BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no : 3175 of 2021
Date of decision : 31.05.2022

Kuldeep Kumar Kohli
Address: - RZ 220B, Street no. 3,
Ram Chowk, Sadh Nagar Part-1,
Palam Colony, New Delhi

Complainant

Versus

M/s Emaar MGF Land Ltd.
Address: Emaar MFG Business Park,
M.G. Road, Sector 28, Sikandarpur Chowk,
Gurugram, Haryana.

Respondent

CORAM:
Dr. K.K. Khandelwal — **Chairman**
Shri Vijay Kumar Goyal — **Member**

APPEARANCE:
Complainant in person — Advocate for the complainant
Shri Dhruv Rohatgi — Advocates for the respondent

ORDER

1. The present complaint dated 10.08.2021 has been filed by the complainant/allottee in Form CRA under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions to the allottee as per the agreement for sale executed inter se them.

A. Project and unit related details

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

Sr. No.	Particulars	Details
1.	Name of the project	Emerald floors at Emerald Hills, Sector 65, Gurugram, Haryana
2.	Area of the project	25.499 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no.	06 of 2008 dated 17.01.2008
	License valid upto	16.01.2021
	Licensee details	Active Promoters Pvt. Ltd. and 2 others
	Area for which license was granted	25.499 acres
5.	HRERA registered/not	**Registered** vide no. 104 of 2017 dated 24.08.2018 [For 82768 sq. mtrs.]
	Validity of registration	23.08.2022
6.	Provisional allotment letter dated	03.07.2009 [annexure C12, page 86 of complaint]
7.	Unit no.	EHF-350-I-GF-130 [page 96 of complaint]
8.	Date of execution of buyer's agreement	28.05.2010

		[page 94 of complaint]
9.	Possession clause	***13. POSSESSION*** ***(a) Time of handing over the possession*** *Subject to terms of this clause and subject to the Allottee(s) having complied with all the terms and conditions of this Agreement, and not being in default under any of the provisions of this Agreement and compliance with all provisions, formalities, documentation etc., as prescribed by the Company, the Company proposes to hand over the possession of the independent floor within 27 months from the date of execution of this Agreement. The Allottee(s) agrees and understands that the Company shall be entitled to a* ***grace period of 3 months, for applying and obtaining the occupation certificate in respect of the Independent Floor and/or the Project***. (Emphasis supplied) [page 114 of complaint]
10.	Due date of possession	28.08.2012 [**Note:** Grace period is not included]
11.	Total consideration as per statement of account dated 20.08.2021 at page 196 of reply	Rs. 7,987,870/-
12.	Total amount paid by the complainant as per statement of account dated 13.10.2021 at page 197 of reply	Rs.7,991,076/-

13.	Occupation certificate	09.06.2016 [annexure R8, page 187 of reply]
14.	Offer of possession	05.10.2016 [annexure R9, page 188 of reply]
15.	Date of conveyance deed	07.08.2018 [annexure R8, page 155 of reply]

B. Facts of the complaint

3. The complainant has made the following submissions in the complaint:

i. That the representatives of the company handed over a brochure of the company regarding the project "emerald hills" in the 2009 itself and the brochure of the company, looked to be a very well-designed brochure of international standards speaking high of the respondent. The complainant, who was caught in the web of false promises by the agents of the respondent company, paid an initial booking amount of Rs. 5,00,000/- vide cheque no. 235780 dated 07.06.2009 drawn on ING Vyasa bank ltd. and the same was acknowledged by the respondent.

ii. That the respondent issued a provisional allotment letter no. EHF/704596 dated 3.7.2009 to the complainant, allotting a flat bearing unit No. EHF-350-I-GF-130 (hereinafter referred to as 'unit') in Ivory Sector, on the plot size of 292.64 sq. mtrs (350 sq. yds.), in Emerald Floors at Emerald Hills, Sector 65, urban estate, Gurgaon having super build up area of 1750 sq.ft. in the aforesaid project of the builder.

iii. That in spite of the payment towards third instalment having been made, the respondent sent the request for the payment to be made within 90 days once again vide letter no. EHF/705073-PR-030 dated 19.9.2009 and this was again addressed to a wrong address and copy of the repeated payment request was handed over to the complainant during one of his visits to the respondent office. The point to be emphasized here is that in spite of repeated requests in writing and complaint at the customer services, the address is not being corrected in the records and the wrong speaks volumes of the high handedness of the respondent.

iv. That ordinarily a buyer's agreement should be signed by the builder within a period of maximum three months from the date of accepting the initial booking amount which in the present case was 11.06.2009 but in the present case a period of 11 months had lapsed when the BBA agreement was signed i.e. 28.05.2010. The delivery period as per the BBA clause 13 (a) comes to 28.05.2012 but in case the BBA was signed on time within three months from making the first payment (on 11.6.2009) by 11.9.2009, in such a case the delivery period would have been 11.02.2012.

v. That the complainant made another payment of Rs.7,76,321/- vide cheque no. 688850 dated 16.10.2011 towards the fourth instalment which had to be paid on start of construction which means against a delivery period of 11.02.2012, the respondent is starting the construction in October 2011, which is a clear indication of the respondent having no intention of delivering the project on time i.e. by 11.02.2012.

vi. The respondent did not allow the complainant to visit the site and the complainant was never allowed to see the site before making the payment and hence had no option but to make the payments as and when demanded. That on 03.03.2014, the complainant specifically informed the respondent that despite eight reminders requesting the respondent to correct the address, the same has not been done hence the complainant cannot be held responsible for such major act of irresponsibility on the part of the respondent's team.

vii. That on 05.10.2016 the respondent sent an offer of possession to the complainant after a delay of approx. 4 years 6 months, along with many demands, which were not payable as per the BBA. The offer of possession was an ambiguous offer of possession and carried many demands which were not a part of the builder buyer's agreement and also carried the indemnity-cum-undertaking wherein certain conditions were very objectionable and hence in no certain terms made the offer of possession an unambiguous offer of possession.

viii. That the complainant was asked to pay an amount of Rs. 75,261/- towards the HVAT in the form of a DD. It was further stated that the amount mentioned is a provisional amount. The complainant was further informed that for the period post March 2014 the respondent shall continue to contest the current mechanism adopted by the department. The complainant was further asked to give an FD of Rs. 13,774/-. That on 14.06.2017 the complainant sent another e mail to the Respondent objecting to many demands which were not a part of the BBA. In the said e mail objections were raised on many demands which were not a part of the BBA more

specifically charges for electrification amounting to Rs.56,667/- electricity connection charges amounting to Rs.24,000/- administration charges, registration charges, HVAT details of the compensation etc. That on 22.09.2017 the complainant sent detailed letter to the respondent asking for removal of demands which are not a part of the BBA and handing over the possession with demands as per the BBA.

ix. The major demands requested to be removed in the above referred letter were:

- Electrification charge of Rs. 65,187/-
- Interest Free Security Deposit of Rs. 87,500/-
- Water Connection charge of Rs 3996/-
- Electricity connection charge of Rs. 27,600/-
- Monthly maintenance charge of Rs. 53,130/-
- HVAT charge of Rs. 2,91,165/-
- Registration charge, administrative charge and incidental charge of Rs. 31,301/-
- Insistence on an Indemnity-cum-Undertaking
- Increase in the stamp duty by Rs. 72,300/- from 5, 06,100/- as mentioned in the offer of possession to Rs. 5, 78,400/- for no fault of the complainant

x. The complainant had all the intentions of signing the conveyance deed, but the respondent was never prepared to remove the amounts from the offer of possession, which were not a part of the builder buyer agreement. That it is on 18.07.2018, the complainant was made a payment of Rs. 14,40,672/- after being

forced to sign an agreement and a copy of the agreement was not provided to the complainant nor were any details provided to the complainant as to how this figure has been reached. That on 11.09.2018, the possession of the flat was offered for handing over to the complainant, but the flat had many seepage issues. this was written on the unit handover letter specifically by the complainant when the handover was actually given on 11.09.2018. The complainant had no option but to accept the unit first and then only he was assured of the payment payable to the complainant, as per their own calculations.

xi. That while giving the said cheque to the complainant, the amount towards IFMS of Rs. 53,130/- HVAT amounting to Rs. 75,261/- and Rs. 13,774/- Administrative charges of Rs. 12,000/- registration charges of Rs. 29,501.00, electrification charges of Rs. 65,167/- were all deducted and the entire compensation till the time of possession and rectification of defects was not given to the complainant nor was an additional amount towards the charges for the registration by Rs. 72,300/- from 5, 06,100/- as mentioned in the offer of possession to Rs. 5, 78,400/-, were refunded to the complainant. That the cause of action accrued in favour of the complainant and against the respondent on the date when the respondents advertised the said project, it again arose on diverse dates when the apartments owners entered into their respective agreement, it also arose when the respondents inordinately and unjustifiably and with no proper and reasonable legal explanation or recourse delayed the

project beyond any reasonable measure continuing to this day, it continues to arise as the apartment owners have not been delivered the apartments and the infrastructure facilities in the project have not been provided till date and the cause of action is still continuing and subsisting on day to day basis.

C. Relief sought by the complainant/allottee

4. The complainant has filed the present compliant for seeking following relief:

i. It is most respectfully prayed that this authority be pleased to order the respondent to adjust the entire amount of interest due to the complainant from the date of the delivery period as per the buyer's agreement to the actual delivery of possession after due rectification having been done on 31.03.2020 as per the guidelines laid in the Act of 2016.

ii. It is most respectfully prayed that this authority be pleased to order the respondent to pay the balance amount due to the complainant from the respondent on account of the interest after deducting what has already been paid, as per details provided earlier in the petition, which, for the sake of brevity are not being repeated here.

iii. It is most respectfully prayed that this authority be pleased to order the respondent not to charge anything irrelevant which has not been agreed to between the parties as stated in the interim relief, which for the sake of brevity is not being repeated.

iv. It is most respectfully prayed that this authority be pleased to order the respondent not to charge anything towards HVAT for the reasons explained in the petition.

v. It is most respectfully prayed that this authority be pleased to order the respondent to withdraw the excessive demands raised as per details provided in the interim relief as well as the main petition.

vi. It is most respectfully prayed that this authority be pleased to order the respondent to kindly handover the entire possession of the unit of the complainant, once it is ready, in all respects with proper road, electrification of the roads, functioning of the club etc. and other things which were assured in the brochure, as the complainant had booked a unit in a complex based on the brochure and not a stand-alone flat.

5. On the date of hearing, the authority explained to the respondent/promoter about the contravention as alleged to have been committed in relation to section 11(4)(a) of the Act and to plead guilty or not to plead guilty.

D. Reply by the respondent/promoter

6. The respondent has raised certain preliminary objections and has contested the present complaint on the following grounds:

i. That the present complaint pertains to the alleged delay in delivery of possession for which the complainant has filed the present complaint, before the authority, inter-alia seeking possession of the unit in question as well as delayed interest towards delay in handing over the property.

ii. That the complainant prior to approaching the respondent, had conducted extensive and independent enquiries regarding the project and it was only after the complainant was fully satisfied with regard to all aspects of the project, including but not limited to the

capacity of the respondent to undertake development of the same, the complainant took an independent and informed decision to purchase the said unit, un-influenced in any manner by the respondent. The complainant consciously and wilfully opted for a construction linked plan for remittance of the sale consideration for the unit in question and further represented to the respondent that the original allottee shall remit every instalment on time as per the payment schedule. the respondent had no reason to suspect bonafide of the complainant. That the respondent issued the provisional allotment letter dated 03.07.2009 to the complainant.

iii. That the respondent on receipt of the occupation certificate, offered possession of the said unit to the complainant vide the letter of offer of possession dated 05.10.2016 subject to making payments and submission of necessary documents. The complainant has duly taken the possession of the unit in question. The conveyance deed in respect of the unit in question has also been executed. That after execution of the unit handover letter and obtaining of possession of the unit in question after the execution of the conveyance deed, the complainant is left with no right, entitlement or claim against the respondent. The transaction between the complainant and the respondent stands concluded and no right or liability can be asserted by the respondent or the complainant against the other. The instant complaint is a gross misuse of process of law. The contentions advanced by the complainant in the false and frivolous complaint are barred by estoppel. That the complainant has been given a huge compensation of Rs. 21,60,411/- for delay in

possession, much beyond the terms of compensation under the buyer's agreement. The present complaint has been filed with malafide intent to extort more and more money from the respondent.

iv. That the present complaint is not maintainable in law or on facts. The provisions of the real estate (regulation and development) act, 2016 (hereinafter referred to as the 'act') are not applicable to the project in question. The occupation certificate has been issued on 09.06.2016 in respect of the tower in which the apartment in question is located i.e., before the notification of the Haryana real estate regulation and development rules 2017 (hereinafter referred to as the 'rules').

v. Thus, part of the project in which the unit in question is situated is not an 'ongoing project" under rule 2(1)(o) of the rules. The same does not require registration and consequently has not been registered under the provisions of the act. this authority does not have the jurisdiction to entertain and decide the present complaint and the same is liable to be dismissed on this ground alone.

vi. It is imperative to mention herein that the terms and conditions set out in the agreement clearly provided compensation to be paid in the event of delay in handing over of the possession and the complainant after having understood the clauses had executed the agreement and therefore, the relief being claimed by the complainant did not take into account the contractual position and as such the relief claimed is not maintainable before the authority. The complainant has duly benefitted and admittedly received the

amounts already agreed upon. The complainant has failed to honour the payment schedule and consequent thereto, is not entitled to any benefit towards delay payment charges. Thereafter, at the time when the respondent extended the waiver of delay payment charges to the complainant, the complainant had once again executed an indemnity cum undertaking dated 26.08.2014, waiving his rights to claim any further amounts. The complainant cannot now retract from the same, which was executed by him with open eyes. Clearly the complainant is now becoming greedy and trying to extort excessive amounts from the respondent.

vii. That the complaint is also liable to be dismissed for the reason that for the unit in question, the buyer's agreement was executed on 28.05.2010 i.e. prior to coming into effect of the act and the rules. as such, the terms and conditions of the agreement executed prior to the applicability of the act and the rules, would prevail and shall be binding between the parties. in view thereof, the authority has no jurisdiction to entertain the present complaint as the complainant has no cause of action to file the present complaint under the act/rules. It is a settled law that the act and rules are not retrospective in nature. Therefore, the application of the sections/rules of the act/rules relating to interest /compensation, cannot be made retrospectively. as such, the complainant is not entitled to any relief whatsoever. In view thereof, the complainant does not deserve any relief whatsoever. the present complaint merits outright dismissal, with costs and strictures against the complainant.

viii. That in terms of clause 13(a) the respondent proposed to offer possession of the unit in question within 27 months from the date of execution of the agreement with 3 months grace period. The said clause only prescribes an estimated time period for handing over of possession. The time period mentioned therein is neither cast in stone nor fixed and is only a tentative estimate provided by the respondent. More importantly, the same was subject to not only force majeure, but primarily on "compliance" of clauses of the agreement by the complainant with a 3 month grace period thereon, for applying and obtaining completion/occupation certificate in respect of the unit and/or the project. The complainant has completely misconstrued, misinterpreted and miscalculated the time period as determined in the buyer's agreement. It is pertinent to mention that it is categorically provided in clause 11(b)(v) that in case of any default/delay by the allottees in payment as per schedule of payment incorporated in the buyer's agreement, the date of handing over of possession shall be extended accordingly, solely on respondent's discretion till the payment of all outstanding amounts to the satisfaction of respondent. Clause 13(b)(v) of the buyer's agreement, till payment of all outstanding amounts to the satisfaction of the respondent. Clause 11 (b) (v) is herein reproduced below for further reference:

> *"That the Allotee(s) agrees and accepts that in case of any default/delay in payment as per the Schedule of Payments, the date of handing over of the possession shall be extended accordingly solely on the Company's discretion till the payment of all outstanding amounts to the satisfaction of the Company".*

It is submitted that the complainant has defaulted in timely remittance of the instalments and hence the date of delivery of possession of the unit in question is not liable to be determined in the manner sought to be done by the complainant. The complainant is conscious and aware of the said agreement and has filed the present complaint to harass the respondent and compel the respondent to surrender to his illegal demands. That the filing of the present complaint is nothing but an abuse of the process of law. more importantly, the same was subject to not only force majeure, but also on "timely payment" of all instalments by the allottees. even otherwise, subsequently, vide indemnity cum undertaking, the complainant had declared that they shall not be entitled to any compensation for delay.

ix. The terms and conditions as set out in the agreement were accepted by the complainant and the complainant agreed and undertook to scrupulously comply with the same. the said agreement was followed by indemnity cum undertaking by the complainant. Therefore, they are now barred by estoppel in raising any grievance qua the same. it does not now lie in the mouth of the complainant to allege default on part of the respondent.

x. It is submitted that the complainant defaulted in timely remittance of instalments and the same is duly reflected in the statement of account correctly maintained by respondent in due course of its business. The complainant, therefore, are not entitled to any compensation/interest in accordance with clause 15 of the buyer's agreement. It is further submitted that the complainant consciously

and maliciously chose to ignore the payment request letters and reminders issued by the respondent and flouted in making timely payments of the instalments which was an essential, crucial and an indispensable requirement under the buyer's agreement. furthermore, when the proposed allottees default in their payments as per schedule agreed upon, the failure has a cascading effect on the operations and the cost for proper execution of the project increases exponentially and further causes enormous business losses to the respondent. the complainant chose to ignore all these aspects and willfully defaulted in making timely payments. It is submitted that the respondent despite defaults of several allottees earnestly fulfilled its obligations under the buyer's agreement and completed the project as expeditiously as possible in the facts and circumstances of the case. therefore, there is no equity in favour of the complainant.

xi. That it is further submitted that despite there being a number of defaulters in the project, the respondent itself infused funds into the project and has diligently developed the project in question. The respondent had applied for occupation certificate and obtained the same vide memo bearing no. ZP-441-/SD(DK)/2019/5982 dated 09.06.2016. It is pertinent to note that once an application for grant of occupation certificate is submitted for approval in the office of the concerned statutory authority, the respondent ceases to have any control over the same. The grant of sanction of the occupation certificate is the prerogative of the concerned statutory authority over which the respondent cannot exercise any influence. As far as

the respondent is concerned, it has diligently and sincerely pursued the matter with the concerned statutory authority for obtaining of the occupation certificate. No fault or lapse can be attributed to the respondent in the facts and circumstances of the case. Therefore, the time period utilised by the statutory authority to grant occupation certificate to the respondent is necessarily required to be excluded from computation of the time period. Thus, it is most respectfully submitted that the present complaint deserves to be dismissed at the very threshold.

7. 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.

8. Jurisdiction of the authority

E. The preliminary objections raised by the respondent regarding jurisdiction of the authority to entertain the present complaint 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.

E.I Territorial jurisdiction

9. 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, therefore this authority has complete territorial jurisdiction to deal with the present complaint.

E.II Subject-matter jurisdiction

10. The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as per provisions of section 11(4)(a) of the Act leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

F. Findings on the objections raised by the respondent

F.I Objection regarding jurisdiction of authority w.r.t. buyer's agreement executed prior to coming into force of the Act.

11. One of the contentions of the respondent is that the authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the buyer's agreement executed between the parties and no agreement for sale as referred to under the provisions of the Act or the said rules has been executed inter se parties. The respondent further submitted that the provisions of the Act are not retrospective in nature and the provisions of the Act cannot undo or modify the terms of buyer's agreement duly executed prior to coming into effect of the Act. The authority is of the view that the Act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements made

between the buyers and sellers. The said contention has been upheld in the landmark judgment of hon'ble Bombay High Court in ***Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)*** which provides as under:

> *"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter.....*
>
> *122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."*

12. Also, in appeal no. 173 of 2019 titled as ***Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya*** dated 17.12.2019, the Haryana Real Estate Appellate Tribunal has observed-

> *"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."*

13. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the builder-

buyer agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the buyer's agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of the Act and are not unreasonable or exorbitant in nature.

G. Findings on the reliefs sought by the complainant/allotee

G.I It is most respectfully prayed that this authority be pleased to order the respondent to adjust the entire amount of interest due to the complainant from the date of the delivery period as per the buyer's agreement to the actual delivery of possession after due rectification having been done on 31.03.2020 as per the guidelines laid in the RERA, 2016.

G.II It is most respectfully prayed that this authority be pleased to order the respondent to pay the balance amount due to the complainant from the respondent on account of the interest after deducting what has already been paid, as per details provided earlier in the petition, which, for the sake of brevity are not being repeated here.

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

15. Clause 13(a) of the buyer's agreement provides for time period for handing over of possession and is reproduced below:

"13. POSSESSION

***(a)* Time of handing over the Possession**

Subject to terms of this clause and subject to the Allottee(s) having complied with all the terms and conditions of this Agreement, and not being in default under any of the provisions of this Agreement and compliance with all provisions, formalities, documentation etc., as prescribed by the Company, the Company proposes to hand over the possession of the independent floor within 27 months from the date of execution of this Agreement. The Allottee(s) agrees and understands that the Company shall be entitled to a ***grace period of 3 months, for applying and obtaining the occupation certificate in respect of the Independent Floor and/or the Project.***

16. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement, and the complainant not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoter. 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 formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment time period 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 dotted lines.

17. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within 27 *months from the date of execution of this Agreement* and further provided in agreement that promoter shall be entitled to a grace period of 3 ***months for applying and obtaining the occupation certificate in respect of the Independent Floor and/or the Project***. The date of execution of buyer's agreement is 28.05.2010. The period of 27 months expired on 28.08.2012, As a matter of fact, the promoter has not applied to the concerned authority for obtaining completion certificate/ occupation certificate within the grace period prescribed by the promoter in the buyer's agreement. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 3 months cannot be allowed to the promoter at this stage.

18. **Admissibility of delay possession charges at prescribed rate of interest:** Section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

> ***Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]***

(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.:

Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.

19. The legislature in its wisdom in the subordinate legislation under the rule 15 of the rules has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.

20. 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., 31.05.2022 is 7.40%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.40%.

21. 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;"

22. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 9.40% by the respondent/promoter which is the same as is being granted to the complainant in case of delayed possession charges.

23. Considering the above-mentioned facts, the authority calculated due date of possession according to clause 13 of the buyer's agreement dated 28.05.2010 i.e., 27 months from the date of execution and disallows the grace period of 3 months as the promoter has not applied to the concerned authority for obtaining completion certificate/occupation certificate within the time limit prescribed by the promoter in the buyer's agreement. As per the settled law one cannot be allowed to take advantage of his own wrong. Therefore, the authority allows DPC **w.e.f. 28.08.2012 till 05.12.2016** i.e., expiry of 2 months from the date of offer of possession (05.10.2016). **In this particular case, our attention was drawn towards page 163 of the complaint where a handover advised letter was issued by the respondent company, wherein it is categorically mentioned that your aforesaid home is now ready for physical possession as per the terms and conditions of BBA. When the unit has become ready for physical possession only on 29.05.2017 as specifically been admitted by the respondent, the authority allowing delayed possession charges till 29.05.2017 taking into consideration there has been correspondence between the complainant and the respondent in the intervening period between the offer of possession and the unit now ready for possession. The amount of compensation already credited/paid to**

the allottee shall be adjusted in the amount of delay possession charges.

The complainant is directed to pay outstanding dues, if any, after adjustment of delay possession charges/interest for the period the possession is delayed. The rate of interest chargeable from the complainant/allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.40% by the respondents/promoters which is the same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delay possession charges as per section 2(za) of the Act.

G.III It is most respectfully prayed that this authority be pleased to order the Respondent not to charge anything irrelevant which has not been agreed to between the parties as stated in the interim relief, which for the sake of brevity is not being repeated.

- **IFMS**

  The authority has decided this issue in the complaint bearing no. ***4031 of 2019*** titled as ***Varun Gupta V/s Emaar MGF Land Ltd.*** wherein the authority has held thatthe respondent may be allowed to collect a reasonable amount from the allottees under the head "IFMS". However, the authority directs that the promoter must always keep the amount collected under this head in a separate bank account and shall maintain that account regularly in a very transparent manner. If any allottee of the project requires the promoter to give the details regarding the availability of IFMS amount and the interest accrued thereon, the promoter must provide details to the allottee. It is further clarified that out of this IFMS/IBMS, no amount can be spent by the promoter for the expenditure it is liable to incur to discharge its liability and obligations as per the provisions of section 14 of the Act

- **HVAT**

  The authority has decided this in the complaint bearing no. ***4031 of 2019*** titled as ***Varun Gupta V/s Emaar MGF Land Ltd.*** wherein the authority has held that the promoter is entitled to charge VAT from the allottee for the period up to 31.03.2014 @ 1.05% (one percent VAT + 5 percent surcharge on VAT). However, the promoter cannot charge any VAT from the allottees/prospective buyers for the period 01.04.2014 to 30.06.2017 as the same was to be borne by the promoter-developer only. The respondent-promoter is bound to adjust the said amount, if charged from the allottee with the dues payable by him or refund the amount if no dues are payable by him. In the present complaint, the respondent has not charged any amount towards HVAT for the period of 01.04.2014 till 30.06.2017, however, vide letter of offer of possession dated 05.10.2016 has demanded lien marked FD of Rs. 2,91,165/- towards future liability of HVAT for liability post 01.04.2014 till 30.06.2017. In light of judgement stated above, the respondent shall not demand the same and the lien so marked be removed.

- **Administrative charges**

  The authority has decided this in the complaint bearing no. ***4031 of 2019*** titled as ***Varun Gupta V/s Emaar MGF Land Ltd.*** wherein the authority has held thatthe registration of property at the registration office is mandatory for execution of the conveyance (sale) deed between the developers (seller) and the homebuyer (purchaser). Besides the stamp duty, homebuyers also pay for execution of the conveyance/sale deed. This amount, which is given to the developers in the name of registration charges, is significant. The authority considering the pleas of the developer-promoter directs that a nominal amount of up to Rs.15000/- can be charged by the promoter – developer for any such expenses which it may have incurred for facilitating the said transfer as has been fixed by the DTP office in this regard. For any other charges like incidental/miscellaneous and of like nature, since the same are not

defined and no quantum is specified in the builder buyer's agreement, therefore, the same cannot be charged.

In the present complaint, the respondent has charged an amount of ₹ 12,000/- towards administrative charges which is less than 15,000/- therefore, the complainant is liable to pay the same.

- **Maintenance charges for two years**

The authority has decided this issue in the complaint bearing no. ***4031 of 2019*** titled as ***Varun Gupta V/s Emaar MGF Land Ltd.*** wherein the authority has held that the respondent is right in demanding advance maintenance charges at the rates' prescribed in the builder buyer's agreement at the time of offer of possession. However, the respondent shall not demand the advance maintenance charges for more than one year from the allottee even in those cases wherein no specific clause has been prescribed in the agreement or where the AMC has been demanded for more than a year.

In the present complaint, as per clause 20 of the buyer's agreement, following provisions has been made with respect to the advance maintenance charges:

> *"20. MAINTENANCE*
>
> *(a)The Allottee hereby agrees and undertakes to enter into a separate Maintenance Agreement as per the draft provided as Annexure-IX to this Agreement with the Maintenance Agency as may be appointed or nominated by the company for the maintenance of the common facilities/ amenities provided in the project and/or the common areas of the building.*
>
> *(b)The Allottee(s) agrees and undertakes to execute a separate tripartite maintenance agreement with the designated maintenance agency identified, nominated, and/or appointed by the Company. The Allottee(s) further agrees and undertakes to pay the indicative and approximate maintenance charges as may be levied by the maintenance agency for the upkeep and maintenance of the Project, its common areas, utilities, equipment installed in the building and such other facilities forming part of the Project. Such charges payable by the Allottee(s) will be subject to escalation of such costs and*

expenses as may be levied by the maintenance agency. The Company reserves the right to change, modify, amend, and impose additional conditions in the tripartite maintenance agreement at the time of its final execution.
(c)In addition to the payment of the maintenance charges to be paid by the Allottee(s), the Allottee(s) agrees and undertakes to pay interest free maintenance advance security as applicable, which shall be intimated at the time of handover of the possession of the said Independent Floor."

In the present complaint, the respondent has demanded Rs.53,130/- towards advance maintenance charges (@ Rs.1.1 per sq. ft. + service tax @ 15% from 01.02.2017-31.01.2019) for period of 24 months as per letter of offer of possession dated 05.10.2016.

Keeping in view the facts above, the authority deems fit that the respondent is right in demanding advance maintenance charges at the rate prescribed therein at the time of offer of possession in view of the judgement (supra). However, the respondent shall not demand the advance maintenance charges for more than one (1) year from the allottee.

- **Electrification charges**

The authority has decided this issue in the complaint bearing no. ***4031 of 2019*** titled as ***Varun Gupta V/s Emaar MGF Land Ltd.*** wherein the authority has held that the promoter cannot charge electrification charges from the allottees while issuing offer of possession letter of a unit even though there is any provision in the builder buyer's agreement to the contrary.

24. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 09.06.2016. However, the respondent offered the possession of the unit in question to the

complainant only on 05.10.2016. So, it can be said that the complainant came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the complainant should be given 2 months' time from the date of offer of possession. These 2 months of reasonable time is being given to the complainant keeping in mind that even after intimation of possession practically he has to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit, but this is subject to that the unit being handed over at the time of taking possession is in habitable condition.

25. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainant is entitled to delay possession charges at prescribed rate of the interest @ 9.40 % p.a. w.e.f. **28.08.2012 till 29.05.2017**.

H. Directions of the authority

26. 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 the interest at the prescribed rate i.e., 9.40 % per annum for every month of delay on the amount paid by the complainant from **28.08.2012 till 29.05.2017**. The amount of compensation already credited/paid to the allottee shall be adjusted in the amount of delay possession charges.

II. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order as per rule 16(2) of the rules.

III. The complainant is directed to pay outstanding dues, if any, after adjustment of delay possession charges/interest for the period the possession is delayed. The rate of interest chargeable from the complainant/allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.40% by the respondents /promoters which is the same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delay possession charges as per section 2(za) of the Act.

IV. The respondent shall not charge anything from the complainant which is not the part of the buyer's agreement. The respondent is debarred from claiming holding charges from the complainants /allottees at any point of time even after being part of apartment buyer's agreement as per law settled by hon'ble Supreme Court in civil appeal no. 3864-3899/2020 decided on 14.12.2020.

27. Complaint stands disposed of.

28. File be consigned to registry.

(Vijay Kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman
Haryana Real Estate Regulatory Authority, Gurugram

Dated: 31.05.2022