

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

Complaint no. : 4132 of 2020
First date of hearing : 08.01.2021
Date of decision : 28.09.2021

LDS Guarding Solutions Pvt. Ltd. through its
authorized signatory

R/o: - 33- B, M.B. Road, Saidulajab, Near Saket
Metro Station, New Delhi- 110030

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:

Mr. Sukhbir Yadav

Advocate for the complainant

Mr. Suresh Rohilla & Shri

Advocate for the respondent

Ashwariya Sinha

**HARERA
ORDER
GURUGRAM**

1. The present complaint dated 02.12.2020 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 सत्यमेव जयते	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	29.07.2014 [Page 39 of complaint]
14.	Date of execution of apartment buyer agreement	16.01.2015 [Page 42 of complaint]
15.	Unit no. as per apartment buyer agreement	O.S- 3, second floor [Page 39 of complaint]
16.	Unit measuring	1304.08 sq. ft
17.	Payment plan	Construction linked payment plan [Page 73 of complaint]
18.	Total consideration as per payment plan	Rs. 91,61,669/- [Page 73 of the complaint]

19.	Total amount paid by complainant	Rs. 84,24,507/- [Page 42 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 complainant	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 years 10 months 18 days

B. Facts of the complaint

3. The complainant, director of M/s Lions Detective & Security Pvt. Ltd. namely Ms. Saroj Jaiswal received a marketing call from the office of a real estate agent firm Mantra Realty Consulting Pvt. Ltd., who represents himself as an authorized agent of the respondent and marketed the commercial project name and style "Merchant Plaza" situated at Sector 88, Gurugram. The director of the complainant company visited the sales office of the respondent and consulted with the marketing staff of the respondent. The marketing staff of the

respondent showed a rosy picture of the project and allured with proposed specifications and assured for the timely delivery of the shop. The respondent has given a marketing brochure of the project, which stipulates that the project has "the intelligent and functional design approach ensures that all access points are segregated, there are separate lifts and stairs, dedicated drop off points and well defined and earmarked common facilities.

4. Being impressed by presentation and assurances given by the respondent, the complainant purchased one shop admeasuring 1304.08 sq. ft. bearing shop no. O.S- 3 in the project namely the Merchant Plaza, Sector 68, Gurugram being developed by the respondent and paid Rs. 11,00,000/- towards the booking amount and signed a pre-printed application form. The shop was purchased under the construction linked payment plan for a total sale consideration of Rs. 91,61,669/-. On 29.07.2014, the respondent issued a letter of allotment of shop no O.S- 3 on the second floor in "Merchant Plaza" at sector 88, Gurugram, admeasuring 1304.08. sq.ft.
5. The complainant submitted that on 16.01.2015, a pre-printed, arbitrary, one-sided, and ex-facie apartment buyer agreement was executed inter-se between the parties. As per clause no. 11.1 of apartment buyer agreement, respondent 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) and the same was approved on 30.05.2013. It was further agreed that even

after the expiry of the commitment period, the respondent shall be further entitled to a grace period of a maximum of 180 days for issuing the possession notice (grace period).

6. On 30.03.2015, complainant availed a loan from HDFC limited against the said unit and the respondent issued permission to mortgage letter in favour of HDFC Limited, in respect of the shop no- O.S- 3 admeasuring 1304.08 sq.ft. in "Merchant Plaza" at sector 88, Gurugram. On 08.02.2016, the respondent sent a credit note letter stating that a sum of Rs. 3,12,000/- is due towards the appropriated Installment of inclusive of service Tax & Swachh Baharat Cess and also stated that " this is as per request letter dated 04.01.2016 received from Mantra 4 realty against their future brokerage bills. On 23.01.2017, the respondent endorsed the name of the complainants i.e. M/s LDS Guarding Solution Pvt. Ltd. in its record and transferred all the onward rights in respect of unit no. O.S- 3 in project Merchant Plaza, Sector 88.
7. The respondent assure the complainant that the project is about to complete and will get the possession of the shop on the due date of possession as per BBA i.e. 30.11.2017. the complainant continued to pay each of the remaining instalments as pe the payment schedule of the builder buyer agreement complainant have already paid more than 94% amount i.e. Rs. 85,62,128/- along with other allied charges demanded from time to time. The complainant, however, observed that there was no progress in the construction of the subject shop as per the committed time frame, and accordingly raised their grievance to the

respondent. Though the complainant was always ready and willing to pay the remaining instalments provided if there is progress in the construction of the shop.

8. The respondent received occupation certificate 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 conditional one with the remarks as "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.
9. On 17.02.2020, the respondent issued a letter of offer of possession of the unit and demanded Rs. 11,45,851/- towards the balance amount due towards the price of the unit Rs. 1,30,408/- towards the interest free maintenance security deposit & Rs. 6,32,188/- towards the misc. expenses for the sale deed.
10. Since May 2017, the complainant has 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 complainant has 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.

11. It is further submitted that the main grievance of filing the present complaint is that despite paying more than 94% of the purchase price of the ship, in a timely manner, the respondent party has miserably failed to deliver the possession of fully constructed and developed shop as per the specifications shown in the brochure and promised in builder buyer agreement. It is highly germane to mention here that the complainant has not just purchased four walls and a roof but have purchased all the allied amenities and facilities as promised at the time of receiving the payment. The complainant has paid Rs. 85,62,128/- and after paying such a huge amount, the basic infrastructure promised as part of the project has not been completed, and even post 7 years of booking, the respondent has failed to complete the construction of all shops reflecting a disregard, unprofessionalism, and negligence upon their part. Based on the present status of the project, it seems that the project will take at least another year to be completed in all respects, subject to the willingness and intent of the respondent to complete the project.

12. For the first-time cause of action for the present complaint arose in January 2015, when the buyer agreement containing unfair and unreasonable terms was, for the first time, forced upon the allottees. The cause of action further arose in November 2017, when the respondent party failed to handover the possession of the shop as per the buyer agreement. Further, the cause of action again arose on

various occasions, including on a) December 2017 b) Feb 2018 c) May 2018 d) July 2019 e) July 2020 and on many time till date, when the protests were lodged with the respondent party about its failure to deliver the project and the assurance 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 pay interest at the prescribed rate for every month of a delay from the due date of possession till the handing over the possession and handover the physical possession of the shops.
- ii. 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 contraventions 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. That the present complaint has been filed on 21.11.2020 after offer of possession to the complainant vide letter dated 17.02.2020 and therefore the same is not maintainable. The complainant 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 reject the allegations of complainant. The complainant has no cause to file the present complaint and has delayed in taking possession of the unit. The complaint deserves to dismiss on this ground alone.
- ii. That the complainant/allottee had agreed to pay instalments on time and discharge his obligations as per application form and apartment buyer's agreement. However, he has miserably failed to make payments of respective instalments from time to time and delayed the payment of outstanding for about 2537 days i.e. about 83 ¹/₂ months as on 30.11.2020. From the perusal of statement of account, the complainant has made violation of the Act and has defaulted in making timely payment of dues and



outstanding. Therefore, the complainant has 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 updates of construction to the complainant. He 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 complainant 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 complainant has failed to bring on record any document, evidence etc. which may even allude that the respondent has violated the provisions of the Act, the complainant has no locus standi. Therefore, the complainant has no cause of action or grounds to file the present complaint.

- vi. 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.
- vii. That the complainant approached the respondent and submitted an application for booking of a retail shop bearing unit no. OS-3 on ground floor approximate super area of 1304.08 sq. ft. at the basic sale price of Rs.6,000/- per sq. ft. and paid a sum of Rs.4,00,000/- as booking amount. The complainant had agreed and signed the payment plan for payment of instalment dues as per construction linked plan.
- viii. That pursuant to the application form, the respondent allotted a unit bearing no. O.S -3 on ground floor in the said project in favour of the complainant vide allotment letter dated 29.07.2014 for the basic sale consideration of Rs 78,24,480/- plus all other charges, service tax, levies and other allied charges as per payment plan. The complainant and the respondent had executed the apartment buyer's agreement on 16.01.2015 for the said unit.
- ix. That the project was completed in September 2019 and 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 complainant that the project has been completed, and further offered the possession of unit no. O.S-3, and requested to complete necessary formalities and to make pending payments.

- x. 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 complainant:
- 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.
- xi. Till date, the complainant has not obtained possession of the office space and have made brazen default in taking possession of unit in the utter violation to the terms and conditions of ABA, and the provisions of RERA Act.
- xii. An amount of Rs. 10,43,730/- including tax along with interest of Rs. 4,26,317/- is due and outstanding upon the complaint. As per terms and under the provision of RERA Act, the outstanding amount is fetching interest @15% per annum, which the complainant is liable to pay to the respondent from due date, till the date of payment as per clause 7.3 of ABA.



- xiii. There is no delay in handing over of possession by the respondent. In fact the clause no. 11.1 of the ABA provides that the respondent will hand over the possession within a period of 4 years from the date of approval of the building plan for the project pr within such other timelines as may be directed by any competent authority. Clause 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 upto the date of 20.06.2021 by the Haryana Real Estate Regulatory Authority, being the competent authority in terms of the ABA.
- xiv. 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 starting the development of the project, the respondent has been sending updates about the progress of the project regularly from time to time mostly on monthly basis to all the buyers including the complainant and also the customer care department of the respondent regularly in touch with the buyer for giving updates on the progress of the project.
14. 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.

E. Written arguments filed by both the parties

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

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 सत्यमेव जयते

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 objections raised by the respondent

H. 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 complaint 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.

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 16.01.2015, 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.

I. Direction of the authority

40. 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

HARERA

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 28.09.2021

Judgement uploaded on 20.12.2021.