

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

Complaint no. : 851 of 2021
First date of hearing : 31.03.2021
Date of decision : 31.03.2021

1. Mr. Ujwal Ritwik
R/o- S B Saran TSD Maa Post
Box 10252 Shuaiba 65453 Kuwait
Also at- Seement Vihar, Kaushabi
Sector 14, Uttar Pradesh.

Complainant

Versus

M/s SS Group Pvt. Ltd.
Regd. Office: 77, SS House, Sector 44,
Gurugram-122003, Haryana.

Respondent

CORAM:

Shri Samir Kumar
Shri Vijay Kumar Goyal

**Member
Member**

APPEARANCE:

Mr. Shashank Singh
Shri C.K. Sharma and Shri
Dhruv Dutt Sharma

Advocate for the complainant
Advocate for the respondent

ORDER

1. A complaint dated 12.02.2021 was filed under section 31 of the Real Estate (Regulation and Development) Act, 2016 read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 by the complainant Ujwal ritwik, against the promoter M/s SS Group Pvt. Ltd., on account of violation of the clause 8.1 of flat buyer's agreement executed

on 18.08.2012 in respect of unit described below for not handing over possession by the due date which is an obligation of the promoter under section 11(4)(a) of the Act *ibid*.

2. Since, the flat buyer's agreement has been executed on 18.08.2012 i.e. prior to the commencement of the Act *ibid*, therefore, the penal proceedings cannot be initiated retrospectively. Hence, the authority has decided to treat the present complaint as an application for non-compliance of statutory obligation on part of the promoter/respondent in terms of section 34(f) of the Act *ibid*.

3. The particulars of the complaint are as under:

1.	Name and location of the project	"The Coralwood", Sector 84, Gurugram, Haryana.
2.	Nature of the project	Group housing complex
3.	Project area	15.275 acres
4.	Registered/not registered	Registered
5.	HRERA registration number	381 of 2017dt. 12.12.2017
6.	HRERA registration certificate valid up to	31.12.2019
7.	DTCP license no.	59 of 2008 dated 19.03.2008(valid upto 18.03.2020)
8.	Occupation certificate granted on	17.10.2018 (valid upto 18.03.2020)
9.	Date of execution of flat buyer's agreement	18.08.2012

10.	Flat/unit no.	1203 , 12 th floor, tower F, type G
11.	Flat measuring	2250 sq ft.
12.	Payment plan	Construction linked payment plan
13.	Total consideration amount	Rs.94,76,000/- (as per applicant ledger on page no. 55 of complaint)
14.	Total amount paid by the complainants till date	Rs.92,25,368/- (as per application ledger on page no. 55 of complaint)
15.	Date of delivery of possession as per clause 8.1 of flat buyer's agreement i.e. 36 months from the date of signing of this agreement i.e. 18.08.2012)	18.08.2015
16.	Delay in handing over possession from due date of possession till date of offer of possession via email 29.02.2020 plus 2 months	4 years 8 months 11 days
17.	Date of offer of possession via email	29.02.2020
18.	Penalty clause as per flat buyer's agreement	Clause 8.3 of the agreement i.e. Rs.5/- per sq. ft. per month of the super area for a period of 12 months or till the handing over of the possession, whichever is earlier.

4. The details provided above have been checked on the basis of record available in the case file which has been provided by the complainant and the respondent. a flat buyer's agreement dated 18.08.2012 is available on record for the aforesaid unit

according to which the possession of the same was to be delivered by 18.08.2015. Neither the respondent has delivered the possession of the said unit till date to the complainant nor they have paid any compensation @ Rs.5/- per sq. ft. per month of the super area for a period of 12 months or till the handing over of the possession, whichever is earlier as per clause 8.1 of flat buyer's agreement dated 18.08.2012. Therefore, the promoter has not fulfilled his committed liability as on date.

A. Brief facts of the complaint.

5. The complainant submitted that the complainant applied to the respondent vide application dated 13.05.2012 agreeing to the terms and conditions as set out in the application for allotment of residential flat no. 1203 type-g located in tower-f on 12th floor, in the group housing complex having an approximate super area of 2250 sq. feet and paid a sum of rs. 9,00,000/- towards the "sale price" of the flat at the time of application. The complainant and the Respondent entered into a flat Buyer's agreement on 18.08.2012 at Gurgaon, Haryana.
6. The complainant further submitted that as per clause 8 of the agreement the developer was obligated to hand over the possession of the flat within a period of 36 months from the

date of signing of the agreement dated 18.08.2012. As per the agreement, the respondent shall be entitled to a grace period of 90 days after the expiry of 36 months or such extended period (for want of building sanctioned plan), for applying and obtaining the occupation certificate in respect of the group housing complex.

7. That the respondent sent a communication dated 29.02.2020 to the complainant that the respondent has completed the development of his project "the coralwood" group housing complex situated at sector-84, gurugram and the same is ready for possession. In the said letter, it was also indicated that the unit No. F-1203 allotted to the Complainant and also sought remaining payment within 15 days from the date of present offer letter. The respondent also requested to the complainant to take possession of the above mentioned Unit within 15 days from the receiving of the present communication and as well as after making payment.
8. That the complainant replied to the offer of possession which was sent by the respondent and pointed out that the said offer of possession is delayed. However, the complainant expressed his interest to take the possession of the flat but sought compensation for delayed possession.

9. The complainant also expressed in his mail dated 05.03.2020, that the respondent/developer did not consider or whisper about the compensation for delayed delivery of possession. That having been aggrieved by the response of the Respondent the complainant is constrained to file the present complaint before this Ld. Authority.

B. Relief sought by the complainant.

- a) To grant the 18 % interest on money advanced (for the delay caused in giving the delivery of possession) from the 'due date of delivery of possession' i.e. 18.11.2015 till date.
- b) To pass an order directing the respondent/developer to deliver the possession of allotted unit as per the terms of buyer's agreement and in accordance with the law laid down in this regard.
- c) To perish the claim of "Holding-Charge" levied by the respondent in as much as it's arbitrary and untenable in the light of present circumstances, since the Complainant has not been paid delayed compensation.
- d) To pass an order imposing appropriate costs for the proceedings & compensation for the hardship caused to the complainant due to the respondent.

C. Reply by the respondent.

10. The respondent submitted that the complaint filed by the complainant before the Id. authority, besides being misconceived and erroneous, is untenable in the eyes of law. the complainant has misdirected himself in filing the above captioned complaint before this Id. authority as the reliefs being claimed by the complainant, besides being illegal, misconceived and erroneous, cannot be said to even fall within the realm of jurisdiction of this Id. authority.
11. It would be pertinent to make reference to some of the provisions of the the Act, made by the Government of Haryana in exercise of powers conferred by sub-section 1 read with sub-section 2 of section 84 of the Act. section 31 of the Act provides for filing of complaints with this Id. authority or the adjudicating officer. Sub-section (1) thereof provides that any aggrieved person may file a complaint with the authority or the adjudicating officer, as the case may be, for any violation or contravention of the provisions of the Act or the rules and regulations made there under against any promoter, allottee or real estate agent, as the case may be. Sub-section (2) provides that the form, manner and fees for filing complaint under sub-section (1) shall be such as may be prescribed. Rule 28 of the rules provides for filing of



complaint with this Id. authority, in reference to section 31 of the Act. Sub-clause (1) inter alia, provides that any aggrieved person may file a complaint with the authority for any violation of the provisions of the Act or the rules and regulations made thereunder, save as those provided to be adjudicated by the adjudicating officer, in form 'C.R.A'. Significantly, reference to the "authority", which is this Id. authority in the present case and to the "adjudicating officer", is separate and distinct. "adjudicating officer" has been defined under section 2(a) to mean the adjudicating officer appointed under sub-section (1) of section 71, whereas the "authority" has been defined under section 2(i) to mean the real estate regulatory authority, established under Sub-section (1) of section 20.

12. Apparantly, in the present case, the complainant is seeking interest which, from reading of the provision of the Act and the Rules, especially those mentioned hereinabove, would be liable for adjudication, if at all, by the adjudicating officer and not this Id. Authority. Thus, on this ground alone the complaint is liable to be rejected.

13. It is a matter of record and rather a conceded position that no such agreement, as referred to under the provisions of 2016 act and the Rules, has been executed between respondent

and the complainant. Rather, the agreement that has been referred to, for the purpose of getting the adjudication of the complaint, though without jurisdiction, is the flat buyer's agreement, executed much prior to coming into force of the Act.

14. The adjudication of the complaint for interest and compensation, as provided under sections 12, 14, 18 and 19 of the act, if any, has to be in reference to the agreement for sale executed in terms of the Act and the rules and no other agreement. This submission of the respondent inter alia, finds support from reading of the provisions of the Act as well as the rules, including the aforementioned submissions.
15. Thus, in view of the submissions made above, no relief much less as claimed can be granted to the complainant. It is reiterated at the risk of repetition that this is without prejudice to the submission that in any event, the complaint, as filed, is not maintainable before this Id. authority.
16. That the reliefs sought by the complainant appear to be on misconceived and erroneous basis. Hence, the complainant is estopped from raising the pleas, as raised in respect thereof.
17. That apparently, the complaint filed by the complainant is abuse and misuse of process of law and the reliefs claimed as sought for, are liable to be dismissed. No relief much less any

interim relief, as sought for, is liable to be granted to the complainant.

18. That the complainant has miserably and willfully failed to make payments in time or in accordance with the terms of the allotment/ flat buyer's agreement. It is submitted that the complainant has frustrated the terms and conditions of the flat buyer's agreement, which were the essence of the arrangement between the parties and therefore, the complainant now cannot invoke a particular clause, and therefore, the complaint is not maintainable and should be rejected at the threshold. that the complainant has also misdirected in claiming interest on account of alleged delayed offer for possession. besides the fact that this ld. authority cannot be said to have any jurisdiction to award/grantsuch relief to the complainant, it is submitted that there cannot be said to be any alleged delay in offering of the possession.

D. Jurisdiction of the authority

19. The preliminary objection raised by the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observed that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

D.I. Territorial jurisdiction

20. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, 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, therefore this authority has complete territorial jurisdiction to deal with the present complaint.

D.II Subject matter jurisdiction

21. The respondent has contended that the complainant is seeking interest which, from reading of the Act and the rules, would be liable for adjudication, if at all, by the adjudicating officer and not this Id. Authority. The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as held in ***Simmi Sikka v/s M/s EMAAR MGF Land Ltd. (complaint no. 7 of 2018)*** leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage. The said decision of the authority has been upheld by the Haryana Real Estate Appellate Tribunal in its judgement dated 03.11.2020, in appeal nos. 52 & 64 of 2018 titled as ***Emaar MGF Land Ltd. V. Simmi Sikka and anr.***

E. Findings of the authority on objections raised by respondent.

E.I Holding charges.

22. The respondent is contending that the complainant is liable to pay holding charges as per the flat buyer's agreement for the reason that complainant has delayed in taking possession even after offer of possession being made by the respondent. The authority observed that as per clause 9 of the agreement, in the event the flat buyer delays to take the possession of the unit within the time limit prescribed by the company in its intimation/offer of possession then the promoter shall be entitled to holding charges. However, it is interesting to note that the term holding charges has not been clearly defined in the flat buyer's agreement or any other relevant document submitted by the respondent/promoter. Therefore, it is firstly important to understand the meaning of holding charges which is generally used in common parlance. The term holding charges or also synonymously referred to as non-occupancy charges become payable or applicable to be paid by the allottee if the possession has been offered by the builder to the owner/allottee and physical possession of the unit has not been taken over by the allottee, the flat/unit is lying vacant even when it is in a ready-to-move condition. Therefore, it can be inferred that holding charges is

something which an allottee has to pay for his own unit for which he has already paid the consideration just because he has not physically occupied or moved in the said unit.

23. The hon'ble NCDRC in its order dated 03.01.2020 in case titled as "Capital Greens Flat Buyer Association and Ors. V. DLF Universal Ltd., Consumer case no. 351 of 2015" held as under:

"36. It transpired during the course of arguments that the OP has demanded holding charges and maintenance charges from the allottees. As far as maintenance charges are concerned, the same should be paid by the allottee from the date the possession is offered to him unless he was prevented from taking possession solely on account of the OP insisting upon execution of the Indemnity-cum-Undertaking in the format prescribed by it for the purpose. If maintenance charges for a particular period have been waived by the developer, the allottee shall also be entitled to such a waiver. As far as holding charges are concerned, the developer having received the sale consideration has nothing to lose by holding possession of the allotted flat except that it would be required to maintain the apartment. Therefore, the holding charges will not be payable to the developer. Even in a case where the possession has been delayed on account of the allottee having not paid the entire sale consideration, the developer shall not be entitled to any holding charges though it would be entitled to interest for the period the payment is delayed."

24. The said judgment of NCDRC was also upheld by the hon'ble Supreme Court vide its judgement dated 14.12.2020 passed in the civil appeal filed by DLF against the order of NCDRC (supra). The authority earlier, in view of the provisions of the Act in a lot of complaints decided in favour of promoters that holding charges are payable by the allottee. However, in the

light of the recent judgement of the NCDRC and hon'ble Apex Court (supra), the authority concurring with the view taken therein decides that a developer/ promoter/ builder cannot levy holding charges on a homebuyer/allottee as it does not suffer any loss on account of the allottee taking possession at a later date.

25. As far as holding charges are concerned, the developer having received the sale consideration has nothing to lose by holding possession of the allotted flat except that it would be required to maintain the apartment. Therefore, the holding charges will not be payable to the developer. Even in a case where the possession has been delayed on account of the allottee having not paid the entire sale consideration, the developer shall not be entitled to any holding charges though it would be entitled to interest for the period the payment is delayed.

F. Findings on the relief sought by the complainant.

26. In the present complaint, the complainants intend 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."

27. The complainant made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter as mentioned above. The complainant requested that necessary directions be issued to the promoter to comply with the provisions and fulfil obligation under section 37 of the Act.

28. As per clause 8.1 of the flat buyer's agreement provides for handing over of possession and is reproduced below:

Subject to terms of this clause and subject to the Flat Buyer(s) having complied with all the terms and condition of this Agreement and not being in default under any if the provisions of this Agreement and complied with all the provisions, formalities, documentation etc., as prescribed by the Developer, the Developer proposes to handover the the possession of the Flat within a period of thirty six (36) months from the date of signing of this Agreement. However this period will be automatically stand extended for the time taken in getting the building plans sanctioned. The Flat Buyer(s) agrees and understands that the Developer shall be entitled to a grace period of 90 days, after the expiry of thirty six (36) months or such extended period (for want of building sanctioned plans), for applying and obtaining the Occupation Certificate in respect of the group housing complex."

29. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the apartment within 36 months from the date of signing of the flat buyer's agreement.



This period of 36 months expires on 10.05.2015. Further the flat buyer's agreement provides that promoter shall be entitled to a grace period of 90 days for applying and obtaining occupation certificate in respect of group housing complex. As a matter of fact, the promoter has not applied for occupation certificate within the time limit prescribed by the promoter in the flat buyer's agreement. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 90 days cannot be allowed to the promoter at this stage. The same view has been upheld by the hon'ble Haryana Real Estate Appellate Tribunal in appeal nos. 52 & 64 of 2018 case titled as ***Emaar MGF Land Ltd. VS Simmi Sikka*** case and observed as under: -

68. As per the above provisions in the Buyer's Agreement, the possession of Retail Spaces was proposed to be handed over to the allottees within 30 months of the execution of the agreement. Clause 16(a)(ii) of the agreement further provides that there was a grace period of 120 days over and above the aforesaid period for applying and obtaining the necessary approvals in regard to the commercial projects. The Buyer's Agreement has been executed on 09.05.2014. The period of 30 months expired on 09.11.2016. But there is no material on record that during this period, the promoter had applied to any authority for obtaining the necessary approvals with respect to this project. The promoter had moved the application for issuance of occupancy certificate only on 22.05.2017 when the period of 30 months had already expired. So, the promoter cannot claim the benefit of grace period of 120 days. Consequently, the learned Authority has rightly determined the due date of possession

30. It has been observed that as per clause 9 of the agreement, in the event the flat buyer delays to take the possession of the

unit within the time limit prescribed by the company in its intimation/offer of possession then the promoter shall be entitled to charge holding charges.

31. It is interesting to note that the term holding charges has not been clearly defined in the BBA and or any other relevant document submitted by the respondents/promoters. Therefore, it is firstly important to understand the meaning of holding charges which is generally used in common parlance. The term holding charges or also synonymously referred to as non-occupancy charges become payable or applicable to be paid if the possession has been offered by the builder to the owners/allottees and physical possession unit not taken over by allottees, but the flat/unit is lying vacant even when it is in a ready-to-move condition. Therefore, it can be inferred that holding charges is something which an allottee has to pay for his own unit for which he has already paid the consideration just because he has not physically occupied or moved in the said unit.

32. The hon'ble NCDRC in its order dated 03.01.2020 in case titled as "Capital Greens Flat Buyer Association and Ors. V. DLF Universal Ltd., Consumer case no. 351 of 2015" held as under:

"36. It transpired during the course of arguments that the OP has demanded holding charges and maintenance charges from

the allottees. As far as maintenance charges are concerned, the same should be paid by the allottee from the date the possession is offered to him unless he was prevented from taking possession solely on account of the OP insisting upon execution of the Indemnity-cum-Undertaking in the format prescribed by it for the purpose. If maintenance charges for a particular period have been waived by the developer, the allottee shall also be entitled to such a waiver. As far as holding charges are concerned, the developer having received the sale consideration has nothing to lose by holding possession of the allotted flat except that it would be required to maintain the apartment. Therefore, the holding charges will not be payable to the developer. Even in a case where the possession has been delayed on account of the allottee having not paid the entire sale consideration, the developer shall not be entitled to any holding charges though it would be entitled to interest for the period the payment is delayed."

33. The said judgment of NCDRC was also upheld by the Hon'ble Supreme Court vide its judgement dated 14.12.2020 passed in the civil appeal filed by DLF against the order of NCDRC (supra). The authority earlier, in view of the provisions of the Rules, 2017 in a lot of complaints decided in favour of promoters that holding charges are payable by the allottee. However, in the light of the recent judgement of the NCDRC and Hon'ble Apex Court (supra), the authority concurring with the view taken therein decides that a developer/ promoter/ builder cannot levy holding charges on a homebuyer/allottee as it does not suffer any loss on account of the allottee taking possession at a later date even due to an ongoing court case.

34. As far as holding charges are concerned, the developer having received the sale consideration has nothing to lose by holding

possession of the allotted flat except that it would be required to maintain the apartment. Therefore, the holding charges will not be payable to the developer. Even in a case where the possession has been delayed on account of the allottee having not paid the entire sale consideration, the developer shall not be entitled to any holding charges though it would be entitled to interest for the period the payment is delayed.

35. The complainants made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter as mentioned above. The complainants requested that necessary directions be issued to the promoter to comply with the provisions and fulfil obligation under section 37 of the Act.

36. As per clause 8.1 of the flat buyer's agreement

Subject to terms of this clause and subject to the Flat Buyer(s) having complied with all the terms and condition of this Agreement and not being in default under any if the provisions of this Agreement and complied with all the provisions, formalities, documentation etc., as prescribed by the Developer, the Developer proposes to handover the the possession of the Flat within a period of thirty six (36) months from the date of signing of this Agreement. However this period will be automatically stand extended for the time taken in getting the building plans sanctioned. The Flat Buyer(s) agrees and understands that the Developer shall be entitled to a grace period of 90 days, after the expiry of thirty six (36) months or such extended period (for want of building sanctioned plans), for

applying and obtaining the Occupation Certificate in respect of the group housing complex.”

37. On consideration of the facts and the agreement dated 18.08.2012 for unit no. 1203, 12th floor, tower F, type G in “The Coralwoods”, sector 84, gurugram, the possession was to be handed over to the complainants within a period of 36 months + 90 days grace period from date of execution of this agreement which comes out to be . It was construction linked plan. However, respondent has not delivered the unit in time. Complainants have already paid rs. 92,25,368/- to the respondent against a total sale consideration of rs. 94,76,000/-. As such, the complainants are entitled for delayed possession charges at prescribed rate of interest i.e. 9.30% per annum w.e.f 18.11.2015 as per the provisions of section 18 of the Act *ibid*.

G. Directions of the authority

38. After taking into consideration all the material facts as adduced and produced by both the parties, the authority exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issues the following directions to the respondent in the interest of justice and fair play:

- i. The respondent is directed to pay the interest at the prescribed rate i.e. 9.30% per annum for every month of delay on the amount paid by the complainants.
- ii. The respondent is directed to pay interest accrued from 18.08.2015 to 29.02.2020 plus two months on account of delay in handing over of possession to the complainants within 90 days from the date of order.
- iii. The respondent is directed to not to charge anything from the complainant which is not the part of buyers agreement.

39. Complaints stands disposed of.

40. File be consigned to the registry.


(Samir Kumar)
Member


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 31.03.2021