

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

Date of decision: 08.09.2022

Name of the Builder		Emaar MGF Land Limited	
Project Name		Gurgaon Greens	
S.no.	Complaint No.	Complaint title	Attendance
1.	CR/4616/2021	Puneet Singh vs. Emaar MGF Land Limited	Shri Rishabh Kanojiya Shri Harshit Batra
2.	CR/5157/2021	Vishal Vireshwar Melita vs. Emaar MGF Land Limited	Shri Rishabh Jain Shri Harshit Batra
3.	CR/5182/2021	Neeta Kapoor and Deep Ahluwalia vs. Emaar MGF Land Limited	Shri Jagdeep Kumar Shri Dhruv Rohatgi

CORAM:

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

ORDER

1. This order shall dispose of all the 3 complaints titled as above filed before this authority in form CRA under section 31 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred as "the Act") read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (hereinafter referred as "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 its obligations, responsibilities and functions to the allottees as per the agreement for sale executed inter se between parties.
2. The core issues emanating from them are similar in nature and the complainant(s) in the above referred matters are allottees of the project, namely, **Gurgaon Greens** (group housing project) being developed by the same respondent/promoter i.e., **Emaar MGF Land Limited**. The terms and

conditions of the builder buyer's agreements fulcrum of the issue involved in all these cases pertains to failure on the part of the promoter to deliver timely possession of the units in question, seeking award of delayed possession charges, possession and the execution of the conveyance deeds.

3. The details of the complaints, reply status, unit no., date of agreement, possession clause, due date of possession, total sale consideration, amount paid up, and reliefs sought are given in the table below:

Project: Gurgaon Greens, Sector 102, Gurugram							
Possession clause: Clause 14							
<u>Time of handing over the Possession</u>							
<p><i>Subject to terms of this clause and barring force majeure conditions, subject to the Allottee having complied with all the terms and conditions of this Agreement, and not being in default under any of the provisions of this Agreement and compliance with all provisions, formalities, documentation etc., as prescribed by the Company, the Company proposes to hand over the possession of the Unit within 36 (Thirty Six) months from the date of start of construction, subject to timely compliance of the provisions of the Agreement by the Allottee. The Allottee agrees and understands that the Company shall be entitled to a grace period of 5 (five) months, for applying and obtaining the completion certificate/occupation certificate in respect of the Unit and/or the Project.</i></p>							
<p>Note:</p> <p>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 5 months cannot be allowed to the promoter.</p>							
Sr. no	Complaint no./title/ date of complaint	Reply status	Unit No. and area admeasure- -eing	Date of execution of allotment letter	Due date of possession	Total sale consideration and amount paid by the Complainant (s)	Relief Sought



1.	CR/4616/2021 case titled as Puneet Singh vs. Emaar MGF Land Limited DOR-09.12.2021	Reply received on 21.01.2022	GGN-06-0101, 1st floor, building no.06 [annexure P1, page 24 of complaint]	22.04.2013 [annexure page 21 of complaint]	14.06.2016 Offer of possession: 11.12.2018	TSC: Rs. 98,65,925/- AP: Rs. 98,65,924/- (As per statement of account dated 17.12.2021 at page 183-184 of reply	1. Direct the respondent to pay delay possession charges for every month of delay from expiry of commitment period till the actual date of handing over possession to the complainant i.e. 18.02.2019 at the rate prescribed by rule 15 of the Rules 2017 which is 9.30% p.a. for inordinate delay in delivery of possession of the apartment in terms of clause 14 of the buyer's agreement which is the duty of the respondent under section 11(4) of the Act.
2.	CR/5157/2021 Case titled as Vishal Vireshwar Mehta through SPA Holder Shri Sachin Goel V/s Emaar MGF Land Ltd. DOR-03.01.2022	Reply received on 11.02.2022	GGN-26-0601, 6th floor, building no. 26 [annexure R3, page 51 of reply]	17.04.2013 [annexure R3, page 48 of reply]	25.06.2016 Offer of possession: 19.07.2019	TSC: Rs. 99,97,113/- AP: Rs. 1,05,38,860/- (As per statement of account dated 01.07.2021 at page 86 of complaint]	DPC.



<p>3. CR/5182/2021 case titled as Neeta Kapoor and Deep Ahluwalia Vs. Emaar MGF Land Ltd.</p> <p>DOR- 17.01.2022</p>	<p>Reply received on 22.02.2022</p>	<p>GGN-07-0402, 4th floor, building no. 07</p> <p>[annexure R4, page 62 of reply]</p>	<p>09.05.2013 [annexure R4, page 59 of reply]</p>	<p>14.06.2016 Offer of possession:</p>	<p>TSC: Rs. 97,72,714/- AP: Rs. 97,72,715/- As per statement of account dated 09.02.2022 at page 157 of reply</p>	<p>1. DPC 2. Direct the respondent to return Rs. 1,12,593/- unreasonably charged by the respondent by increasing sale price after execution of buyer's agreement between the respondent and the complainants. 3. Direct the respondent to issue necessary instructions to the complainant's bank to remove lien marked over ID of Rs. 2,79,542/- in favour of the respondent on the pretext of liability of HVAT for the period of 01.04.2014 till 30.06.2017. 4. Direct the respondent to return entire amount paid as GST tax by complainants between 01.07.2017 to 24.07.2019.</p>
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Note: In the table referred above certain abbreviations have been used. They are elaborated as follows:

Abbreviations Full form

DOR- Date of receiving complaint

TSC- Total Sale consideration

AP- Amount paid by the allottee(s)

DPC- Delayed possession charges

4. The aforesaid complaints were filed by the complainants against the promoter on account of violation of the builder buyer's agreement executed between the parties *inter se* in respect of said unit for not handing over the possession by the due date, seeking award of delayed possession charges, to return unreasonably charged by increasing sale area.
5. It has been decided to treat the said complaints as an application for non-compliance of statutory obligations on the part of the promoter/respondent in terms of section 34(f) of the Act which mandates the authority to ensure compliance of the obligations cast upon the promoters, the allottee(s) and the real estate agents under the Act, the rules and the regulations made thereunder.
6. The facts of all the complaints filed by the complainant(s)/allottee(s) are also similar. Out of the above-mentioned case, the particulars of lead case **CR/4616/2021 Case titled as Puneet Singh V/s Emaar MGF Land Ltd.** are being taken into consideration for determining the rights of the allottee qua delay possession charges.

A. Project and unit related details

7. 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:

CR/4616/2021 Case titled as Puneet Singh V/s Emaar MGF Land Ltd.

Sr. No.	Particulars	Details
1.	Name of the project	Gurgaon Greens, Sector 102, Gurugram, Haryana
2.	Total area of the project	13.531 acres
3.	Nature of the project	Group Housing Colony

4.	DTCP license no.	75 of 2012 dated 31.07.2012
	Validity of license	30.07.2020
	Licensee	Kamdhenu Projects Pvt. Ltd. & Aur.
5.	HRERA registered/ not registered	Registered vide no. 36(a) of 2017 dated 05.12.2017 for 95829.92 sq. mtrs.
	HRERA registration valid up to	31.12.2018
	HRERA extension of registration vide	01 of 2019 dated 02.08.2019
	Extension valid up to	31.12.2019
6.	Occupation certificate	05.12.2018 [annexure R5, page 140 of reply]
7.	Unit no.	GGN-06-0101, 1 st floor, building no.06 [annexure P1, page 24 of complaint]
8.	Provisional allotment letter dated	25.01.2013 [annexure R2, page 42 of reply]
9.	Date of execution of buyer's agreement	22.04.2013 [annexure P1, page 21 of complaint]
10.	Possession clause	<p>14. POSSESSION</p> <p>(a) Time of handing over the Possession</p> <p><i>Subject to terms of this clause and barring force majeure conditions, subject to the Allottee having complied with all the terms and conditions of this Agreement, and not being in default under any of the provisions of this Agreement and compliance with all provisions, formalities, documentation etc., as prescribed by the Company, the Company proposes to hand over the possession of the Unit within <u>36 (Thirty Six) months from the date of start of construction</u>, subject to timely compliance of the provisions of the Agreement by the Allottee. The Allottee agrees and understands that the Company</i></p>

		<i>shall be entitled to a grace period of 5 (five) months, for applying and obtaining the completion certificate/occupation certificate in respect of the Unit and/or the Project.</i> (Emphasis supplied) [Page 37 of complaint]	
11.	Date of start of construction as per statement of account dated 17.12.2021 at page 183 of reply	14.06.2013	
12.	Due date of possession	14.06.2016 [Note: Grace period is not included]	
13.	Total consideration	As per statement of account dated 17.12.2021 at page 183 of reply	As per the payment plan annexed with the buyer's agreement
		Rs. 98,65,925/-	Rs.95,19,496/-
14.	Total amount paid by the complainant as per statement of account dated 17.12.2021 at page 184 of reply	Rs.98,65,924/-	
15.	Offer of possession	11.12.2018 [annexure P12, page 80 of complaint]	
16.	Unit handover letter dated	18.02.2019 [annexure P14, page 88 of complaint]	
17.	Conveyance deed executed on	27.02.2019 [annexure P15, page 92 of complaint]	

B. Facts of the complaint

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

- i. The buyer's agreement dated 22.04.2013 was executed between the complainant and the respondent for allotment of the

apartment for a basic sale consideration of RS. 74,36,583/- the total sales consideration paid by the complainant for the apartment is RS. 95,19,496/-. In terms of the recitals of the buyer's agreement, Emaar had entered into collaboration agreements with owners of the scheduled land i.e. its wholly owned subsidiaries namely, m/s Kamdhenu projects Pvt. Ltd. and m/s Divit estates Pvt. Ltd. for development of the scheduled land and marketing and selling the units in the scheduled land pursuant to the said agreements and grant of license no. 75/2012 dated 31.07.2012 in favor of Emaar by director, town and country planning, ("DTCP") for a group housing company, Emaar commenced construction and development of the project on the scheduled land.

- ii. The complainant vide application dated 23.01.2013 applied to Emaar for registration/provisional allotment of a unit in the project. The same is evidenced by recitals in the buyer's agreement. It is submitted that the buyer's agreement contemplates that the project would be completed in a time bound manner by the respondent-Emaar. In particular, in terms of clause 14 of the said agreement, Emaar was to hand over the possession of the apartment to the complainant within a period of 36 months from the date of start of construction ("**commitment period**"). The said clause also provided for a further grace period of 5 (five) months after the expiry of the commitment period for the purpose of applying and obtaining the completion certificate/ occupation certificate in respect of the apartment/project. ("**grace period**").

- iii. Further, clause 16 of the buyer's agreement provides that in the event of failure by Emaar to offer the possession to the complainant within the grace period, then Emaar shall be liable to pay to the complainant compensation computed at the rate of Rs. 7.50 (rupees seven and paise fifty only) per sq. ft. of the super area i.e., 1650 sq. ft. in the present matter ("**delay compensation**") for period of delay till delivery of possession of the apartment to the complainant. In respect of payment request letter dated 30.10.2014, Emaar vide email dated 05.12.2014 informed the complainant that due to unforeseen circumstances, the milestone of "on casting of 9th floor roof slab" has been revised to 30.12.2014 from 30.11.2014. The details of 'unforeseen circumstances' were not provided to the complainant.
- iv. It is submitted that there was no delay in the overall development of the project due to the aforesaid 'unforeseen circumstances.' The same is clear from email dated 18.12.2014 through which the complainant was intimated by Emaar about the progress at the project site and that the occupation certificate was likely to be applied for in quarter 2 of 2016 in a phased manner. It is pertinent to note that the said timeline is the same as the one communicated to the complainant vide email dated 21.04.2014. Vide email dated 07.06.2016 issued by Emaar, the complainant was informed that Emaar had initiated the process of demerger of the company pursuant to a scheme of arrangement under sections 391-394 of the companies act, 1956 and had also filed such scheme with the hon'ble high court of

Delhi. The complainant was assured of Emaar's commitment to ensure completion of the project at the earliest possible time. It was also stated therein that Emaar's resources were concentrated to put the project on a fast track to completion and contractor mobilization was being renewed at the project site. It was further stated therein that the complainant would be provided the target completion schedules for the project and would be regularly updated about the progress of the project. Furthermore, vide email dated 22.06.2016 the forecasted schedule till application of occupation certificate was provided to the complainant by Emaar vide email dated 22.06.2016. Subsequently, vide email dated 01.02.2017 the updated forecasted schedule till handover was provided to the complainant by Emaar. Vide email dated 07.07.2016 the complainant was informed that Emaar MGF Land Ltd. is being operated under the management of Emaar properties, Dubai and Emaar MGF Land Ltd. is now a subsidiary of Emaar properties, Dubai. It was stated therein that the early completion of the reorganization process (already commenced under Section 391-394 of the companies Act, 1956) was in the best interest of Emaar. The complainant was assured of Emaar's commitment to completion of the project at the earliest.

- v. Vide emails dated 09.11.2016 and 11.11.2016 issued to the complainant, Emaar informed the complainant herein that taking cognizance of the issue of extremely high level of air pollution in NCR, the Haryana state pollution control board (in compliance with order passed by the national green tribunal)

has issued a compliance directive to all developers to stop all construction work from 08.11.2016 till 15th November 2016. Resultantly, the construction work at their Gurgaon sites would be temporarily suspended. The complainant was further assured that he would be duly informed about resumption of the construction activity and the lost time due to this temporary suspension would be made up.

- vi. The letter of offer of possession dated 11.12.2018 was issued by Emaar to the complainant intimating that the occupation certificate for the apartment has been received and the apartment was ready for possession. The complainant was further requested to clear the dues and submit the requisite documents for possession within a period of 60 days of the date of the said letter. As per 'annexure 1' appended to the said letter, the delayed compensation amount of Rs. 3,07,171/- had been adjusted against the amount payable by the complainant. It is submitted that no breakup or method of computation of the delay compensation or details of period for which the delay compensation was awarded was ever provided to the complainant despite several demands vide telephone and emails including email dated 08.01.2019 in an apparent attempt by Emaar to deny the complainant his legal right of the prescribed interest on delayed possession under section 18 of Rera read with rules 15 of Hrera rules. The actual physical possession of the apartment was handed over to the complainant by Emaar vide unit handover letter dated 18.02.2019.

- vii. The conveyance deed dated 27.02.2019 was executed between the complainant, Emaar MGF land limited, m/s. Kamdhenu projects private limited and m/s Divit estates private limited in respect of the apartment. A comparison of the rates prescribed by clauses 16 and 13 (finally revised to 10% p.a with 18% GST) of the buyer's agreement clearly shows that the 'delay compensation' contemplated under the said agreement is ex-facie arbitrary, one-sided, and unfair and wholly favoring the respondents. It is submitted that the respondents herein cannot be allowed to take undue advantage of their dominant position over the complainant. Such inequitable and one-sided terms are not binding on the rights of the complainants and cannot be used to deny the complainant equitable relief under the RERA and HRERA Rules.
- viii. In this respect, regard may be had to the decision of the Hon'ble Apex Court in **Pioneer Urban Land & Infrastructure Limited vs. Govindan Raghavan, (2019) 5 SCC 725** wherein it was held that one-sided, unilateral and unfair terms contained in the apartment buyer's agreement are not binding upon the flat purchasers. The relevant extract of the said judgment is reproduced hereinbelow:

"6.8. A term of a contract will not be final and binding if it is shown that the flat purchasers had no option but to sign on the dotted line, on a contract framed by the builder. The contractual terms of the agreement dated 8-5-2012 are ex facie one-sided, unfair and unreasonable. The incorporation of such one-sided clauses in an agreement constitutes an unfair trade practice as per Section 2(1)(r) of the Consumer Protection Act, 1986 since it adopts unfair methods

or practices for the purpose of selling the flats by the builder.

In view of the above discussion, we have no hesitation in holding that the terms of the apartment buyer's agreement dated 8-5-2012 were wholly one-sided and unfair to the respondent flat purchaser. The appellant builder could not seek to bind the respondent with such one-sided contractual terms.

- ix. Similar view was taken by the National Consumer Disputes Redressal Commission in several decisions including **Thangavel Palanivel v. DLF Southern Homes Pvt. Ltd. (Consumer Complaint No. 304 of 2015 decided on 29.8.2016)** (against which Civil Appeal no. 11494/2016 was dismissed by the Hon'ble Supreme Court), **Satish Kumar Pandey v. Unitech Ltd. and connected matters (Consumer Complaint No. 427 of 2014)**, **Jivitesh Nayal v. Emaar MGF Land Ltd 2017 SCC OnLine NCDRC 565**. The relevant extract of the judgment in **Jivitesh Nayal** (supra) is reproduced hereinbelow:

"9. ...The aforesaid compensation is a unilateral and patently unfair term imposed by the builders upon the flat buyers. Having already paid the booking amount to the builder, they have no option but to sign on the dotted lines, since the failure to execute the agreement unilaterally drafted by the builder and imposed upon the flat builders is likely to result in the booking amount being forfeited by the builder. Therefore, executing an agreement containing such a term is nothing, but a consent given under coercion and cannot be said to be the result of the exercise of a free consent on the part of the flat buyer. Moreover, a term to pay such a paltry compensation to the flat buyer in the event of default on the part of the builder, while making him pay exorbitant interest in the event of default or delay on his part is an absolutely unfair term. In fact, the incorporation of a term for payment of a paltry compensation to the buyer

in the event of the failure of the builder to deliver possession within the time period committed by him, had become so wide spread and rampant that the Legislature had to step in by enactment of the Real Estate (Regulation & Development) Act, 2016 to statutorily require the builder to pay compensation in the form of interest at prescribed rate in the event of the possession being delayed or the buyer deciding to quit on account of the delay on the part of the builder in delivering upon the promise made by him. Therefore, irrespective of Clause 15(a) of the BBA, the complainants in my view are entitled to a just and fair compensation for the period the possession of the flats is delayed by the opposite party."

C. Relief sought by the complainant:

9. The complainant has sought following relief(s):

(i) Direction be given to the respondent to pay delayed possession compensation for every month of delay from expiry of commitment period till the actual date of handing over possession to the complainant i.e. 18.12.2019 at the rate prescribed by Rule 15 of the HRERA Rules, 2017 which is 9.3% per annum for inordinate delay in delivery of possession of the apartment in terms of clause 14 of the apartment buyer's agreement which is the duty of the respondent under section 11(4) of Rera.

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

D. Reply by the respondent

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

i. That the complainant is 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 complainant as a speculative investment and not for the purpose of self-use as his residence. Therefore, there is no equity in favour of the complainant. However, since the respondent has delivered possession of the units comprised in the relevant part of the project, the registration of the same has not been extended thereafter. That subsequent to the provisional allotment of the said unit the complainant executed the buyer's agreement on 22.04.2013. That the rights and obligations of the parties are determined from the terms and conditions of their contract. That the relationship between the parties is contractual in nature and is governed by the buyer's agreement, the contents of which were willingly and voluntarily accepted between the parties. The rights and obligations of the parties flow directly from the agreement. At the outset, it must be noted that the complainant willingly consciously and voluntarily entered into all and every agreement after reading and understanding the contents thereof to their full satisfaction.

- ii. The respondent has had a bona fide conduct since the very beginning as the respondent despite not being under the obligation to send the payment reminder letters/payment request letters by the virtue of the clause 12(b) of the agreement, sent such letters at several point of time and completed the construction of the project without having regular payments by the various allottees of the project. The respondent has shown exemplary conduct as a real estate promoter which be duly taken into account. Clause 12 of the agreement is reiterated hereunder:

12. TIME IS THE ESSENCE

It is also specifically and categorically understood and agreed by the Allottee that the Company shall not be obliged to send demand notices/or reminders regarding the payments to be made by the Allottee as per the

Schedule of Payments in Annexure-III or obligations to be performed by the Allottee.

- iii. That it is known and practically understood that the regular, continuous and timely flow of payments from the allottees is essential in order to carry out the proper development and completion of the real estate project. In the present case the duty was not being abided by the complainant and in furtherance to which the complainant was sent the reminder by the respondent (reminder1/716329) on 30.12.2016.
- iv. That, furthermore, the delivery of possession was further subject to force majeure conditions as spelled out in clause 31 of the agreement, reiterated as under:

"The handover of the Unit shall be subject to force majeure clause which, inter alia, includes delay on account of non-availability of steel and/or cement and/or other Builder materials, water supply or electric power or slow down strike or due to a dispute with the construction agency employed by the Company, civil commotion or by reasons of war, enemy action, earthquake or any act of God. If there is any delay in the delivery of possession of the Unit or the Company is unable to deliver possession of the Unit due to force majeure event or due to any notice, order, rule or notification of the Central or State Government and/or any other public or competent authority or for any other reason beyond the control of the Company, shall be entitled to a reasonable extension of the time for delivery of possession of the Unit. The Allottee understands and acknowledges that if due to any force majeure conditions, the whole or part of the Project is abandoned or abnormally delayed, the Allottee shall not be entitled to prefer any claim whatsoever except that the Company shall on demand refund the Allottee's money without any interest."

- v. The respondent was adversely affected by various construction bans, lack of availability of building material, regulation of the construction and development activities by the judicial authorities including NGT in NCR on account of the environmental conditions, restrictions on usage

of ground water by the High Court of Punjab & Haryana, demonetization etc. and other force majeure circumstances, yet, the respondent completed the construction of the project diligently and timely, without imposing any cost implications of the aforementioned circumstances on the complainants and demanding the prices only as and when the construction was being done. That all these circumstances come within the purview of the force majeure clause and hence allow a reasonable time to the respondent builder. That it must also be noted that the respondent had the right to suspend the construction of the project upon happening of circumstances beyond the control of the complainant as per clause 14(b)(i), however, despite all the hardships faced by the respondent, the respondent did not, suspend the construction and managed to keep the project afloat through all the adversities.

- vi. That it must be noted by the hon'ble authority that despite such circumstances being faced by the respondent, the respondent has complied with all of its obligations, not only with respect to the agreement with the complainant but also as per the concerned laws, rules and regulations thereunder and the local authorities. That despite the innumerable hardships being faced by the respondent, the respondent completed the construction of the project and applied for occupation certificate vide an application dated 12.04.2018 before the concerned authority and successfully attained the occupation certificate dated 05.12.2018. It is to be noted that the construction of all the booked apartments has been completed, out of which more than 500 Units have been handed over till date.

- vii. That thereafter, and only after obtaining the requisite permissions, the respondent legally offered the possession of the unit to the complainant on 11.12.2018 vide the letter of offer of possession. Thereafter, the complainant executed the indemnity cum undertaking for possession on 07.01.2019, subsequently, took the physical possession of the unit on 18.02.2019 vide the unit handover letter. It needs to be categorically noted that the complainant had satisfied themselves with regard to the measurement, location, dimension and development, area, location and legal status of the unit, as is evident in the unit handover letter. The letter of offer of possession dated 11.12.2018, indemnity cum undertaking for possession dated 07.01.2019 and the unit handover letter dated 18.02.2019.
- viii. Thereafter, the absolute title over the unit was transferred to the complainant through conveyance deed bearing vasika no. 8319 dated 27.02.2019. That the complainant after having executed the conveyance deed, taking peaceful possession of the unit, and having enjoyed(ing) such possession for almost three years, the complainant should not be entitled to claim the interest on the delayed possession. Thus, the present complaint is devoid of any cause of action and is nothing but an abuse of process of law. It is submitted that a contract is deemed to be concluded after execution of the conveyance deed as the complainant is left with no right, entitlement or claim against the respondent and the transaction between the complainant and the respondent stands concluded and no right or liability can be asserted by the respondent or the complainant against the other. It is pertinent to take into reckoning that the complainant has obtained possession of the unit in question and the complaint is a gross misuse of process of

law and hence the present complaint is liable to be dismissed with heavy costs. That after having slept on their rights for a number of years, the complainants cannot be rightly allowed to have the present claims.

- ix. That at this instance, it must also be noted that the complainant seek interest for alleged delayed delivery of possession. It needs to be categorically noted that even though the due date for delivery of possession was proposed and not absolute and subject to the conditions as enumerated in clauses 14 and 31 of the buyer's agreement and the fact that the delay, if any, was caused due to the circumstances beyond the control of the respondent, yet the respondent has already given compensation along with offer of possession of Rs. 3,07,171/- on 07.12.2018, as is evident from the statement of accounts dated 17.12.2021. That after having already received the compensation as per the terms and conditions of the agreement, claiming interest cannot be rightfully demanded and hence the present claim is liable to be dismissed.
- x. Moreover, without accepting the contents of the complaint in any manner whatsoever, the bonafide conduct of the respondent has to be highlighted as the respondent has credited an amount of rs.48,279/- towards anti-profiting, Rs.3,07,171/- as compensation credited on IOP and monies credited towards the TDS as is evident from the statement of account. Without prejudice to the rights of the respondent, delayed interest if any has to be calculated only on the amounts deposited by the allottees/complainants towards the basic principal amount of the unit in question and not on any amount credited by the respondent, or any payment made by the allottees/complainants towards delayed



payment charges (DPC) or any Taxes/Statutory payments etc. That after having already received the compensation along with offer of possession as per the terms and conditions of the agreement, claiming interest cannot be rightfully demanded and hence the present claim is liable to be dismissed.

- xi. The complainant is conscious and aware of the agreement and has filed the present complaint to harass the respondent and compel the respondent to surrender to his illegal demands. It is submitted that the filing of the present complaint is nothing but an abuse of the process of law. That there exists no cause of action for the complainants to file the present complaint. That the respondent has made good on all parts of his responsibilities and obligations under the agreement and under the law, rules and regulations. that for the reason of non-existence of an existing cause of action, this complaint is liable to dismissed on this ground alone.
- xii. That in light of the bona fide conduct of the respondent, the peaceful possession having been taken by the complainants, compensation taken by the complainants at the time of offer of possession, non-existence of cause of action and the frivolous complaint filed by the complainants, this complaint is bound be dismissed with costs in favour of the respondent.

E. Jurisdiction of the authority

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

E. I Territorial jurisdiction

13. As per notification no. 1/92/2017-ITCP 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

14. 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;

The provision of assured returns is part of the builder buyer's agreement, as per clause 15 of the BBA dated..... Accordingly, the promoter is responsible for all obligations/responsibilities and functions including payment of assured returns as provided in Builder Buyer's Agreement.

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.

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

F. Findings on the objections raised by the respondent:

F.I Objection regarding entitlement of DPC on ground of complainant being investor

16. The respondent submitted that the complainant is investor and not consumer/allottee, thus, the complainant is not entitled to the protection of the Act and thus, the present complaint is not maintainable.
17. The authority observes that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that 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 under section 31 of the Act, any aggrieved person can file a complaint against the promoter if the promoter 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 buyer's agreement, it is revealed that the complainant is an allottee/buyer and they have paid total price of Rs.98,65,924/- to the promoter towards purchase of the said 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,"*
18. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the buyer's agreement executed between respondent and complainant, it is crystal clear that the complainant is allottee as the subject

unit was 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 complainant-allottee being investors is not entitled to protection of this Act stands rejected.

F.II Whether the execution of the conveyance deed extinguishes the right of the allottee to claim delay possession charges?

19. The respondent submitted that the complainant has executed the conveyance deed on 27.02.2019 and therefore, the transaction between the complainant and the respondent has been concluded and no right or liability can be asserted by respondent or the complainant against the other. Therefore, the complainant is estopped from claiming any interest in the facts and circumstances of the case. The present complaint is nothing but a gross misuse of process of law.
20. 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 taking over the possession and thereafter execution of the conveyance deed can best be termed as respondent having discharged its liabilities as per the buyer's agreement and upon taking possession, and/or executing conveyance deed, the complainants never gave up their statutory right to seek delayed possession charges as per the provisions of the said Act. Also, the same view has been upheld by the

Hon'ble Supreme Court in case titled as **Wg. Cdr. Arifur Rahman Khan and Aleya Sultana and Ors. Vs. DLF Southern Homes Pvt. Ltd. (now Known as BEGUR OMR Homes Pvt. Ltd.) and Ors. (Civil appeal no. 6239 of 2019)** dated 24.08.2020, the relevant paras are reproduced herein below:

- 34 The developer has not disputed these communications. Though these are four communications issued by the developer, the appellants submitted that they are not isolated aberrations but fit into a pattern. The developer does not state that it was willing to offer the flat purchasers possession of their flats and the right to execute conveyance of the flats while reserving their claim for compensation for delay. On the contrary, the tenor of the communications indicates that while executing the Deeds of Conveyance, the flat buyers were informed that no form of protest or reservation would be acceptable. The flat buyers were essentially presented with an unfair choice of either retaining their right to pursue their claims (in which event they would not get possession or title in the meantime) or to forsake the claims in order to perfect their title to the flats for which they had paid valuable consideration. In this backdrop, the simple question which we need to address is whether a flat buyer who seeks to espouse a claim against the developer for delayed possession can as a consequence of doing so be compelled to defer the right to obtain a conveyance to perfect their title. It would, in our view, be manifestly unreasonable to expect that in order to pursue a claim for compensation for delayed handing over of possession, the purchaser must indefinitely defer obtaining a conveyance of the premises purchased or, if they seek to obtain a Deed of Conveyance to forsake the right to claim compensation. This basically is a position which the NCDRC has espoused. We cannot countenance that view.*
- 35. The flat purchasers invested hard earned money. It is only reasonable to presume that the next logical step is for the purchaser to perfect the title to the premises which have been allotted under the terms of the ABA. But the submission of the developer is that the purchaser forsakes the remedy before the consumer forum by seeking a Deed of Conveyance. To accept such a construction would lead to an absurd consequence of requiring the purchaser either to abandon a just claim as a condition for obtaining the conveyance or to indefinitely delay the execution of the Deed of Conveyance pending protracted consumer litigation."*

21. Therefore, in furtherance of *Varun Gupta V/s Emaar MGF Land Ltd. (supra)* and the law laid down by the hon'ble Apex Court in the *Wg. Cdr. Arifur Rahman (supra)*, this authority holds that even after execution of the conveyance deed, the complainant cannot be precluded from his right to seek delay possession charges from the respondent-promoter.

G. Findings on the relief sought by the complainant:

22. The common issues with regard to delayed possession charges & other invalid charges are involved in all these cases.

G.1 Delay possession charges

23. **Relief sought by the complainant:** Direct the respondent to pay delay possession charges for every month of delay from expiry of commitment period till the actual date of handing over possession to the complainant i.e. 18.02.2019 at the rate prescribed by rule 15 of the Rules, 2017 which is 9.30% p.a. for inordinate delay in delivery of possession of the apartment in terms of clause 14 of the buyer's agreement which is the duty of the respondent under section 11(4) of the Act.

24. 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."

25. Clause 14(a) of the buyer's agreement provides for time period for handing over of possession and is reproduced below:

"14. POSSESSION

(a) Time of handing over the possession

Subject to terms of this clause and barring force majeure conditions, and subject to the Allottee having complied with all the terms and conditions of this Agreement, and not being in default under any of the provisions of this Agreement and compliance with all provisions, formalities, documentation etc., as prescribed by the Company. The Company proposes to hand over the possession of the Unit within 36 (Thirty Six) months from the date of start of construction, subject to timely compliance of the provisions of the Agreement by the Allottee. The Allottee agrees and understands that the Company shall be entitled to a grace period of 5 (five) months, for applying and obtaining the completion certificate/occupation certificate in respect of the Unit and/or the Project."

26. 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 allottees of their 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.

27. **Due date of possession and admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within 36 (thirty-six) months from the date of start of construction and further provided in agreement that promoter shall be entitled to a grace period of 5 months for applying and obtaining completion certificate/occupation certificate in respect of said unit. The date of start of construction is 14.06.2013 as per statement of account dated 17.12.2021. The period of 36 months expired on 14.06.2016. As a matter of fact, the promoter has not applied to the concerned authority for obtaining completion certificate/ occupation certificate within the time limit (36 months) prescribed by the promoter in the buyer's agreement. The promoter has moved the application for issuance of occupation certificate only on 05.12.2018 when the period of 36 months has already expired. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, the benefit of grace period of 5 months cannot be allowed to the promoter due to aforesaid reasons.
28. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges at the prescribed rate. Proviso to 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.

29. The legislature in its wisdom in the subordinate legislation under 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.
30. 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., 08.09.2022 is 8%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10%.
31. **Rate of interest to be paid by the complainant in case of delay in making payments-** 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."*

32. 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 complainant in case of delayed possession charges.
33. On consideration of the documents available on record and submissions made by the parties regarding contravention as per provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 14(a) of the buyer's agreement executed between the parties on 22.04.2013, the possession of the subject flat was to be delivered within a period of 36 months from the date of start of construction plus 5 months grace period for applying and obtaining the completion certificate/ occupation certificate in respect of the unit and/or the project. The construction was started on 14.06.2013. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over possession comes out to be 14.06.2016. Occupation certificate was granted by the concerned authority on 05.12.2018 and thereafter, the possession of the subject flat was offered to the complainant on 11.12.2018. Copies of the same have been placed on record. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the subject flat and it is failure on part of the promoter to fulfil its obligations and responsibilities as per the buyer's agreement dated 22.04.2013 to hand over the possession within the stipulated period.
34. 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 05.12.2018. The respondent offered the possession of the unit in question to the complainant only on 11.12.2018, so it can be said that the complainant came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the 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 they have to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e. 14.06.2016 till the expiry of 2 months from the date of offer of possession (11.12.2018) which comes out to be 11.02.2019.

35. 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 delayed possession at prescribed rate of interest i.e. 10% p.a. w.e.f. 14.06.2016 till expiry of 2 months from the date of offer of possession (11.12.2018) which comes out to be 11.02.2019 as per provisions of section 18(1) of the Act read with rule 15 of the rules.
36. Also, the amount of compensation already paid to the complainant by the respondent as delay compensation in terms of 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 Return of amount unreasonably charged by increasing sale price.

37. This additional issue raised in complaint no. 5182 of 2021 case titled as **Neeta Kapoor vs. Emaar MGF Land Limited.**
38. **Relief sought by the complainants:** Direct the respondent to return Rs.1,12,593/- unreasonably charged by the respondent by increasing sale price after execution of buyer's agreement between the respondent and the complainants.
39. As per schedule of payment annexed with the buyer's agreement (annexure P1, page 55 of complaint), the total sale consideration is Rs.90,99,983/- which is inclusive of basic sale price, EDC and IDC, club membership, IFMS, car parking, PLC and additional charges. Whereas as per statement of account dated 17.12.2021 (annexure P2, page 77 of complaint), the sale consideration has been increased to Rs.91,30,076/- i.e. an increase of Rs.30,093/-. Further IFMS of Rs.82,500/- has also been again added. Accordingly, Rs.1,12,593/- have been charged extra. Therefore, the respondent is directed to delete the said amount from the total sale consideration.
40. **Direct the respondent to issue necessary instructions to the complainant's bank to remove lien marked over FD of Rs.2,79,542/- in favour of the respondent on the pretext of liability of HVAT for the period of 01.04.2014 till 30.06.2017.**

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, vide letter of offer of possession dated 11.12.2018, the respondent has demanded lien marked FD of Rs. 2,79,542/- towards future liability of HVAT for liability post 01.04.2014. In light of judgement stated above, the respondent shall not demand the same and the lien so marked be removed. Also, information about the same be sent to the concerned bank by the promoter as well as complainants along with the copy of this order.

41. Direct the respondent to return entire amount paid as GST tax by complainants between 01.07.2017 to 24.07.2019.

The complainants submitted that GST came into force on 01.07.2017 and the possession was supposed to delivered by 14.06.2016. Therefore, the tax which has come into existence after the due date of possession and this extra cost should not be levied on complainants. On the contrary, the respondent denied that any amount towards GST is liable to be returned to the complainants and the demands towards GST are statutory demands which cannot be evaded.

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 complainant/allottee 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 14.06.2016 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.


H. Directions of the authority

42. Hence, the authority hereby passes this order and issue 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 complainants from due date of possession i.e. 14.06.2016 till 11.02.2019 i.e. expiry of 2 months from the date of offer of possession (11.12.2018). 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 respondent is directed to pay arrears of interest accrued within 90 days from the date of order of this order as per rule 16(2) of the rules and thereafter monthly payment of interest be paid till date of handing over of possession shall be paid on or before the 10th of each succeeding month.
- iii. The respondent shall delete an amount of Rs.1,12,593/- from the total sale consideration.
- iv. The respondent cannot charge any HVAT 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. Therefore, the respondent shall not demand the same and the lien so marked be removed. Information about the same be also sent to the concerned bank by the promoter as well as complainants along with copy of this order.
- v. 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.
- vi. The respondent shall not charge anything from the complainants which is not the part of the buyer's agreement. The respondent is also not entitled to claim holding charges from the complainants/allottees 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.
- vii. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.

- viii. The rate of interest chargeable from the allottees 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 allottees, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.
43. This decision shall mutatis mutandis apply to cases mentioned in para 3 of this order.
44. Complaint stands disposed of. True certified copy of this order shall be placed in the case file of each matter. ~~There shall be separate decrees in individual cases.~~
45. File be consigned to registry.


Sanjeev Kumar Arora
Member


Ashok
Sangwan
Member


Dr. K.K. Khandelwal
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 08.09.2022