

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

Complaint no. : 3524 of 2020
First date of hearing : 18.12.2020
Date of decision : 21.09.2021

1. M Three M India Private Limited
Address:- M3M India, Office 8, M3M
Urbana, Sector-67, Gurugram
2. Manglam Multiplex Private Limited
Address: LGF,F-22, Sushant Shopping
Arcade, Sushant Lok, Phase-1, Gurugram

Complainants

Versus

1. Mr. Bhavya Hasija
2. Mrs. Rashi Ramani Hasija
Both R/o D0-901, Vigyan Vihar, Sector-
56, Plot no. 19, Opposite Police Station,
Gurugram-1220011

Respondents

CORAM:

Shri Samir Kumar
Shri V.K. Goyal

Member
Member

APPEARANCE

Ms. Shriya Takkar
Ms. Surbhi Tandon

Advocate for the complainants
Advocate for the respondents

ORDER

1. The present complaint dated 16.10.2020 has been filed by the complainants/promoters in Form CRA under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 19(6) (7) and (10) of the Act.

A. Project and unit related details

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

S.No.	Heads	Information
1.	Name and location of the project	M3M Golf Estate- M3M Merlin, Sector-67
2.	Nature of the project	Group housing complex
3.	Project Area	13.344 acres
4.	RERA registration status	Not Registered
5.	DTCP license no.	53 of 2011 dated 10.06.2011 valid upto 09.06.2021
6.	Name of licensee	Consolidate realtors Pvt. Ltd.
7.	Apartment/unit no.	MM TW-A10,/2102, Tower 5-A10, Level 21
8.	Unit area	3267 sq. ft
9.	Allotment letter	29.10.2015 (Page 51 of the complaint)
10.	Date of execution of apartment buyer's agreement	29.09.2018 (Page 65 of complaint)
11.	Payment plan	Subvention Plan (Page 33 of complaint)
12.	Total sales consideration	Rs. 3,35,01,629/-/- (As per statement of account, page 151 of complaint)
13.	Total amount paid by allottees	Rs.2,78,39,389/- (As per statement of account, page 151 of complaint)
14.	Due date of delivery of possession	<i>As per clause 17.1 the company shall notify the</i>

		<p><i>allottee in writing to assume possession of the apartment upon receipt of the total consideration and other charges/ amounts as per the payment plan opted by the allottee and execution of the requisite documents such as necessary indemnities, undertaking and other documentation as the company may prescribed in the notice of possession and on the completion of all such formalities and payments the conveyance deed shall be executed and registered and the allottee shall be handed over the possession of the apartment.</i></p>
15.	Date of offer of possession	27.02.2020 (Page 149 of complaint)
16.	Permission to use of the apartment	22.04.2019 (Page 139-143 of the complaint)
17.	Cancellation notice	19.05.2020 (Page 156 of complaint)
18.	OC received on	OC received dated 24.03.2017 (Page 30 of complaint)
19.	Date of tripartite agreement	24.01.2019 (Page 125 of complaint)

B. Facts of the complaint

3. The complainants submitted that after making independent enquiries and only after being fully satisfied with the status of the project the respondents applied for the allotment of a 'complete and ready to move in residential apartment' through Khomes Realtors in the project of complainants namely 'M3M Merlin' situated in sector 67 Gurugram. The respondents had also duly signed and understood the indicative terms and conditions of the allotment along with the application form dated 21.09.2018. All the terms and conditions including the cost of the apartment, size/super area of the apartment, timeline for possession etc. were clearly mentioned in the said application along with indicative terms and conditions. That earlier in October, 2015 the respondents had approached the complainants no.1 for allotment of an apartment in another project 'M3M Escala' developed by the company at sector 70 A, Gurugram. In view of the request made by the respondents to the complainants no. 1 company the respondents were allotted apartment bearing no. ME TW-02/0303 in M3M Escala vide allotment letter dated 29.10.2015.
4. That the apartment buyer's agreement was executed between the complainants and the respondents. It is pertinent to mention here that while executing the apartment buyer's agreement, it was agreed by the complainants and the respondents that they would be bound by the terms and conditions of the apartment buyer agreement as illustrated therein. That the complainants vide the demand letter dated

01.10.2018 raised the second demand that was due within 30 days of booking. Further the complainants also requested the original allottees to pay the previous balance to the tune of Rs.32,65,010/-. The same was payable on or before 20th October 2018. It is submitted that all the demands were raised as per the payment plan opted by the respondents.

5. That since the respondents/allottees failed to make the payments, the complainants issued reminder notice dated 05.12.2018 requesting the respondents to clear their outstanding dues. That thereafter the respondents requested the complainants for termination of the apartment allotted in M3M Escala and consequent adjustment of the amounts paid against the apartment in M3M Escala towards the amounts due for the apartment in M3M Merlin. As a goodwill gesture, the complainants agreed to the request of the respondents and cancelled the allotment of the apartment in M3M Escala and adjusted the amounts paid towards the sale consideration for the apartment in M3M Merlin. That the complainants suffered a loss to the tune of Rs. 4,90,549/- towards delayed interest on instalments due towards the unit in M3M Escala.
6. That thereafter Permission to Mortgage Letter dated 24.01.2019 was issued by the complainants to the State Bank of India thereby allowing the respondents to mortgage the apartment for availing Loan facility and a tripartite agreement dated 24.01.2019 was executed between the respondents, State Bank of India and the complainants. That

the respondents approached the complainants for the grant of permission to use the apartment and submitted an indemnity bond cum declaration cum undertaking executed on 22.04.2019 towards the same. Accordingly, the complainants as a benevolent act, granted the respondents, the permission to use the apartment on leave and license basis and to physically occupy the said apartment on a leave and license basis, vide the permission to use letter, which came into effect on May 03, 2019, and was valid till March 18, 2020, even though the entire sale consideration for the apartment had not been fully paid. It is submitted that the respondents vide the indemnity bond cum declaration cum undertaking had undertaken to pay the balance amount to the complainants in three equated instalments of 5% each and which shall be payable in 6th, 12th and 18th month from the date of booking of the said apartment.

7. That the complainants vide the demand letter dated 02.09.2019 raised the third demand that was due within 12 months from the date of booking. That since the respondents failed to make the payment the complainants issued a reminder letter dated 17.10.2019 and requested the respondents to clear their dues. Since even after issuance of reminder the respondents did not approach the complainants to clear their outstanding dues, the complainants were forced to send Pre-cancellation notice dated 11.11.2019 to the respondents. That since the respondents continuously failed to make the payments hence, the complainants were

constrained to send letter dated 07.12.2019 giving last and final opportunity to the respondents for remittance of the due amount. That the respondents approached the complainants No. 1 to book an apartment in another project of the complainants namely M3M Golf Estate in Sector 65 Gurugram and paid an amount of Rs.2,00,000/-. However, as the respondents were a chronic defaulter who was time and again transferring his booking from one project to another, and as the respondents were asking for a discounted price, the booking was not accepted and the amount of Rs. 2,00,000/- was returned to the respondents and duly acknowledged by them. The complainants vide letter dated 27.02.2020 sent the notice of possession to the allottees and also advised them to clear all dues and to take the possession of the apartment in question. Since the respondents failed to make timely payment, reminder letter dated 04.05.2020 was issued by complainants to the respondents thereby requesting them to clear their outstanding dues and take possession of the apartment. That despite sending repeated reminders the respondents failed to clear their dues and take over the possession, the complainants were constrained to issue a pre-cancellation letter dated 19.05.2020.

8. That the respondents are continuing to stay in the apartment and is in possession of the same, despite not having made the payment as per the notice of possession and without paying any rent. It is stated that the permission to use the apartment granted to the respondents expired on 18th March 2020. Thus,

an amount of Rs. 65,000/-per month towards rent calculated at market rate is payable by the respondents from March 2020 and till date a total amount of approximately Rs. 3,25,000/- is payable by the respondents towards rent.

9. That in a desperate attempt to wriggle out of their contractual obligations the respondents filed a police complaint dated 01.07.2020 against the complainants and its officials in P.S. Sector 53, Gurugram. The response to the said police complaint was duly filed by the complainants. That in the present case, possession of the apartment has already been offered by the complainant No. 1 company. Thus, respondents are liable to pay the outstanding dues along with the interest on the payments due. It is stated that the respondents have defaulted in taking timely possession of the apartment are thus also liable to pay holding charges. It is submitted that the complainants in the present case are suffering recurring losses at the hands of the respondents as permission given to them to use the apartment in question expired on 18.03.2020 after which they are liable to pay the rent/occupation fee. The market rent is approx. 65,000/- per month hence taking into consideration the rent for this month as well, the occupation charges due are approx. Rs.3,25,000/-.
10. That the respondents have breached their contractual obligations and have also breached the obligation cast upon him in terms of section 19(10) of the Act, whereby the respondents were under obligation to take the possession within the prescribed period upon receipt of the notice of

offer of possession. That the respondents however have failed to clear their dues and take the physical possession of the apartment and also complete all the formalities for the due conveyance, transfer and grant of rights, title and interest in the said apartment in their favour.

11. That the Hon'ble High Court of Bombay in the matter titled **Neelkamal Realtors Suburban Pvt. Ltd. and Anr vs. Union of India** has already held that RERA strikes the balance between the promoter and allottees, the relevant paragraph is reproduced herein below:

In the case of Cellular Operators Association of India and ors. vs. Telecom Regulatory Authority of India and ors. (Supra), the Supreme Court held that there cannot be any dispute in respect of settled principles governing provisions of Articles 14, 19(1)(g) read with Article 19(6). But a proper balance between the freedom guaranteed and the social control permitted by Article 19(6) must be struck in all cases.

C. Relief sought by the complainants

12. The complainants have filed the present complaint for seeking following reliefs:
- (i) The respondents may kindly be directed to take the possession of the said apartment which is ready and in the state of being occupied after the completion of the requisite formalities by the respondents including payment of all the outstanding dues.
 - (ii) The respondents also be directed to pay the balance consideration and delayed interest as per section 19 of the Real Estate (Regulation and Development) Act, 2016.

(iii) The respondents also be directed to pay holding charges as per the terms and conditions of the apartment buyer's agreement.

(iv) The respondents also be directed to pay the outstanding maintenance dues of the maintenance agency.

13. On the date of hearing, the authority explained to the respondents about the contravention as alleged to have been committed in relation to section 19 (6) (7) of the Act to plead guilty or not to plead guilty.

D. Reply of the respondents

14. The respondents contested the complaint on the following grounds:-

- i. It is submitted that the complaint is hit by section 3 of the act and liable to be dismissed out rightly with heavy cost. That the complaint is counter blast/ to cover-up act of the legal notice dated 04.06.2020 so sent by the respondents to the complainants and their erring officials for commission of cheating with the respondents. That in the month of September 2018, complainant no. 1 and 2 in order to generate more money, offered apartment in M3M Merlin to the respondents having area 3267 sq. feet by offering adjustment of payment already made by respondents in M3M Escala. The said offer was accepted, due to persuasion done by complainants 1 and 2 vide letter dated 11.12.2018 and further personal persuasions. That complainants with all their glowing stories asked respondents to pay the booking amount for

another project "MERLIN" and the complainants accordingly made payment of Rs. 1,00,000.00 vide receipt No. 64885 dated 20.09.2018.

- ii. That respondents vide email dated 25.09.2018 replied to email of complainant Mr. Atul Yadav, client's Manager Sales, stating about receiving of RTGS for unit no. A10/2102 in M3M Merlin, for providing overall cost of the unit. However, respondents were not informed about overall prices of the apartment at time of booking in M3M Merlin. That the complainants issued allotment letter dated 25.09.2018 in name of respondents.
- iii. That buyer agreement was executed between the respondents and complainant no. 1 & 2 vide buyer agreement dated 29.09.2018. That respondents were allotted with unit no. MM-TW-A10/2102 having unit area as 3267 sq. feet, which was sold at the basic price of Rs. 10150.00 per square feet excluding IFMS and possession charges @ Rs. 100/- and Rs. 50/- per square feet respectively.
- iv. That it is imperative to mention that as per para no. 40.4 of the buyer's agreement dated 29.09.2020 has entrusted with authority to the respondents/ buyers to anytime surrender the apartment. That clause 40.4 of the buyer's agreement is reproduced as under:

"In the event, the Allottees desire to surrender the apartment, for any reason whatsoever at any point of time, the company at its sole discretion, may cancel/terminate the agreement and after forfeiting the earnest money, may refund the remaining amount to

the allottees without interest or compensation and after deduction of any other charges and dues as may be due and payable to the company including any interest accrued on delayed payment and any brokerage/margin/fee/commission paid by the company to a channel partner (in case for the application of the allotment having been made through a channel partner) and/or late payment charges, if any and tax incidence, if any, from the sale proceeds of the further sale/ re-sale of the apartment."

Further clause 42.1 of the Agreement which reads as under:

"if any provision or part thereof of this agreement is determined to be void or unenforceable under the applicable law, such provision or such part thereof shall be deemed amended or deleted in so far as reasonably consistent with the purpose of this Agreement and to the extent necessary to conform to the applicable law and the remaining unaffected part of such provision and all other provisions of the agreement shall remain valid and enforceable as applicable at the time of the execution of this agreement."

- v. That upon the issuance of letter of permission to mortgage dated 24.01.2019 by the complainants the tripartite agreement was signed between the complainants, respondents and State Bank of India according to the terms and conditions laid down by the consent of all the parties. That respondents on 12.02.2019 paid a sum of Rs. 67,00,000.00 and same was acknowledged by complainants vide receipt no. 67726. Further, a sum of Rs. 32,02,017.00 was credited into account of complainants from the State Bank of India and stand acknowledged vide receipt no. 67731 dated 12.02.2019.
- vi. That the respondents, as per the instructions of the complainants, surrendered the deposits made with

another project M3M ESCLA and sought adjustment of Rs. 28,37,372.00 vide receipt no. 68358 dated 15.03.2019 and same was adjusted by the complainants. That payment of Rs. 1,50,00,000.00 was made by the complainants on 12.02.2019 and same was acknowledge vide receipt No. 68358 issued by complainants. That respondents being the bonafide consumer of the State Bank of India made timely payment to the loan instalments and already made a total sum of Rs. 19,63,172.00 to the State Bank of India on account of loan avail from purchase of property from the complainants. This is resulted in reduction in loan amount and at same direct investment of the respondents had gone upon Rs. 19,63,172.00/-.

- vii. That the complainants till date have made total payment of Rs. 2,78,39,389/- out of total sale price consideration of Rs. 3,36,50,100/- to the respondents along with that the complainants have paid interest of Rs. 19,63,172.00 to the State Bank of India. That around the month of November 2019 respondents were again approached by representatives of complainant no. 1 and 2 whereby complainants persuaded respondents to avail subvention scheme by shifting the existing investment from M3M Merlin project to M3M Golf Estate, a premium project, of the complainants, and explained with so much persuasion that respondents agreed to shift their investment so made in M3M Merlin project to the other project of the

complainants in M3M golf estate, of complainants, for which respondents issued a booking cheque of Rs. 2,00,000/- which stand even encashed by the complainants. That the consent of complainants a sale of unit in M3M Golf Estate a Premium Project for booking amount @ Rs. 12,950.00 per sq. feet under retain or refuse offer and also taken post-dated cheques from the respondents, thus clearing the cheques till January 2020.

viii. That to the surprise of the respondents, complainants took a summersault and cancelled the offer by taking step back without explanation any reason for such an act after encashment of the cheque of Rs. 2,00,000.00 on 11.12.2019. That upon enquiry so made, it came to the knowledge of the respondents that some of the officials of complainants have committed cheating, for the complainants, with the respondents at the time of entering into buyer agreement dated 29.09.2018 whereby the unit of M3M Merlin was sold at the basic price of Rs. 10,150.00 per square feet whereas the actual cost of the unit was of Rs. 8,394/- per sq. feet, resultantly, respondents cannot be offered of unit in M3M Golf Estate, a Premium Project, at a price of Rs. 12,950.00 per square feet. It was big shock to the respondents that around Rs. 57,36,800.00 has been cheated from them by misleading them and by showing wrong projections and figures of prices of the unit on forged and fabricated documents.

- ix. That as the complainants persuaded and have entered into buyer agreement with the respondents under the garb of fraudulent and misleading information regarding the prices but the respondents do not possess the proofs regarding the same. That in order to prove the fraud so committed and to expose complainants the respondent's collected information of the sales made by complainants of the relevant period at the correct rate of sale price. To the utter shock to the respondents the sales made by the complainants were at Rs. 8,394/- per sq. feet per contra to the sales made to the respondents @ Rs. 10,150 per sq. ft excluding charges related to their project M3M Merlin. The said crucial facts shattered Respondents that they are being cheated by the complainants in connivance with each other.
- x. That the complainants and their erring officials were served with legal notice dated 04.06.2020 and reply was given by the complainants through reply dated 15.07.2020. the respondents served with the rejoinder to reply to legal notice through rejoinder dated 10.08.2020 to the complainants. The response of the complainants stands proved that they expressly admitted to the offence committed with the respondents and want to take shelter of agreement so entered, as binding.
- xi. That complainants have sold their M3M project's same category units at different prices to the prospective buyers which makes it clear that buyer agreement dated

29.09.2018 is not only a case of mis-selling but also a case of fraud upon the respondents by greasing their hands in connivance with their employees and respondents cannot be asked to pay excessive payment of Rs. 57,36,800/- without any reason and justification, under the garb of agreement so entered with their bonafide belief of correct selling done by the complainants. That the respondents have also verified that no escalation of prices of overall unit were done by complainants from any competent authority and also not disclosed on their website. That as the agreement dated 24.01.2019 is void as the sale consideration are fraudulent and has caused injury to the respondents. That respondents were never given accurate picture about correct price of property on which same has been sold to respondents by the complainants despite the same they were bound to sell the project's similar unit at same rate as per specified price fixed. That the mis selling of the project's similar unit at different prices by the complainants are clear case of cheating with the respondents because such act itself falls within the parameters of unfair trade practice and misused of monopolistic status in the market related to product/project/unit and its misused thereof.

xii. That the respondents believed the price claimed by the complainants to be correct price and only correct price available in the market under sale related to the project's unit in question at the time of sale, but the said

project/unit having selling value @ Rs. 8,394/- per square feet, and whereas complainants have charged from respondents escalated prices for selling of flat/ unit thus following unfair trade practice by charging additional amount of Rs. 1,756 per sq. feet of unit of area having 3267 square feet thereby causing loss of Rs. 57,36,800.00 to respondents which amounts to cheating and for doing the same complainants by disclosing the same through forged documents to respondents, by giving impression to respondents that the unit is having sale value @ Rs. 10,150.00 only and not Rs. 8,394.00 per sq. feet and sold to other customers at the same price.

- xiii. That the respondents on 28.08.2020 received an eviction notice dated 26.08.2020 on his email wherein the para 8 of the notice *"... even though the company has offered the possession of apartment vide Notice of Possession, you have failed to take the payment and violated the terms of the Buyer's Agreement. You have in addition to violating the terms of Buyer's Agreement also violated the terms of Indemnity Bond-Cum-Declaration-Cum-Understanding dated 22 April 2019 and Permission to Use."*
- xiv. That the said notice was not required under the facts and circumstances more so the same was targeted as notice of excess payment has been served upon the complainant's way back in June 2020. So, in order to avoid addressing to the grievances of the respondents the complainants prefer to carry ahead with arm twisting for illegal benefit.
- xv. That the respondents vide reply dated 29.08.2020 had mentioned *"...It is evident that as M3M is trapped and*

exposed, therefore they are avoiding police confrontation dated 24th Aug and 28th Aug (asked by Economic offence Wing Commissionerate of Police Gurugram to Mr. Ram Prakash Kona, M3M Customer Relation and M3M). This is further evident as call from SBI Bank (Ms Vaishali Singh) on loan recovery against pricing fraud and cheating on above M3M Merlin unit was avoided by Mr. Ram Prakash Kona, M3M Customer Relation. While M3M has enjoyed wrongful gains by cheating Complainants/ allottees (Bhavya Hasija), please return cheated amount of **Rs. 2,78,39,289** on immediate basis along with additional damages as per Notice dated 04.06.2020. The key received on provisional allotment of the above unit, which is vacant, can be returned once the above amount is received towards my hard-earned money and loan on this unit by SBI." It is clear from the above email reply that the respondents have no intention to retain the unit in question and has agreed to return the keys for the same after the cheated amount is being refunded.

15. 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

16. 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 the allottees as per section 19(6), (7) and (10) of the Act 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 respondents: -**17. Objection regarding refund of entire amount**

The respondents are contesting that the complainants/promoters are liable for refund amount of Rs. 2,78,39,289/- paid by the respondents along with Rs. 57,36,800/- so charged by the complainants upon disclosure of fake and illegal sale base price to respondents which

amounts to cheating and unfair trade practice, by providing forged documents to respondents by giving impression to respondents that the unit is having sale value Rs. 10,150/- and not Rs. 8,394/- per sq. ft. and sold to other customers at Rs. 8,394/- per sq. ft. with interest at such rate as may be prescribed. The authority is of view that the complainants and the respondents entered into an agreement of subvention plan and all the EMIs have been paid by them and the possession of the unit was to be taken by the respondents on 19.05.2020 which has already expired. The payment plan is crystal clear that the total amount of Rs. 3,36,50,100/- was to be paid in four installments. Now, the respondents are residing in the flat in an unauthorized manner which has been denied by the counsel for the respondents standing in the court and it has been alleged by the complainants that they have given only Rs. 2,52,00,000/- against a total sale consideration of Rs. 3,36,50,000/-. Builder buyers' agreement was signed inter-se both the parties on 29.09.2018 and as per the statement of account total cost consideration comes to Rs. 3,35,01,629/- out of which respondents have paid an amount of Rs. 2,78,39,389/-. Now the complainants are raising an issue w.r.t refund of entire amount as per the provisions of section 12 after signing of builder buyer's agreement. Once BBA has been signed the provisions of section 12 cannot invoked at this belated stage as the buyer is fully liable as per section 19 (6) of the Act which is re-produced as under:-

"(6) Every allottee, who has entered into an agreement for sale to take an apartment, plot or building as the

case may be, under section 13, shall be responsible to make necessary payments in the manner and within the time as specified in the said agreement for sale and shall pay at the proper time and place, the share of the registration charges, municipal taxes, water and electricity charges, maintenance charges, ground rent, and other charges, if any.

18. Whether the respondents/allottees are bound to make the up-to-date payment along with interest to the complainants/promoters and accept physical possession of the flats?

The authority observed that as per section 19(6) every allottees who has entered into an agreement or sale to take an apartment, plot or building as the case may be under section 19 shall be responsible to make necessary payments in the manner and within the time as specified in the said agreement for sale and shall pay at the proper time and place the share of the registration charges, municipal taxes, water and electricity charges, ground rent, and other charges, if any. Section 19 of the Act deals with rights and duties of allottees. Sub-section (6) and sub-section (7) of section 19 read as follows:

"(6) Every allottees, who has entered into an agreement for sale to take an apartment, plot or building as the case may be, under section 13, shall be responsible to make necessary payments in the manner and within the time as specified in the said agreement for sale and shall pay at the proper time and place, the share of the registration charges, municipal taxes, water and electricity charges, maintenance charges, ground rent, and other charges, if any.

(7) The allottees shall be liable to pay interest, at such rate as may be prescribed, for any delay in payment towards any amount or charges to be paid under sub-section (6)".

19. Thus, these sub-sections of section 19 cast a duty upon the allottees to make the timely payment of the instalments and in case she makes a delay to pay the interest at the prescribed rate. The sub-sections are couched in a mandatory form and the allottees are bound to make the payments of the instalments along with interest, if any, as per the time schedule given in the flat buyer agreement/agreement for sale. As per clauses 9 of the builder buyer agreements the allottees timely perform its obligation under this agreement. Clause 9 is reproduced as hereunder: -

9. TIME IS THE ESSENCE

9.1 Notwithstanding anything contained in this agreement, timely performance by the allottees of all its obligation under this agreement, including without limitation its obligation to make timely payment of every instalment of the total consideration in accordance with the payment plan along with payment of other charges such as applicable stamp duty, registration fee, IFMS, and other charges including for Gas Supply Pipeline and FTTH (Free to the home) Cable etc. any deposits, as stipulated under this agreement and/or that may otherwise be payable on or before the due date and/or as and when demanded by the company, as the case may be, and also to discharge all other obligations under this agreement shall be the essence of this agreement.

20. Admittedly, the allottees have not adhered to the payment schedule provided on page 110 of the complaint and has made continuous defaults. The complainants have already received occupation certificate on 24.03.2017 and issued notice of offer of possession which was dispatched on 27.02.2020 upon the respondents. The complainants vide the said notice of offer of

possession advised and requested the respondents to clear the outstanding dues and take the possession of the apartment.

G. Finding on the relief sought by the complainants

21. Relief sought by the complainants:

- (i) Direct the respondents to take the possession of the said apartment which is ready and in the state of being occupied after the completion of the requisite formalities by the respondents including payment of all the outstanding dues.
- (ii) The respondents also be directed to pay the balance consideration and delayed interest as per section 19 of the Real Estate (Regulation and Development) Act, 2016.
- (iii) The respondents also be directed to pay holding charges as per the terms and conditions of the apartment buyer's agreement.

22. In the present complaint, the complainants/promoters intend to give the possession of the apartment which is ready and as per section 19(10) the Act, allottees shall take physical possession of the apartment, plot, building as the case may be, within a period of two months of the occupancy certificate issued for the said apartment, plot or building as the case may be. Section 19(10) proviso read as under.

"Section 19: - Right and duties of allottees.

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.....
19(10) states that every allottee shall take physical possession of the apartment, plot or building as the case may be within a period of two months of the occupancy

*certificate issued for the said apartment,
plot or building, as the case may be.*

The respondents/allottees have failed to abide by the terms of agreement by not making the payments in timely manner and take the possession of the unit in question as per the terms and conditions of the apartment buyer's agreement and the payment plan opted by the respondents/allottees. Further cause of action also arose when despite repeated follow-ups by the complainants and the complainants having performed their contractual obligations, the respondents/allottees withheld their contractual obligation. The respondents/allottees shall make the requisite payment as per the provision of section 19(6) of the Act and as per section 19(7) to pay the interest at such rate as may be prescribed for any delay in payments towards any amount or charges to be paid under sub-section (6). Proviso to section 19(6) and 19(7) reads as under.

"Section 19: - Right and duties of allottees. -

*19(6) states that every allottees, who has entered into an agreement for sale to take an apartment, plot or building as the case may be, under section 13[1], shall be responsible to make necessary payments in the manner and within the time as specified in the said agreement for sale and shall pay at the proper time and place, the share of the registration charges, municipal taxes, water and electricity charges, **maintenance charges**, ground rent, and other charges, if any.*

19(7) states that the allottees shall be liable to pay interest, at such rate as may be prescribed, for any delay in payment towards any amount or charges to be paid under sub-section (6).

23. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottees by the promoters, in default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottees, in case of default. The relevant section is reproduced below:

"(za) "interest" means the rates of interest payable by the promoter or the allottees, as the case may be.

Explanation. — For the purpose of this clause—

- (i) the rate of interest chargeable from the allottees by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottees, in case of default;*
- (ii) the interest payable by the promoter to the allottees 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 allottees to the promoter shall be from the date the allottees defaults in payment to the promoter till the date it is paid;"*

24. Therefore, interest on the delay payments from the allottees shall be charged at the prescribed rate i.e. 9.30% by promoter. 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., 21.09.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

H. Holding Charges

25. The term holding charges or also synonymously referred to as non-occupancy charges become payable or applicable to be

paid if the possession has been offered by the builder to the owner/allottees and physical possession of the unit not taken over by allottees, but 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 allottees have 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. The next thing that pops up for consideration is as to what are then maintenance charges being taken by the developer/RWA. Maintenance charges are the charges, either annually or monthly, applicable to be paid by the owners/allottees once he/she has taken possession of the property/unit. These charges are paid for the general maintenance and upkeep of the building and/or society. A person purchases a flat for his own residential usage/or for letting it out further as per his own discretion and requirement. She is bound as per law to pay the maintenance charges for her flat/unit whether she is personally residing or even if the flat is kept locked and being unused. The member has to pay the full maintenance charges without any concessions and in most cases, pays advance maintenance charges as well. Maintenance charges are applicable right from the time possession of a flat/unit is taken over by any prospective buyers/allottees. However, payment of maintenance charges is carried out on a monthly basis for the upkeep of the entire building and project. Therefore, simply understood, the flat closed/locked/vacant/not occupied for

any period is equal to self-occupied, which is further equal to regular full maintenance charges and non-occupancy charges/holding charges should not be levied.

26. The Hon'ble NCDRC in its order dated 03.01.2020 in case titled as **Capital Greens Flat Buyer Association and Ors. Vs. 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."

(Emphasis supplied)

27. The said judgment of Hon'ble 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 Hon'ble NCDRC (supra). The authority earlier, in view of the provisions of the rules in a lot of complaints decided in favour of promoters that holding charges are payable by the allottees. However, in the light of the recent judgement of the Hon'ble

NCDRC and Hon'ble Apex Court (supra), the authority concurring with the view taken therein decides that a developer/ promoter/ builder cannot levy holding charges on a homebuyers/ allottees as it does not suffer any loss on account of the allottees taking possession at a later date even due to an ongoing court case.

28. 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 allottees 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.
29. On consideration of the documents available on record and submissions made by both the parties regarding contravention of provisions of the Act, the authority is satisfied that the respondents/allottees are in contravention of the section 19(6), 19(7) and 19(10) of the Act by not making the payment on time and not taking the possession as per the agreement. By virtue of clause 17.1 of the agreement executed between both the parties on 29.09.2018 the possession of the subject apartment was to be delivered as the company shall notify the allottee in writing to assume possession of the apartment upon receipt of the total consideration and other charges/amounts as per the payment plan opted by the


allottees and execution of the requisite documents such as necessary indemnities, undertaking and other documentation as the company may prescribed in the notice of possession and on the completion of all such formalities and payments the conveyance deed shall be executed and registered and the allottees shall be handed over the possession of the apartment. Accordingly, it is the failure of the allottees/respondents to fulfil their obligations, responsibilities as per the buyer's agreement dated 29.09.2018 to take the possession within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 19(6), 19(7) and 19(10) of the Act on the part of the respondents are established.

I. Directions of the authority:-

30. 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) of the Act:

- i. The respondents/allottees shall make the requisite payments and take the possession of the subject apartment as per the provisions of section 19(6), (7) and (10) of the Act, within a period of 30 days otherwise the promoter may forfeit the amount as per the provisions of builder buyers' agreement, Act and regulations of the Real Estate Regulatory authority in this context.

- ii. Interest on the delay payments from the respondents shall be charged at the prescribed rate of interest @9.30% p.a. by the promoter.
 - iii. The complainants/promoters shall not charge anything from the respondents/allottees which is not the part of the agreement. However, holding charges shall not be charged by the promoters at any point of time even after being part of agreement as per law settled by hon'ble Supreme Court in civil appeal no. 3864-3889/2020 decided on 14.12.2020.
31. Complaint stands disposed of.
 32. File be consigned to registry.


(Samir Kumar)
Member


(V.K. Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Date: 21.09.2021

Judgement uploaded on 21.12.2021