BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no : 4403 of 2021
Date of decision : 31.05.2022

1. Mr. Yogendra Singh Verma
2. Mrs. Vedna Verma
Address: - House No. 196, Vivek Vihar, Water Works, Colony, Shamli, Uttar Pradesh- 247776 **Complainants**

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:
Shri Rahul Thareja Advocate for the complainants
Shri Dhruv Rohatgi Advocates for the respondent

ORDER

1. The present complaint dated 08.11.2021 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 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 complainants, 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 Premier at Emerald Estate, 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 till	16.01.2021
	Licensee name	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	21.10.2009 [annexure R3, page 65 of reply]
7.	Unit no.	EFP-32-0001, ground floor (1650 sq.ft.) [page 53 of complaint]
8.	Date of execution of buyer's agreement	01.02.2010 [annexure A1, page 49 of compliant]
9.	Possession clause	***11. 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 Buyer's Agreement, and not being in default under any of the provisions of this Buyer's Agreement and compliance with all provisions, formalities, documentation etc., as prescribed by the Company, the Company proposes to hand over the possession of the Unit within* ***36***

		months from the date of execution of Buyer's 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 completion certificate/occupation certificate in respect of the Unit and/or the Project***. (Emphasis supplied) [page 66 of complaint]
10.	Due date of possession	01.02.2013 [**Note:** Grace period is not included]
11.	Complainants are subsequent allottees	The respondent acknowledged the complainants as allottees vide nomination letter dated 22.02.2013 (annexure R7, page 162 of reply) in pursuance of agreement to sell dated 28.01.2013 (page 145 of reply) executed between the complainants and the previous allottee (Meena Kumar).
12.	Total consideration as per statement of account dated 10.11.2021 at page 193 of reply	Rs. 86,86,653/-
13.	Total amount paid by the COMPLAINANTS as per statement of account dated 10.11.2021 at page 194 of reply	Rs.83,23,860/-
14.	Occupation certificate	05.03.2019 [annexure R10, page 186 of reply]
15.	Offer of possession	29.01.2020 [annexure C2, page 105 of complaint]

B. Facts of the complaint

3. The complainants have made the following submissions in the complaint:

i. That the cause of action accrued in favour of the complainants and against the respondent on the date when the respondents advertised the project, it again arose on diverse dates when the owners of the apartment entered into their respective agreement, it also arose when the respondent 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. The respondent not only failed to adhere to the terms and conditions of buyer's agreement but also illegally extracted money from the petitioner by stating false promises and statements. The respondent took the advantage of the petitioner, and the petitioner was always kept in dark about the construction and the respondent company did not leave any stone unturned to illegally extract money. The respondent having assured an exclusive area of 500 sq. ft. in the front and rear area of the ground floor flat, considering it as a ground floor and charging the complainants a sum of Rs. 9,90,000.00 as the ground floor charges, allotted to the complainants, is now retracting from the commitment of providing exclusivity to the area of 500 sq.ft.

ii. The proportionate amount of the preferential location charges (PLC) for certain units in the project which inter alia would be for open spaces at the rate of 5% of BSP ground floor at the rate of Rs. 600 sq. ft and if the allottee opts for such unit, the PLC of the same shall be included in the total consideration payable by the allottee(s) as set out in clause 1.2 (a) (i) for the said unit.

iii. The allottees understand that if due to change in the layout plan, the location of the any unit, whether preferentially located or otherwise is changed to any other preferential location, where the PLC are higher than the rate as mentioned hereinabove, then in such case the allottees shall be liable to pay the PLC as per the revised PLC decided by the company within (30) days of any such communication received by the allottee(s)in this regard. However, if due to the change in the layout of the unit ceases to be preferentially located, then in such case the company shall be liable to refund only the amount of PLC paid by the allottee(s) without any interest and/or compensation and/or damages and/or costs of any nature whatsoever and such refund shall be adjusted in the following instalment for the unit.

iv. Deposit of Rs. 68,111.00. for the estimated HVAT liability before the execution of conveyance deed as per offer of possession letter which is illegal and unjustified. that one of the salient features of amnesty scheme vide notification dated 12.09.2016 of Haryana government dealing with vat on developers, is that in condition no. 4, it says that a contractor/developer opting under this scheme shall pay year wise, in lieu of tax, interest or penalty arising from his business, by way of one time settlement, a lump sum amount at the rate of one percent of the entire aggregate amount received or receivable from business carried out during a year, without deduction of any kind.

v. The other provision of the scheme says that no input tax credit shall be allowed to the contractor under this scheme, on the purchase of goods used in the works contract. It may be concluded with the text of this scheme that this is a composition scheme in which the department has allowed the taxpayer to pay lump-sum tax @ 1% of

total turnover instead of going into the complications of taking input credits on purchases and other deductions & then paying taxes as applicable on goods transferred. It is very well known that when a composition scheme is opted by a dealer /taxable person, then no other input tax credits or deductions are allowed to that person & moreover, the respondent cannot charge tax from its customers.

vi. These provisions were there under rule 49/49A of HVAT as well as under the corresponding provision of GST also, wherever, the Govt. has allowed composition tax to a dealer, it debars them from charging that tax from their customers. Thus, to conclude, looking into the text of the amnesty scheme and intent of the legislature, it can be argued that the developer cannot charge the HVAT paid as per the said amnesty from its customers as discussed above."

vii. It shall be noted that under the composition scheme, the developer is prohibited from collecting any amount by way of tax under the Act from the complainants. That offering possession by the respondent on payment of charges which the complainants are not contractually bound to pay, cannot be considered to be a valid offer of possession. HVAT was never, as per the act, payable by the allottee and hence the offer of possession is not a valid offer of possession. That the respondent knowing well that HVAT is not payable by the allottee, being the complainant, as the HVAT came into existence much after the flat was sold to the complainants and hence to any stretch of the imagination. That the respondent is guilty of unjust enrichment and therefore should be directed to withdraw the demand from the statement of account attached and remitted to the complainants with the appropriate rate of interest. Advance monthly maintenance charges for 24 months amounting to Rs. 69,300.00

viii. Apart from the above, the following charges levied by the respondent are not payable by the complainants and hence are not payable at all.

- Electrical Meter Charges- Rs. 1,05372/-
- Administrative Charges- Rs. 14,160/-
- Miscellaneous Expenditure for Registration Charges-Rs. 2,500/-
- Delayed Payment Charges at the rate of 12% P.A- Rs. 10,549/-

ix. As mentioned above the authority in several matters has passed orders which mandate that the allottees are not liable to make any payments that were not contractually bound to pay. Since the above-mentioned charges are not legally payable by the complainants these charges are unjust, illegal and unmaintainable. Hence for this reason as well, the offer of possession is not a valid offer of possession. The respondent should be directed to withdraw the demand from the offer of possession attached and remit the charges back to the complainants with appropriate rate of interest.

x. **GST amount is not applicable**

In the matter of the GST amount of Rs. 55,136/- as mentioned in the intimation of offer of possession, the goods and service tax laws came into application w.e.f 01.07.2017. As per the builder buyer agreement signed by the complainants dated 01st February 2010, the deemed date of possession comes to the 01st of February 2013. No doubt that the complainants have agreed to pay all the government rates and taxes levied and leviable now or in the future by the government, municipal authority or any other government authority. But this liability shall be confined only up to the deemed date of possession. The delay in the delivery of possession is the

default on the part of the company hence the company shall be liable to pay any GST that shall accrue after the due date of possession.

xi. Payment of IFMS of per sq. ft. at the time of offer of possession. In the matter of the applicable IFMS amount of Rs. 82,500/- as mentioned in the intimation of offer of possession, as per the BBA the allottee had to pay IFMS/IBMS and it was left to the allottee to decide what the complainants wished to pay.

xii. IFMS is security collected by the promoters of the project and is called interest free maintenance security whereas IBMS is also security against the maintenance called interest bearing maintenance security. The promoter collects this amount on per sq. ft basis which shall be payable by the complainants within 45 days of receiving a valid offer of possession. Since the respondent has been unable to provide a valid offer of possession, the same cannot be collected by the respondent and amounts to unjust enrichment. Holding charges with necessary statutory taxes, as per the agreed terms and conditions of the application form and buyers' agreement shall be applicable in case of failure to take possession.

C. Relief sought by the complainants/allottees

4. The complainants have filed the present compliant for seeking following relief:

(i) It is most respectfully prayed that this authority be pleased to order the respondent to refund the amount of PLC charged in the ground floor amounting to Rs.9,90,000/- as the respondent has miserably failed to offer 500 sq. ft of exclusive front and rear lawn to the complainants.

(ii) It is most respectfully prayed that this authority be pleased to declare this offer of possession as invalid and direct the respondent to reissue a valid offer of possession.

(iii) It is most respectfully prayed that this authority be pleased to order the respondent to remit the charges mentioned in the offer of possession and on the payment of charges which the unit buyer was not legally bound to pay.

(iv) It is most respectfully prayed that this authority be pleased to order the respondent to not to charge the HVAT, Advance maintenance, GST, IFMS, as the same is not legally bound to pay the same.

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 complainants have 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 even otherwise, the complainants have no locus standi or cause of action to file the present complaint. The present complaint is based on an erroneous interpretation of the provisions of the act as well as an incorrect understanding of the terms and conditions of the buyer's agreement dated 01.02.2010.

iii. 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 provision of the act. This authority does not have the jurisdiction to entertain and decide the present complaint. The present complaint is liable to be dismissed in this ground alone.

iv. That the complainants are not an "allottee" but an investor who has booked the apartment in question as a speculative investment in order to earn rental income/ profit from its resale. the apartment in question has been booked by the complainants as a speculative investment and not for the purpose of self-use as their residence. Therefore, no equity lies in favour of the complainants.

v. That original allottee had booked the unit in question, that thereafter the original allottee vide application form dated 22.09.2009 applied to the respondent for provisional allotment of a unit bearing number EFP-32-0001 in the project. it is submitted that the original allottee prior to approaching the respondent, had conducted extensive and independent enquiries regarding the project and it was only after the original allottee 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, that the original allottee took an independent and informed

decision to purchase the unit, un- influenced in any manner by the respondent. The original allottee consciously and willfully 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 original allottee. That the respondent issued the provisional allotment letter dated 21.10.2009 to the original allottee. That the original allottee as well as the subsequent allottee in terms of the indemnities and undertakings had consciously and voluntarily declared and affirmed that they would be bound by all the terms and conditions of the provisional allotment in favour of the original allottee. it was further declared by the subsequent allottee that having been substituted in the place of the original allottee, he was not entitled to any compensation for delay, if any, in delivery of possession of the unit in question or any rebate under a scheme or otherwise or any other discount, by whatever name called, from the respondent. Furthermore, the respondent, at the time of endorsement of the unit in question in their favour, had specifically indicated to subsequent allottee that the original allottee had defaulted in timely remittance of the instalments pertaining to the unit in question and therefore have disentitled himself for any compensation/interest. The respondent had conveyed to subsequent allottee that on account of the defaults of the original allottee, subsequent allottee would not be entitled to any compensation for delay, if any. It is pertinent to mention that the complainants in terms of the indemnity cum undertaking had

consciously and voluntarily declared and affirmed that they would be bound by all the terms and conditions of the provisional allotment in favour of the subsequent allottee. It was further declared by the complainants that having been substituted in the place of the subsequent allottee, they were not entitled to any compensation for delay, if any, in delivery of possession of the unit in question or any rebate under a scheme or otherwise: or any other discount, by whatever name called, from the respondent. Furthermore, the respondent, at the time of endorsement of the unit in question in their favour, had specifically indicated to the complainants that the original allottee as well as the subsequent allottee had defaulted in timely remittance of the instalments pertaining to the unit in question and therefore, have disentitled himself for any compensation/interest. the respondent had conveyed to the complainants that on account of the defaults of the original allottee and subsequent allottee, the complainants would not be entitled to any compensation for delay, if any. The said position was duly accepted and acknowledged by the complainants. The complainants are conscious and aware of the fact that they are not entitled to any right or claim against respondent. the complainants have intentionally distorted the real and true facts and have filed the present complaint in order to harass the respondent and mount undue pressure upon it. It is submitted that the filing of the present complaint is nothing but an abuse of the process of law.

vi. That in the manner as aforesaid, the complainants stepped into the shoes of the subsequent allottee. That it needs to be highlighted that the original allottees, the subsequent allottees as well as the

complainants were not forthcoming with the outstanding amounts as per the schedule of payments.

vii. That the complainant is also liable to dismissed for the reason that for the unit in question the buyer's agreement was executed on 001.02.2010 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 complainants have no cause of action to file the present complaint under the act/rules.

viii. That the project has got delayed on account of the following reasons which were/are beyond the power and control of the respondent and hence the respondent cannot be held responsible for the same:

Firstly, The National Building Code (NBC) was revised in the year 2016, and in terms of the same, all high-rise buildings (i.e., buildings having a height of 15 meters and above), irrespective of the area of each floor, are now required to have two staircases. It is expected that the construction of the second staircase will be completed in the first quarter of 2020. Thereafter, upon issuance of the occupation certificate and subject to force majeure conditions, possession of the apartment shall be offered to the complainants. Secondly, the defaults on the part of the contractor.

ix. 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 05.03.2019. 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. Section 11(4)(a) of the Act provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

> ***Section 11***
>
> .....
>
> *(4) The promoter shall-*
>
> *(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;*
>
> ***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.*

11. So, in view of the provisions of the Act quoted above, 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/promoter

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

12. 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."

13. 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."

14. 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 complainants/allottees

G.I Direct the respondent to pay the interest at the prevalent rate as per the Act and the Rules p.a. to the complainants on the entire amount paid by them towards the delay possession charges w.e.f. the

committed date of possession till the time the actual possession is delivered after obtaining the occupation certificate for the entire unit including servant quarters and a valid offer of possession made without adding any condition which do not form part of BBA.

15. 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."*

16. Clause 11(a) of the buyer's agreement provides for time period for handing over of possession and is reproduced below:

> "**11. 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 Buyer's Agreement, and not being in default under any of the provisions of this Buyer's Agreement and compliance with all provisions, formalities, documentation etc., as prescribed by the Company, the Company proposes to hand over the possession of the Unit within **36 months from the date of execution of Buyer's 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 completion certificate/occupation certificate in respect of the Unit and/or the Project**.*

17. 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 complainants 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.

18. The complainants in the present complaint are subsequent allottees and had purchased the unit in question from the previous allottee vide agreement to sell dated 28.01.2013 and thereafter, the respondent had acknowledged them as allottees vide nomination letter dated 22.02. 2013. In terms of the order passed by the authority in complaint titled as ***Varun Gupta Versus Emaar MGF Land Ltd. (CR/4031/2019)***, the complainants are entitled to delayed possession charges w.e.f. date of nomination letter.

19. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within 36 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 for applying and obtaining the occupation certificate in respect of the unit and/or the Project. The date of execution of buyer's agreement is 01.02.2010. The period of 36 months expired on 01.02.2013. 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.

20. **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.*

21. 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.

22. 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%.

23. 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;"*

24. Therefore, interest on the delay payments from the complainants 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 complainants in case of delayed possession charges.

25. Considering the above-mentioned facts, the authority calculated due date of possession according to clause 11 of the buyer's agreement dated 01.02.2010 i.e., 36 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. 22.02.2013 (date of nomination letter i.e. the date on which the complainants entered into the shoes of the previous allottee) till 29.03.2020** i.e., expiry of 2 months from the date of offer of possession (29.01.2020).

The complainants are 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 complainants/allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.40% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delay possession charges as per section 2(za) of the Act.

G.II Direct the respondent to refund the amount of PLC charges on the ground floor amounting to Rs. 9,90,000/- as the respondent has miserably failed to offer 500 sq. ft. of exclusive front and rear lawn to the complainants.

26. The counsel for the complainants submitted that they paid a sum of Rs.9,90,000/- as the preferential location charges as the unit allotted to them is on ground floor and as per the buyer's agreement, the complainants understands that they have exclusive access rights for the front and rear lawns that form part of preferentially located ground floor units. "Exclusive" as per the definition means "restricted to the person" hence the complainants only had the right of access to the front and the rear lawns, for which, the complainants have paid a sum of Rs.9,90,000/- which has been added to the total consideration for such preferentially located unit. This means the complainants alone and only alone had

reserved rights to the front and the rear area measuring 500 sq. ft. and no one else has been left with the rights, title, interest, claim or lien of any nature whatsoever in the said portion and the same has become the absolute property of the complainants, with the right to use, enjoy, sell and transfer the same more so when the complainants have paid a sum of Rs. 9,90,000/- Also, they will have to pay the increased stamp duty because of the increase in the cost of the unit because of the PLC. However, the said area is now the undivided common area which is being used by the respondent for laying certain Fire Safety Stairs and using for a fire tender corridor to take care of the fire safety norms as laid by the different National Building Codes including National Building Code 2005. Therefore, the complainants are before the authority for seeking refund of PLC of Rs.9,90,000/- so charged.

27. The counsel for the respondent denied that the PLC has been levied on account of the unit having exclusive access rights for the front and rear lawns that form part of preferentially located ground floor units. It is submitted that as per the norms and guidelines as laid down by the National Building Code, 2005, to use an area for laying certain fire safety stairs and a fire tender corridor to take care of the fire safety norms. It is further submitted that the respondent can't put the lives of the residents at stake by not adopting the fire safety norms. So, it is denied that the rear lawn was for the exclusive use of the complainants. It is submitted that the complainants have access to the front and rear lawns. The unit in question is on the ground floor, which is a preferential location and as such the PLC is chargeable on the unit in question.

28. The authority observes that as per clause 1.2 (e) of the buyer's agreement, following provisions have been made regarding PLC:

"1.2(e) Preferential Location Charges

*(i) The proportionate amount of the preferential location charges ('**PLC**') for certain Units in the Project which inter alia would be for Open Space at the rate of 5% of BSP, Corner Plot at the rate of 5% of BSP, Ground Floor at the rate of Rs.600/- sq. ft., 1st Floor at the rate of Rs.150/- sq. ft., 2nd Floor at the rate of Rs.75/- sq. ft. and if the Allottee(s) opts for any such Unit, the PLC for the same shall be included in the Total Consideration payable by the Allottee(s) as set out in clause 1.2 (a)(i) above for the said Unit.*

(ii) The Allottee(s) understands that if due to change in layout plan, the location of any Unit, whether preferentially located or otherwise is changed to any other preferential location, where the PLC are higher than the rate as mentioned hereinabove, then in such a case the Allottee(s) shall be liable to pay the PLC as per the revised PLC decided by the Company within thirty (30) days of any such communication received by the Allottee(s) in this regard. However, if due to the change in the layout plan the Unit ceases to be preferentially located, then in such an event the Company shall be liable to refund only the amount of PLC paid by the Allottee(s) without any interest and/or compensation and/or damages and/or costs of any nature whatsoever and such refund shall be adjusted in the following installment for the Unit."

In the present complaint, it is matter of fact that the unit is located on the ground floor and as per clause 1.2(e)(i) of the buyer's agreement, the promoter has demanded PLC of Rs. 9,90,000/- for the unit being preferentially located at ground floor. Neither the allotment letter nor the buyer's agreement anywhere states that the said amount has been charged for exclusive right to front or rear lawn. Therefore, the contention of the complainants are devoid of merits. In light of the above, the authority observes that the respondent has demanded PLC as per the terms of the buyer's agreement and the complainants is liable to pay the same.

- **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 vide letter of offer of possession dated 29.01.2020 and the same is

also evident from the statement of account dated 17.11.2020 (page no. 110 of compliant). In light of the above facts, the said relief becomes infructuous and is disallowed.

- **Advance maintenance 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 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, the respondent has demanded Rs.69,300/- towards advance maintenance charges (@ Rs.3.5 per sq. ft. + GST @ 18%) for period of 12 months as per letter of offer of possession dated 29.01.2020.

  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) and the respondent is demanding the advance maintenance charges for one (1) year from the allottee. Therefore, the complainants/allottees are liable to pay the same.

- **GST**

  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 for the projects where the due

date of possession was prior to 01.07.2017 (date of coming into force of GST), the respondent/promoter is not entitled to charge any amount towards GST from the complainants/allottees as the liability of that charge had not become due up to the due date of possession as per the buyer's agreements.

In the present complaint, the possession of the subject unit was required to be delivered by 01.02.2013 and the incidence of GST came into operation thereafter on 01.07.2017. So, the complainants cannot be burdened to discharge a liability which had accrued solely due to respondents' own fault in delivering timely possession of the subject unit. So, the respondent/promoter is not entitled to charge GST from the complainants/allottees as the liability of GST had not become due up to the due date of possession as per the said agreement as has been held by **Haryana Real Estate Appellate Tribunal, Chandigarh in appeal bearing no. 21 of 2019 titled as M/s Pivotal Infrastructure Pvt. Ltd. Vs. Prakash Chand Arohi.** Also, the authority concurs on this issue and holds that the difference between Post-GST and Pre-GST shall be borne by the promoter. The promoter is entitled to charge from the allottee the applicable combined rate of VAT and service tax fixed by the government.

29. 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 05.03.2019. However, the respondent offered the possession of the unit in question to the complainants only on 29.01.2020. 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. These 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.

30. 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 complainants are entitled to delay possession charges at prescribed rate of the interest @ 9.40 % p.a. **w.e.f. 22.02.2013 (date of nomination letter i.e., the date on which the complainants entered into the shoes of the previous allottee) till 29.03.2020** i.e., expiry of 2 months from the date of offer of possession (29.01.2020).

H. Directions of the authority

31. 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 complainants from **22.02.2013 (date of nomination letter i.e., the date on which the complainants entered into the shoes of the previous allottee) till 29.03.2020** i.e., expiry of 2 months from the date of offer of possession (29.01.2020). The arrears of interest accrued so far shall be paid to the complainants within 90 days from the date of this order as per rule 16(2) of the rules.

ii. The complainants are 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 complainants/allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.40% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delay possession charges as per section 2(za) of the Act.

32. Complaint stands disposed of.

33. File be consigned to registry.

(Vijay Kumar Goyal)
Member

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

Dated: 31.05.2022