BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 4278 of 2020
First date of hearing : 08.01.2021
Date of decision : 28.09.2021

Shri. Joginder Mohan
R/o: - 599, Dr. Mukherjee Nagar **Complainant**

Versus

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

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

APPEARANCE:
Shri. Vikas Khatri Advocate for the complainant
Shri. Suresh Rohilla & Shri Aishwarya /Sinha Advocate for the respondent

ORDER

1. The present complaint dated 04.12.2020 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	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 45 of reply)
13.	Allotment letter	06.07.2013 [Page 16 of complaint]
14.	Date of execution of apartment buyer agreement	**23.07.2014** [Page 18 of complaint]
15.	Unit no. as per apartment buyer agreement	SA-604, 6th floor [Page 16 of complaint]
16.	Unit measuring	703.61 sq. ft
17.	Increase in super area of the unit as per statement of account	740.92 sq.ft. (Page 64 of complaint)
18.	Payment plan	Construction linked payment plan [Page 52 of complaint]
19.	Total consideration as per payment plan	Rs. 45,02,487/- [Page 52 of the complaint]
20.	Total amount paid by complainant as per ledger	Rs. 41,97,962/- [Page 48 of reply]
21.	Due date of delivery of	30.05.2017

	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)	Grace period not allowed
22.	Date of offer of possession to the complainant	**20.02.2020** [Page 65 of complaint]
23.	Delay in handing over possession till date of offer of possession+ 2 month i.e. 20.04.2020	2 years 10 months 21 days

B. Facts of the complaint

3. The complainant has booked a service apartment on 20.05.2013 in the project "The Merchant Plaza" of the respondents at sector 88 Gurugram, Haryana. The complainant was allotted service apartment bearing no. SA- 604 vide allotment letter dated 06.07.2013 having an approx. super area of 704 sq.ft. at a basic price of @5500/- per sq.ft. plus other charges and taxes. thereafter various demands were raised by the respondents towards the cost of the aforesaid service apartment which were duly paid by the complainant in time as and when demanded. An apartment buyers' agreement was executed

the said agreement the possession was to be handed within a period of 4 years from the date of sanction of building plan which were sanctioned on 30.05.2013. That from time-to-time demands were raised by the respondents and a total of Rs. 41,97,962/- was paid by the complainant to the respondent towards cost of the aforesaid unit along with other charges and taxes. That the possession of the unit was to be handed over to the complainant on or before 30.05.2017 i.e. within 4 years of the sanctioning of building plan however due to the reasons best known to the respondents the possession of the aforesaid unit was only offered by the respondent to the complainant on 20.02.2020 i.e. after nearly a span of 2 years and 9 months. It is pertinent to mention that the building is still not complete and the interior finishing and exterior work for the entire building is yet to be carried out and the respondents have sent an offer for possession for an incomplete building. That due to the aforesaid delay on the part of the respondents the respondents are liable to pay an interest of Rs. 17,31,600/- calculated @15% p.a to the complainant on the entire amount paid of Rs, 41,97,962/- in addition to a compensation of Rs. 5,00,000/- towards the mental trauma, stress and losses caused due to the delay in possession. That the respondent has also raised an arbitrary and illegal demand of Rs. 2,58,770/- towards the increase in super area along with the letter of offer for possession, whereas no revised sanction plan have ever been obtained by the respondents for the increase in super area from the concerned authority neither a copy of the same if any obtained have been provided to the complainant despite repeated requests and reminders dated 02.03.2020,

07.04.2020,, 20.05.2020, 01.06.2020 & 01.10.2020 thus the same be quashed and nullified.

C. Relief sought by the complainant

i. Direct the respondent to pay interest amount of Rs. 17,31,600/- against delay in possession for the period 30.05.2017 to 20.02.2020 calculated @15% p.a. on total amount paid by the complainant i.e. Rs. 41,97,962/- plus the accrued interest till the date of realization of the said amount.

ii. Direct the respondent to quash and nullify the arbitrary demand of Rs. 2,58,770/- towards the cost of increase in super area in the absence of any revised sanctioned building layout plans showing such increase.

11. 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

12. 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 20.02.2020 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 817 days i.e. about 27 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 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.

iv. The complainant approached the respondent and submitted an application dated for booking of a service apartment bearing unit no. SA-604 on 6th floor approximate super area of 740.92 sq.ft. at the basic sale price of Rs 5,500/- per sq.ft. and paid a sum of Rs 5,00,000/- as booking amount. The complainant had agreed and signed the payment plan as per construction linked plan.

v. That pursuant to the application form, the respondent allotted a unit bearing no. SA-604 on ground floor in the said project in favour of the complainant vide allotment letter dated 06.07.2013 for the basic sale consideration of Rs 38,69,855/- 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 23.07.2014 for the said unit.

vi. 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 20.02.2020 duly informed the complainant that the project has been completed, and further offered the possession of unit no. SA- 604, and requested to complete necessary formalities and to make pending payments.

vii. That under the terms of offer of possession letter dated 20.02.2020, 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.

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

ix. That there is no delay in handing over/offer of possession by the respondent. In fact, the clause no. 11.1 of the apartment buyer agreement provides that the respondent will hand over the possession within a period of 4 years from the date of the approval of the building plan for the project or within such other timeline as may be directed by any competent authority. Then, clause no. 11.1 of the ABA further provides that even after the expiry of the commitment period, the respondent shall be further entitled to a grace period of 180 days for issuing the possession notice. As per HRERA registration, the project completion date is allowed up to the date of 20.06.2021 by the Haryana Real Estate Regulatory Authority, being the competent authority.

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 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 touch with the buyers for giving updates on the progress of the project.

13. Copies of all the relevant documents have been files and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submissions made by the parties.

E. Written arguments filed by both the parties

14. 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

15. 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

16. 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

17. 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.

18. 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."*

19. 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")."

20. 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 doted lines.

21. **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.

22. 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.

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

24. 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.

25. 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.

26. 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.

27. **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.

28. **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.*

29. 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.

30. 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%.

31. **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.

32. 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;"*

33. 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.

34. **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.

35. In the present complaint, the possession has been offered on 20.02.2020 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.

36. 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 23.07.2014, the possession of the subject apartment was to be delivered within a period of 4 years from the date of approval of the building plans for the project or within such other timelines as may be directed by the competent authority. For the reasons quoted above, the due date of possession is to be calculated from the date of approval of building plans i.e. 30.05.2013 and the said time period of 4 year has not been extended by any competent authority. Therefore, the due date of possession is calculated from the date of approval of building plan and the said time period of 4 years expired on 30.05.2017. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over possession is 30.05.2017. The respondent has failed to offer possession of the subject apartment till date of this order. Accordingly, it is the failure of the respondent/promoter to fulfil its obligations and responsibilities as per the agreement to hand over the possession within the stipulated period.

37. 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 20.02.2020. 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 (20.02.2020) which comes out to be 20.04.2020. 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.

38. 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 (20.04.2020), 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. Calculation of increase in supe area

9. The complainant in his complaint has submitted that the respondent at the time of offer of possession had increased the super area of the flat from 703.61 sq. ft. to 740.92 sq. ft without any prior intimation and justification.

10. Clause 4.12 of the apartment buyer agreement provides for change in super area of the unit:

> *"4.12 The Buyer will be intimated about such Changes as per the policy guidelines of DGTCP as may be applicable from time to time. Any Changes approved by the Competent Authority shall automatically supersede the present approved layout plan/Building Plans of the Commercial Complex and in such circumstances, the Buyer accepts a variation up to +/- 10% of the present Super Area of the Apartment at the time of offer of possession subject to the proviso that-*
>
> *4.12.1 If the Super Area of the Apartment is increased, the Buyer shall pay additional consideration at the BSP and PLC mentioned herein and the additional proportionate EDC, IDC (and IAC if demanded by the Competent Authority), the Specified Expenses and Taxes as may be applicable for such increase;*
>
> *4.12.2 If the Super area of the apartment is reduced, the Company shall refund/ adjust the proportionate excess consideration paid at the BSP and PLC as mentioned herein and proportionate excess of EDC, IDC (and IAC if demanded by the Competent Authority), the Taxes and Specified Expenses for the reduced area which will be refunded/adjusted without application of any interest;*
>
> *4.12.3 If any increase/reduction is beyond 10% of the super area of the apartment and the buyer declines to accept such increase of beyond 10%, then the company shall, at its discretion, offer an alternate apartment anywhere in the commercial complex (if available) to the buyer and of similar specification as the apartment including such alternate apartment having a super area of +/-10%. Such alternate apartment, if offered to the*

buyer, shall be mandatorily acceptable to the buyer and this agreement shall means and shall be deemed to refer to the alternate apartment and payments made/ as may be required by the company for allotment of such alternate apartment. The allotment of the apartment shall be cancelled and the same shall thereafter belong absolutely and entirely to the company with right or lien of the buyer on such apartment.

4.12.4 However, if no alternate apartment is available, or if available is not offer to the buyer at the sole discretion of the company, then this agreement will be terminated and the company shall refund to the buyer the money paid by the buyer till such termination with simple interest at the rate of 15% per annum applied on each payment from its date of receipt subject to the deduction of amounts paid by the buyer towards taxes, interest on all delayed payment(s) and brokerage/commission paid by the company to a broker engaged by the buyer, if any, in respect of the apartment. Suh refund will be made to the buyer after the re-sale of the apartment and thereafter, the buyer shall be left with no lien, right, title, interest or claim of whatsoever nature in the apartment or against the company."

11. From the bare perusal of clause 4.12 of the agreement, it is evident that the respondent has agreed to intimate the allottee about such changes as per the policy guidelines of DGTCP as may be applicable from time to time and any changes approved by the competent authority shall automatically supersede the present approved layout plan/building plans of the commercial complex. Further, the complainant had accepted a variation up to +/- 10% of the present super area of the unit in question at the time of offer of possession. The authority observes that the building plans for the project in question were approved by the competent authority on 30.05.2013 vide memo. no. ZP-867/SD(BS)/2013/41292. Subsequently, the buyer's agreement was executed inter se parties on 23.07.2014. Since then, no revised sanction plan has ever been obtained by the respondent the increase in super area from the concerned authority. A copy of the same, if any, has not

been provided by the respondent to the complainant/allottee. The super area once defined in the agreement would not undergo any change if there were no change in the building plan. If there was a revision in the building plan, then also allottee should have been informed about the increase/decrease in the super area on account of revision of building plans supported with due justification in writing.

12. Therefore, the authority is of the opinion that unless and until, the allottee is informed about the increase/decrease of the super area, the promoter is not entitled to burden the allottee with the liability to pay for an increase in the super area. The authority is of the opinion that each and every minute detail must be apprised, schooled and provided to the allottee regarding the increase/decrease in the super area and he should never be kept in dark or made to remain oblivious about such an important fact i.e., the exact super area till the receipt of the offer of possession letter in respect of the unit.

13. In a recent judgement of National Consumer Disputes Redressal Commission, New Delhi, bearing Consumer *Case No. 285 of 2018 (Pawan Gupta Vs. Experion Developers Pvt. Ltd. Decided on 26.08.2020)* which has been upheld by the Hon'ble Supreme Court of India in civil appeal nos. 3703-3704 of 2020 decided on 12th January 2021, the NCDRC in this case observed as under:

> *"17. The complaints have been filed mainly for two reasons. The first is that the opposite party has demanded extra money for excess area and second is the delay in handing over the possession. In respect of excess area, the complainant has made a point that without any basis the opposite party sent the demand for excess area and the certificate of the architect was sent to the complainant, which is of a later date. The*

justification given by the opposite party that on the basis of the internal report of the architect the demand was made for excess area is not acceptable because no such report or any other document has been filed by the opposite party to prove the excess area. Once the original plan is approved by the competent authority, the areas of residential unit as well as of the common spaces and common buildings are specified and super area cannot change until there is change in either the area of the flat or in the area of any of the common buildings or the total area of the project (plot area) is changed. The real test for excess area would be that the opposite party should provide a comparison of the areas of the original approved common spaces and the flats with finally approved common spaces/ buildings and the flats. This has not been done. In fact, this is a common practice adopted by majority of builders/developers which is basically an unfair trade practice. This has become a means to extract extra money from the allottees at the time when allottee cannot leave the project as his substantial amount is locked in the project and he is about to take possession. There is no prevailing system when the competent authority which approves the plan issues some kind of certificate in respect of the extra super area at the final stage. There is no harm in communicating and charging for the extra area at the final stage but for the sake of transparency the opposite party must share the actual reason for increase in the super area based on the comparison of the originally approved buildings and finally approved buildings. Basically, the idea is that the allottee must know the change in the finally approved lay-out and areas of common spaces and the originally approved lay-out and areas. In my view, until this is done, the opposite party is not entitled to payment of any excess area. Though the Real Estate Regulation Act (RERA) 2016 has made it compulsory for the builders/developers to indicate the carpet area of the flat, however the problem of super area is not yet fully solved and further reforms are required."

14. Keeping in view the above discussions and the judgement, the authority reckons that it is basically an unfair trade practice, commonly adopted by majority of builders/developers which has become a means to extract illegally extra money from the allottees at the time when allottee cannot leave the project since his substantial amount is

already locked in the project and he is about to take possession. If at this stage, allottee decides to walk out from the project, he will suffer huge monetary losses apart from mental agony, frustration, disappointment, stress and strain which he has gone through in waiting for getting possession of the unit which is ready to move now but only for the reason of extra illegal demand, he may not be in a position to take possession and the developer is eager to cancel the unit under the garb of one-sided clauses in the agreement. Therefore, the authority after going through the facts and circumstances of the case, deduces that without giving any justification for increase in super area, there is no case made out for charging it. There was a need to put system in place so that at the time of approval of building plans, the promoter was obligated to disclose all the relevant details of super area and whenever there was a revision of building plans, the approval of the competent authority should have been taken before hand prior to raising any demands.

15. Further, in a recent judgement passed by the NCDRC in *Capital Greens Flat Buyer Association Vs. DLF Universal Limited & Anr.* along with connected matters wherein vide judgement dated 03.01.2020 the Commission held that the additional demand on account of increase in the super area, which has been restricted to 15% of the super area stated in the agreements, is justified and the relevant paras are reproduced as under:

> *"13. In terms of Annexure-II of the Agreements executed between the developer and the allottees, the price of the apartments was to be calculated on the basis of its super area. It was also noted in the above referred clause that the super area*

mentioned in clause 1.1 was only tentative and could change. The allottees had agreed not to object to the change of the super area. However, if the super area was to increase/decrease by more than 15% on account of any alteration/modification/change, the allottees were required to be intimated in writing before carrying out the proposed change and had an option to take refund of the payment which they had made to the developer alongwith interest.

The super area in terms of Annexure-II of the Agreements was to consist of the apartment area, pro-rata share of the common areas of the building and pro-rata share of other common areas outside the building, as defined therein.

14. *In the project subject matter of these complaints, the developer has not sought additional payment for increase in the super area beyond 15%. Therefore, no prior notice to the allottees was required before increasing the super area and to the extent there has been actual increase in the super area, as defined in Annexure-II of the Agreements, the allottees are required to pay for such an increase. The allottees had also agreed that not only the super area but even the percentage of the apartment area to the super area could change and they would have no objection to change of the said ratio, though the case of the OP is that the ratio has not changed and the same continues to be 78.5% of the super area.....*

.....Therefore, I have no hesitation in holding that the additional demand on account of increase in the super area, which has been restricted to 15% of the super area stated in the agreements, is justified. Though, the ratio of the apartment area to the super area could also change, it is stated in the affidavit of Mr. Mukul Gupta that the final percentage of the apartment area to the super area of the apartment is not less than 78.5% and there is no material to the contrary filed by the allottees. Therefore, I find no justification in the grievance with respect to the demand on account of increase in the super area of the apartments.

.....

37. *For the reasons stated hereinabove, the complaints are disposed of with the following directions:*

(i) The OP is entitled to the additional demand on account of increase in the super area of the apartments....."

16. The said judgement of NCDRC has been upheld by the Hon'ble Supreme Court vide Judgement dated 14.12.2020 in a civil appeal filed by *DLF Home Developers Ltd. vs. Capital Greens Flat Buyers Association.*

17. There is no harm in charging for the extra area, if justifiable, at the final stage but for the sake of transparency, the respondent must share the calculations for increase in the super area based on the comparison of the originally approved building plans and finally approved building plans. The premise behind this is that the allottee must know the change in the finally approved lay-out and areas of common spaces viz-a-viz the originally approved lay-out plans and common areas.

18. The authority therefore opines that until the justification/basis is given by the promoter for increase in super area, the promoter is not entitled to payment of any excess super area over and above what has been initially mentioned in the builder buyer agreement, least in the circumstances where such demand has been raised by the builder without giving supporting documents and justification. The Act has made it compulsory for the builders/developers to indicate the carpet area of the flat, and the problem of super area has been addressed but regarding on-going projects where builder buyer agreements were entered into prior to coming into force the Real Estate (Regulation and Development) Act, 2016 matter is to be examined on case-to-case basis.

19. In the present complaint, the approximately super area of the unit in the apartment buyer agreement was shown to be 703.61 sq. ft. and has

now been increased to 740.92 sq. ft. at the time of offer of possession. Therefore, the area of the said unit can be said to be increased by 37.31 sq. ft. In other word, the area of the said unit is increased by 5.30%. The respondent, therefore, is entitled to charge for the same at the agreed rates since the increase in super area is 37.31 sq. ft. which is less than 15% however, this will remain subject to the conditions that the flats and other components of the super area in the project have been constructed in accordance with the plans approved by the department/competent authorities. In view of the above discussion, the authority holds that the demand for extra payment on account of increase in the super area from 703.61 sq. ft. to 740.92 sq. ft. by the promoter from the complainant is legal but subject to condition that before raising such demand, details have to be given to the allottee and without justification of increase in super area any demand raised is quashed.

I. Direction of the authority

39. 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 20.04.2020 i.e. date of offer of possession (20.02.2020) + 2 months.

ii. The arrears of such interest accrued from 30.05.2017 till 20.04.2020 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.