BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 4193 of 2020
First date of hearing: 08.01.2021
Date of decision : 28.09.2021

1. Shweta Jain
2. Abhishek Jain

Both RR/o: - D-2/7, Second floor, ARDEE City, Sector-52, Gurugram-122001 **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 Advocate 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 allottees as per the agreement for sale executed inter se.

A. Project and unit related details

2. The particulars of unit details, sale consideration, the amount paid by the complainants, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S. No.	Heads	Information
1.	Name and location of the project	The Merchant Plaza, 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 (annexure I of reply)
7.	Firefighting approval granted on	26.09.2013
8.	Environmental clearance dated	28.02.2014 (annexure II of reply)
9.	Excavation approval granted on	04.04.2014

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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 (page 45 of reply)
13.	Date of execution of apartment buyer's agreement	23.07.2014 (Page 35 of complaint)
14.	Unit no. as per allotment letter	SA- 704, 7th floor (Page 30 of complaint)
15.	Unit measuring	703.61 sq.ft.
16.	**Increase in super area** of the unit as per statement of account	740.92 sq. ft. (Page 75 of complaint)
17.	Payment plan	Construction linked payment plan (page 67 of complaint)
18.	Total consideration as per payment plan	Rs. 55,57,902/- (page 67 of complaint)
19.	Total amount paid by complainants	Rs. 52,40,872.94/- as per SOA (annexure R/8 page 71 of reply)
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)

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21.	Date of offer of possession to the complainants	20.02.2020 (page 47 of reply)
22.	Delay in handing over possession till date of offer of possession + 2 months i.e., 20.04.2020	2 years 10 months 21 days

B. Facts of the complaint

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 2012 and for last 8 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 if respondent company believing that the promises made by the respondent company 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 2012 and only in the year 2020 did the respondent company offer a possession, but to the utter dismay of the

complainants the possession so offered is only paper possession as the unit of the complainants is a service apartment to be used in rental pool and had to come complete with full furnishing and furniture. Whereas the possession offered by the respondent company is only of a brick-and-mortar structure and nothing more.

5. The complainants have submitted that respondent company namely, M/s Silverglades Infrastructure Private Limited was a company registered under the Companies Act, 1956 having its registered office at C-8/1-A, Vasant Vihar, New Delhi-110057 and corporate office at 5 floor, Time Square Building, block –B, Sushant Lok-phase-I , Gurugram, Haryana. The respondent company claims to be a leading name is Real Estate Sector. That the present complaint is qua the project under the name and style of "Merchant Plaza" situated in sector 88, Gurugram, Haryana.

6. The complainants have submitted that in the year of 2012, the complainants lured by the brochures and catalogues shown by the officials/representation of the respondent company decided to buy a service apartment in the 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 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 16.10.2015 when the payment was made at the time of submitting the application form.

7. The complainants have submitted that thereafter they were made due payments as and when demanded by the respondent company. On 22.07.2013 the complainants received the allotment letter ref no. allottees I.D. 024 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. That vide the allotment letter dated 22.07.2013 the complainants were allotted unit no. 901, 9th floor, in of area 765.50 sq.ft. in the project Merchant Plaza of the respondent company

8. The complainants have submitted that respondent company even without executing the BBA had already taken 30% of the total basic consideration. The respondent company had promoted the said project, calling it one of its kind, with fully furnished, ready to move service apartment which would be leased out to third party, ensuring a regular monthly income for the complainants however all the hopes of the complainants came crashing down when the possession was delayed by over 2 years and when the possession was offered in Feb, 2020 it was only a paper possession.

9. 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 2014 the respondent company got sent builder buyer agreement to the complainants. Thus, the builder buyer

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agreement got signed and executed on 23.07.2014. 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 which 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.

10. 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 allottees 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.

11. 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.

12. The complainants have submitted that at the time of booking, the respondent company had informed and promised the complainants that the service apartment would be leased to a third party and the complainants would get monthly income out of such lease, the complainants believing the words, commitments and promises of the respondent company put their life-long savings in the project of the respondent company to ensure a constant/regular monthly income for themselves. The respondent company had informed them that they would be leasing out the said unit to third party who would be paying monthly rental and till date no such agreement with third party, namely for leasing of the unit has wither been signed or produced before the complainants.

13. 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 52,40,873/- out of Rs 56,75,068/- i.e., 92% of the payment has been made by the complainants. That the respondent company has raised a claim of Rs 2,85,698/- in lieu of increase in area and Rs. 99,140.00/- on account of GST. Interestingly the demand for increased area amount is completely incorrect since

the respondent company for the increased area of 37.11 sq.ft. could charge 2, 59,770/- @ 7000 per sq.ft. whereas the demand raised by the respondent is Rs 2,85,698/-. It is pertinent to mention here that the complainants always made the payment as and when demanded by the respondent company. They have fulfilled their 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 24.02.2020, did the respondent company sent the possession notice. That is after more than 2 years of due date of delivery. That the statement of account and possession notice issued by the respondent company are annexed with the complaint.

14. 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 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 allottees have 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.

15. The complainants have submitted that the respondent company without taking approval of the two-third allottees of the project, altered the size of the unit. That the size of the unit at the time of booking was 703.61 sq.ft. Whereas the possession notice date 20.02.2020, sent by the respondent company shows the size of the unit to be increased to 740.92 sq.ft. i.e., increase size of 37.11. sq.ft. The section 14 of the RERA Act, 2016 explicitly denounces such acts and omissions of the builders.

16. 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.

17. 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.*

18. 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.

19. 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 20.02.2020, 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 till the date of actual possession.

20. 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

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accordance with the agreed terms of BBA and have committed grave unfair practices and breach of the agreed terms between the parties. The respondent being in utter violation of section 18 of the RERA Act, the complainants have the right to get interest on the delayed possession at the prescribed rate of interest from the due date of delivery to date of offer of possession.

C. Relief sought by the complainants:

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

i. Direct the respondent to pay an interest at the prescribed rate per annum on the delay in handing over the possession from 30.11.2017 till actual date of possession in view of the violation of section 18 of the RERA Act 2016.

ii. Direct the respondent company to provide copy of amended building plan approvals whereby the area of the unit increased by more than 6% i.e., from 703.61 to 740.92 sq.ft.

iii. Direct the respondent company to provide the calculation of increased due in the last instalment raised at the time of possession notice dated 20.02.2020.

iv. Direct the respondent company to provide possession after completing the unit and provide the amenities and furnishing as promised.

D. Reply by the respondent

22. The respondent has contested the complaint on the following grounds.

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i. That the present complaint has been filed on 17.11.2020 after offer of possession to the complainants vide letter dated 20.02.2020 and therefore not maintainable. The complainants ought to have taken possession in 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 ABA and those as provided under the RERA Act. The complainants have no cause of action to file present complaint and delay in taking possession of the unit.

ii. The complainants were agreed, under the payment plan of application form signed by them to pay instalments on time and discharge their obligations as per application form and apartment buyer's agreement. However, the complainants miserably filed to make payments of his respective instalments from time to time and delayed the payment of outstanding for about 1036 days i.e. about 34 months as on 30.11.2020. from the perusal of statement of account, it is clear that complainants have made violation of the Act and did not made timely payment of dues and outstanding. Therefore, the complainants have approached with unclean hands.

iii. The obligation to approach this hon'ble authority with clean hands is an absolute obligation. The complainants have attempted

to pollute the stream of justice, and touched the pure foundation of justice with tainted hands and therefore, is not entitled to any relief, interim or final. Pertinent to say that the court does not sit simply as an umpire in a contest between the parties and declare at the end of the combat as to who won and who lost but has a legal duty of its own, independent of parties, to take active part in proceeding and reach at the truth, which is the foundation of administration of justice. Therefore, the truth should become the ideal to inspire the court to pursue. Moreover, it is the bounden duty of the authority to ensure that dishonesty and any attempt to surpass the legal process must be effectively curbed and the authority must ensure that there is no wrongful, unauthorised or unjust gain to anyone as a result of abuse of the process of the law. One way to curb the tendency is to impose realistic or punitive costs.

iv. Since, commencement of construction the respondent had been sending monthly update of construction to the complainants. The complainants have never raised any issue regarding the progress, timeline, quality of construction of the project and any other defects in the service of the respondent. Further, the complainants have 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.

v. That the complainants submitted an application for booking of a service apartment tentative super area of 740.92 sq.ft. at the basic

sale price of Rs 7000/- per sq.ft. and paid a sum of Rs 5,00,000/- as booking amount. The complainants had agreed and signed the payment plan or payment of instalment dues as per construction linked plan.

vi. That pursuant to the application form, the respondent allotted the complainants a unit bearing no SA-704 on 8th floor in the said project, vide allotment letter dated 22.07.2013 having super area of 740.92 for the basic sale consideration of Rs 49,25,270/- plus all other charges, IMFSD, service tax, levies and other allied charges as per payment plan, accepted and acted upon later by the complainants in terms of clause 4.6 of the ABA.

vii. The complainants and the respondent had executed the apartment buyer's agreement on 23.07.2014 for the said unit.

viii. That the respondent commenced excavation, construction and development of project after obtaining all approvals as directd by the competent authorities which provide for "consent to establish" approval, obtained on 16.06.2014 and soon thereafter, commenced the construction of the said project on 01.11.2014.

ix. That the project was completed in Sep 2019, whereupon the respondent applied for occupation 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. Pertinent to say that competent authority took approx. 06 months i.e. 180 days for granting occupation certificate for the project.

x. The respondent vide its letter dated 20.02.2020 duly informed the complainants that the project has been completed, and further offered the possession of unit no. SA 704, and requested to complete necessary formalities and make pending payment as per clause specified and agreed to under the said "Buyer Agreement". 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 complainants:

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

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

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

xi. That the unit is furnished and completed in all respect and refusal to take possession is absolutely wrong and unreasonable, tantamount to default and violation under clause 12 of ABA and section 19(10) of the RERA Act.

xii. The respondent has timely offered the possession of unit to the complainants. In fact, the clause no 11.1 of the ABA provides that the respondent will hand over the possession within a period of 4 years from the date of approval of the building plan for the project or within such other timeline as may be directed by any competent authority. As per direction of the Town and Country

Planning Authorities, the construction can only commence after consent to establish approval. Clause no 11.1 of the ABA further provides that even after the expiry of the commitment period the respondent shall be further entitles to grace period of 180 days for issuing the possession notice. As per HRERA registration the project completion date is allowed upto the date of 20.06.2021 by the Haryana Real Estate Regulatory Authority, being the competent authority in terms of the ABA.

xiii. That the respondent duly complied with all applicable provisions of the Act and rules made there under and also that of agreement for sale qua the complainants 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 complainants and also the customer care department of the respondent regularly touch with the buyers for giving updates on the progress of the project.

xiv. That the brazen violation and defaults to the terms and condition of ABA as well as the RERA Act, is being committed by the complainants. The complainants have neither made timely payment of instalment nor come forward to take possession of unit offered for possession as such an amount of Rs 8,15,482/- is

due on account of unit price and an amount of Rs 92,573/- is outstanding on account of interest.

E. Written arguments filed by both the parties

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

23. 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.

F. Jurisdiction of the authority

6. 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

7. 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.

G.II Subject matter jurisdiction

Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottees as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

> ***Section 11(4)(a)***
>
> *Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;*
>
> *Provided that the responsibility of the promoter, with respect to the structural defect or any other defect for such period as is referred to in sub-section (3) of section 14, shall continue even after the conveyance deed of all the apartments, plot or buildings, as the case may be, to the allottees are executed.*
>
> ***Section 34-Functions of the Authority:***
>
> *34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.*

So, in view of the provisions of the Act of 2016 quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

G. Findings on the relief sought by the complainants

G. 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 20.02.2020 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 allottees that even a single default by the allottees 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 allottees of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottees are left with no option but to sign on the doted lines.

28. **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.

29. The point of controversy in the present compliant is that whether the 48 months period is to be calculated from the date of "Consent to Establish" i.e. 16.06.2014 as contended by the respondent or the date of approval of building plan i.e. 30.05.2013 as contended by the complainants.

30. 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.

31. The authority is of the view that the words "other such approvals" is vague, confusing and deceitful. The respondent is claiming that the sanction plan contained statutory and mandatory pre-conditions before commencement of construction works. The respondent has acted in a highly discriminatory and arbitrary manner. If the said possession clause is read in entirety, the time period of handing over possession is only a tentative period for completion of the said unit in question and the promoter is aiming to extend this time period indefinitely on one eventuality or the other. Moreover, the respondent is claiming to compute due date of possession from numerous approvals and the said approvals are sole liability of the promoter for which allottees cannot be allowed to suffer. It is settled proposition of law that one cannot get the advantage of his own fault. Nowhere in the agreement it has been defined that what approvals forms a part of the

"other such approvals", to which the due date of possession is subjected to in the said possession clause. It seems to be just a way to evade the liability towards the timely delivery of the subject unit.

32. Moreover, the complainants had opted for construction linked plan and the respondent was liable to raise demand as per progress in construction at the site. Our attention was also drawn towards letter dated 14.03.2014 wherein it has been mentioned that- *"You would be happy to know that our Environmental Clearance and Building Plan approvals are well in place now. We have in fact recently done the "Bhoomi Pujan" at the Merchant Plaza site and started the construction work. Our Project team has started the excavation work and is geared up for ensuring smooth delivery of the project."*. Furthermore, our attention was drawn towards the statement of account at page 81 of complaint which clearly states that the demand on account of 'On start of excavation' has been raised on 15.05.2014 which is against statutory provisions, the then existing, as no construction can be started without obtaining consent to establish.

33. Thus, there cannot be two dates for the same cause- one for start of demanding the payment of installments towards the total cost of the unit in question and second for calculating the due date of possession of the unit in question to the allottees. According to the established principles of law and the principles of natural justice when a certain glaring illegality or irregularity comes to the notice of the adjudicator, the adjudicator can take cognizance of the same and adjudicate upon it. The inclusion of such vague and ambiguous type of clauses in the

agreement which are totally arbitrary, one sided and against the interests of the allottees must be ignored and discarded in their totality. In the light of the above-mentioned reasons, the authority is of the view that the date of sanction of building plans ought to be taken as the date for determining the due date of handing over possession of the unit in question to the complainants.

34. **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.

35. **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 allottees 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.*

36. 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.

37. 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%.

38. **Rate of interest to be paid by complainants for delay in making payments**: The respondent contended that the complainants have

defaulted in making timely payments as per the payment plan opted by him. Thus, not entitled to any relief.

39. The authority is of the view that the definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottees by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottees, in case of default. The relevant section is reproduced below:

> *"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.*
>
> *Explanation.—For the purpose of this clause—*
>
> *(i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*
>
> *(ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"*

40. 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.

41. **Validity of offer of possession:** At this stage, the authority would express its views regarding the concept of 'valid offer of possession'. It is necessary to clarify this concept because after valid and lawful offer of possession the liability of promoter for delayed offer of possession

comes to an end. On the other hand, if the possession is not valid and lawful, liability of promoter continues till a valid offer is made and allottees remains entitled to receive interest for the delay caused in handing over valid possession. The authority after detailed consideration of the matter has arrived at the conclusion that a valid offer of possession must have following components:

i. **Possession must be offered after obtaining occupation certificate-** The subject unit after its completion should have received occupation certificate from the department concerned certifying that all basic infrastructural facilities have been laid and are operational. Such infrastructural facilities include water supply, sewerage system, storm water drainage, electricity supply, roads and street lighting.

ii. **The subject unit should be in habitable condition-** The test of habitability is that the allottees should be able to live in the subject unit within 30 days of the offer of possession after carrying out basic cleaning works and getting electricity, water and sewer connections etc from the relevant authorities. In a habitable unit all the common facilities like lifts, stairs, lobbies, etc. should be functional or capable of being made functional within 30 days after completing prescribed formalities. The authority is further of the view that minor defects like little gaps in the windows or minor cracks in some of the tiles, or chipping plaster or chipping paint at some places or improper functioning of drawers of kitchen or cupboards etc. are minor defects which do not render

the unit uninhabitable. Such minor defects can be rectified later at the cost of the developers. The allottees should accept possession of the subject unit with such minor defects under protest. This authority will award suitable relief for rectification of minor defects after taking over of possession under protest.

However, if the subject unit is not habitable at all because the plastering work is yet to be done, flooring works is yet to be done, common services like lift etc. are non-operational, infrastructural facilities are non-operational then the subject unit shall be deemed as uninhabitable and offer of possession of an uninhabitable unit will not be considered a legal valid offer of possession.

[Note (facts to be clarified during hearing): As per the photographs annexed by the respondent, the unit in question seems to be habitable. The photographs enclosed with written argument filed by the respondent were taken after 02.03.2021 i.e. after more than a year from the offer of possession. However, the complainants had also placed on record certain photographs dated 17.09.2020 which suggest that the construction in the project was not complete and works like completion of boundary walls, whitewash and plaster etc. were still going on.]

iii. **Possession should not be accompanied by unreasonable additional demands-** In several cases additional demands are made and sent along with the offer of possession. Such additional demands could be unreasonable which puts heavy burden upon the allottees.

An offer accompanied with unreasonable demands beyond the scope of provisions of agreement should be termed an invalid offer of possession. Unreasonable demands itself would make an offer unsustainable in the eyes of law. The authority is of the view that if respondent has raised additional demands, the allottees should accept possession under protest.

42. 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 complainants towards certain objections regarding taking possession. The objections such as 24 meters connecting road has not been built, escalator and elevators are not installed, the club facilities are not ready as yet, electrical connection from DHBVN and the generators of adequate capacity have not been installed, main entrance gate has not been constructed, boundary wall has not been constructed, no painting, flooring, door and finishing work inside the shops are pending. The counsel for the respondent informed that all the observations has been attended except 24 meters wide connected road. The counsel for the respondent has given written submissions to that effect on 12.04.2021 in compliance of interim order dated 02.03.2021 passed by the authority. Therefore, the offer of possession is valid.

42. 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. 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.

43. Section 19(10) of the Act obligates the allottees to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 11.02.2020. The respondent

offered the possession of the unit in question to the complainants only on 20.02.2020. So, it can be said that the complainants came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the complainants should be given 2 months' time from the date of offer of possession. This 2 months' of reasonable time is being given to the complainants keeping in mind that even after intimation of possession practically he has to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e. 30.05.2017 till the expiry of 2 months from the date of offer of possession (20.02.2020) which comes out to be 20.04.2020. The complainants are further directed to take possession of the allotted unit after clearing all the dues within a period of 2 months and failing which legal consequences as per the provisions of the Act will follow.

44. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with proviso to section 18(1) of the Act on the part of the respondent is established. As such the allottees shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 30.05.2017 till the handing over of the possession, at

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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.II Increase in super area

45. The complainants are contending that the respondent has also raised an arbitrary and illegal demand of Rs. 2,85,698/- towards the increase in super area along with the letter of offer for possession, whereas no revised sanction plan has ever been obtained by the respondent for the increase in super area from the concerned authority neither a copy of the same if any obtained have been provided to the complainants despite various repeated requests and reminders thus the same be quashed and nullified. The said fact has not been denied by the respondent in its reply. The complainants are seeking relief regarding quashing the arbitrary demand of Rs.2,85,698/- towards the cost of increase in super area in the absence of any revised sanctioned building layout plans showing such increasing.

46. Clause 4.12 of the apartment buyer's 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 add 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.....

4.12.4 However, if no....."

47. The authority observed that as per buyer's agreement, the complainants were allotted the said apartment measuring 703.61 but subsequently, vide offer of possession letter dated 20.02.2020, the area of the unit was increased to 740.92 sq. ft. Therefore, the area of the said unit can be said to be increased by 37.31 sq. ft. In other words, the area of the said unit is increased by 5.30%.

48. The respondent, therefore, is entitled to charge for the same at the agreed rates since the increase in super area is far less than 10%; this, however, will remain subject to the conditions that the apartment 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 complainants are legal but subject to condition that before raising such demand details have to be given to the allottees

without justification of increase in super area any demand raised is quashed.

H. Directions of the authority

49. 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 allottees, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

vi. The respondent shall not charge anything from the 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.

23. Complaint stands disposed of.

24. 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.