BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 2723 of 2020
First date of hearing : 08.01.2021
Date of decision : 28.09.2021

1. Parshuram Narsinh Deshpande
2. Neelima Deshpande
R/o: - flat no- 409, wing 4 A, Sobha Quartz, Green Glen Layout, Bellandur, Bengaluru South, Bengaluru- 560103. **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

ORDER

1. The present complaint dated 07.10.2020 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 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** [Page 34 of written arguments filed by the respondent]
6.	Firefighting approval granted on	**26.09.2013** [Page 48 of written arguments filed by the respondent]
7.	Environmental clearance dated	**28.02.2014** [Page 49 of written

		arguments filed by the respondent]
8.	Excavation approval granted on	**04.04.2014** [Page 47 of written arguments filed by the respondent]
9.	Consent to Establish	**16.06.2014** [Page 60 of written arguments filed by the respondent]
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** [Page 72 of written arguments filed by the respondent]
12.	Date of **occupation certificate**	**11.02.2020** [Page 82 of complaint]
13.	Allotment letter	06.09.2013 [Page 78 of complaint]
14.	Date of execution of apartment buyer agreement	**15.09.2014** [Page 39 of complaint]
15.	Unit no. as per apartment buyer agreement	GF-78, ground floor [Page 78 of complaint]
16.	Unit measuring	488 sq. ft
17.	Payment plan	Construction linked payment plan

		[Page 71of complaint]
18.	Total consideration as per payment plan	Rs. 53,29,996/- [Page 71 of the complaint]
19.	Total amount paid	Rs. 48,43,308.05/- [Page 45 of reply]
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 84 of complaint]
22.	Delay in handing over possession till date of offer of possession + 2 months i.e 17.04.2020	2 years10 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 487.90 sq. ft. bearing shop no. GF – 78 in the project, being developed by the respondent and paid Rs.6,00,000/- 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. 53,29,996/-.

4. The complainants submitted that on 15.09.2014, 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 25.07.2019, the respondent sent an email to complainants and sent the copy of the leger along with an offer for a fit-out letter towards the unit, on which the complainants replied on 10.08.2019 and alleged their

6. The complainants have submitted that respondent kept raising the demands as per the stage of construction and he kept making

payments as per demands raised by the respondent and till 22.05.2017, the complainants have been paid Rs. 22,67,201/- i.e. 84% of the total sale consideration. The respondent received occupation certificate from the 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.

7. The complainants have submitted that on 17.02.2020, the respondent issued a letter of offer of possession of the unit and demanded Rs. 5,69,747 "balance amount due towards the price of the unit", Rs. 24,712/- towards the "Interest-Free Maintenance Security Deposit" and Rs.1,87,136 towards "the cost of stamp duty and an additional amount towards misc. expenses for the sale deed". It is pertinent to mention here that the super area of shop was increased by 6.53 sq. ft. and now the new area of shop is 247.12 sq. ft.

8. The complainants have submitted that on 22.04.2020, 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. 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.

9. The complainants have submitted that the main grievance of filing the present complaint is that despite of paying more than 77% 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.

10. 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.

11. 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 do 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

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

i. Direct the respondent to handover the possession of flat to the allottees immediately and not later than six months from the date of judgement, complete in all respects, and execute all required documents for transferring/conveying the ownership of the respective shops.

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 calculation of carpet area and common loading on the subject shop.

iv. Direct the respondent party to restrain from charging holding charges and maintenance charges.

v. Restraining the respondent from charging Rs. 3,50,000/- under the head club charges.

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

vii. Direct the respondent to install lifts and escalators.

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

D. Reply by the respondent

14. The respondent has contested the complaint on the following grounds:

i. That the present complaint has been filed on 29.09.2020 after offer of possession to the complainants vide letter dated 17.02.2020 and therefore the same is not maintainable. The complainants ought to have take possession at first instance and thereafter could have raised the issues or deficiencies if any. Therefore, the complaint is malafide, fanciful, unreasonable and bad in law. The allegation of delay and other deficiencies has been levelled aforethought and concocted, solely to skip those obligations which are delegated upon the complaint under the

terms and conditions of apartment buyer agreement and those as provided under the Act. The project and individual unit photographs are placed as annexure-R/3 which outrightly falsify and rejects the allegations of complainants. The complainants have no cause to file present complaint and has delayed in taking possession of the unit. The complaint deserves to dismiss on this ground alone.

ii. That the complainants/allottees had agreed under the payment plan of application form signed by him to pay instalments on time and discharge his obligations as per application form and apartment buyer's agreement. However, the complainants miserably failed to make payments of respective instalments from time to time and delayed the payment of outstanding for about 255 days i.e. about 8 1/2 months as on 30.11.2020. From the perusal of statement of account, the complainants have made violation of the Act and has defaulted in making timely payment of dues and outstanding. Therefore, the complainants have approached with unclean hands.

iii. That the present complaint is not in the prescribed format of **"CRA"** as stipulated in regulation 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 and therefore is not maintainable as per regulation 11 of the Haryana Real Estate Regulatory Authority, Gurugram (Adjudication of Complaints), Regulations, 2018.

iv. That since commencement of construction, the respondent had been sending monthly update of construction to the

complainants. The complainants had never raised any issue regarding the progress, timeline, quality of construction of the project and/or any other defects/deficiency in the service of the respondent. Further, the complainants had never complained of any violation of any of the provisions of the Act from the date of booking till the date of filing the present complaint. The present complaint is malafide.

v. That as per the Act and rules made thereunder, a complaint may be filed by a person only if the respondent has committed any act in violation of the Act and rules made thereunder. As the complainants have failed to bring on record any document, evidence etc. which may even allude that the respondent has violated the provisions of the Act, the complainants have no locus standi. Therefore, the complainants have no cause of action or grounds to file the present complaint.

vi. That the respondent is a company incorporated under the Companies Act, 1956 and has developed commercial project over 2.75625 acres of land situated in Village Hayatpur, Sector-88, Gurugram, Haryana named as "**Merchant Plaza**". The project is comprising of 422 units, parking spaces and other utilities in accordance with the sanctioned plans and approvals.

vii. That respondent has obtained license from Director General, Town and Country Planning Department, Government of Haryana ("DTCP") for development of the project vide license no. 01 of 2013 dated 07.01.2013. The entire project had been registered under the Act vide registration certificate no. 340 of

2017 dated 10.10.2017 and same is valid up to 20.12.2020. Further 6 months extension has been provided by HARERA order no. 9/3-2020 HARERA/GGM (Admn.) dated 26.05.2020. Therefore, the registration certificate is valid up to 20.06.2021.

viii. That the complainants approached the respondent and submitted an application for booking of a retail shop bearing unit no. GF-78 on ground floor approximate super area of 247.12 sq. ft. at the basic sale price of Rs.9,000/- per sq. ft. and paid a sum of Rs.1,00,000/- as booking amount. The complainants had agreed and signed the payment plan for payment of instalment dues as per construction linked plan.

ix. That pursuant to the application form, the respondent allotted a unit bearing no. GF-78 on ground floor in the said project in favour of the complainants vide allotment letter dated 06.09.2013 for the basic sales consideration of Rs 26,73,378/- plus all other charges, service tax, levies and other allied charges as per payment plan. The complainants and the respondent had executed the apartment buyer's agreement on 15.09.2014 for the said unit.

x. That the project was completed in September 2019, whereupon the respondent applied for occupancy certificate from the competent authority on 11.09.2019. The occupancy certificate for the project was received from the concerned authority vide memo. No ZP-867/AD(RA)/2020/3936 dated 11.02.2020. The respondent vide its letter dated 17.02.2020 duly informed the complainants that the project has been completed, and further

offered the possession of unit no. GF-78, and requested to complete necessary formalities and to make pending payments.

xi. That under the terms of offer of possession letter dated 17.02.2020, the respondent also offered the following facilities/benefits as a special gesture to all the buyers including the complainants:

a. The facility to undertake the interior fit-outs free of maintenance charges for the period leading up to possession.

b. There would be no maintenance charges for a period of 6 months from the date of formal possession.

c. To lease out the units of the buyers without any service charges for the same.

xii. That the unit is furnished and complete in all respect and refusal to take possession is absolutely wrong and unreasonable, tantamount to violation of apartment buyer agreement and the Act.

xiii. That there is no delay in handing over/offer of possession by the respondent. In fact, the clause no. 11.1 of the apartment buyer agreement provides that the respondent will hand over the possession within a period of 4 years from the date of the approval of the building plan for the project or within such other timeline as may be directed by any competent authority. Then, clause no. 11.1 of the ABA further provides that even after the expiry of the commitment period, the respondent shall be further entitled to a grace period of 180 days for issuing the

possession notice. As per HRERA registration, the project completion date is allowed up to the date of 20.06.2021 by the Haryana Real Estate Regulatory Authority, being the competent authority.

xiv. That the respondent had started the excavation in the project land soon after receiving the approval of 'Consent to Establish' dated 16.06.2014 from the Haryana Sate Pollution Control Board and after completion of excavation, commenced the construction of the said project on 01.11.2014. The respondent has already received occupancy certificate and offered formal possession to the complainants on 17.02.2020.

xv. That in terms of clause 7.1, 7.2 and 7.3 of the buyer's agreement, the complainants are responsible and obligated to pay the instalments within the time agreed and for any delay in making payment, the respondent shall charge 15% simple interest. In terms of clause 13.5 of the said agreement, the respondent has no right to withhold the due payments for any reason whatsoever.

xvi. That the respondent has already suffered huge financial loss in lieu of non-payment of instalments by complainants/allottees. In spite of default of non-payment of installments by the complainants/allottees, the respondent has competed project and offered possession thereof to the complainants. However, the complainants have neither made timely payments nor come forward to take possession of unit offered to him.

xvii. That the complainants are an under obligation and responsible to pay and the respondent is entitled to recover the due amount along with interest agreed in terms of the buyer's agreement under section 19 (6) and (7) of the Act and rule 15 of the rules and to take the possession under section 19(10). In view of the forgoing, it is clear that complainants have committed the breach of the provisions of the Act. That in addition to the above, the respondent is also entitled to claim/recover holding charges and maintenance charges from the complainants/allottees as per clause 14 of the said agreement.

E. Written arguments filed by both the parties

15. Both the parties have filed written arguments on 12.04.2021 in compliance of order dated 02.03.2021 and reiterated their earlier version as contended in the pleadings.

16. 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.

F. Jurisdiction of the authority

17. 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.

F.I Territorial jurisdiction

18. 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.

F.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.

G. Findings on the objections raised by the respondent

G.I Objection regarding format of the complaint

19. The respondent has raised contention that the present complaint is not in the prescribed format of CRA as stipulated in rule 28 of the rules and therefore is not maintainable as per regulation 11 of the Haryana Real Estate Regulatory, Gurugram (Adjudication of complaints) Regulation, 2018.

20. The authority observed that the reply is patently wrong as the complaint has been filed in the prescribed manner. The authority has no hesitation in saying that the respondent is trying to mislead the authority by saying that the said complaint has not been filed by the complainants in the prescribed format of "CRA". There is a prescribed proforma for filing complaint before the authority under section 31 of the Act read with rule 28 of the rules in form CRA. There are 9 different headings in this form which have been given in the complaint. Since, the present complaint has been filed in CRA form along with necessary enclosure. Therefore, the said plea of the respondent w.r.t rejection of complaint on this ground is also rejected and the authority has decided to proceed with this complaint as such.

G.II Maintainability of complaint

The respondent contended that the present complaint filed under section 31 of the Act is not maintainable as the respondent has not violated any provisions of the Act.

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 of the unit in question by the due date as per the apartment buyer agreement. Therefore, the complaint is maintainable.

H. Findings on the relief sought by the complainants

H.I Delay possession charges

21. 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.

22. 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."*

23. 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")."*

24. 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.

25. **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.

26. 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.

27. 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.

28. 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.

29. 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.

30. 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.

31. **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.

32. **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.*

33. 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.

34. Consequently, as per website of the State Bank of India i.e., https://sbi.co.in, the marginal cost of lending rate (in short, MCLR) as on date i.e., 28.09.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

35. **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.

36. 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;"

37. 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.

38. **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

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.

39. 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.

40. 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 15.09.2014, 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.

41. 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.

42. 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.

H.II Club charges

43. That the complaint has claimed the relief restraining the respondent from charging the club charges. The respondent vide written argument dated 12.04.2021 contended that the as per clause 4.22. of the agreement, certain areas, facilities and amenities are excluded from the scope of this agreement in which the buyer is not entitled to any ownership rights, title or interest etc. in any form or manner whatsoever. The area of these facilities and amenities are neither included in common area nor in the computation of the super area for calculating the total sale consideration as shown in the deed of declaration. Therefore, the buyer has no right to claim interest in respect of such area, facilities and amenities. The areas under these facilities are under sole ownership of the respondent/developer. However, the complainants have agreed for payment of club charges in the payment plan duly executed between both the parties and club charges/conveyance charges are clearly mentioned and had been

agreed between both the parties. Therefore, the complainants are entitled to pay the club charges as agreed between both the parties.

44. The relevant clause of the apartment buyer agreement is reproduced below:

> *"4.22 All other areas, facilities and amenities such as recreational facilities, parks etc. are excluded from the scope of this Agreement and the Buyer shall not be entitled to any ownership rights, title or interest etc. in any form or manner whatsoever in such areas, facilities and amenities which have not been included in the computation of the Super Area for calculating the Total Sale Consideration of the Unit and therefore, the Buyer has not paid any consideration for use or ownership in respect of such areas, facilities and amenities. The Buyer agrees that the ownership of such areas, facilities and amenities shall vest solely with the Company and their usage and manner/method of use would be at terms as may be prescribed by the Company."*

45. The authority is of the view that there is no specific provision in the apartment buyer agreement except that same has been mentioned in the Schedule-IV of the agreement i.e. payment plan as club/convenience charges is Rs. 3,50,000/-. The complainants have agreed to make payment of total sale consideration as per the apartment buyer agreement. However, the respondent has placed on record photographs depicting the swimming pool, club house and public utility. The respondent has also submitted that the club house, swimming pools are available in the project and the same are open for use by the allottees.

46. NCDRC in its judgement dated 27.01.2016 passed in **Anil Lekhi Vs. Akme Projects Ltd.** held that at the time of execution of sale deed, it was represented by the opposite parties that they shall provide facilities with respect to club having state of the art amenities and

accordingly the club membership charges were paid by the allottees. However, even after execution of the conveyance deed and receipt of the club membership fees/charges the opposite parties had failed to provide the club facility to the aggrieved allottees and prayed for refund along with interest. The NCDRC observed that since the developer could not provide the club facility despite receipt of money amounts to deficiency of service and the allottees are entitled to refund of the entire amount paid towards such facility along with interest at the prescribed rate.

47. In **Wg. Cdr. Arifur Rahman Khan and Aleya Sultana and Ors. vs. DLF Southern Homes Pvt. Ltd. civil appeal no. 6239 of 2019 and civil appeal no., 6303 of 2019 decided on 24.08.2019,** it has held that the demand of club charges in pursuance of the stipulation contained in the BBA executed between the promoter and the allottee has been held to be legal and justified by the hon'ble Supreme Court of India and further the said view has been endorsed **DLF Home Developer Ltd. vs. Capital Greens Flat Byers Association, civil appeal nos. 3864-3889 of 2020 decided on 14.12.2020;** hence, the authority holds that the demand for "club charges" is legal and justified.

48. The authority is of the view that the club has come into existence and the same is operational and the demand raised by the respondent for the said amenity shall be discharged by the complainants as per the terms and conditions stipulated in the agreement.

H.III Holding charges

49. 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.

50. 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.*

51. 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 owner/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.

52. 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."

53. 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.

54. 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 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.

H.IV Maintenance charges

55. The respondent submitted that as per clause 1(aa), 15.4 and 15.8 of the apartment buyer agreement, the company shall be entitled to maintenance charges if buyer fails to take possession of unit within stipulated period of 30 days from the date of offer of possession.

56. The relevant clauses of the apartment buyer agreement are reproduced below:

> *"1(aa) Maintenance Charges shall mean the charges payable to the Maintenance Agency by the Buyer for maintenance services of the Commercial Complex, including common areas and facilities but does not include the charges for actual consumption of utilities in the Unit including but not limited to electricity, water, gas, etc which shall be charged extra based upon actual consumption at periodic intervals and any statutory payments, taxes with regard to the Unit/Commercial Complex. The details of Maintenance Charges shall be described in the Maintenance Agreement.*
>
> *15.4 The Buyer undertakes to regularly pay the bills towards Maintenance Charges as may be raised by the Maintenance Agency from the date of the Possession Notice on pro-rata basis irrespective of whether the buyer is in possession or occupation of the Unit or not. In order to secure due performance of the Buyer in payment of the Maintenance Charges, the Buyer agrees to deposit, at the time of handover of the possession, and to always keep deposited with the Company an Interest-Free Maintenance Security Deposit ("IFMSD") of an amount calculated @ Rs.100/- (Rupees One Hundred only) per sq. ft. of the Super Area of the Unit. In case of failure of the Buyer to pay the Maintenance Charges ordered before the due date, the Buyer authorises the Company to adjust such unpaid Maintenance Charges from the IFMSD.*
>
> *15.8 In case the Buyer does not take possession of the Unit within the time stipulated in the Possession Notice, while the Maintenance Charges shall become due and payable to the Company/Maintenance Agency from the date of Possession Notice, the Company/Maintenance Agency shall have a lien on the Unit to the extent of all dues towards unpaid Maintenance Charges/IFMSD and any other dues payable to the Maintenance Agency by the buyer under the Maintenance Agreement after the IFMSD has been exhausted and this condition/obligation shall run concurrently with ownership of the Unit within the meaning of Section 31 of Transfer of*

Property Act, 1882 and shall survive conveyance of the Unit in favour of the Buyer...."

57. The authority observed that the Act mandates under section 11 (4) (d), that the developer will be responsible for providing and maintaining the essential services, on reasonable charges, till the taking over of the maintenance of the project by the association of the allottees. Section 19(6) of the Act also 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, shall be responsible to make necessary payments in the manner and within the time as specified in the said agreement for sale/BBA and shall pay within stipulated time and appointed place, the share of the registration charges, municipal taxes, water and electricity charges, maintenance charges, ground rent and other charges, if any.

58. Maintenance charges essentially encompass all the basic infrastructure and amenities like parks, elevators, emergency exits, fire and safety, parking facilities, common areas, and centrally controlled services like electricity and water among others. Initially, the upkeep of these facilities is the responsibility of the builder who collects the maintenance fee from the residents. Once a resident's association takes shape, this duty falls upon them, and they are allowed to change or introduce new rules for consistently improving maintenance. In the absence of an association or a society, the builder continues to be in charge of maintenance. Usually, maintenance fees are charged on per flat or per square foot basis. Advance maintenance charges on the other hand accounts for the maintenance charges that

builder incurs while maintaining the project before the liability gets shifted to the association of owners. Builders generally demand advance maintenance charges for 6 months to 2 years in one go on the pretext that regular follow up with owners is not feasible and practical in case of ongoing projects wherein OC has been granted.

59. Thus, the authority is of the view that the respondent is entitled to collect advance maintenance charges as per the buyer's agreement executed between the parties. However, the period for which advance maintenance charges (AMC) be levied should not be arbitrary and unjustified. In the present case, the respondent has failed to specify the time period in the buyer agreement for which the advance maintenance shall be payable. Generally, AMC is charged by the builder/developer for a period of 6 months to 2 years. The authority is of the view that the said period is required by the developer for making relevant logistics and facilities for the upkeep and maintenance of the project. Since the developer has already received the OC/part OC and it is only a matter of time that the completion of the project shall be achieved; its ample time for a RWA to be formed for taking up the maintenance of the project and accordingly the AMC is handed over to the RWA.

60. Keeping in view the facts above, the authority deems fit that the respondent is right in demanding advance maintenance charges at the rate prescribed therein at the time of offer of possession. However, the respondent shall not demand the advance maintenance charges for more than one (1) year from the allotee even in those cases

wherein no specific clause has been prescribed in the agreement or where the AMC has been demanded for more than one (1) year.

I. Direction of the authority

61. 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.

66. Complaint stands disposed of.

67. 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.