



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

Complaint no. : 2568 of 2018
First date of hearing : 17.07.2019
Date of decision : 22.10.2021

1.	Shri Om Prakash Lohan R/O: - 635, Hewo-2 Sector 56, Gurugram, Haryana-122011	Complainant
Versus		
1.	M/s SS Group Private Limited Regd. Office at: - 77, SS House, Sector-44, Gurugram, Haryana-122003	Respondent

CORAM:	
Dr. K.K. Khandelwal	Chairman
Shri Samir Kumar	Member
Shri Vijay Kumar Goyal	Member
APPEARANCE:	
Smt. Priyanka Agarwal (Advocate)	Complainant
Sh. Dhruv Dutt Sharma (Advocate)	Respondent

HARERA
GURUGRAM

ORDER

1. The present complaint 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.

A. Unit and project related details

2. The particulars of unit details, 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 Leaf", Sector 85, Gurugram.
2.	Project area	11.09 acres
3.	Nature of the project	Group Housing Complex
4.	a) DTCP license no.	81 of 2011 dated 16.09.2011
	b) License valid up to	15.09.2024
	c) Name of the licensee	M/S Shiva Profins Private Limited
5.	a) RERA registered/not registered	Registered
	b) Registration certificate no.	23 of 2019 dated 01.05.2019 valid up to 31.12.2019
	c) Extension no.	05 of 2020 dated 20.01.2020 valid up to 31.12.2020
6.	Unit no.	2B, 2 nd floor, building no. 10 (page no. 46 of the complaint)
7.	Unit admeasuring	2280 sq. ft.



		(page no. 46 of the complaint)
8.	Allotment Letter	10.09.2012 (page no. 71 of the complaint)
9.	Date of execution of the flat buyer's agreement	28.09.2013 (page no. 44 of the complaint)
10.	Payment plan	Construction linked payment plan (page no. 77 of the complaint)
11.	Subsequent allottee	30.09.2013 (page no. 69 of the complaint)
12.	Total consideration	Rs. 1,22,83,200/- (page no. 91 of the complaint)
13.	Total amount paid by the complainant	Rs. 1,00,48,602/- (page no. 91 of the complaint)
14.	Possession clause	Subject to terms of this clause and subject to the Allottee(s) having complied with all the terms and conditions of this Buyer's Agreement and not being in default under any of the provisions of this Buyer's Agreement and compliance with all provisions, formalities, documentation etc. as prescribed by the Company, the Company proposes to hand over the possession of the Unit within 36 months from the date of signing of this agreement, subject to timely compliance of the provisions of the Buyer's Agreement by the



		Allottee. The Allottee(s) agrees and understands that the Company shall be entitled to a grace period of 90 days, for applying and obtaining the occupation certificate in respect of the Unit and/or the Project. (emphasis applied)
15.	Due date of delivery of possession	28.09.2016
16.	Occupation certificate	Not obtained
17.	Offer of possession	Not offered
18.	Delay in handing over the possession till date of this order i.e. 22.10.2021	5 years 24 days.
19.	Grace period utilization	Grace period is not allowed in the present complaint.

B. Facts of the complaint

3. That the respondent M/s S.S Group Pvt. Ltd. is a renowned developer having a number of housing projects in his name, one of their residential project (under construction) is at sector-85, Gurugram and is named as "The Leaf". (Hereinafter referred as the said 'project') The said project was started in the year 2012 when the respondent company through its authorized representatives started collecting money for the housing project while floating the brochure. The complainant on 03.07.2012 booked a unit bearing no. 2B (2nd floor), building no. 10 having super area 2280 sq. ft. (Hereinafter referred as the said 'unit') along with reserved parking space for one car by paying a sum of 10,00,000/-



Another few payments of Rs 2,19,887/-, Rs. 12,19,887/-, and Rs.12,27,200/- were made thereafter on demand from the respondent.

4. That a total of Rs 36,66,794/- was collected by the respondent when the flat buyer's agreement (Hereinafter referred as the 'FBA') dated 27.09.2013 was presented to be signed to the complainant having unilateral clauses written in it favouring the respondent. At the time of booking it were the words of the respondent that the possession of the said unit will be handed over to the buyers within next 36 months (which the brochure also supports), but by means of the FBA the period was extended for another 15 months. Fearing that a huge sum has already been taken by the respondent and having no other option the complainant signed the agreement.
5. That from year 2012 till 2018, the respondent has received a total of Rs.1,06,69,102/- from the complainant but still the possession of the said unit has not been offered by them. It was also agreed through the FBA by the respondent that the said unit will be handed over in 36 months i.e. on or before 28.09.2016 in all respect along with parking for one car but still the structural construction of the flats\towers is going on at the site.
6. That the FBA has been very cleverly drafted by the respondent with terms and conditions which suits them and the terms are not mutually agreed between the parties. It



bears only the arbitrary wishes of the respondent and is fastened upon the complainant. One of the clauses in the FBA was also to this effect that in the event of failure of the flat buyer to sign and return this agreement in this original form to the developer (respondent) within 30 days, there shall be forfeiture of the money paid by the buyer. That having no option left with the complainant as he has already paid Rs. 36,66,974/- by this time, he had to forcibly sign the FBA after a gap of 15 months from 1st payment made by him.

7. That the respondent by means of the FBA again extended the of completion/ possession of the said unit by saying that developer (respondent) proposes to hand over the possession of the flat within a period of 36 months from the date of signing of this agreement. That at the time of booking of flat on 03.07.2012 the words of the respondent were that the building plan/ floor plan are already approved and the construction will soon be completed and within 3 years the possession will be handed over to the complainant. This period has again been extended by the respondent by way of their allotment letter and the imposed FBA dated 27.09.2013. It is clearly an unfair practice on the part of respondent.
8. That at the time of applying for the said unit the respondent represented that the building plan were already approved and the construction was started. Believing on these representations made by the respondent, the complainant paid Rs. 10,00,000/- for the said unit on 03.07.2012. This fact was actually a false averment made by the respondent and



was only to allure the complainant. After reading of the FBA, it was transpired that the respondent took approval of the building plan from District Town and Country Planning Department Haryana on 08.08.2013 vide approval no. 48267. Also, to say here that before this approval dated 08.08.2013, the respondent has already collected sum of Rs. 12,27,200/- on 15.07.2013 under the head of 'Commencement of Construction Work'. The amount of starting construction was collected in prior to the approval of the building plan.

9. That it was agreed by the respondent that the possession of the said unit will be given to the complainant within 36 months and if in case the possession will not be handed over in time then there shall be compensation for this delay @ Rs.5/- per sq. ft. per month to be paid by the respondent which also has not been complied by the respondent.
10. That the respondent from June 2012 to December 2018 consistently demanded payments which were paid by the complainants on time. No reason has ever been communicated by the respondent for the delay in handing over the possession of the said unit. The complainant visited the respondent's office a number of times with a request to speedily conclude the work but it was of no avail.
11. That the act and conduct of the respondent has caused lot of physical as well as mental harassment to the complainant. The complainant also suffered huge financial loss as hard-earned money is withheld with the respondent. No possession of the said unit has been offered to the



complainant till date. Hence the respondent is liable to payback Rs 1,06,69,102/- to the complainant under section 18 of the Act of 2016 along with interest @18% per annum. The respondent is also liable to pay compensation for mental tension as well as physical harassment as he is guilty of deficiency of service and commitment.

12. That the status of the said unit as on 09.07.2018 is that in tower B-10, there are 16 floors in total to be constructed by the developer and RCC frame structure is complete upto 15th floor. The brick masonry work is complete up to 13th floor. The plumbing of the tower is yet to be started. No external plaster is there and is yet to be started. The other number of works which are yet to be started are – doors, windows, electrical wiring, painting – internal & external, kitchen, floor/wall tiles, POP, RCC water storage tank on terrace, car parking etc. etc. Besides it, the number of other major work are the community building, shopping complex, playground, water supply connection to be taken from HUDA, power backup genset. It shows that a very limited work has been done in the last 6 years by the respondent builder who is enjoying the hard-earned money of the complainant.
13. That the cause of action to file the instant complaint has occurred within the jurisdiction of this authority as the apartment which is the subject matter of this complaint is situated in Gurugram.

C. Relief sought by the complainant.



14. The complainant has sought following relief:

- (i) Direct the respondent to pay interest at the 18% on delayed possession since the due date of possession till the actual date of possession.

D. Reply by the respondent.

15. That at the outset, the respondent humbly submits that each and every averment and contention, as made/raised in the complaint, unless specifically admitted, be taken to have been categorically denied by respondent and may be read as travesty of facts.
16. That the complaint filed by the complainant before this authority, besides being misconceived and erroneous, is untenable in the eyes of law. The complainant has misdirected himself 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.
17. It would be pertinent to make reference to some of the provisions of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as '2016 Act') and the Haryana Real Estate (Regulation and Development) Rules, 2017 (hereinafter referred to as '2017 Haryana Rules'), 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.

18. Apparently, 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.

19. That in the present case, the complainant is seeking interest in the form of delay possession charges which, from reading of the provisions of the 2016 Act and 2017 Rules, would be liable for adjudication, if at all, by the adjudicating officer and not this authority. Thus, this authority cannot assume the powers of the adjudicating officer, especially keeping in view



the nature of reliefs sought by the complainant, as such, on this ground alone the complaint is liable to be rejected.

20. 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.
21. That at this stage, it would be just and proper to refer to rule 8 and rule 15 of the 2017 Haryana Real Estate Regulatory Authority rules, which may be relevant for the adjudication of the present lis. From the conjoint reading of the aforementioned sections/ rules, form and annexure 'A', it is evident that the 'agreement for sale', for the purposes of Haryana Real Estate Regulatory Authority rules, is the one as laid down in annexure 'A', which is required to be executed inter se the promoter and the allottee.
22. That it is a matter of record and rather a conceded position that no such agreement, as referred to under the provisions of 2016 Act and 2017 Haryana rules, has been executed between the respondent and the complainant. Rather, the agreement that has been referred to, for the purpose of getting the adjudication of the complaint, though without jurisdiction, is the flat buyer's agreement, executed much prior to coming into force of the Act of 2016.
23. The adjudication of the complaint for interest as provided under sections 12, 14, 18 and 19 of 2016 Act, if any, has to be in reference to the agreement for sale executed in terms of



2016 Act and 2017 Haryana rules and no other agreement. This submission of the respondent inter alia, finds support from reading of the provisions of 2016 Act as well as 2017 Haryana Rules, including the aforementioned submissions.

24. That the reliefs sought by the complainant appear to be on misconceived and erroneous basis. Hence, the complainant is estopped from raising the pleas, as raised in respect thereof, besides the said pleas being illegal, misconceived and erroneous.
25. That 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.
26. That the complainant has also misdirected in claiming interest on account of the 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. It has been categorically agreed between the parties that subject to the complainant having complied with all the terms and conditions of the flat buyer's agreement and not being in default under any of the provisions of the said agreement and having complied with all provisions, formalities, documentation etc., the developer proposed to handover the possession of the unit in question within a period of 36 months from the date of signing of the agreement. It had



been agreed that the respondent would also be entitled to a further grace period of 90 days after expiry of 36 months.

27. Further, it had been also agreed and accepted that in case of any default/delay in payment as per the schedule of payments as provided in annexure 1 to the flat buyer's agreement, the date of handing over of the possession shall be extended accordingly. Reference may be made to clause 8.1(b)(iii) of the flat buyer's agreement.

"8.1(b) (iii) The Flat Buyer(s) agrees and accepts that in case of any default/ delay in payment as per the Schedule of Payments as provided in Annexure I, the date of handing over of the possession shall be extended accordingly solely on Developer's discretion till the payment of all outstanding amounts to the satisfaction of the Developer."

28. In the present case, it is a matter of record that the complainant has not fulfilled his obligation and has not even paid the instalments on time that had fallen due. Accordingly, no relief much less as claimed can be granted to the complainant.
29. That the municipal corporation of Gurugram vide direction dated 14.10.2019 bearing memo no. MCG/ADMC/2019 imposed a complete ban from 11.10.2019 to 31.12.2019 on the construction activities in Gurugram. Further, Environment Pollution (Prevention and Control) Authority for NCR vide direction dated 01.11.2019 bearing EPCA-R/2019/L-53 imposed a complete ban from 01.11.2019 to 05.11.2019. Further, Hon'ble Supreme Court vide its order dated 04.11.2019 in the matter bearing W.P (C) No.



13029/1985 also banned the construction activities in Delhi NCR till further orders keeping in mind the damage caused to the environment due to construction and demolition activities. It is pertinent to mention here that the Hon'ble Supreme Court has only on 09.12.2019 partially uplifted the ban on construction activities in Delhi NCR between 6am to 6pm. The respondent had managed to maintain the minimum labour force constantly in the labour camp at the project site to complete the pending work at the earliest. Even in the year 2018, vide Notification No. EPCA- R/2018/L-91 and EPCA- R/2018/L-100 periodic ban on constructions were imposed. Such bans that have been imposed from time to time in the past years, not only had enormous adverse impact on the construction of infrastructure projects. The adverse effects of banning the construction activity disrupts the arrangement of plant & machinery, supply of raw material and manpower resources as it takes a long time to reorganize the labour force once the ban is lifted. Another factor to be considered is that most of the labour force in NCR hails from Eastern UP/Bihar so during such period wherein the ban remains in effect, the labour force usually heads back to their hometowns, since it becomes difficult for them to sustain here without any source of income. It is an admitted fact, consequently, on an average the construction ban of 1 day culminates into roughly 10 days of delay in overall construction activity. It is not disputed that due to the outbreak of Covid-19, the entire world went into lockdown



and all the construction activities were halted and no labourers were available. In fact, all the developers are still facing hardship because of acute shortage of labourers and even the HRERA, Gurugram has vide order dated 26.05.2020 declared the Covid 19 as a calamity under the force majeure clause and therefore there cannot be said to be any delay in delivering the possession by the respondents. That due to the ban imposed by the above said authorities there was no progress at site consequent to which respondent's manpower, plant and machinery and other resources which stood fully mobilized at site were rendered idle thereby casting upon the respondent heavy financial losses due to the stagnancy of resources. It is also pertinent to mention herein that such bans majorly affect the projects which are near completion like the project in question. Hence, even after putting days and nights in completing the project, the delay occurred due to such circumstances which were beyond the control of the respondent company.

30. That there is a huge outstanding amount to be paid by the allottees, which has resulted in alleged delay in handing over of possession to the allottees. It is further submitted that due to the money crunch created by the allottees by not making timely payments and in order to meet the gap for cost of completion of the project arisen on account of non-payment/default in payment of instalments by the allottees, the company approached **SWAMIH investment fund - I** (special window for completion of construction of affordable



and mid-income housing projects) which has been formed to complete construction of stalled, brownfield, RERA registered residential developments that are in the affordable housing / mid-income category, are networth positive and requires last mile funding to complete construction. It has a target corpus of Rs. 12,500 Crores with a green shoe option of Rs. 12,500 crores. The **SWAMIH** investment fund - I vide their letter dated 23.07.2020 has sanctioned an initial amount of Rs. 110 crores which may extend up to Rs. 166 crores if required to complete the project. The first trench had already been disbursed to the respondent company in the month of September 2020 and the same is being infused into the project for speedy construction. As per the condition of the fund sanctioned the entire amount of the fund shall be utilized only in completion of the project under the observation and monitoring of the agency deployed by the SWAMIH fund in the project. The primary objective of establishment of SWAMIH fund is to help the home buyers in getting their homes and is sponsored by the Secretary, Department of Economic Affairs, Ministry of Finance, Government of India on behalf of the Government of India. If any adverse relief is allowed by this authority, then the basic objective of the intervention of the Government of India shall be defeated.

31. 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 submitted that 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 further 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, etc. It is most respectfully submitted that the irregular and insufficient payment by the prospective buyers such as the complainant freezes the hands of developer / builder in proceeding towards timely completion of the project.

32. That status of the construction of the building in which the unit allotted to the complainant is located is near completion as the finishing work is underway. The respondent shall offer the possession of the unit to the complainant shortly subject to the payment of the remaining dues by the complainant.
33. Copies of all the relevant do have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submission made by the parties.

E. Jurisdiction of the authority



34. The respondent has raised an objection regarding jurisdiction of authority to entertain the present complaint. The authority observes 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, Haryana the jurisdiction of Haryana Real Estate Regulatory Authority, Gurugram shall be entire Gurugram district for all purposes. In the present case, the project in question is situated within the planning area of Gurugram district. Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

E. II Subject-matter jurisdiction

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

Section 11(4)(a)

Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

The provision of assured returns is part of the builder buyer's agreement, as per clause 15 of the BBA dated..... Accordingly, the promoter is responsible



for all obligations/responsibilities and functions including payment of assured returns as provided in Builder Buyer's Agreement.

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

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

F. Findings on the objections raised by the respondent.

F. I Maintainability of complaint

35. The respondent contended that the present complaint filed under section 31 of the Act is not maintainable as the respondent has not violated any provision of the Act.
36. The authority, in the succeeding paras of the order, has observed that the respondent is in contravention of the section 11(4)(a) read with proviso to section 18(1) of the Act by not handing over possession by the due date as per the agreement. Therefore, the complaint is maintainable.

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

37. Another contention of the respondent is that in the present case the flat buyer's agreement was executed much prior to the date when the Act came into force and as such section 18



of the Act cannot be made applicable to the present case. 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."

38. 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."

39. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the flat buyer's agreements have been executed in the manner that there is no scope left to the allottees 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 and are not in contravention of any other Act, rules, regulations made thereunder and are not unreasonable or exorbitant in nature.

G. Findings on the relief sought by the complainant.

G.I Delay possession charges.



Relief sought by the complainant: Direct the respondent to pay interest at 18% on delayed possession since the due date of possession till the actual date of possession.

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

"Section 18: - Return of amount and compensation

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

.....

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

41. Clause 8.1(a) of the flat buyer's agreement, provides for handing over possession and the same is reproduced below:

8.1 Time of handing over the Possession

(a) Subject to terms of this clause and subject to the Flat Buyer(s) having complied with all the terms and condition of this Agreement and not being in default under any if the provisions of this Agreement and complied with all the provisions, formalities, documentation etc., as prescribed by the Developer, the Developer proposes to handover the possession of the Flat within a period of thirty-six (36) months from the date of signing of this Agreement. The Flat Buyer(s) agrees and understands that the Developer shall be entitled to a grace period of 90 days, after the expiry of thirty-six (36) months for applying and obtaining the Occupation Certificate in respect of the group housing complex."

42. 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 and the complainant not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and 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 dotted lines.

43. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the apartment within a period of 36 months from the execution of flat buyer's agreement. The flat buyer's agreement was executed on 28.09.2013. Therefore, the due date of handing over possession comes out to be 28.09.2016. It is further provided in agreement that promoter shall be entitled to a grace period of 90 days for applying and obtaining the occupancy certificate etc. from



the competent authority. In the present case the respondent has neither completed the construction of the subject project nor has obtained the occupation certificate from the competent authority till date therefore he does not fulfil the criteria for grant of the grace period., As per the settled law one cannot be allowed to take advantage of his own wrongs. Accordingly, this grace period of 90 days cannot be allowed to the promoter.

44. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges at prescribed rate. 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.



45. The legislature in its wisdom in the subordinate legislation under 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.
46. 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., 22.10.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.
47. **Rate of interest to be paid by complainant for delay in making payments:** 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;"



48. 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.
49. On consideration of the documents available on record and submissions made by both the parties, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of 8.1(a) of the flat buyer's agreement executed between the parties on 28.09.2013, the possession of the subject unit was to be delivered within 36 months from the date of execution of the flat buyer's agreement. Therefore, the due date of handing over possession is 28.09.2016. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over possession is 28.09.2016. The occupation certificate has not been received by the respondent till date and the possession of the subject unit has not been offered to the complainant. Copies of the same have been placed on record. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the complainant as per the terms and conditions of the flat buyer's agreement dated 28.09.2013 executed between the parties. It is the failure on part of the promoter to fulfil its



obligations and responsibilities as per the flat buyer's agreement dated 28.09.2013 to hand over the possession within the stipulated period.

50. 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 has not been received by the respondent till date nor has offered possession to the complainant. Therefore, in the interest of natural justice, the complainant should be given 2 months' time from the date of offer of possession when the respondent offers it. 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., 28.09.2016 till offer of possession of the subject flat after obtaining occupation certificate from the competent authority plus two months or handing over of possession whichever is earlier as per the provisions of section 19(10) of the Act.
51. Accordingly, 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 respondent is established. As such



complainants are entitled to delayed possession charges at the prescribed rate of interest i.e., 9.30% p.a. for every month of delay on the amount paid by the complainant to the respondent from the due date of possession i.e., 28.09.2016 till the offer of possession of the subject flat after obtaining occupation certificate from the competent authority plus two months or handing over of possession whichever is earlier as per the provisions of section 18(1) of the Act read with rule 15 of the rules and section 19 (10) of the Act.

H. Directions of the authority

52. 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 from the due date of possession i.e., 28.09.2016 till the offer of possession of the subject flat after obtaining occupation certificate from the competent authority plus two months or handing over of possession whichever is earlier as per section 19 (10) of the Act.
 - ii. The arrears of such interest accrued from 28.09.2016 till the date of order by the authority shall be paid by the promoter to the allottee within a period of 90 days from date of this order and interest for every month of delay shall be paid by the promoter to the allottee



before 10th of the subsequent month as per rule 16(2) of the rules.

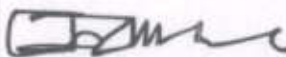
- iii. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
- iv. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is 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.
- v. The respondent shall not charge anything from the complainant which is not the part of the agreement. However, holding charges shall also not be charged by the promoter at any point of time even after being part of agreement as per law settled by the Hon'ble Supreme Court in civil appeal no. 3864-3889/2020 dated 14.12.2020.

53. Complaint stands disposed of.

54. File be consigned to registry.


(Samir Kumar)
Member


(Vijay Kumar Goyal)
Member


(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 22.10.2021

Judgement uploaded on 08.12.2021.