

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

Complaint no. : 3084 of 2021  
First hearing date : 28.09.2021  
Date of decision : 28.09.2021

Shraddha Pandey  
R/o:-32 Mangalpuri Ismail Gang Chinhat Lucknow

**Complainant**

Versus

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

**Respondent**

**CORAM:**

Shri Samir Kumar  
Shri V.K. Goyal

**Member  
Member**

**APPEARANCE:**

Shri. Sukhbir Yadav  
Shri. Suresh Rohilla & Shri  
Ashwariya Sinha

Advocate for the complainant  
Advocates for the respondent

**ORDER**

1. The present complaint dated 17.08.2021 has been filed by the complainant/allottee 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 allottee 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 complainant, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S. No.	Heads	Information
1.	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	<b>30.05.2013</b>
6.	Firefighting approval granted on	<b>26.09.2013</b>
7.	Environmental clearance dated	<b>28.02.2014</b>
8.	Excavation approval granted on	<b>04.04.2014</b>
9.	Consent to Establish	<b>16.06.2014</b>
10.	RERA registered/ not registered	<b>Registered 340 of 2017 dated 27.10.2017</b>
	RERA registration valid up to	<b>20.12.2020</b>
11.	Approval of electrification plan granted on	<b>16.01.2020</b>
12.	Date of occupation certificate	<b>11.02.2020</b>

		[page 72 of complaint]
13.	Allotment letter	08.08.2013 [Page 69 of complaint]
14.	Date of execution of apartment buyer agreement	<b>14.03.2015</b> [Page 30 of complaint]
15.	Unit no. as per apartment buyer agreement	FF-08, first floor [Page 69 of complaint]
16.	Unit measuring	579 sq. ft
17.	Payment plan	Construction linked payment plan [Page 61 of complaint]
18.	Total consideration as per payment plan	Rs. 53,44,216/- [Page 61 of the complaint]
19.	Total amount paid by complainant as per ledger	Rs. 48,40,330/- [Page 79 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 complainant	<b>17.02.2020</b>

		[Page 74 of complaint]
22.	Delay in handing over possession till date of offer of possession 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 complainant purchased one shop admeasuring 587.57 sq. ft. bearing shop no. FF-08 in the project, being developed by the respondent and paid Rs.5,00,000/- 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. 53,44,216/-. On 14.03.2015, 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 permission for fit outs letter and asked the complainant to pay Rs. 7,12,127/-. The respondent received occupation certificate from the Town & Country Planning Department for ground floor to 2<sup>nd</sup> floor, 4<sup>th</sup> floor (Part), 5<sup>th</sup> floor (Part), and 6<sup>th</sup> floor to 11<sup>th</sup> 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 3<sup>rd</sup> floor and part area of the 4<sup>th</sup> and 5<sup>th</sup> floor.
6. The complainant has submitted that on 17.02.2020, the respondent issued a letter of offer of possession of the unit and demanded Rs. 7,50,493 "balance amount due towards the price of the unit", Rs. 57,874/- towards the "Interest-Free Maintenance Security Deposit" and Rs.2,63,318 towards "the cost of stamp duty and an additional amount towards misc. expenses for the sale deed". The respondent kept raising demands as per the stage of construction and the complainant kept paying the demands and till 30.06.2017, the

- complainant as been paid Rs. 48,40,330/- i.e. 90% of total the sale consideration.
7. Since May 2017, complainant is regularly vesting the office of respondent as well as the construction site and making efforts to get possession of the allottee shop, but all in vain, despite several visits by the complainant. The complainant has never been able to understand 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 complainant has submitted that the main grievance of filing the present complaint is that despite of paying more than 90% 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 of shop on promised time and till date project is without amenities. Moreover, it was promised by the respondent party at the time of receiving payment for the shop that the possession of a fully constructed shop and the developed project shall be handed over to the complainant as soon as construction completes.
  9. The complainant has 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 complainant has submitted that for the first time cause of action for the present complaint arose in March 2015, when the unilateral, arbitrary, and on-sided terms and conditions were imposed on complainant. The second time cause of action arose in May 2017,

when the respondent party failed to hand over the possession of the shop as per the buyer agreement. Further, the cause of action again arose in November 2017 when the respondent party failed to handover the possession of the shop as per promise. Further, the cause of action again arose on various occasions, including on a) September 2018; b) May 2019; c) February 2020; d) June 2020; e) Jan 2021; f) April 2021, and on many times till date, when the protests were lodged with the respondent party about its failure to deliver the project and the assurances were given by them that the possession would be delivered by a certain time. The cause of action is alive and continuing and will continue to subsist till such time, as this hon'ble authority restrains the respondent party by an order of injunction and passes the necessary orders.

**C. Relief sought by the complainant**

11. The complainant has sought following relief(s):

- i. Direct the respondent to handover the possession of flat to the allottee 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 r area calculation (carpet area, loading and super area).

- iv. Direct the respondent not to charge RS. 3,50,000/- under the head club charges.
  - v. Direct the respondent party to comply with the conditions of OC.
  - vi. Direct the respondents to install lifts & escalators.
  - vii. Direct the respondent party to provide GST input credit details.
  - viii. Direct the respondent to complete and seek necessary governmental clearances regarding infrastructural and other facilities including road, water, sewerage, electricity, environmental, etc. before handing over the physical possession of the shops.
12. 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**

13. The respondent has contested the complaint on the following grounds:
- i. The complainant has agreed under the payment plan of application form signed by her to pay instalments on time and discharge her obligations as per application. Form and apartment buyer's agreement. However, the complainant miserably failed to make payments of her respective instalments from time to time and delayed the payment of outstanding for about 524 days as on 31.08.2021. From the perusal of statement





- of account, it is clear that complainant has made violation of the Act and did not made timely payment of dues and outstanding. Therefore, the complainant has approached with unclean hands.
- ii. The obligation to approach this hon'ble authority with clean hands is an absolute obligation. The complainant has attempted to pollute the stream of justice and touched the pure foundation of justice with tainted hands and therefore, is not entitle to any relief, interim or final. Pertinent to say that the court does not sit simply as an umpire in a contest between the parties and declare at the end of the combat as to who won and who lost but as a legal duty of its own, independent of parties, to take active part in proceeding and reach at the truth, which is the foundation of administration of justice. Therefore, the truth should become the ideal to inspire the courts to pursue. Moreover, it is the bounden duty of the adjudicating office to ensure that dishonesty and any attempt to surpass the legal process must be effectively curbed and the authority must ensure that there is no wrongful, unauthorised or unjust gain to anyone as a result of abuse of the process of the law. One way to curb the tendency is to impose realistic or punitive costs.
- iii. Since commencement of construction the respondent had been sending regular updates in relation to construction to the complainant. The complainant has never raised any issue regarding the progress, timeline, quality of construction of the project and any other defects in the service of the respondent. further, the complainant has 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. Therefore, it can be concluded that present complaint is made with a malafide intension.

- iv. The complainant is a resident of 32, Mangalpuri, Ismail Ganj, Chinhat, Lucknow- 227105 and had booked a retail shop admeasuring 580 sq.ft. in the aforesaid project through application form dated 08.03.2013 for basic sale consideration of Rs. 7,500/ per sq.ft. and paid a sum of Rs. 5,00,000/- as booking amount. The complainant had agreed and signed the payment plan for payment of instalment dues as per construction linked plan.
- v. That pursuant to the application from, the respondent allotted the complainant a unit admeasuring 579 sq.ft. bearing no FF-08 on first floor in the said project, vide allotment letter dated 08.08.2013 On 14.03.2015 the complainant executed buyer's agreement for retail shops and offices with the appellant for the retail shop admeasuring 578.57 sq.ft. The buyer's agreement was executed by the respondent with fee will without any coercion or undue influence, therefor ethe same is binding on the parties thereto.
- vi. It is submitted that the said project had already been completed by the appellant by Sep 2019, upon which an application for grant of occupancy certificate was made with the Director General Town and Country Planning, Haryana. Thereafter, the

- appellant was granted occupancy certificate dated 11.02.2020 by the Director General Town and Country Planning, Haryana.
- vii. After receipt of occupation certificate, the respondent vide its letter dated 17.01.2020 offered the possession of unit no. FF-08 to the complainant and requested to complete necessary formalities and make pending payment as per clauses specified under buyer's agreement. However, in contravention and violation of the buyer's agreement, the complainant failed to take possession of the said unit, till the date of filing of present reply. Till the date of filing the present appeal, the respondent has paid Rs. 48,40,330/- to the appellant towards sale consideration of the unit. As per statement of account, an amount of Rs 7,41,340/- is outstanding towards interest as on 31.08.2021.
- viii. There is no delay in handing over of possession by the respondent. Clause no. 11.1 of the buyer's agreement states that the company will hand over the possession within 48 months from the date of the approval of the building plan for the project or such other approval required, whichever is later, to commence the construction of the project or within such other timelines as may be directed by any competent authority. In addition to the 48 months period, a further grace period of 6 months is also provided to the respondent herein for handing over the possession of the unit to the complainant.

- ix. It is submitted that the complainant has been continuously defaulting in making payments of her instalment's dues despite several demand letter and reminders.
- x. The respondent has duly complied with all applicable provisions of the Real Estate (Regulation and Development) Act, 2016 and rules made thereunder and also that of agreement for sale qua the complainant and other allottees. Since the commencement of the development of the project, the respondent has been sending regular updates regarding the progress of the project to all the buyers including the complainant and also the customer care department of the respondent is in regular touch with the buyers for providing them assistance and updates on the progress of the project.
- xi. It is submitted that the complainant agreed under the payment plan signed by them, to pay the instalments on time. The complainant has failed to make payments of their respective instalments as demanded by the respondent as per agreed payment plan. It is significant to note that complainant failed to clear her dues despite repeated reminders by the respondent. The respondent, empathizing with inability of the complainant to pay, also informed the complainant, through various demand request letter, that loan facility was available by leading banks such as HDFC, ICICI, SBI, central Bank of India, Reliance Home Finance Limited, Tata Capital Home Loan at good rate of interest. Despite having multiple ways by which the complainant could



have made the payment, the complainant chose not to discharge her liability under the buyer's agreement.

- xii. Furthermore, as a goodwill gesture, the appellant, vide reminder letter dated 01.10.2020 offered the respondent a one-time settlement to waive off late payment interest charges amounting to Rs. 64,753/-. But the respondent did not avail the offer and continued to make default.
- xiii. It is the admitted position of the parties herein that the answering respondent offered possession of the respectable units to the complainants herein vide its letter dated 17.02.2020. However, the complainant instead of taking possession as per the terms agreed between the parties, has filed the present complaint before this hon'ble authority seeking compensation over delayed offer of possession, among other reliefs. Consequently, for the intervening period the respondent has been saddled with the administrative cost of holding the said unit until possession thereof is duly taken. Furthermore, during the said period until possession is taken by the allottee, or surrendered, no third party rights can be created and therefore the respondent builder is further incurring a cost of retaining the said unit and maintaining the same. It is pertinent to point out that such a circumstances wherein the buyer fails to take possession of the unit as per the agreement, has been duly contemplated under the apartment buyer's agreement under clauses 12.2,12.3,14.15.4 and 15.8, whereby the buyer has agreed to take possession of the unit and execute the conveyance

deed within a period of 30 days from the possession notice, failing which the company shall be entitled to holding and maintenance charges for the period during which possession was not taken. Therefore, in terms of the buyer's agreement as executed between the parties hereto, the respondent develop is entitled to holding and maintenance charges.

**E. Written arguments filed by both the parties**

14. 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.
15. 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**

16. 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**

17. 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 allottee 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 complainant at a later stage.

**G. Findings on the relief sought by the complainant**

**H.I Delay possession charges**

18. Relief sought by the complainant: 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.
19. In the present complaint, the complainant 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."*

20. 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")."*



21. 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 allottee that even a single default by the allottee 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 allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.
22. **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.
23. 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 complainant.

24. 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 starting 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.
25. 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 allottee 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.

26. Moreover, the complainant 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.
27. 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 complainant.

28. **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.

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

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

*(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.*

*Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.*

30. 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.
31. 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%.

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

33. 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 allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

*"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be. सत्यमेव जयते*

*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;"*

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

35. **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 allottee 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 allottee 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 complainant 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.

36. 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 complainant 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.

37. 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 14.03.2015, 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.
38. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation

certificate was granted by the competent authority on 11.02.2020. The respondent offered the possession of the unit in question to the complainant only on 17.02.2020. So, it can be said that the complainant came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the complainant should be given 2 months' time from the date of offer of possession. This 2 months' of reasonable time is being given to the complainant 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 complainant is 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.

39. 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 allottee 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 GST input credit details**

40. The complainant is claiming GST input credit details. On the other hand, the respondent has submitted that the Goods and Service tax Act was passed in the parliament on 29<sup>th</sup> March 2017 and came into effect on 1<sup>st</sup> July 2017. The buyers, who have made payment after 01.07.2017 shall be entitled to get credit thereof. However, those who have not made payment of instalments before 01.07.2017 are not entitle to the GST benefit, as per law.
41. In this context the attention of the authority was drawn to the fact that the legislature while framing the GST law specifically provided for anti-profiteering measures as a check and to maintain the balance in the inflation of cost on the product/services due to change in migration to a new tax regime i.e. GST, by incorporating section 171 in Central Goods and Services Tax Act, 2017/ Haryana Goods and Services Tax Act, 2017, the same is reproduced herein below:
- "Section 171. (1) Any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices."*
42. The intention of the legislature was amply clear that the benefit of tax reduction or 'Input Tax Credit' is required to be passed onto the customers in view of section 171 of HGST/CGST Act, 2017. As per the above said provisions of the Act, it is mandatory for the respondent to pass on the benefits of 'Input Tax Credit' by way of commensurate reduction in price of the flat/unit. Accordingly, respondent should

reduce the price of the unit/consideration to be realized from the buyer of the flats commensurate with the benefit of ITC received by him. The promoter shall submit the benefit given to the allottee as per section 171 of the HGST Act, 2017.

43. The builder has to pass the benefit of input tax credit to the buyer. In the event, the respondent-promoter has not passed the benefit of ITC to the buyers of the unit then it is in contravention to the provisions of section 171(1) of the HGST Act, 2017 and has thus committed an offence as per the provisions of section 171 (3A) of the above Act. The allottee shall be at liberty to approach the State Screening Committee Haryana for initiating proceedings under section 171 of the HGST Act against the respondent-promoter. The concerned SGST Commissioner is advised to take necessary action to ensure that the benefit of ITC is passed on to the allottee in future.

### **H.III Club charges**

44. 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 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 complainant has 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 complainant is entitled to pay the club charges as agreed between both the parties.

45. 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."*

46. 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 complainant has 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 allottee.

47. 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 allottee. 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 allottee 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 allottee is entitled to refund of the entire amount paid towards such facility along with interest at the prescribed rate.
48. 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.

49. 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 complainant as per the terms and conditions stipulated in the agreement.


**I. Direction of the authority**


50. 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 allottee within a period of 90 days from date of this order as per rule 16(2) of the rules.
- iii. The complainant is 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 complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.



- v. The rate of interest chargeable from the allottee 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 allottee, 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 complainant 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.
76. Complaint stands disposed of.
77. 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.