.02.2020.

(iii) That the complainant has already booked an office unit No B1-508 @ Rs 41,50,600/- on 31.08.19 by handing over a cheque of Rs. 2,11,000/- and further transferred online Rs. 5,27,000/- till 04th December 2019 but respondent has failed to provide the signed copy of the builder buyer agreement till 18.02.2020. Further respondent has demanded to pay fund of Rs 10 lacs on account of unit no B1-508 and the same was further Transferred on 24th February 2020. That the respondent has further committed to handover the possession of the one unit no B2-808 on or before 15.03.2020 if the complainant paid Rs. 3.00 lacs on or before 10.03.2020 on account of unit

no B1-508 and further the complainant has paid Rs 3.00 lacs on 09.03.2020 and Mr. Kuldip has committed over the phone to possession of the unit no B2-808 on or before 15.03.2020.

(iv) That the complainant has made various request mail for possession of the both unit no B1-508 and B2-808 but the respondent has never replied for physical possession and ultimately the complainant was called to complete the documentary formalities to handover the physical possession of one unit no B2-808 on 27.08.2020 and took the signature on possession document before the physical possession, However it is pertinent to mention here that when the complainant visited the unit no B2-808 and complainant has observed some issue in paint and cleaning and requested to complete the unit and again handed over the key of the said unit no B2-808 to Mr. Mohit who has taken the sign on possession related documents. Ultimately possession of the unit no B2-808 was handed over on 07.10.2020 when the respondent has handed over the possession of unit no B1-508.

(v) That the complainant submitted that the original allottee has made the total payment of Rs. 25,10,909 before the expected date of possession 03.12.2016 and further paid

Rs. 11,35,440 before the receiving of the occupation Certificate. That the intimation of occupation certificate has been received on 28.11.2019 vide letter dated 30.11.2019 and the remaining payment of Rs. 6,77,110 was made on or before 24.01.2020. That the respondent initially offered CAM charges at the rate of Rs. 2.50 per sq., however the facility as committed in builder buyer agreement has not been delivered as the complainant has regularly visited to the unit. Further there is no running club, swimming pool, proper cleaning, lighting and adequate security guard till date. In spite of this the associate person of the respondent has raised the bill for CAM for the month of Oct 20 to Dec 20 @ Rs. 7 per Sq. ft i.e. the respondent without providing any adequate facility increased the CAM charges from Rs.2.50 to Rs. 7.00 per sq. ft. which is totally unfair.

(vi) That respondent took more than 10 percent of total consideration i.e. Rs. 10,30,900 till 17.07.2012 but the respondent has failed to make builder buyer agreement and the same was made with a delay of 14 month. As per clause 9(1) of the builder buyer's agreement, the construction of the building was contemplated to be completed within a period of three years from the date of

execution of the agreement with two grace periods for six months each. There is no justification to have two grace periods of six months each for completion of the construction. Prescribing the two grace periods without any justification and sufficient cause again shows the terms and conditions of the agreement to be unfair and unreasonable.

(vii) That the complainant further submitted that in view of clause 10.4 of the buyer's agreement, allottee is entitled to the delayed possession charges/interest only at the rate of Rs.5 per square feet per month. However, the aim of the Act is to safeguard the interest of the aggrieved person may be allottee or the promoter. The rights of the parties are to be balanced and must be equitable. The promoter cannot be allowed to take any undue advantage of his dominant position and to exploit the needs of the home buyer. This hon'ble authority is duty bound to take into consideration the legislative intent i.e. to protect the interest of consumers/allottee in real estate sector. As per clause 10.4 of the agreement in case of failure of the developer to give the possession within the stipulated period the respondent/allottee is only entitled to receive the compensation at the rate of Rs.5 per square feet of the

super area per month for the period of delay. This will come to only 0.97 % (Rs.42000/ Rs. 4323459*100) p.a. However, as per clause 7 of the agreement the appellant/promoter was entitled to charge the interest at the rate of 18% per annum on the delayed payment for the period of delay. The appellant/promoter as per clause 11 of the agreement has been given the vast powers even to cancel the allotments if the default is not cured within 30 days of the date of issue of the notice and to forfeit the entire earnest money paid by the allottee. As per clause 10.4 in case the developer abandons the project for any reason whatsoever the developer will be entitled to terminate the agreement and the allottee shall be refunded the amount paid by him only with 9% per annum simple interest for the period such amount was lying with the developer and to pay no other compensation whatsoever. Thus, the aforesaid terms of the agreement dated 03.06.2013 are ex-facie one sided, unfair and unreasonable, which constitute the unfair trade practice on the part of the appellant/promoter.

(viii) That due to lot of delay in possession of both Unit and to get the compensate of interest on invested money in both units, the complainant has made lot of requests to appoint

an arbitrator vide mail dated 16.10.2020, 19.10.2020 and 20.10.2020 but the respondent further failed to appoint arbitrator. That the complainant has already mentioned in the mail dated 20.10.20 to compensate all legal cost as the respondent has not provide appointment of arbitrator as well as no resolution of the complainant.

C. **Relief sought by the complainant:**

4. The complainant has filed the present compliant for seeking following relief:

   (i) Direct the respondent to pay delayed possession charges at the prescribed interest rate i.e 10.75% for every month of delay from the due date of possession till the handing over the possession, on paid amount.

   (ii) Direct to waiver of CAM charges till 31st March 2021 as the builder is committed to waive off common maintenance charges for six months after possession of the units and also not started to provide the facility as committed in buyer builder agreement till now.

   (iii) Direct to the respondent to provide for third party audit to ascertain/measure accurate common area maintenance charges per sq. ft.

5. On the date of hearing, the authority explained to the respondents/promoters about the contravention as alleged to have been committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent

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

i. That the instant complaint is liable to be dismissed as not maintainable in as much as, the possession of subject matter unit [i.e., unit bearing no. 808, measuring tentative super area 700 Sq. Ft. on 8th floor of tower B-2 in the aforesaid project] has already been handed over to complainant on 26.08.2020 and complainant received the possession without any protest whatsoever, vide possession certificate dated 26.08.2020 duly signed by the complainant. That complainant vide the said possession certificate duly agreed and consented *"that all the accounts pertaining to the said unit has been fully and finally settled and complainant is left with no claims, whatsoever against the respondent."* Thus, respondent has discharged all its obligation towards the complainant and instant complaint has been filed after expiry of 6 months from the date of handing over of possession of said unit, therefore, on this ground alone, instant complaint is liable to be dismissed.

ii. That the instant complaint is further liable to be rejected on the ground that the present complainant is a re-

allottee/subsequent transferee who purchased the unit bearing No. 808 in tower B2 of project plaza at 106-1, from the original allottee and endorsed in favour of the complainant on 19.02.2021, in the records of respondent (i.e., after the construction of project got complete and occupation certificate obtained and possession offered to the original allottee on 20.12.2019). That as per law settled by the Hon'ble Supreme Court, a re-allottee cannot claim any compensation or interest for delay in possession, as they cannot claim parity with original allottee.

iii. That the respondent has already completed the construction of its commercial project plaza @106-1 situated at sector-106, Gurugram and has obtained the occupation certificate in respect of the same from Director General Town and Country Planning, Chandigarh vide Memo bearing no. ZP-833/AD/(RA)/2019/29244 dated 28.11.2019. Respondent after obtaining the occupation certificate, offered the possession of the unit bearing No.808, tower B2, of the aforesaid project to its original allottees namely Ritu Batra and Sudhir Kumar Bhalla vide letter dated 30.11.2019. Thereafter, the letter dated 20.12.2019 was sent to the aforesaid original

allottees for making the payments due at the stage of offer of possession. That the original allottees requested the respondent that they do not wish to take handover of the said unit and rather want to transfer all their rights, interest and liabilities in the said unit in favour of the now complainant and accordingly, applied for transfer of said unit vide letter dated 01.02.2020.

iv. That at the time of transfer original allottee/transferor(s) had submitted an affidavit declaring vide clause 5 of the said Affidavit that *"We have been left with no rights or interests or claims in the above-mentioned booking or unit or against Developer/Company"*. That complainant has only stepped in shoes of the original allottee(s) as a result of assignment of rights and liabilities by original allottee(s) in favour of the complainant. Therefore, complainant has no entitlement whatsoever to claim such rights/interest which the original allottee have already waived before transferring the unit to complainant.

v. That the complainant is not the original allottee but the re- allottee and at the time of endorsement of the original agreement in favour of the complainant the date of delivery of possession has already lapsed. In spite, of being well aware of the fact that there was a delay in

delivery of the project, complainant still proceeded to purchase the unit from original allottee(s) on the terms and conditions to which the respondent is not privy. Thus, complainant having accepted the delay is therefore, now estopped from claiming any penalty/interest in delay, if any in delivery of possession.

vi. That respondent at the time of endorsement of the original agreement in favour of the complainant on 19.02.2021 did promise any specific time for delivery of the possession of unit nor the complainant has notified to respondent, seeking immediate delivery of the said unit. Hence, complainant was aware that time for performance was not stipulated as the essence of the contract and the original allottees had accepted the delay in offer of possession. Thus, complainant is not entitled to any relief under section 18 (1) of the Real Estate (Regulation and Development) Act, 2016 and instant complaint is liable to be dismissed at the outset on this ground alone.

vii. That respondent communicated the complainant to take over possession of the said unit however, complainant avoided to visit site due to the prevailing pandemic COVID-19 stated that she will take the possession of unit after opening of lock down. Thereafter, she informed

respondent that as she does not want multiple visits, she will take the possession of both the units i.e. [B2-808 (subject Unit) and B1-508 (allotted to complainant by respondent on 18.02.2020] simultaneously. Respondent informed the complainant that possession of unit B1-508 will only be handed over once she clears the pending payments. However, in the meanwhile, she may take possession of the subject matter unit. Finally, the complainant visited the site on 26.08.2020 and received possession of the said unit to her complete satisfaction vide possession certificate duly signed by her on dated 27.08.2020.

viii. That being completely satisfied and having fully and finally settled all account with respondent pertaining to said unit and agreement dated 03.06.2013 endorsed in favour of complainant on 19.02.2020, Maintenance Agreement was also executed between the complainant and Prop bridge Services Private Limited (**"Maintenance Agency"**) on 16.10.2020. That this authority has no jurisdiction to entertain the instant complaint as in the facts and circumstances, there is no delay in delivery of possession to complainant nor the complainant is entitled to any compensation under section 18 of the Act as the

respondent has discharged and performed all its obligations towards the complainant and accounts have been fully and finally settled between the parties on 27.08.2020 itself.

7. The complainant has filed rejoinder on 31.03.2021 to the complaint filed by her on the perusal of the rejoinder it can be said that the rejoinder is based on the same fact and circumstances as mentioned in the complaint.

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

E. Jurisdiction of the authority

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

E.I Territorial jurisdiction

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 completed territorial jurisdiction to deal with the present complaint.

E.II Subject matter jurisdiction

The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as per provisions of section 11(4)(a) of the Act and duties of allottee as per section 19(6),(7) and(10) leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

F. Findings of the authority on the objections raised by the respondent:-

F.I Whether a subsequent allottee who had executed an affidavit with waiver clause is entitled to claim delay possession charges?

10. The respondent submitted that complainant is subsequent allottee and the complainant had only stepped in shoes of the original allottee as a result of assignment of rights and liabilities by original allottee in favour of the complainant. Therefore, complainant has no entitlement whatsoever to claim such rights/interest which the original allottee has already waived before transferring the unit to complainant. That respondent at the time of endorsement of the original agreement in favour of the complainant on 19.02.2021 did promise any specific time for delivery of the possession of unit

nor the complainant has notified to respondent, seeking immediate delivery of the said unit. Hence, complainant was aware that time for performance was not stipulated as the essence of the contract and the original allottees had accepted the delay in offer of possession. Thus, complainant is not entitled to any relief under section 18 (1) of the Real Estate (Regulation and Development) Act, 2016 and instant complaint is liable to be dismissed at the outset on this ground alone. With regard to the above contentions raised by the promoter/developer, it is worthwhile to examine following four sub-issues:

(i) Whether subsequent allottee is also allottee as per provisions of the Act?

(ii) Whether the subsequent allottee is entitled to delayed possession charges w.e.f. due date of handing over possession or w.e.f. the date of addendum letter (i.e., date on which he became allottee)?

i. Whether subsequent allottee is also an allottee as per provisions of the Act?

11. The term "allottee" as defined in the Act also includes and means the subsequent allottee, hence is entitled to the same relief as that of the original allottee. The definition of the allottee as provided in the Act is reproduced as under:

> *"2 In this Act, unless the context otherwise requires-*

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

12. Accordingly, following are allottees as per this definition:

    (a) Original allottee: A person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter.

    (b) Allottee after subsequent transfer from the original allottee: A person who acquires the said allotment through sale, transfer or otherwise. However, an allottee would not be a person to whom any plot, apartment or building is given on rent.

13. From a bare perusal of the definition, it is clear that the transferee of an apartment, plot or building who acquires it by any mode is an allottee. This may include (i) allotment; (ii) sale; (iii) transfer; (iv) as consideration of services; (v) by exchange of development rights; or (vi) by any other similar means. It can be safely reached to the only logical conclusion that no difference has been made between the original allottee and the subsequent allottee and once the unit, plot, apartment or building, as the case may be, has been re-allotted in the name of the subsequent purchaser by the promoter, the

subsequent allottee enters into the shoes of the original allottee for all intents and purposes and he shall be bound by all the terms and conditions contained in the buyer's agreement including the rights and liabilities of the original allottee. Thus, as soon as the unit is re-allotted in his name, he will become the allottee and nomenclature "subsequent allottee" shall only remain for identification for use by the promoter. Therefore, the authority does not draw any difference between the allottee and subsequent allottee per se.

14. Reliance is placed on the judgment dated 26.11.2019 passed in consumer complaint no. 3775 of 2017 titled as **Rajnish Bhardwaj Vs. M/s CHD Developers Ltd.** by NCDRC wherein it was held as under:

> *"15. So far as the issue raised by the Opposite Party that the Complainants are not the original allottees of the flat and resale of flat does not come within the purview of this Act, is concerned, in our view, having issued the Re-allotment letters on transfer of the allotted Unit and endorsing the Apartment Buyers Agreement in favour of the Complainants, this plea does not hold any water....."*

15. The authority concurs with the Hon'ble NCDRC's decision dated 26.11.2019 in **Rajnish Bhardwaj vs. M/s CHD Developers Ltd.** (supra) and observes that it is irrespective of the status of the allottee whether it is original or subsequent, an amount has been paid towards the consideration for a unit and the endorsement by the developer on the transfer

documents clearly implies his acceptance of the complainants as allottees.

16. Therefore, taking the above facts into account, the authority is of the view that the term subsequent allottee has been used synonymously with the term allottee in the Act. The complainant/subsequent allottee at the time of buying the said unit takes on the rights as well as obligations of the original allottee vis-a-viz the same terms and conditions of the buyer's agreement entered into by the original allottees. Moreover, the amount if any paid by the subsequent or original allottees is adjusted against the unit in question and not against any individual. Furthermore, the name of the complainant/subsequent allottee has been endorsed on the same builder buyer's agreement which was executed between the original allottees and the promoter. Therefore, the rights and obligation of the subsequent allottee and the promoter will also be governed by the said buyer's agreement.

ii. **Whether the subsequent allottee is entitled to delayed possession charges w.e.f. due date of handing over possession or w.e.f. the date of addendum letter (i.e. date on which he became allottee)?**

17. The respondent/promoter contended that the complainant/subsequent allottees shall not be entitled to any compensation/delayed possession charges since at the time of the execution of transfer documents/agreement for sale, they

were well aware of the due date of possession and have knowingly waived off their right to claim any compensation for delay in handing over possession or any rebate under a scheme or otherwise or any other discount. The respondent/ promoter had spoken about the disentitlement of compensation/delayed possession charges to the subsequent allottee who had clear knowledge of the fact w.r.t. the due date of possession and whether the project was already delayed. But despite that they entered into the agreement for sell and/or an affidavit declaring vide clause 5 of the said affidavit that *"we have been left with no rights or interests or claims in the above-mentioned booking or unit or against developer/company"*. That complainant had only stepped in shoes of the original allottee as a result of assignment of rights and liabilities by original allottee in favour of the complainant. Therefore, complainant has no entitlement whatsoever to claim such rights/interest which the original allottee has already waived before transferring the unit to complainant.

18. The authority placed reliance on the recent case titled as ***M/s Laureate Buildwell Pvt. Ltd. Vs. Charanjeet Singh, civil appeal no. 7042 of 2019 dated 22.07.2021***, the Apex Court has held that relief of interest on refund, enunciated by the decision in ***HUDA Vs. Raje Ram (2008)*** which was applied in ***Wg. Commander Arifur Rehman*** (Wg. Cdr. Arifur Rahman Khan and Aleya Sultana and Ors. V. DLF Southern Homes Pvt. Ltd. (now Known as BEGUR OMR Homes Pvt. Ltd.) and Ors.

(Civil appeal no. 6239 of 2019) dated 24.08.2020) cannot be considered good law and has held that the subsequent purchaser/respondent had stepped into the shoes of the original allottee, and intimated Laureate (builder) about this fact in April 2016, the interest of justice demand that the interest at least from that date should be granted, in favour of the respondent. The relevant paras of the said judgment are being reproduced as follows:

> *"31. In view of these considerations, this court is of the opinion that the per se bar to the relief of interest on refund, enunciated by the decision in Raje Ram (supra) which was applied in Wg. Commander Arifur Rehman (supra) cannot be considered good law. The nature and extent of relief, to which a subsequent purchaser can be entitled to, would be fact dependent. However, it cannot be said that a subsequent purchaser who steps into the shoes of an original allottee of a housing project in which the builder has not honoured its commitment to deliver the flat within a stipulated time, cannot expect any – even reasonable time, for the performance of the builder's obligation. Such a conclusion would be arbitrary, given that there may be a large number- possibly thousands of flat buyers, waiting for their promised flats or residences; they surely would be entitled to all reliefs under the Act. In such case, a purchaser who no doubt enters the picture later surely belongs to the same class. Further, the purchaser agrees to buy the flat with a reasonable expectation that delivery of possession would be in accordance within the bounds of the delayed timeline that he has knowledge of, at the time of purchase of the flat. Therefore, in the event the purchaser claims refund, on an assessment that he too can (like the original allottee) no longer wait, and face intolerable burdens, the equities would have to be moulded. It would no doubt be fair to assume that the purchaser had knowledge of the delay. However, to attribute knowledge that such delay would continue indefinitely, based on an a priori assumption, would not be justified. The equities, in the opinion of this court, can properly be moulded by directing refund of the principal amounts, with interest @ 9% per annum from the date the builder acquired knowledge of the transfer, or acknowledged it.*

32. In the present case, there is material on the record suggestive of the circumstance that even as on the date of presentation of the present appeal, the occupancy certificate was not forthcoming. In these circumstances, given that the purchaser/respondent had stepped into the shoes of the original allottee, and intimated Laureate about this fact in April 2016, the interests of justice demand that interest at least from that date should be granted, in favour of the respondent. The directions of the NCDRC are accordingly modified in the above terms." .....*(Emphasis supplied)*

19. In the present case, the complainant/subsequent allottee has been acknowledged as an allottee by the respondent vide addendum letter dated 19.02.2020. The authority has observed that the promoter has confirmed the transfer of allotment in favour of subsequent allottee (complainant) and the installment paid by the original allottee was adjusted in the name of the subsequent allottee and the next installments were payable/due as per the original allotment letter. Also, we have also perused the buyer's agreement which was originally entered into between the original allottees and the promoter. The same buyer's agreement has been endorsed in favour of the subsequent allottee/complainant. All the terms of buyer's agreement remain the same, so it is quite clear that the subsequent allottee has stepped into the shoes of the original allottee.

20. In the present complaint, the complainant/subsequent allottee had purchased the unit after expiry of the due date of handing over possession, the authority is of the view that the

subsequent allottee cannot be expected to wait for any uncertain length of time to take possession. Even the complainant has been waiting for their promised flats and surely, they would be entitled to all the reliefs under this Act. It would no doubt be fair to assume that the subsequent allottee/complainant had knowledge of delay, however, to attribute knowledge that such delay would continue indefinitely, based on priori assumption, would not be justified. Therefore, in light of ***Laureate Buildwell judgment (supra)***, the authority holds that in cases where subsequent allottees have stepped into the shoes of original allottees after the expiry of due date of handing over possession and before the coming into force of the Act, the subsequent allottees shall be entitled to delayed possession charges w.e.f. the date of entering into the shoes of original allottees i.e. addendum letter. In the present complaint, the addendum letter was issued by the respondent in the favour of the complainant on 19.02.2020 grace period of six month is allowed due to covid-19 and as such the due date of possession comes out to be 19.08.2020.

G. Findings on the relief sought by the complainant

21. Relief sought by the complainant:

(iv) Direct the respondent to pay delayed possession charges at the prescribed interest rate i.e 10.75% for every month of delay from the due date of possession till the handing over the possession, on paid amount.

(v) Direct to waiver of CAM charges till 31st March 2021 as the builder is committed to waive off common maintenance charges for six months after possession of the units and also not started to provide the facility as committed in buyer builder agreement till now.

(vi) Direct to the respondent to provide for third party audit to ascertain/measure accurate common area maintenance charges per sq. ft.

22. In the present complaint, the complainant intends to continue with the project and is seeking delay possession charges 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."*

23. Clause 9.1 of the apartment buyer agreement (in short, agreement) provides for handing over of possession and is reproduced below:

"9.1 SCHEDULE FOR POSSESSION OF THE SAID UNIT

The developer based on its present plans ad estimates and subject to all just exceptions/force majeure/statutory prohibitions/courts order etc., contemplates to complete the construction of the said building/Said unit within a period of three years from the date of execution of this agreement with two grace periods of six months each, unless there is a delay for reason mentioned in clause 10.1,10.2 and clause 37 or due to failure of allottee(s) to pay in time the price of the said unit along with other charges and dues accordance with the schedule of payments given in Annexure-C or as per the demands raised by the Developer from time to time or any failure on the part of the Allottee(s) to abide by all or any of the terms or conditions of this Agreement.

At the outset it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement. 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 and the commitment date 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 drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the doted lines.

24. **Admissibility of grace period:** As a matter of fact, the promoter has given the valid reason for delay to complete the project within the time limit prescribed by the promoter in the apartment buyer's agreement. Accordingly, this grace period of six months is allowed due to Covid-19 and as such the due date of possession comes out to be 19.08.2020 to the promoter at this stage.

25. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges at the rate of 10.75% p.a. however, 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.

26. 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.

27. 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., 25.08.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

28. **Rate of interest equally chargeable to the allottee in case of default in payment:-** 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;"

29. Therefore, interest on the delay payments from the complainant 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 complainant in case of delayed possession charges.

30. On consideration of the documents available on record and submissions made by both the parties it is the failure of the promoter to fulfil its obligations and responsibilities as per the buyer's agreement dated 03.06.2013 to hand over the possession within the stipulated period. In this case the complainnat is the subsequent allottee and she steeped into the shoes of original allottee on 19.02.2020. Grace period of six month is allowed due to covid-19 and as such the due date of possession comes out to be 19.08.2020. 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. In the present case, the complainant was offered

possession by the respondent on 07.10.2020 after receipt of occupation certificate dated 28.11.2019. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the complainant as per the terms and conditions of the addendum agreement dated 19.02.2020 executed between the parties.

31. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 28.11.2019. However, the respondent offered the possession of the unit on 07.10.2020, so it can be said that the complainant came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, they should be given 2 months' time from the date of offer of possession. This 2 month of reasonable time is being given to the complainant keeping in mind that even after intimation of possession practically they have to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit, but this is subject to that the unit being handed over at the time of taking possession is in habitable

condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e. 19.08.2020 till the expiry of 2 months from the date of offer of possession (07.10.2020) which comes out to be 07.12.2020.

32. Accordingly, the non-compliance of the mandate contained in section 11(4)[a) read with section 18(1) of the Act on the part of the respondent is established. As such, the complainant is entitled to delay possession charges at prescribed rate of the interest @ 9.30% p.a. w.e.f. 19.08.2020 till 07.12.2020 as per provisions of section 18(1) of the Act read with rule 15 of the Rules.

H. 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 is directed to pay interest at the prescribed rate of 9.30% p.a. for every month of delay on the amount paid by the complainants from the due date of possession i.e., 19.08.2020 till 07.12.2020 i.e. expiry of 2 months from the date of offer of possession (07.10.2020). 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 the rules.

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

iii. The respondent shall not charge anything from the complainants which is not the part of the agreement, however, holding charges shall not be charged by the promoter 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.

34. Complaint stands disposed of.

35. File be consigned to registry.

(Samir Kumar)
Member

(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 25.08.2021

Judgement uploaded on 30.11.2021.