BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 4189 of 2020
First date of hearing: 08.01.2021
Date of decision : 28.09.2021

1.Subhash Tandon
2. Neelam Tandon
Both RR/o: - C- II, Vasant Kunj, New Delhi **Complainants**

Versus

M/s Silverglades infrastructure Pvt. Ltd,
Regd. office: - Time Square Building, 5th floor,
block B, Sushant Lok, Phase- I,
Gurugram-122009. **Respondent**

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

APPEARANCE:
Ms. Ankur Berry Advocate for the complainants
Shri Suresh K Rohilla & Shri Ashwariya Sinha Advocates for the respondent

ORDER

1. The present complaint dated 23.11.2020 has been filed by the complainants/allottees in form CRA under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the

provision of the Act or the rules and regulations made there under or 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 complainants, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S. No.	Heads	Information
1.	Name and location of the project	The Merchant Plaza, Sec 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	06.01.2021
	Name of licensee	Magnitude Pvt. Ltd.
5.	RERA registered/ not registered	**Registered 340 of 2017 dated 27.10.2017**
	RERA registration valid up to	**20.12.2020**
6.	Building plans approved on	30.05.2013
7.	Firefighting approval granted on	26.09.2013
8.	Environmental clearance dated	28.02.2014
9.	Excavation approval granted on	04.04.2014
10.	Consent to establish	16.06.2014
11.	Approval of electrification plan granted on	16.01.2020

12.	Date of occupation certificate	11.02.2020
13.	Allotment letter	13.09.2014 (page 22 of complaint)
14.	Date of execution of apartment buyer's agreement	24.04.2017 (Page 28 of complaint)
15.	Unit no. as per allotment letter	GF-31, ground floor (Page 22 of complaint)
16.	Unit measuring	809.90 sq.ft.
17.	Payment plan	Construction linked payment plan (page 59 of complaint)
18.	Total consideration as per payment plan	Rs. 84,70,868/- (page 59 of complaint)
19.	Total amount paid by complainants	Rs. 78,80,734/- as per applicant ledger (annexure P5 on page 67 (a) of complaint)
20.	Due date of delivery of possession	30.05.2017 (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 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)
21.	Date of offer of possession to the complainants	17.02.2020 (page 75 of complaint)
22.	Delay in handing over possession till date of offer of possession i.e., 17.04.2020	2 years 10 months 18 days

B. Facts of the complaint

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3. The complainants have submitted that the present complaint is being filed by the complainants against the respondent company who failed to handover the possession of unit in question as per the clause 11 of builder buyer agreement. That instead of delivering the possession of the unit as promised, the respondent company has delayed and breached its set of obligations. It is further submitted that the respondent company has kept the complainants in the dark since year 2013 and for last 7 years the complainants have been cheated to. Therefore, the complainants pray to this hon'ble authority for directing the respondent company for interest on the delay in offering the possession of the unit in question as per the prescribed rate of interest.

4. The complainants have submitted that they have invested their hard-earned money in the project of respondent company namely Merchant Plaza, Sector 88, Gurgaon believing that the promises made by it would be fulfilled and the complainants will get the unit by 30.11.2017. It is humbly submitted that the complainants are running from pillar to post to get possession of the unit for years. That it is pertinent to mention that the booking was made way back in the year 2013 and only in the year 2017 did the respondent company got the BBA executed.

5. The complainants have submitted that in the year of 2013, the were lured by the brochures and catalogues shown by the officials/representatives of the respondent company and decided to buy a service apartment in its project Merchant Plaza of the respondent company as one of its kind, allowing the complainants a safe monthly income. At the time of booking assurances were given by the

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respondent that the possession will be given within 3 years from the date of making booking payment, and the fact that the service apartment would be placed on lease through a rental pool agreement and leased to hotel business giving the complainants a fixed monthly income in their old age. Thus, the complainants believed that they would be delivered the possession of the unit by 01.07.2016 when the payment was made at the time of submitting the application form.

6. The complainants have submitted that thereafter they were made due payments as and when demanded by the respondent company. On 13.09.2014 the complainants received the allotment letter wherein the respondent connivingly mentioned no due date of possession and rather only mentioned that BBA would be executed in due time. There being no clarity as to the due date of possession. Though vide the allotment letter dated 13.09.2014 the complainants were allotted unit no. 31, ground floor, in of area 809.90 sq.ft. in the project Merchant Plaza of the respondent company.

7. The complainants have submitted that respondent company even without executing the BBA had already taken 30% of the total basic consideration. The complainants had sent a written communication to the respondent after paying 30% of the consideration, for issuance of allotment letter and asking as to when th construction would actually start. However, the only intent of the respondent company seemed to indulge in wrongful gain.

8. The complainants have submitted that on 11.03.2014 a letter was issued by the respondent company and received by the complainants announcing and admitting starting of construction work on the project

Merchant Plaza. In the year 2017 the respondent company got sent builder buyer agreement to the complainants. Thus, the builder buyer agreement was got signed and executed on 24.04.2017. Interestingly the respondent had admitted in clause F of the BBA, that the building plans had been approved on 30.05.2013. Further the clause 11 of the BBA defines the terms and conditions of project and possession clearly stated that the possession period was to start from date of approval of the building plans or such other approvals required to commence construction of the project. Thus, from the bare reading of the BBA it is clear that the intended and promised date of possession was 4 years plus 6 months grace period from 30.05.2013 i.e., the date of approval of building plans. The respondent company had to thus deliver the possession of the unit in question on 30.11.2017, however the respondent failed to fulfil its set of obligations.

9. The complainants have submitted that the malicious intent of the respondent company is made ample clear from the fact that as per section 13(1) of the RERA Act, 2016, a promoter cannot accept a sum more than 10% of the cost of the apartment as an application fee, from an allottee without first entering into a written agreement for sale, whereas in the present matter the respondent company had even before issuing the allotment letter had already taken 30% of the total basic price.

10. The complainants have submitted that as per the BBA, the delivery of possession was to be made within 4 years plus 6 months grace period, i.e. on 30.11.2017. That the complainants have been diligent and noticing that the project was delayed beyond time visited the project

site. That upon visit in 2017 the complainants were astonished to see the status of the project, which was nowhere near completion, yet the respondent raised further demands, which the complainants had no option than to pay, in fear of blocking the already deposited consideration amounts. It is pertinent to mention here that the respondent company has failed to adhere with the terms and conditions of BBA.

11. The complainants have submitted that they continued to pay the remaining instalments as per the payment schedule plans of the BBA and has made payment of Rs 78,80,734/- out of Rs 78,82,548/- i.e., 99% of the payment has been made by the complainants and only a small amount is pending it is pertinent to mention here that the complainants always made the payment as and when demanded obligation of making timely payments as and when the demands were raised and the respondent was obligated to handover the possession of the unit by 30.11.2017, however only on 17.02.2020, did the respondent company send the possession notice. That is after more than 2 years of due date of delivery. The statement of account and possession notice issued by the respondent company are annexed with the complaint.

12. The complainants have submitted that it is pertinent to mention here that as per clause no 11. of the BBA, the project was supposed to be completed in 4 years along with an additional grace period of 6 months and possession of the same ought to have been handed over the complainants, completed in all respects, by 30.11.2017 since 'time is essence' of the said agreement. That if the respondent company failed

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to deliver the possession of the unit in question, then as per clause no. 13, the respondent company is liable to pay Rs 10 per sq.ft. month of the super area to the complainants. It is humbly submitted herein that the respondent company has not placed the complainants at the same status as itself and same is apparent from the fact that as per the terms of the BBA the liability of default of allottee has been kept at a very high interest calculated at the rate of 15% per annum whereas the default by respondent was charged only at the rate of Rs 10 per sq.ft. thus there is an clear violation of section 2(za) of the RERA Act, 2016.

13. The complainants have submitted that it is pertinent to mention that the only reason why the complainants decided to invest in the project was in lieu of the promises and immense importance laid down by the respondent herein with regard to the timely possession of the project which subsequently turns out to be false thereby causing immense hardship, both physical and mental to the complainants. That only in the year 2020, the respondent company has offered the possession to the complainants. It is repeated for the sake of brevity that the respondent company was to deliver the possession on 30.11.2017 but the respondent company failed miserably to deliver the possession within due time.

14. The complainants have submitted that the non-compliance of the obligations by the respondent company is apparent and is within the jurisdiction of this hon'ble authority in terms with the law decided by the hon'ble authority Supreme Court in matter titled *Simmi Sikka versus M/s EMMAR MGF Land ltd.*

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15. The complainants have submitted that the respondent company has failed to honor the terms and conditions of the agreement/application-cum booking form signed between the parties. That the respondent company though failed to honor the terms of date of delivery as per the BBA, the respondent company has to pay dues of the interest on delayed period and this the present complaint has been instituted before this hon'ble authority for the relief delayed possession interest.

16. The complainants have submitted that they are aggrieved by the malicious and high headed behaviour of the respondent, who has kept accepting the money deposited by the complainants and even when asked for a refund due to delay in completion of project Merchant Plaza, failed to refund due to delay in completion of project Merchant Plaza, failed to refund the consideration. Further the offer of possession dated 17.02.2020, has come two years too late from 30.11.2017, the actual due date of possession. The complainants cannot be expected to suffer due to the negligence and arrogant actions of the respondent company which is apparent from the facts submitted therein above. The respondent company thus, ought to pay the delayed interest charges from 30.11.2017 i.e., the agreed date of delivery of possession till 17.02.2020, date of possession notice. till the date of actual possession.

17. The complainants have submitted that on the basis of the above raised submissions it can be concluded that the respondent company having failed to complete the construction of the unit in question in time and delay in handing over the possession of the unit of the complainants in

accordance with the agreed terms of BBA and have committed grave unfair practices and breach of the agreed terms between the parties.

C. Relief sought by the complainants:

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

i. Direct the respondent company to pay interest at the prescribed rate per annum on the delay in handing over the possession from the date of building plan approval i.e., 30.05.2013 till 17.02.2020 in view of the violation of section 18 of the RERA Act, 2016.

D. Reply by the respondent

20. Though the respondent/builder was given an opportunity to file written reply but with no positive results, even it was burden with a cost of Rs. 10,000 to be adjusted at the time of final decree. However, written submission has been filed, taken on record and the same being considered for disposed of matters.

i. The respondent obtained LOI and license for development of the said commercial project. The sanction of building plan (BR-III) was received on 30.05.2013, and other post construction approvals were obtained as made mandatory and specified in sanctioned building plan. The permit for excavation was obtained on 04.04.2014 vide memo no. 646. Similarly, the Fire NOC/approval and Environment Clearance were received on 28.02.2014 vide ref. no. SEIAA/HR/2014/387.The Environment Clearance makes it mandatory to obtain "Consent for Establish" before start of construction work at the site. The last approval required for commencement of construction i.e. "Consent to

Establish" was received on 16.06.2014 and whereupon the respondent commenced construction of the project.

ii. That the respondent further submitted that in case complaint/buyer is entitle to DPC, then respondent is also entitled to claim (a) interest on delayed payment (b) Maintenance charges from the date of offer of possession and (c) Holding charges from date of handing over the possession, as per terms of the agreement.

iii. That the cost of material and inputs have risen more than 10% and as per agreement, the buyer had agreed to bear the escalation based on the super area of the apartment in proportion to the super area of all units. However, the company has not made any demand thereof.

iv. That as per clause 11.1 the agreement, the respondent was to hand over the possession within 48 months from the date of the approval of the building plan or ***such other approval required, whichever is later, to commence the construction of the project*** or within such other timeline as may be directed by any competent authority and 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 ("grace period"). The agreement also provides "force majeure" clause. The force majeure event occurred when construction activities were stopped for 91 days by the orders of Environment Protection Control Authority, National Green Tribunal, and hon'ble Supreme Court and which were neither

anticipated nor were within the control of the respondent, and same are part and parcel of force majeure events. Moreover, the momentum in construction takes some time after each prohibitory order. It is well settled that the party cannot be enforced or compelled to perform the impossibilities or cannot be asked to do anything which is prohibited by the order of court of law.

v. That the provision of the Goods and Service tax Act was passed in the parliament on 29th March 2017 and came into effect on 1st July 2017. The buyers, who has made payment after 01.07.2017 shall be entitled to get credit thereof. However, those who have not made payment of instalments before 01.07.2017 are not entitled to the GST benefit, as per law.

vi. The respondent further denied all other allegations and submitted that:

a. The company has already **paid EDC/IDC charges** @ enumerated in LOI dated 15.10.2012 **(Annexure-G)** to the Govt. Of Haryana at the time of issuance of the license no. 01/2013 for external development works.

b. Electricity load 2108 KW is approved by DHBVNL till then adequate provision of electrical supply is made by the respondent.

c. As per Gurgaon Master Plan 2031, there is a provision of 24 mtrs. wide road abuts the project. However, the Govt. of Haryana is keen to acquire the land for said purpose. ***Notwithstanding anything,*** the respondent has already

offered 0.179 acres (726.53 sq. mtrs.) land to the Govt. of Haryana for the provision 24-meter-wide service road **(Annexure-I)** upon which Govt. of Haryana is going at a fast pace.

d. Adequate provision of stormwater is in place. **(Annexure-J)**

e. Deed of declaration has already been filed by the respondent wherein the interest and share of each occupant is specified.

f. Supply of water, electricity, disposal of sewerage has been made available by the respondent itself until provisions are made by the competent authority. These facts can be verified by appointment of local commissioner at the cost and expenses of the complainants.

g. Occupancy certificate is issued by competent authority after their due satisfaction of availability of water, electricity, disposal of sewerage in the project as per the Act.

h. Escalator and elevators are duly installed **(Annexure-K)** and are fully functional.

i. Main gate entrance, boundary wall, club house, swimming pool, public utility are available in the project. **(Annexure-L)** and open for use by the allottees.

j. Painting, door, and finishing work inside the shops and service apartment are in place and well maintained by company itself **(Annexure-M).**

vii. **The authority has no jurisdiction to adjudicate upon the dispute:** The complainants have claimed compensation under

section 18 of the Act. In view of the settled position of law and the Act read with rules framed thereunder, this authority has no jurisdiction to pass judgement / adjudicate upon the dispute, and pass order of compensation or interest, *as the case may be*, in favour of the complainants. It is also a well settled position of the law that the substantial question of law can be raised at any stage without any such plea in the pleading or reply thereof. The proviso to the section 71 lends to the conclusion that adjudicating officer is empowered to deal and adjudicate the matter of refund and compensation in respect of matter covered under section 12, 14, 18 and 19 of the Act.

viii. **Determination of the date of handing over the possession:** The point of controversy is that whether the 48 months period is to be calculated from the date i.e. 16.06.2014, when the "Consent to Establish" was granted by the concerned authority or the date 30.05.2013 on which the building plans were approved as contended by the apartment buyers.

The sanction of Building Plan was accorded by DTCP, Govt. of Haryana vide memo no. ZP-867/SD/(BS)/2013/41292 dated 30.05.2013. The sanctioned plan contained statutory and mandatory pre-condition before commencement of construction works and the same is reproduced as under:

(a) *Clause 3 of the sanctioned Plan stipulate that the Developer shall obtain clearance/NOC from the Fire Department Gurugram before starting the construction/execution of development works at site.*

Thereafter, the Fire NOC was obtained by company on 26.09.2013 and the same was submitted to DTCP Haryana. Section 15 of the

Haryana Fire Safety Act, 2009 makes it mandatory for a builder/developer to obtain the approval of the Fire Fighting Scheme conforming to the National Building Code of India and obtain a No Objection Certificate (NOC) before commencement of construction.

(b) *Clause 16 (xii) of the sanctioned Building Plan stipulate that the Developer shall obtain an NOC from the Ministry of Environment & Forests as per provisions of the Notification No. S.O. 1533 9E) dated 14.09.2006 before starting the construction / execution of development works at site.*

The Environment Clearance was obtained on 28.02.2014:

(c) *Clause 1 of the Environment Clearance stipulate that the Developer shall obtain "Consent to Establish" from the Haryana Pollution Control Board under Air and Water Act, and a copy shall be submitted to the SEIAA before the start of any construction works at site.*

The Consent to Establish was obtained on 16.06.2014.

In view of the mandatory requirement under Haryana Fire Safety Act, 2009; Environment protection Act 1986 to obtain the fire NOC, Environment clearance, and "consent to establish" before commencement of construction activity, as stipulated in the sanctioned building plans, the 54 month specified in clause 11.1 of the agreement for handing over possession of the apartment, would have to be computed from the date on which "Consent to Establish" was obtained, and not from the date of building plans being sanctioned. The relevant citations are mentioned below:

A. Ireo Grace Realtech Pvt. Ltd. Vs Abhishek Khanna & Ors.

B. Novartis Vaccines and Diagnostics Inc Vs Aventis Pharma Limited, 2010(2) Bom CR 317)

C. Rajasthan State Industrial Development and Investment Corp and Ors Vs. Diamond and Gem Development Corporation Ltd. & Ors.

ix. **Force majeure for determination of date of hearing:** The respondent submitted that the date of possession shall get further extended if the completion of the project is delayed by any reason of force majeure. The buyer agreed to the same and confirms not to claim any compensation of any nature whatsoever. It is submitted that company did not agree to perform the impossible. The construction of the project was intermittently stopped many times for almost 03 months by order/directions of the National Green Tribunal, EPCA and Supreme court, etc, which was neither anticipated at the time of execution of agreement nor is within the control of the respondent. That following period are to be excluded from construction period as "force majeure" events wherein the company was stopped by statutory authorities to continue construction on public safety, health and environment protection.

Dated	Authority	Order	Days
04.11.2019 to 16.12.2019	Supreme court in CWP no. 13029/1985	All the construction activity in the entire NCR to remain closed	42days
01.11.2018 to 10.11.2018	Environment Pollution Control Authority	All the construction activity in the entire NCR to remain closed	10 days

24.12.2018 to 26.12.2018	Environment Pollution Control Authority	Construction activities in Delhi, Gurugram, Ghaziabad and Noida to remain closed till 26.12.2018	3 days
09.11.2017 to 17.11.2017	OA 21/2014 National Green Tribunal	All the construction activity in the entire NCR was prohibited till the next date of hearing	09 days
08.11.2016	Newspaper report	Ban on construction in NCR	07 days
16.12.2015	CWP 817/2015	To enforce CPCB norms at the construction site	20 days
Total no. of days			91days

It is well settled that if some unforeseen events occur during the subsistence of the contract which makes it impossible to perform, it need not be performed, as insistence upon the performance would be unjust and unwarranted. This precedent is well settled by Supreme Court in *Satyabrata Ghose Vs. Mugneeram Bhangur & Co., 1954 SCR 310.*

In view of the above, the period of 48+6 (54) months' time would commence only on 16.06.2014 and expire on 16.12.2018. The force majeure period of 91 days during which the construction activities were stopped, after including in above said date would come to 16.03.2019. This period shall also include default period, as per the agreement.

x. **Relief sought restraining respondent from charging holding charges not tenable:** The respondent submitted that the

possession of the said unit was offered to the complainants vide its letter dated 17.02.2020. However, they instead of taking possession as per the terms agreed between the parties have filed the present complaint before this hon'ble authority seeking compensation for delayed offer of possession, among other reliefs.

xi. Consequently, for the intervening period, the respondent has been saddled with the administrative cost of holing the said unit until possession thereof is duly taken. Furthermore, during the said period until possession is taken by the allottee, or surrendered, no third-party rights can be created and therefore the respondent is further incurring cost of retaining the said unit and maintaining the same. It is pertinent to point out that such a circumstance wherein the buyer fails to take possession of the unit as per the agreement has been duly contemplated under clause 14 of the apartment buyer agreement whereby certain charges are levied upon the buyer for the period during which possession was not taken.

Then, in terms of the Haryana Real Estate (Regulation and Development) Rules, 2017 and Annexure 'A' thereof which provides for a model agreement for sale, it has been fairly contemplated that in the event the allottee fails to take possession of the unit within the time so specific, then he shall continue to be liable to pay maintenance charges and holding charges.

xii. **Right of company to charge club/convenience charges, maintenance charges and interest:**

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a. **As per clause 4.22 of the agreement,** certain areas, facilities and amenities are excluded from the scope of this agreement in which the buyer is not entitled to any ownership rights, title or interest etc. in any form or manner whatsoever. The area of these facilities and amenities are neither included in common area nor in the computation of the super area for calculating the total sale consideration as shown in **deed of declaration dated 07.05.2020**. Therefore, the buyer has no right to claim interest in respect of such areas, facilities and amenities. The areas under these facilities are under sole ownership of the respondent/developer.

b. **As per clause 4.1, 6.1 and 7.3 of the agreement,** the buyer has agreed to make total sale consideration, and other charges as per the **"payment plan"** shown in "Schedule-III & Schedule-IV" and to pay interest @ 15% on delayed payment. A careful perusal of schedule IV makes it clear that buyer had agreed to pay club /conveyance charges for those facilities and amenities as specified in clause 4.22 of the agreement. The terms are executed by mutual consent and are not declared to be void or voidable under any provision of Indian Contract Act, 1872.

c. **As per clauses 12.2, 12.3, 14, 15.4 and 15.8 read-with clause 1(aa)**, the buyer has agreed that 'within a maximum period of 30 (thirty) days from the possession notice and the fulfillment of the conditions, the buyer shall take possession and execute the conveyance deed for the unit. The company shall be entitled to holding charges and maintenance charges if

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buyer fails to take possession of unit within stipulated period of 30 days from the date of offer of possession.

xiii. In **DLF Home Developer Ltd Vs. Capital Greens Flat Buyers Association Etc.** the hon'ble Apex Court, while allowing a complaint set aside the direction of NCDRC allowing refund of club charges to the complainant/consumer. While allowing the appeal, the Supreme Court held that:

> *"**10.** Insofar as the parking and club charges are concerned, in view of the decision of the court in Wing Commander Arifur Rahman Khan (supra), the direction of the NCDRC in that regard shall stand set aside.*
>
> ***11.** Accordingly, we allow the appeals in part to the following extent:*
>
> *(i) The compensation on account of delay in handing over possession of the flats to the flat buyers is reduced from 7% to 6%; and*
>
> ***(ii) The direction for the refund of parking charges and club charges and interest on these two components shall stand set aside.***
>
> ***12.** We clarify that the directions of the NCDRC are upheld, save and except, for the above two modifications in terms of clauses (i) and (ii) above. The payment at the rate of 6% per annum shall be made after making due adjustments for the compensation for delay at the contractual rate (where it has been paid in terms of the Agreement to the flat purchasers). The order shall be complied with within a period of two months from today."*

21. Copies of all the relevant documents have been filed 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 submission made by the parties.

E. Jurisdiction of the authority

22. 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.

E.I Territorial jurisdiction

23. 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.

E.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 complainants at a later stage.

F. Findings on the relief sought by the complainants

F. I Delay possession charges

24. The respondent be directed to pay interest at the rate of 15% per annum for the period 30.05.2017 to 17.02.2020 on total amount paid by the allottees/complainants.

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

26. As per clause 11.1 of the apartment buyer agreement (in short, agreement) provides for 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 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")."

27. 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 terms and conditions of the buyer's agreement say making timely payment, may make the possession clause irrelevant and the commitment date for 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.

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 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 expires on 30.05.2017. Further the agreement provides that promoter shall be entitles to a grace period of 180 days for issuing the possession notice ("Grace"). As a matter of fact, nor the promoter has applied for issuance of occupation certificate neither has initiated the process of issuing the possession notice within the time limit prescribed by the promoter 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 complainants are seeking delay possession charges at the rate of 15% p.a. however, proviso to section 18 provides that where an allottee does not intend to withdraw from the project, 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.*

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30. The legislature in its wisdom in the subordinate legislation under the provision of 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. 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 complainants shall be charged at the prescribed rate i.e., 9.30% by the

respondent/promoter which is the same as is being granted to the complainants in case of delay possession charges.

34. 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 24.04.2017, 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. The building plans were approved by the competent authority on 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 expires 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 handover 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. 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, 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.

G. Directions of the authority

35. 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 to 17.02.2020 shall be paid by the promoter to the allottee within a period of 90 days from date of this order and interest for every month of delay shall be paid by the promoter to the allottee before 10th of the subsequent month as per rule 16(2) of the rules.

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

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

v. The rate of interest chargeable from the allottees by the promoter, in case of default shall be at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the 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 complainants which is not the part of the 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 no. 3864-3899/2020.

36. Complaint stands disposed of.

37. File be consigned to registry.

(Shri Samir Kumar)
Member

(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 28.09.2021

Judgement uploaded on 20.12.2021.