

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

**Complaint no:** 2881 of 2021  
**Date of decision:** 08.09.2022

**Mr. Neeraj Chauhan (HUF)**

**Address:** - 30 Adarsh Apartments, A2 Block, Paschim Vihar, New Delhi

**Complainant**

Versus

**M/s Emaar India Limited**

**Address:** 306-308, Square One, C-2, District Centre, Saket, New Delhi

**Respondent**

**CORAM:**

Dr. K.K. Khandelwal  
Shri Ashok Sangwan  
Shri Sanjeev Kumar Arora

**Chairman**  
**Member**  
**Member**

**APPEARANCE:**

Shri Manmeet Singh Jamwal  
Shri Dhruv Rohatgi

Advocate for the complainant  
Advocate for the respondent

**ORDER**

1. The present complaint dated 27.07.2021 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 Plaza, Sector 65, Gurugram, Haryana       |
| 2.      | Total area of the project          | 3.963 acres                                       |
| 3.      | Nature of the project              | Commercial colony                                 |
| 4.      | DTCP license no.                   | 10 of 2009 dated 21.05.2009                       |
|         | Validity of license                | 20.05.2019  |
|         | Licensee                           | Logical Developers Pvt. Ltd. and 15 others        |
|         | Area for which license was granted | 102.7412 acres                                    |
| 5.      | Project registered/not registered  | Not registered                                    |
| 6.      | Occupation certificate             | 08.01.2018<br>[annexure R2, page 27 of reply]     |
| 7.      | Provisional allotment letter dated | 26.08.2010<br>[annexure P1, page 18 of complaint] |
| 8.      | Unit no.                           | EPO-08-038  |





|     |  |   |
|-----|--|---|
|     |  | [annexure P2, page 25 of complaint]   |
| 9.  | Area of unit revised as per letter of offer of possession dated 24.01.2018 | <b>641.17 sq. ft.</b> stands revised from earlier area of 637.67 sq. ft. (i.e., increased by 3.5 sq. ft. / 0.54%)<br>[annexure R10, page 90 of reply]   |
| 10. | Date of execution of buyer's agreement                                     | 07.03.2011<br>[annexure P2, page 24 of complaint]   |
| 11. | Possession clause  | <b>16. POSSESSION</b><br><b>(a) Time of handing over the possession</b><br><i>i. That the possession of the Retail Spaces in the Commercial Complex shall be delivered and handed over to the Allottee(s), <u>within thirty (30) months of the execution hereof</u> subject however to the Allottee(s) having strictly complied with all the terms and conditions of this Agreement and not being in default under any of the provisions of this Agreement and all amounts due and payable by the Allottee(s) under this Agreement having been paid in time to the Company. The Company shall give notice to the Allottee(s), offering in writing, to the Allottee to take possession of the Retail Spaces for his occupation and use ("Notice of Possession").</i><br><i>ii. The Allottee(s) agrees and understands that the Company shall</i> |

|     |   |  |  |
|-----|---|--|--|
|     |   | <p><i>be entitled to <u>a grace period of one hundred and twenty (120) days over and above the period more particularly specified here-in-above in sub-clause (a)(i) of clause 16, for applying and obtaining necessary approvals in respect of the Commercial Complex.</u></i></p> <p>(emphasis supplied)</p> |  |
| 12. | Due date of possession  | 07.09.2013<br>[Note: Grace period is not allowed]  |  |
| 13. | Total consideration   | As per statement of account dated 15.09.2021 at page 87 of reply   | As per payment plan annexed with the buyer's agreement |
|     |   | Rs. 49,08,166/-  | Rs.45,49,137/-   |
| 14. | Total amount paid by the complainant as per statement of account dated 15.09.2021 at page 88 of reply | Rs. 49,76,871/-  |  |
| 15. | Offer of possession   | 25.01.2018<br>[annexure R10, page 90 of reply]   |  |
| 16. | Unit handover letter dated  | 31.05.2018<br>[annexure R12, page 97 of reply]   |  |
| 17. | Conveyance deed executed on   | 05.07.2018<br>[annexure R13, page 100 of reply]  |  |



**B. Facts of the complaint**

3. The complainant has made the following submissions in the complaint: -
- I. That in and around July 2010, after deliberations with the respondent, the complainant was offered unit no. EPO-08-038 on the 8th floor admeasuring 637.67 sq. ft./59.24 sq. meters in the commercial project named "Emerald Plaza" situated at Emerald Hills, sector 65, Gurgaon at the basic sale consideration of Rs. 42,18,187/- excluding EDC, IDC for the unit. Apart from the BSP, the complainant was also liable to pay charges such as EDC, IDC etc. Hence the total charges were Rs.47,26,568/- excluding the applicable taxes. It was further assured that the possession of the said unit would be handed over within 30 months from the date of signing of the agreement and a demarcated car parking space in the basement would also be provided.
  - II. That on 08.07.2010, after being assured of such representations made by the respondent, the complainant made a payment of Rs. 5,00,000/-. Thereafter, on 26.08.2010, the respondent issued provisional allotment letter to the complainant with one dedicated right to usage of car park (cost inclusive in total cost of the unit). The respondent further raised a demand of Rs. 3,43,637/-.
  - III. That on 07.03.2011, the office space buyer's agreement was executed between the parties. That on 25.05.2012, the respondent during the 4th instalment raised a demand of Rs.43,665/- being delay payment charges which was also paid by the complainant under duress.

- IV. That on 25.01.2018, after extensive delay by the respondent of more than 48 months from the expected date i.e., 07.01.2014 (after taking the grace period) of handover of the unit, the respondent issued letter of offer of possession while seeking payment of Rs.9,57,465/- and also demanded delayed payment charges of Rs.41,726/- to be paid by 25.02.2018 to enable the respondent to hand over the possession of the unit.
- V. That on the same day i.e., 25.01.2018, the complainant replied vide email to the respondent expressing shock and also protested that there was no prudent justification that the respondent had to pay only 9% interest on default while the allottee was charged with 24% interest.
- VI. That on 01.02.2018, the respondent replied by email stating that delayed possession charges were only applicable in cases where all payments were made as per due date and since there were instances of delayed payments, hence delayed possession charges were not payable to the complainant. Whereas complainant had cleared the payments as and when demanded by the respondent and even paid interest in duress and respondent accepted all such payments. The respondent had not only claimed but also ensured receipt of such amounts.
- VII. That on 17.04.2018, after the complainant had tried his best to convince the respondent, under duress and as instructed by the respondent, executed the indemnity cum undertaking and made the payment towards stamp papers worth Rs.2,96,940/- and also gave a letter of authority.



- VIII. That on 28.04.2018, the respondent sent an email seeking payment of the delay payment charges of Rs.42,518/- which was replied to by the complainant on 29.04.2018 stating that the respondent had to adjust the same against penalty to be payable by the respondent for delayed possession charges. That on 02.05.2018, complainant issued a notice seeking delayed compensation which has not been replied till date. That on 04.05.2018, after lot of deliberations among the parties and not left with any other alternative, the complainant paid the illegal amount of Rs.41,726/- under duress demanded by the respondent so that the possession of the unit could be taken by him. Despite that, the possession of the unit was not given. The complainant kept following up with the respondent whereupon on 12.05.2018, the respondent replied seeking 3-4 working days to update on grant of possession of the unit. The respondent vide an email dated 22.05.2018 sought payment of maintenance charge of Rs. 36,633/- before proceeding further. On the same day i.e., 22.05.2018, complainant replied that after having paid all the dues, the possession should be handed over without delay. That on 25.05.2018, respondent again sought payment of all amounts. Hence in duress, complainant paid all those amounts as well.
- IX. That on 25.05.2018, the respondent issued a handover advice letter stating that the property was ready for physical possession, and it would contact the complainant within 2 days and on 31.05.2018, respondent issued unit handover letter and the possession of the unit was taken by the complainant.

- X. That on 05.07.2018, the conveyance deed was registered though the stamp paper was purchased by the complainant on 17.04.2018 on the dotted lines as provided by the respondent and having no option but to sign without an opportunity to discuss the statements written by the respondent in it. That on 26.11.2018, the respondent issued the statement of accounts with sale price being Rs.45,83,745/- and cost of property being Rs.49,08,16/-.
- XI. That the complainant from time to time had been enquiring from the respondent about demarking his car parking space and since, there was no response from the respondent, the complainant on 09.07.2019 sent an email requesting the respondent to allot and demarcate the car parking space, which was replied on 17.07.2019 by the respondent stating that there was no availability of car parking space and therefore unable to provide the same.

**C. Relief sought by the complainant**

4. The complainant has sought the following relief:
- i. Direct the respondent to pay interest at 10.75% p.a. for every month from the due date of possession i.e., 07.01.2014 till the date of grant of possession i.e., 31.05.2018 or at the rate provided for under this Act for the delay caused in handing over possession of the unit.
  - ii. Direct the respondent to allocate and demarcate one car parking space in the basement in favour of the complainant.



- iii. In the alternative, if the respondent is not in a position to provide the same, direct the respondent to pay a sum of Rs. 5,00,000/-.
  - iv. Direct the respondent to pay a sum of Rs. 1,50,000/- towards the costs of litigation expenses.
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**

6. The respondent has raised certain preliminary objections and has contested the present complaint on the following grounds:
- i. That the respondent had submitted the application for issuance of occupation certificate in respect of the project in question on 26.05.2017, i.e., well before the notification of the Haryana Real Estate Regulation and Development Rules 2017 (hereinafter referred to as the 'Rules'). The occupation certificate in respect of the said project was issued on 08.01.2018. It is further relevant to mention that the respondent had already applied for part completion certificate for the project where services are complete and hence the project did not fall in the definition of "ongoing project" under Rule 2(1)(o) of the rules. The project was not registered under the provisions of the Act. Therefore, this Hon'ble Authority did not have the jurisdiction to entertain and decide the present complaint. It is further relevant to submit that proceedings

regarding issue of registration and ongoing projects had been stayed by Hon'ble Punjab & Haryana High Court at Chandigarh vide its order dated 13.02.2020 in CWP no. 19958/2017. The present complaint was liable to be dismissed on this ground alone.

- ii. That the provisional allotment was made to the complainant vide letter dated 26.08.2010. The buyer's agreement dated 07.03.2011 was executed between the parties. The complainant consciously and wilfully opted for a construction linked plan.
- iii. That it is submitted that the complainant had defaulted in timely remittance of instalments to the respondent and the same was duly reflected in the statement of accounts dated 15.09.2021 correctly maintained by respondent in due course of its business.
- iv. It is submitted that as per clause 16 (a) of the buyer's agreement dated 07.03.2011 the time period for delivery of possession was 30 months along with grace period of 120 days from the date of execution of the buyer's agreement subject to the allottee(s) having strictly complied with all terms and conditions of the buyer's agreement and not being in default of any provision of the buyer's agreement including remittance of all amounts due and payable by the allottee(s) under the agreement as per the schedule of payment incorporated in the buyer's agreement. It is pertinent to mention that it was categorically provided in clause 16(b)(vi) 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 would be extended accordingly, solely



on the respondent's discretion till the payment of all outstanding amounts to the satisfaction of the respondent.

- v. That as per clause 18 of the buyer's agreement, compensation for any delay in delivery of possession should only be given to such allottees who were not in default of their obligations envisaged under the agreement and who had not defaulted in payment of instalments as per the payment plan incorporated in the agreement. In case of delay caused due to non- receipt of occupation certificate, completion certificate or any other permission/sanction from the competent authorities, no compensation or any other compensation should be payable to the allottees. As delineated hereinabove, the complainant, having defaulted in payment of instalment, was thus not entitled to any compensation or any amount towards interest under the buyer's agreement.
- vi. That, without admitting or acknowledging the truth or legality of the allegations advanced by the complainant and without prejudice to the contentions of the respondent, it is respectfully submitted that the provisions of the Act are not retrospective in nature. The provisions of the Act cannot undo or modify the terms of an agreement duly executed prior to coming into effect of the Act.
- vii. That without prejudice to the contentions of the respondent, it is submitted that the present complaint is barred by limitation. The complainant alleged that the possession of the unit was to be given not later than January 2014 and therefore cause of action, if any, accrued in favour of the complainant in January 2014. Thus, the

complaint seeking interest as a form of indemnification for the alleged delay is barred by limitation.

- viii. That the complainant is not an "Allottee" but an investor who booked the unit in question as a speculative investment in order to earn rental income/profit from its resale. The unit in question was booked by the complainant as a speculative investment and not for the purpose of self-use as a residence.
- ix. That it needs to be highlighted that the respondent had applied to the statutory authority for grant of occupation certificate in respect of the tower in which the unit in question was located on 26.05.2017 and the same was granted on 08.01.2018. It is reiterated that once an application for issuance of occupation certificate was submitted before the concerned competent authority, the respondent ceased to have any control over the same. The grant of occupation certificate was the prerogative of the concerned statutory authority, and the respondent did not exercise any control over the matter. Therefore, the time period utilized by the concerned statutory authority for granting the occupation certificate needs to be necessarily excluded from computation of the time period utilized in the implementation of the project in terms of the buyer's agreement.
- x. That it is pertinent to mention that the complainant was offered the possession of the unit in question through letter of offer of possession dated 25.01.2018. The complainant was called upon to remit due payments including delayed payment charges and to complete the necessary formalities/documentation necessary for



handover of the unit in question to them. However, the necessary documentation was submitted by the complainant as late as on 18.04.2018. After submission of the said documents and verification and processing of the same by the respondent, the unit in question was handed over to the complainant on 31.05.2018. The deed of conveyance was executed on 05.07.2018.

- xi. That it is pertinent to note that an offer for possession marks termination of the period of delay, if any. Therefore, the complainant was not entitled to contend that the alleged period of delay continued even after receipt of offer for possession. The complainant had consciously and maliciously refrained from and delayed obtaining possession of the unit in question. Consequently, the complainant was liable for the consequences including holding charges, as enumerated in the buyer's agreement, for not obtaining possession.
- xii. That upon signing the unit handover letter, the complainant specifically and expressly agreed that the liabilities and obligations of the respondent as enumerated in the allotment letter or the buyer's agreement stood satisfied.
- xiii. That in addition thereto, it is respectfully submitted that the complainant had executed an indemnity cum undertaking dated 17.04.2018 whereby the complainant had declared and acknowledged that it had no ownership right, title or interest in any other part of the project except in the unit area of the unit in question. It is further submitted that as per the buyer's agreement as well as the provisional allotment, the complainant had been

allotted the unit in question for use and enjoyment of common facilities and amenities, including car parking space. The claim of the complainant towards an exclusive demarcated car parking space is ill founded and beyond the terms of the agreement between the parties. The respondent has already executed the deed of conveyance in favour of the complainant in respect to the unit in question as was originally agreed under the buyer's agreement.

xiv. That it is submitted that several allottees defaulted in timely remittance of payment of installments which was an essential, crucial and an indispensable requirement for conceptualization and development of the project in question. 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 whereas enormous business losses befall upon the respondent. The respondent, despite default of several allottees, diligently and earnestly pursued the development of the project in question and has constructed the project in question as expeditiously as possible. It is submitted that the construction of the tower in which the unit in question was situated had been completed by the respondent. The respondent also delivered the possession of the unit in question to the complainant. Therefore, there is no default or lapse on the part of the respondent and there was no equity in favour of the complainant

xv. That it needs to be highlighted that respondent has paid an amount of Rs.19,588/- as benefit on account of anti-profiting and



Rs.6,601/- on account of Early Payment Rebate (EPR). Without prejudice to the rights of the respondent, delayed interest if any has to be calculated only on the amounts deposited by the complainant towards the price of the unit in question and not on any amount credited by respondent, or any payment made by the original allottees towards the purchase price of the unit in question or delayed payment charges (DPC) or any taxes/statutory payments etc.

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.

**E. Jurisdiction of the authority**

8. The preliminary objections raised by the respondent regarding jurisdiction of the authority to entertain the present complaint stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

**E.1 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, 2016 provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

### **Section 11(4)(a)**

*Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;*

### **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 leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

## **F. Findings on the 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.**

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.

13. 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."*

14. 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."*

15. 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.

**F.II Whether signing of unit hand over letter or indemnity-cum-undertaking at the time of possession extinguishes the right of the allottee to claim delay possession charges.**

16. The respondent contended that at the time of taking possession of the subject unit vide unit hand over letter dated 31.05.2018, the complainant has certified itself to be fully satisfied with regard to the measurements, location, direction, developments etc of the unit and also admitted and acknowledge that it do not have any claim of any nature whatsoever against the respondent and that upon acceptance of possession, the liabilities and obligations of the respondent as enumerated in the allotment letter/buyer's agreement, stand fully satisfied. The relevant para of the unit handover letter relied upon reads as under:

*"The Allottee, hereby, certifies that he / she has taken over the peaceful and vacant physical possession of the aforesaid Unit after fully satisfying himself / herself with regard to its measurements, location, dimension and development etc. and hereafter the Allottee has no claim of any nature whatsoever against the Company with regard to the size, dimension, area, location and legal status of the aforesaid Home.*

*Upon acceptance of possession, the liabilities and obligations of the Company as enumerated in the allotment letter/Agreement executed in favour of the Allottee stand satisfied."*

17. In the complaint bearing no. **4031 of 2019** titled as **Varun Gupta V/s Emaar MGF Land Ltd.,** the authority has comprehensively dealt with this issue and has held that the aforesaid unit handover letter does not



preclude the complainants from exercising their right to claim delay possession charges as per the provisions of the Act.

18. In light of the aforesaid order, the complainant is entitled to delay possession charges as per provisions of the Act despite signing of indemnity at the time of possession or unit handover letter.

**F.III Objections regarding the complainant being investor.**

19. The respondent has taken a stand that the complainant is investor and not consumer, therefore, it is not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority observes that the respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that the preamble is an introduction of a statute and states main aims and objects of enacting a statute but at the same time preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if he contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the apartment buyer's agreement, it is revealed that the complainant is buyer and has paid total price of **Rs.49,76,871/-** to the promoter towards purchase of a unit in the project of the



promoter. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

*"2(d) "allottee" in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;"*

20. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the buyer's agreement cum provisional allotment letter executed between promoter and complainant, it is crystal clear that it is an allottee(s) as the subject unit allotted to him by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled as *M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr.* has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottee being an investor is not entitled to protection of this Act also stands rejected.

**G. Findings on the reliefs sought by the complainant.**

**G.I Direct the respondent to pay interest at 10.75% p.a. for every month from the due date of possession i.e., 07.01.2014 till the date of grant**

**of possession i.e., 31.05.2018 or at the rate provided for under this Act for the delay caused in handing over possession of the unit.**

21. 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.”*

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

**“16. POSSESSION**

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

*i. That the possession of the Retail Spaces in the Commercial Complex shall be delivered and handed over to the Allottee(s), **within thirty (30) months of the execution hereof**, subject however to the Allottee(s) having strictly complied with all the terms and conditions of this Agreement and not being in default under any of the provisions of this Agreement and all amounts due and payable by the Allottee(s) under this Agreement having been paid in time to the Company. The Company shall give notice to the Allottee(s), offering in writing, to the Allottee to take possession of the Retail Spaces for his occupation and use (“Notice of Possession”).*

*ii. The Allottee(s) agrees and understands that the Company shall be entitled to a grace period of **one hundred and twenty (120) days** over and above the period more particularly specified here-in-above in sub-clause (a)(i) of clause 16, for applying and obtaining necessary approvals in respect of the Commercial Complex.*





23. 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.

24. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within 30 months of the execution of the agreement and further provided that promoter shall be entitled to a grace period of 120 days for applying and obtaining necessary approvals in respect of the commercial complex. The date of execution



of buyer's agreement is 07.03.2011. The period of 30 months expired on 07.09.2013. As a matter of fact, the promoter has not applied to the concerned authority for applying and obtaining necessary approvals in respect of the commercial complex 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 wrongs. Accordingly, this grace period of 120 days cannot be allowed to the promoter at this stage.

25. **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.

26. 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.

27. 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., 17.08.2022 is 8%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10%.
28. 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;"*
29. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 10% by the respondent/promoter which is the same as is being granted to the complainants in case of delayed possession charges.
30. Considering the above-mentioned facts, the authority calculated due date of possession according to clause 16 of the buyer's agreement



dated 07.09.2013 i.e., 30 months from the date of execution of the agreement and disallows the grace period of 120 days as the promoter has not applied to the concerned authority for obtaining necessary approvals in respect of the commercial complex 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 wrongs. Therefore, the authority allows DPC w.e.f. **07.09.2013 till 25.03.2018 i.e.,** expiry of 2 months from the date of offer of possession (25.01.2018). The amount of compensation already paid to the complainant by the respondent as delayed compensation as per the buyer's agreement shall be adjusted towards delay possession charges payable by the promoter at the prescribed rate of interest to be paid by the respondent as per the proviso to section 18(1) of the Act.

**G.II Direct the respondent to allocate and demarcate one car parking space in the basement in favour of the Complainant. OR In the alternative, if the respondent is not in a position to provide the same, direct the respondent to pay a sum of Rs. 5,00,000/-.**

31. The matter regarding parking in common basement is to be dealt as per the terms and conditions of the buyer's agreement where the said agreement have been entered into before coming into force the Real Estate (Regulation and Development) Act, 2016. Clause 1.3(a)(i) the following provisions have been made regarding parking space:

**"1.3 Parking Space**



- (i) *The Office Space Allottee(s) shall have the right to park one car in the multi-level basement parking of the building, free of any usage charges.*
- (ii) *The Allottee(s) has / have applied for \_ number of car park for his/her exclusive use, at the rates of Rs.0/- (Rupees), as set out in the Payment Plan. The Allottee(s) understands that he/she does not have any right to sell, transfer, and deal with such exclusive parking space independent of the said Office Space. However, such exclusive parking space can only be transferred to any other allottee in the Commercial Complex only.*

32. The Allottee(s) agrees and understands to park his/her/their/its vehicle(s) in the multi-level basement car parking and not nowhere else in the commercial complex.

33. As per the aforesaid clause, the promoter has agreed to allot one car parking, free of any usage charges, in the multi-level car parking.

**G.III. Direct the respondent to pay a sum of Rs. 1,50,000/- towards the costs of litigation expenses.**

34. The complainant is seeking above mentioned relief with regard to compensation. Hon'ble Supreme Court of India in civil appeal nos. 6745-6749 of 2021 titled as *M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of Up & Ors. (supra)*, has held that an allottee is entitled to claim compensation & litigation charges under sections 12,14,18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation & litigation expense shall be adjudged by the adjudicating officer having due regard to the factors



mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation & legal expenses. Therefore, the complainant is advised to approach the adjudicating officer for seeking the relief of litigation expenses.

**H. Directions of the authority**

35. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

- i. The respondent is directed to pay the interest at the prescribed rate i.e., 10% per annum for every month of delay on the amount paid by the complainant from 07.09.2013 till 25.03.2018 i.e., expiry of 2 months from the date of offer of possession (25.01.2018). 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.
- ii. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 10% 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.
- iii. The respondent is directed to give right to park one car in the multi-level basement parking of the building free of any usage charges.



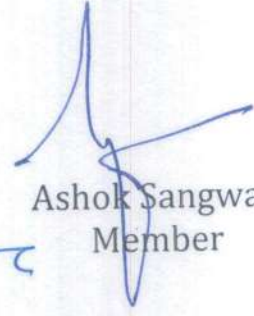



iv. The respondent shall not charge anything from the complainant which is not the part of the buyer's agreement. The respondent is also not entitled to claim holding charges from the complainant/allottee at any point of time even after being part of the buyer's agreement as per law settled by hon'ble Supreme Court in civil appeal nos. 3864-3889/2020 decided on 14.12.2020.

36. Complaint stands disposed of.

37. File be consigned to registry.

  
Sanjeev Kumar Arora  
Member

  
Ashok Sangwan  
Member

  
Dr. K.K. Khandelwal  
Chairman  
08.09.2022

Haryana Real Estate Regulatory Authority, Gurugram

**Dated: 08.09.2022**