BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**:**	**1071 of 2021**
First date of hearing	**:**	**15.04.2021**
Date of decision	**:**	**28.09.2021**

1. Vinod Kumar
2. Rajender Parkash Chandna
Both RR/o: - H.no: 389/9 & 114/9 Shivpuri Gurugram 122001 **Complainants**

Versus

M/s Silverglades Infrastructure Pvt. Ltd,
Regd. office: C-8/1A, Vasant Vihar, New Delhi-110057 **Respondent**

CORAM:
Shri Samir Kumar **Member**
Shri V.K. Goyal **Member**

APPEARANCE:
Mr. Sukhbir Yadav Advocate for the complainants
Mr. Suresh Rohilla & Shri Ashwariya Sinha Advocates for the respondent

EXPARTE ORDER

1. The present complaint dated 01.03.2021 has been filed by the complainants/allottees 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 11(4)(a) of the Act wherein it is inter alia prescribed that the

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promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the rules and regulations made thereunder to the allottees as per the agreement for sale executed inter se.

A. Project and unit related details

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

S. No.	Heads	Information
1.	Name and location of the project	The Merchant Plaza, Sector 88, Gurugram.
2.	Project area	2.75625 acres
3.	Nature of the project	Commercial complex
4.	DTCP license no.	1 of 2013 dated 07.01.2013
	Valid up to	06.01.2023
	Name of licensee	Magnitude Pvt. Ltd.
5.	Building plans approved on	**30.05.2013**
6.	Firefighting approval granted on	**26.09.2013**
7.	Environmental clearance dated	**28.02.2014**
8.	Excavation approval granted on	**04.04.2014**
9.	Consent to Establish	**16.06.2014**
10.	RERA registered/ not registered	**Registered 340 of 2017 dated 27.10.2017**
	RERA registration valid up to	**20.12.2020**
11.	Approval of electrification plan granted on	**16.01.2020**

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12.	Date of **occupation certificate**	**11.02.2020** [Page 78 of complaint]
13.	Allotment letter	N/A
14.	Date of execution of apartment buyer agreement	**08.05.2015** [Page 39 of complaint]
15.	Unit no. as per apartment buyer agreement	GF-1, ground floor [Page 45 of complaint]
16.	Unit measuring	725.08 sq. ft
17.	Payment plan	Construction linked payment plan [Page 69 of complaint]
18.	Total consideration as per payment plan	Rs. 61,26,713/- [Page 69 of the complaint]
19.	Total amount paid	Rs. 55,87,704/- [Page 84 of complaint]
20.	Due date of delivery of possession (As per clause 11.1 of the buyer's agreement: within a period of 4 years from the date of approval of the building plans (i.e. 30.05.2013) for the project or within such other timelines as may be directed by the competent authority & further entitled to a grace period of a maximum of 180 days for issuing the possession notice)	30.05.2017 Grace period not allowed
21.	Date of offer of possession to the complainants	**17.02.2020** [Page 80 of complaint]

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22.	Delay in handing over possession till date of offer of possession+ 2 months i.e. 17.04.2020	2 years 10 months 18 days

B. Facts of the complaint

3. Being impressed by presentation and assurances given by the respondent, the complainants purchased one shop admeasuring 725.08 sq. ft. bearing shop no. GF – 01 in the project, being developed by the respondent paid Rs.8,00,000/- towards the booking amount and signed a pre-printed application form. The shop was purchased under the construction linked plan for a total sale consideration of Rs. 61,26,713/-.

4. The complainants submitted that on 08.05.2015, a pre-printed, arbitrary, one-sided, and ex-facie apartment buyer agreement was executed inter-se him and respondent. As per clause no. 11.1 of apartment buyer agreement, respondent has agreed to give possession of the shop "within a period of 4 years from the date of approval of the building plans for the project or within such other timelines as may be directed by the competent authority (commitment period). It was further agreed that even after the expiry of the commitment period, the company shall be further entitled to a grace period of a maximum of 180 days for issuing the possession notice (grace period). As per recital F of apartment buyer agreement, "The Chief Town Planner-cum-Chairman, Building Plan Approval Committee, Town and Country Planning Department, Haryana has also approved the building plans for the project vide its approval memo no. ZP-867/SD(BS)/2013/41292 dated 30.05.2013. Therefore,

the due date of possession was 30.05.2017 (30.11.2017 with grace period).

5. On 21.05.2019, the respondent issued a letter for permission for fit outs to the complainants and demanded Rs. 8,13,774/- On 11.02.2020, the respondent received occupation certificate from Town & Country Planning Department for ground floor to 2nd floor, 4th floor (Part), 5th floor (Part), and 6th floor to 11th floor, vide memo No. ZP-867/AD(RA)/2020/3936 dated 11.02.2020. The said OC has conditions i.e. "that you shall be fully responsible for the supply of water, disposal of sewerage and storm water of your colony till these services are made available by HSVP/State Government as per their scheme. It is pertinent to mention here that the project did not have adequate provision of water supply and disposal of sewerage and storm water etc. Moreover, there is no supply of electricity in the project from DHBVNL. It is again pertinent to mention here that there is no OC for the 3rd floor and part area of the 4th and 5th floor.

6. The complainants have submitted that on 19.03.2020, the respondent issued a letter for taking over of possession to the complainants and state that "please not that you would be liable for paying holding charges, maintenance charges and ongoing interest on delayed payments that is accruing on account of non-payment as per terms and conditions of the "Buyer Agreement". It is pertinent to mention here that the project is yet not ready for possession and the proposed amenities are yet to be constructed. Therefore, the offer of possession is not tenable in the eyes of law. Thereafter, the complainants

continue to pay the demands raised by the respondent and have paid Rs. 55,87,704/- i.e. more than 91% of the total cost of the shop.

7. The complainants have submitted that on 15.02.2021, he sent a grievance email to the respondent alleging for the delay and asked to send a copy of building plans, sanction letter, revised scheduled date of possession and also asked to send the calculation sheet of delay penalty. On 09.02.2021, the complainants visited the project site and found that the civil, mechanical, electrical & plumbing work of the project was not completed. Moreover, the club was not constructed, and the swimming pool and other amenities were not fit for use. It is pertinent to mention here that the total carpet area of the shop is 360 sq.ft. which is 49% of the total area. Since May 2017, the complainants have been regularly visiting the office of respondent as well as the construction site and making efforts to get the possession of allotted shop, but all in vain. The complainants have never been able to understand/know the actual status of construction. The towers seem to be built-up, but there was no progress observed on finishing and landscaping work.

8. The complainants have submitted that the main grievance of filing the present complaint is that despite of paying more than 91% of the actual amount of shop and ready and willing to pay the remaining amount (if any), the respondent has failed to deliver the possession as per specification and amenities shown in brochure and apartment buyer agreement. The work on other amenities, like external, internal MEP (services) are yet not complete. Even after more than 8 years

from the date of booking, the construction of towers is not complete, and it clearly shows the negligence on the part of the builder. As per project site conditions, it seems that the project in question will take another couple of years for the construction to be completed in all respects, subject to the willingness of respondent to complete the project.

9. The complainants have submitted that the respondent has indulged in unfair trade practices and breach of contract and deficiency in the services. It is prima facie clear on the part of the respondent which makes it liable to answer this hon'ble authority.

10. The complainants are an aggrieved person and is filing the present complaint under section 31 with the authority for violation/ contravention of provisions of this Act. The complainants have submitted that as per section 11 (4) of the Act, the promoter is under obligation towards allottees as per the agreement for sale. That the complainants does not want to withdraw from the project. That as per proviso to section 18 of the Act, where an allottees does not intend to withdraw from the project, the promoter is liable to pay to the allottees, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed. The promoter has not fulfilled his obligation therefore as per obligations on the promoter under section 11(4), 12, and 18, the promoter(s) obligated to pay delayed possession interest to the allottees. The present complaint is not for seeking compensation and the complainants reserves his right to file complaint before adjudicating officer for compensation.

C. Relief sought by the complainants

11. The complainants have sought following relief(s):

    i. Direct the respondent to handover the possession with all amenities.

    ii. Direct the respondent to pay interest at the prescribed rate for every month of a delay from the due date of possession till the handing over the possession.

    iii. Direct the respondent to provide area calculation (carpet area, loading and super area).

    iv. Direct the respondent to comply with the conditions of OC

    v. Direct the respondent to rescind the offer of possession dated 17.02.2020.

    vi. Direct the respondent to install lifts & escalators.

12. Notice to the promoter/respondent through speed post and through e-mail address (cs@silverglades.com) was sent; the delivery report of which shows that delivery was completed. Despite service of notice, the promoter/respondent has failed to file a reply within stipulated time period. However, the advocates have marked attendance on 06.08.2021 and 28.09.2021. This is clear evidence that the service was completed. Despite this the respondent as not chosen to file any reply.

13. Copies of all the relevant documents have been files 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 submissions made by the parties.

D. Jurisdiction of the authority

14. The respondent has raised an objection with regard to jurisdiction of the authority for entertaining the present complaint and the said plea of the respondent stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

D.I Territorial jurisdiction

15. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana 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, and therefore this authority has complete territorial jurisdiction to deal with the present complaint.

D.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;

Provided that the responsibility of the promoter, with respect to the structural defect or any other defect for such period as is referred

to in sub-section (3) of section 14, shall continue even after the conveyance deed of all the apartments, plot or buildings, as the case may be, to the allottees are executed.

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 of 2016 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.

E. Findings on the relief sought by the complainants

E.I Delay possession charges

16. Relief sought by the complainants: Direct the respondent to pay interest at prescribed rate for every month of delay from the due date of possession till the handing over of possession.

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

18. The clause 11.1 of the apartment buyer agreement (in short, agreement) provides the time period of handing over of possession and is reproduced below:

"11.1 Subject to the terms hereof and to the Buyer having complied with all the terms and conditions of this Agreement, the Company proposes to hand over possession of the Apartment within a period of 4 (four) years from the date of approval of the Building Plans for the Project or other such approvals required, whichever is later to commence construction of the project or within such other time lines as may be directed by the Competent Authority ("Commitment Period"). The Buyer further agrees that even after expiry of the Commitment Period, the Company shall be further entitled to a grace period of a maximum of 180 days for issuing the Possession Notice ("Grace Period")."

19. At the outset, it is relevant to comment on the present possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement. 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 allottees that even a single default by the allottees in fulfilling a single term and condition of the buyer's agreement say making timely payment, may make the possession clause irrelevant and the commitment date of 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 allottees 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 allottees are left with no option but to sign on the doted lines.

20. **Due date of handing over possession:** The promoter has proposed to hand over the possession of the apartment within a period of 4 years from the date of approval of the building plans for the project or other such approvals required, whichever is later to commence construction of the project or within such other timelines as may be directed by the competent authority.

21. The point of controversy in the present compliant is that whether the 48 months period is to be calculated from the date of "Consent to Establish" i.e. 16.06.2014 as contended by the respondent or the date of approval of building plan i.e. 30.05.2013 as contended by the complainants.

22. The respondent contended that the building plan was approved by the concerned authority on 30.05.2013. The clause 3 of the approved building plan stipulated that the developer shall obtain the Fire NOC from the concerned department before starting the construction. Thereafter, the Fire NOC was obtained on 26.09.2013. Furthermore, clause 16(xii) of the building plan provides that the developer shall obtain NOC from Ministry of Environment before starting the construction and the Environment Clearance was granted on 28.02.2014. Clause 1 of the Environment Clearance provides that the developer shall obtain Consent to Establish from the concerned authority before stating construction at the site and finally, Consent to Establish was granted on 16.06.2014. Therefore, the due date of possession shall be computed from 16.06.2014.

23. The authority is of the view that the words "other such approvals" is vague, confusing and deceitful. The respondent is claiming that the sanction plan contained statutory and mandatory pre-conditions before commencement of construction works. The respondent has acted in a highly discriminatory and arbitrary manner. If the said possession clause is read in entirety, the time period of handing over possession is only a tentative period for completion of the said unit in question and the promoter is aiming to extend this time period indefinitely on one eventuality or the other. Moreover, the respondent is claiming to compute due date of possession from numerous approvals and the said approvals are sole liability of the promoter for which allottees cannot be allowed to suffer. It is settled proposition of law that one cannot get the advantage of his own fault. Nowhere in the agreement it has been defined that what approvals forms a part of the "other such approvals", to which the due date of possession is subjected to in the said possession clause. It seems to be just a way to evade the liability towards the timely delivery of the subject unit.

24. Moreover, the complainants had opted for construction linked plan and the respondent was liable to raise demand as per progress in construction at the site. Our attention was also drawn towards letter dated 14.03.2014 wherein it has been mentioned that- *"You would be happy to know that our Environmental Clearance and Building Plan approvals are well in place now. We have in fact recently done the "Bhoomi Pujan" at the Merchant Plaza site and started the construction work. Our Project team has started the excavation work and is geared*

up for ensuring smooth delivery of the project.". Furthermore, our attention was drawn towards the statement of account at page 81 of complaint which clearly states that the demand on account of 'On start of excavation' has been raised on 15.05.2014 which is against statutory provisions, the then existing, as no construction can be started without obtaining consent to establish.

25. Thus, there cannot be two dates for the same cause- one for start of demanding the payment of installments towards the total cost of the unit in question and second for calculating the due date of possession of the unit in question to the allottees. According to the established principles of law and the principles of natural justice when a certain glaring illegality or irregularity comes to the notice of the adjudicator, the adjudicator can take cognizance of the same and adjudicate upon it. The inclusion of such vague and ambiguous type of clauses in the agreement which are totally arbitrary, one sided and against the interests of the allottees must be ignored and discarded in their totality. In the light of the above-mentioned reasons, the authority is of the view that the date of sanction of building plans ought to be taken as the date for determining the due date of handing over possession of the unit in question to the complainants.

26. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the apartment within a period of 4 years from the date of approval of the building plans for the project or within such other timelines as may be directed by the competent authority. The building plans were approved by the competent authority on

30.05.2013. Therefore, the due date of possession comes out to be 30.05.2017 after expiry of 4 years. Further the agreement provides that promoter shall be entitled to a grace period of 180 days for issuing the possession notice ("Grace"). As a matter of fact, neither the promoter has applied for issuance of occupation certificate, nor it has initiated the process of issuing the possession notice within the time limit prescribed in the apartment buyer's agreement. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 180 days cannot be allowed to the promoter at this stage.

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

> ***Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]***
>
> *(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.*

28. The legislature in its wisdom in the subordinate legislation under the 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.

29. 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., 28.09.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

30. **Rate of interest to be paid by complainants for delay in making payments**: The respondent contended that the complainants have defaulted in making timely payments as per the payment plan opted by him. Thus, not entitled to any relief.

31. The authority is of the view that 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 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. 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;"

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

33. **Validity of offer of possession:** At this stage, the authority would express its views regarding the concept of 'valid offer of possession'. It is necessary to clarify this concept because after valid and lawful offer of possession the liability of promoter for delayed offer of possession comes to an end. On the other hand, if the possession is not valid and lawful, liability of promoter continues till a valid offer is made and allottees remains entitled to receive interest for the delay caused in handing over valid possession. The authority after detailed consideration of the matter has arrived at the conclusion that a valid offer of possession must have following components:

i. **Possession must be offered after obtaining occupation certificate-** The subject unit after its completion should have received occupation certificate from the department concerned certifying that all basic infrastructural facilities have been laid and are operational. Such infrastructural facilities include water supply, sewerage system, storm water drainage, electricity supply, roads and street lighting.

ii. **The subject unit should be in habitable condition-** The test of habitability is that the allottees should be able to live in the

subject unit within 30 days of the offer of possession after carrying out basic cleaning works and getting electricity, water and sewer connections etc from the relevant authorities. In a habitable unit all the common facilities like lifts, stairs, lobbies, etc. should be functional or capable of being made functional within 30 days after completing prescribed formalities. The authority is further of the view that minor defects like little gaps in the windows or minor cracks in some of the tiles, or chipping plaster or chipping paint at some places or improper functioning of drawers of kitchen or cupboards etc. are minor defects which do not render the unit uninhabitable. Such minor defects can be rectified later at the cost of the developers. The allottees should accept possession of the subject unit with such minor defects under protest. This authority will award suitable relief for rectification of minor defects after taking over of possession under protest.

However, if the subject unit is not habitable at all because the plastering work is yet to be done, flooring works is yet to be done, common services like lift etc. are non-operational, infrastructural facilities are non-operational then the subject unit shall be deemed as uninhabitable and offer of possession of an uninhabitable unit will not be considered a legal valid offer of possession.

[Note (facts to be clarified during hearing): As per the photographs annexed by the respondent, the unit in question

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seems to be habitable. The photographs enclosed with written argument filed by the respondent were taken after 02.03.2021 i.e. after more than a year from the offer of possession. However, the complainants had also placed on record certain photographs dated 17.09.2020 which suggest that the construction in the project was not complete and works like completion of boundary walls, whitewash and plaster etc. were still going on.]

iii. **Possession should not be accompanied by unreasonable additional demands-** In several cases additional demands are made and sent along with the offer of possession. Such additional demands could be unreasonable which puts heavy burden upon the allottees. An offer accompanied with unreasonable demands beyond the scope of provisions of agreement should be termed an invalid offer of possession. Unreasonable demands itself would make an offer unsustainable in the eyes of law. The authority is of the view that if respondent has raised additional demands, the allottees should accept possession under protest.

34. In the present complaint, the possession has been offered on 17.02.2020 after receipt of occupation certificate dated 11.02.2020. The attention of the authority was drawn by the counsel for the complainants towards certain objections regarding taking possession. The objections such as 24 meters connecting road has not been built, escalator and elevators are not installed, the club facilities are not ready as yet, electrical connection from DHBVN and the generators of adequate capacity have not been installed, main

entrance gate has not been constructed, boundary wall has not been constructed, no painting, flooring, door and finishing work inside the shops are pending. The counsel for the respondent informed that all the observations has been attended except 24 meters wide connected road. The counsel for the respondent has given written submissions to that effect on 12.04.2021 in compliance of interim order dated 02.03.2021 passed by the authority. Therefore, the offer of possession is valid.

35. 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 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 clause 11.1 of the agreement executed between the parties on 08.05.2015, the possession of the subject apartment was to be delivered within a period of 4 years from the date of approval of the building plans for the project or within such other timelines as may be directed by the competent authority. For the reasons quoted above, the due date of possession is to be calculated from the date of approval of building plans i.e. 30.05.2013 and the said time period of 4 year has not been extended by any competent authority. Therefore, the due date of possession is calculated from the date of approval of building plan and the said time period of 4 years expired on 30.05.2017. 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 30.05.2017. The respondent has failed to

offer possession of the subject apartment till date of this order. Accordingly, it is the failure of the respondent/promoter to fulfil its obligations and responsibilities as per the agreement to hand over the possession within the stipulated period.

36. Section 19(10) of the Act obligates the allottees to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 11.02.2020. The respondent offered the possession of the unit in question to the complainants only on 17.02.2020. So, it can be said that the complainants came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the complainants should be given 2 months' time from the date of offer of possession. This 2 months' of reasonable time is being given to the complainants keeping in mind that even after intimation of possession practically he has to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e. 30.05.2017 till the expiry of 2 months from the date of offer of possession (17.02.2020) which comes out to be 17.04.2020. The complainants are further directed to take possession of the allotted unit after clearing all the dues within a period of 2 months and failing which legal consequences as per the provisions of the Act will follow.

37. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with proviso to section 18(1) of the Act on the part of the respondent is established. As such the allottees shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 30.05.2017 till the handing over of the possession (17.04.2020), at prescribed rate i.e., 9.30 % p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules.

E.II Holding charges

38. The complainants are contending that the respondent shall not charge holding charges. However, the counsel for the respondent stressed that as the complainants are not coming forward to take possession, and so he is liable to pay holding charges as per clause 12.2, 12.3, and 14 of the said agreement.

39. The relevant clauses of the buyer's agreement are reproduced below:

> *12.2 Within a maximum period of 30 (thirty) days from the Possession Notice and the fulfilment of the aforesaid conditions to the complete satisfaction of the Company, the Buyer and the Company shall execute the Conveyance Deed for the Unit (in the format provided by the Company) and thereafter, the Buyer shall be deemed to have taken the possession of the Unit.*
>
> *12.3 If the Buyer fails to complete the requirements of the Possession Notice as stated aforesaid and to take possession of the Unit within the time stipulated, then the Unit, while remaining in the possession of the Company, shall nonetheless be at the soul risk, responsibility and cost of the Buyer and the Company shall be entitled to also recover Holding Charges as provided hereinafter which shall be a distinct charge unrelated to the Total Sale Consideration and shall also be in addition to the Maintenance Charges. Any delay in payment of applicable Holding Charges shall be deemed to be an event of default giving rise to specific rights of the Company as in enunciated in terms thereof.*
>
> ***14. HOLDING CHARGES***

The Buyer agrees and accept that in the event of failure to take possession of the Unit in the manner as aforesaid, then the Company shall have the option to cancel this Agreement or the Company may, without prejudice to its rights under law and equity and at its sold discretion, condone such failure of the Buyer to take possession of the Unit on the condition that the Buyer shall pay to the Company holding charges @ Rs. 10/- (Rupees Ten only) per sq. ft. of the Super Area of the Unit per month or part thereof for the entire period of delay ("Holding Charges") and to withhold execution of the Conveyance Deed in respect of the Unit till the Holding Charges with applicable overdue interest as prescribed in this Agreement, if any, are fully paid.

40. The authority observes that as per clause 12.3 of the apartment buyer agreement, in the event the allottees/buyers delays to take the possession of the unit within the time limit prescribed by the company in its intimation/offer of possession, then the promoter shall be entitled to holding charges. However, it is be noted that the term holding charges has not been clearly defined in the apartment buyer agreement. Therefore, it is firstly important to understand the meaning of holding charges which is generally used in common parlance. The term holding charges or also synonymously referred to as non-occupancy charges become payable or applicable to be paid by the allottees if the possession has been offered by the builder to the owners/allottees and physical possession of the unit has not been taken over by the allottees, the flat/unit is laying 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.

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

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

42. The said judgment of NCDRC was also upheld by the hon'ble Supreme Court vide its judgement dated 14.12.2020 passed in the civil appeal nos. 3864-3889 of 2020 filed by DLF against the order of NCDRC. The authority earlier, in view of the provisions of the Act in a lot of complaints decided in favour of promoters that holding charges are payable by the allottee. However, in the light of the recent judgement of the NCDRC and hon'ble Apex Court (supra), the authority concurs with the view taken therein and holds decides that a developer/ promoter/ builder cannot levy holding charges on a homebuyer/allottee as it does not suffer any loss on account of the allottee taking possession at a later date.

43. As far as holding charges are concerned, the developer having received the sale consideration has nothing to lose by holding

possession of the allotted unit 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.

F. Direction of the authority

44. 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., 30.05.2017 till 17.04.2020 i.e. date of offer of possession (17.02.2020) + 2 months.

ii. The arrears of such interest accrued from 30.05.2017 till 17.04.2020 shall be paid by the promoter to the allottees within a period of 90 days from date of this order as per rule 16(2) of the rules.

iii. The complainants are further directed to take possession of the allotted unit after clearing all the dues, if any, within a period of 2 months as per section 19(10) of the Act and failing which legal consequences as per the provisions of the Act will follow.

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

v. The rate of interest chargeable from the allottees by the promoter, in case of default shall be 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.

vi. The respondent shall not charge anything from the complainants which is not part of the buyer's 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 nos. 3864-3899/2020.

57. Complaint stands disposed of.

58. File be consigned to registry.

(Samir Kumar)
Member

(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 28.09.2021

Judgement uploaded on 20.12.2021.