BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	:	**48 of 2021**
First date of hearing	:	**03.03.2021**
Date of decision	:	**08.09.2022**

1. Kamal Aneja
2. Shivani Aneja
Both RR/o: 18/273, New Moti Nagar,
New Delhi-110015. **Complainants**

Versus

M/s Emaar India Ltd.
Address: Emaar MGF Business Park,
Mehrauli Gurgaon Road, Sikandarpur Chowk,
Sector-28, Gurugram-122002, Haryana. **Respondent**

Coram:

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

Appearance:

Shri Varun Chug	Advocate for the complainants
Shri J.K. Dang	Advocate for the respondent

ORDER

1. The present complaint dated 14.01.2021 have been filed by the complainants/allottees in Form CRA under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all

obligations, responsibilities and functions to the allottee as per the agreement for sale executed inter se them.

A. Project and unit related details

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

S.No.	Heads	Information
1.	Project name and location	"Emerald Estate Apartments at Emerald Estate" in Sector 65, Gurugram, Haryana.
2.	Project area	25.499 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no. and validity status	06 of 2008 dated 17.01.2008 Valid/renewed up to 16.01.2025
5.	Name of licensee	Active Promoters Pvt. Ltd. and others, C/o Emaar MGF Land Ltd.
6.	HRERA registered/ not registered	"Emerald Estate" registered vide no. 104 of 2017 dated 24.08.2017 for 82768 sq. mtrs.
	HRERA registration valid up to	23.08.2022
7.	Occupation certificate granted on	11.11.2020 [Page 173 of reply]
8.	Provisional allotment letter dated	24.09.2009 [Page 14 of complaint]
9.	Revised allotment letter	08.04.2010 [Page 36 of reply]
10.	Unit no.	EEA-G-F03-04, 3rd floor, building no. G [Page 25 of complaint]
11.	Unit measuring	1395 sq. ft.
12.	Date of execution of buyer's agreement	08.06.2010 [Page 23 of complaint]

13.	Payment plan	Construction linked payment plan [Page 56 of complaint]
14.	Total consideration as per statement of account dated 24.02.2021 at page 113 of reply	Rs.58,06,878/-
15.	Total amount paid by the complainants as per statement of account dated 24.02.2021 at page 114 of reply	Rs.59,57,962/-
16.	Date of commencement of construction as per statement of account dated 24.02.2021 at page 113 of reply	26.08.2010
17.	Due date of delivery of possession as per clause 11(a) of the said agreement i.e. 36 months from the date of commencement of construction (26.08.2010) + grace period of 6 months, for applying and obtaining the completion certificate/ occupation certificate in respect of the unit and/or the project. [Page 39 of complaint]	26.08.2013 **[Note:** Grace period is not included]
18.	**Date of offer of possession to the complainants**	**20.11.2020** [Page 176 of reply]
19.	Delay compensation already paid by the respondent as per statement of account dated 24.02.2021 at page 114 of reply	Rs. 5,22,380/-

B. Facts of the complaint

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

i. That the property in question i.e. apartment bearing no. EEA-G-F03-04 (third floor) admeasuring 1395 sq. ft. along-with car parking space in the project of the respondent known as "Emerald Estate Apartment" situated at Sector-65, Gurugram, Haryana, was booked by the complainants, in the year 2009. The said unit was allotted vide provisional allotment letter dated 24.09.2009. Thereafter, on 08.06.2010, the complainants entered into a buyer's agreement with the respondent in respect of the unit in question.

ii. That the total cost of the apartment was Rs.58,06,878/- only and since it was construction linked payment plan, the payment was to be made on the basis of schedule of payment provided by the respondent. The complainants had already paid the entire amount towards the cost of the property and in fact a sum of Rs.1,47,638/- is lying credit balance of the complainants, which is due and payable by the respondent.

iii. That it was represented to the complainants, by the respondent, by way of various advertisements, that the project in question shall be constructed, developed and designed by a team of ace architects and structural designers to meet world class infrastructural quality and standards. The complainants were induced by the representations of the respondent/promoter and thereby purchased the property in question.

iv. That the said buyer's agreement is totally one sided, which impose completely biased terms and conditions upon the complainants,

thereby tilting the balance of power in favour of the respondent, which is further manifest from the fact that the delay in handing over the possession by the respondent would attract only a meagre penalty of Rs.5/- per sq. ft., on the super area of the flat, on monthly basis, whereas the penalty for failure to take possession would attract holding charges of Rs.50/- per sq. ft. and 24% penal interest on the unpaid amount of instalment due to the respondent.

v. That as per the clause 11(a) of the said buyer's agreement dated 08.06.2010, the respondent had categorically stated that the possession of the said apartment would be handed over to the complainants within 36 months from the date of commencement of construction of the project i.e. 26.08.2010, excluding a further grace period of 6 months.

vi. That in all these years, the complainants also visited at the site and observed that there are serious qualities issues with respect to the construction carried out by the respondent. The apartment/apartments were sold by representing that the same will be luxurious apartment however, all such representations seen to have been made in order to lure complainants to purchase the apartment at extremely high prices. The respondent has compromised with levels of quality and is guilty of mis-selling. There are various deviations from the initial representations. The respondent marketed luxury high end apartments but they have

compromised even with the basic features, designs and quality to save costs. The structure, which has been constructed, on face of it is of extremely poor quality. The construction is totally unplanned, with sub-standard, low grade, defective and despicable construction quality.

vii. That the respondent has breached the fundamental terms of the contract by inordinately delaying in delivery of possession by 82 months. The complainants were made to make advance deposit on the basis of information contained in the brochure, which is false on the face of it as is evident from the construction done at the site so far.

viii. That the complainants vide their emails addressed to the respondent had asked to indemnify them, for the delay in handing over the possession of the apartment but the respondent company had indemnified the complainant as per the buyer's agreement and had only offered a meagre sum of Rs.5,22,380/-. In fact, the complainants through their emails had demanded compensation as per the RERA but the respondent company has miserably failed to accede to their legitimate request and has turned deaf ear.

ix. That the complainants, without any default, had been timely paying the instalments towards the property, as and when demanded by the respondent. The respondent had promised to complete the project by February 2014 including the grace period of six months. The construction of the project had commenced on 26.08.2010 and the

possession was finally offered on 20.11.2020, which resulted in extreme kind of mental distress, pain and agony to the complainants.

x. That the respondent has breached the fundamental term of the contract by inordinately delaying in delivery of the possession. The respondent had committed gross violation of the provisions of section 18(1) of the Act by not handing over the timely possession of the flat in question and not giving the interest and compensation to the buyer as per the provisions of the Act.

C. Relief sought by the complainants

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

i. Direct the respondent to handover the possession of the property in question to the complainants, in time bound manner.

ii. Direct the respondent to pay interest @18% p.a. as interest towards delay in handing over the property in question as per the provisions of the Act and the rules.

iii. Pass such order or further order as this hon'ble authority may deem fit and proper in the facts and circumstances of the present case.

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 complainants have filed the present complaint seeking, inter alia, interest and compensation for alleged delay in delivering possession of the apartment booked by the complainants. It is respectfully submitted that such complaints are to be decided by the adjudicating officer under section 71 of the Act read with rule 29 of the rules and not by this hon'ble authority. The present complaint is liable to be dismissed on this ground alone.

ii. That the present complaint is based on an erroneous interpretation of the provisions of the Act as well as an incorrect understanding of the terms and conditions of the buyer's agreement dated 08.06.2010. 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. The provisions of the Act relied upon by the complainants for seeking interest or compensation cannot be called in to aid in derogation and in negation of the provisions of the buyer's agreement. The interest is compensatory in nature and cannot be granted in derogation and ignorance of the provisions of the buyer's agreement. The interest for the alleged delay demanded by the complainants is beyond the scope of the buyer's agreement. The complainants cannot demand any

interest or compensation beyond the terms and conditions incorporated in the buyer's agreement.

iii. That initially apartment bearing no. EEA-M-F02-04 was provisionally allotted to the complainants having tentative super area of 1395 sq. ft. vide provisional allotment letter dated 24.09.2009. Subsequently, unit no EEA-J-F02-04 was provisionally allotted to the complainants vide revised allotment letter dated 08.04.2010. Thereafter, buyer's agreement was executed between the complainants and the respondent on 08.06.2010. The complainants had opted for a construction linked payment plan and had agreed and undertaken to make payment in accordance therewith. However, the complainants defaulted in payments on several occasions. Consequently, the respondent was constrained to issue notices and reminders for payment. The statement of account dated 24.02.2021 reflects the payments made by the complainants and the accrued delayed payment interest thereon. The project in question has been registered under the Act and the registration of the project is valid till 23.08.2022.

iv. That there have been numerous defaults on the part of the complainants in making timely payment of sale consideration as per the payment plan. Accordingly, the complainants are not entitled to any compensation for any delay in delivery of possession under clause 13 (c) of the buyer's agreement. The contractual relationship

between the complainants and the respondent is governed by the terms and conditions of the buyer's agreement which are binding upon the parties with full force and effect.

v. That the respondent has paid Rs.5,22,380/- as delay compensation in accordance with the buyer's agreement. Furthermore, an amount of Rs. 47,112/- has been credited as benefit on account of Anti-Profiting and Rs. 4,191/- on account of Early Payment Rebate (EPR). Without prejudice to the rights of the respondent, delayed interest if any has to 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 or any taxes/statutory payments etc.

vi. That the project got delayed on account of various reasons which were/are beyond the power and control of the respondent and hence, the respondent cannot be held responsible for the same. There were defaults on the part of the contractor (M/s B L Kashyap and Sons). The contractor was not able to meet the agreed timelines for construction of the project. The progress of the work at the project site was extremely slow on account of various defaults on the part of the contractor, such as failure to deploy adequate manpower, shortage of material etc. and hence, the respondent cannot be held responsible for the same. In the aforesaid circumstances, the respondent was

constrained to issue notice of termination dated 16.01.2015, terminating the contract and calling upon the contractor to remove itself from the project site without removal/damage to the materials, equipment, tools, plant & machinery and to hand over the contract document.

vii. That the respondent apprehended that the contractor would remove from the project site, material, tools, plant & machinery which would then not be available to the respondent for use for completion of the project. Therefore, the respondent filed petition bearing no. O.M.P. no. 100 of 2015 under section 9 of the Arbitration and Conciliation Act, 1996 before hon'ble High Court seeking relief in nature of restraining the contractor from interfering with the business activities of the respondent and appointing local commissioner to inspect project site and prepare an inventory of material, equipment, tools, plant and machinery. However, the parties settled the disputes during the pendency of the aforesaid proceedings and the contractor assured the respondent that the project shall be completed within the decided timeline as this considered to be in the interest of justice and to mitigate losses. Further, the contractor had also undertaken to complete the project within the agreed timelines i.e., within 18 months. Despite the aforementioned settlement, the contractor did not amend its ways and persistently defaulted in meeting the agreed timelines for completion of the project. In view of the above, the

respondent was constrained to terminate the contract with the contractor vide termination notice dated 30.08.2018. After termination of contract, the respondent filed a petition against the contractor before the Hon'ble Delhi High Court seeking interim protection against the contractor so that the contractor does not, inter alia, disturb the possession and work at the site. Similar petition was also filed by the contractor against the respondent.

viii. That the aforesaid two petitions, along with two other petitions pertaining to a different contract came up for hearing on 06.09.2018. The hon'ble High Court by order dated 06.09.2018 disposed of the said cases and issued several directions. The hon'ble High Court appointed Justice A.P. Shah (Retd.) as the sole arbitrator for adjudication of disputes between the respondent and the contractor. Furthermore, RITES Ltd. (a Government Undertaking) was appointed as the local commissioner to inter alia, inspect and take joint measurement of work done and balance to be done and file its report before the sole arbitrator. The High Court gave liberty to the respondent to award the contract to new agency(ies) for completing the remaining work. However, it was directed that the project site shall be handed over to such new agency(ies) with the permission of the sole arbitrator. That the arbitration proceedings titled as B L Kashyap and Sons Vs. Emaar MGF Land Ltd (arbitration case number 1 of 2018) before Justice A.P. Shah (Retd.), sole arbitrator have been

initiated. The Hon'ble Arbitrator vide order dated 27.04.2019 gave liberty to the respondent to appoint another contractor w.e.f. 15.05.2019. It is evident from the aforesaid, that the respondent had been diligently pursuing the matter before the sole arbitrator and no fault can be attributed to the respondent in this regard. A force majeure situation that had arisen on account of which the respondent was unable to fulfill its obligations till the situation persisted.

ix. That the respondent completed construction of the apartment/ building and applied for the issuance of the occupation certificate on 20.07.2020. The occupation certificate has been issued by the competent authority on 11.11.2020. Upon receipt of the occupation certificate, possession of the apartment has been offered to the complainants vide offer of possession letter dated 20.11.2020. The complainants have been called upon to make remaining payment and complete the necessary formalities required to enable the respondent to hand over possession to the complainants.

x. That the complainants executed the indemnity cum undertaking for possession on 24.12.2020 but instead of making balance payment and taking possession of the unit, the complainants have filed the present complaint. It is submitted that the respondent has duly fulfilled its obligations under the buyer's agreement by completing construction and offering possession in accordance with the buyer's agreement, within the period of validity of registration of the project under the

Act, i.e., before 23.08.2022. Thus, there is no default or lapse on the part of the respondent.

xi. That several allottees, including the complainants, have 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, has diligently and earnestly pursued the development of the project in question and has constructed the project in question as expeditiously as possible. Therefore, there is no default or lapse on the part of the respondent and there in no equity in favour of the complainants. It is evident from the entire sequence of events, that no illegality can be attributed to the respondent. Thus, it is most respectfully submitted that the present complaint deserves to be dismissed at the very threshold.

E. Application dated 16.03.2021 moved by the complainant for seeking issuance of necessary directions to the respondent

7. That the present complaint was filed on 14.01.2021. However, the complainants were subsequently called by the respondent for home orientation and physical handover of the property. So, on 10.03.2021, the complainants visited the property in question to complete the above

stated process. Upon visiting the apartment, the complainants got to know that the apartment was neither park facing nor pool facing for which the respondent has already charged preferential location charges to the tune of Rs.2,70,630/- and Rs.67,657/- respectively.

8. That as per clause no.1.2(a)(i) of the buyer's agreement, the complainants were charged a hefty preferential location charges of Rs.3,38,287/- only for the apartment being park and pool facing that forms part of the preferential located units. As per clause 1.2(e)(ii) of the buyer's agreement, in case of any change in layout plan, if the unit ceases to be preferentially located then in such event, the respondent shall be liable to refund only the amount of PLC paid by the allottees. Therefore, the PLC amount so charged by the respondent is liable to be returned to the complainant for non-compliance of the buyer's agreement clause for preferential location charges.

9. That moreover, the complainants are holding their unit in tower-G and the respondent has allotted covered car parking at level-2 of the basement at tower J thereby causing huge inconvenience and discomfort to the complainants and hence, is offering a completely defective project despite charging huge costs towards covered car parking from the complainants.

10. That the complainants vide email dated 13.03.2021 brought these issues to the notice of the respondent and even requested for refund of PLC amount along with interest. But no heed was paid to their grievance and

till date the PLC amount has not been refunded by the respondent. In view of the above submissions, the complainants pray for the following:

a. Direct the respondent to refund the PLC amount of Rs.3,38,287/- charged towards park and pool facing unit.

b. Direct the respondent to provide covered parking to the complainants in tower M only, in which the unit in question is located.

c. Any other relief which this hon'ble authority may deem fit and proper under the facts and circumstances of the present case.

F. Reply by the respondent to the application dated 16.03.2021

11. That the letter of offer of possession dated 20.11.2020 had been issued by the respondent to the complainants. Furthermore, the complainants had executed the indemnity cum undertaking for possession on 24.12.2020 but instead of making the balance payment and taking possession of the unit, the complainants have filed the present complaint. It is submitted that the respondent has duly fulfilled its obligations under the buyer's agreement by completing construction and offering possession in accordance with the buyer's agreement, within the period of validity of registration of the project under the Act, i.e., before 23.08.2022. Thus, there is no default or lapse on the part of the respondent.

12. The respondent denied that the complainants had been called by the respondent after 14.01.2021 for home orientation and physical handover of the apartment. It is pertinent to mention that the complainants had actually visited the apartment in question on 07.01.2021. It is denied that

the complainants had visited the apartment on 10.03.2021. It is pertinent to mention that at the time of visiting the apartment on 07.01.2021, the complainants had satisfied themselves with respect to the specifications of the apartment in question completed as specified in the buyer's agreement executed between the parties and had raised no objection at the relevant point in time.

13. The respondent denied that the apartment in question is neither park facing nor pool facing. It is not denied that the respondent had charged preferential location charges. It is pertinent to mention that the apartment of the complainants is preferentially located. Furthermore, the complainants had never raised any objection at the time of visiting the apartment in question for the first time. It is submitted that the photographs appended with the application under reply have been clicked from a certain angle so that the park and the pool are not visible from the said angle. The allegations levelled by the complainants with respect to the location of the apartment are a result of afterthought and have been advanced at this highly belated stage merely to bias the mind of this hon'ble authority. The complainants cannot be allowed to supplement the complaint filed by them by modifying the reliefs sought by the complainants by way of the false and frivolous application under reply. There has been no change in the preferential location and the apartment in question is pool and park facing for which preferential charges have been charged.

14. The respondent denied that the apartment in question is located in tower M. It is pertinent to mention that the apartment in question is actually located in tower G. The details with respect to the car parking allotted to the complainants are a matter of record. It is to be stated that the basement parking of the towers is common and connected and the parking for tower G is accessible is connected to the basement and is easily accessible from tower G. It is also pertinent to be mentioned that nowhere in the buyer's agreement has the parking space specified to be provided below tower G in the said project. It is wrong and denied that the car parking allotted to the complainants has caused huge inconvenience and discomfort to the complainants. It is wrong and denied that the respondent is offering a completely defective project or that the respondent has charged a huge cost towards the covered car parking from the complainant. It is pertinent to mention that the complainants had voluntarily chosen to pay any additional amount for the right to use the car parking. The complainants have no valid reason to challenge the amount charged by the respondent towards the car parking or the location of the car parking. It is submitted that the complainants had not even once mentioned anything about the car parking charges or the location of the car parking in the complaint filed by them. The allegations levelled by the complainants at this highly belated stage are a result of afterthought. That in the interest of justice, the present application is liable to be dismissed with punitive costs.

G. Jurisdiction of the authority

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

G.I Territorial jurisdiction

16. 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.

G.II Subject-matter jurisdiction

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

H. Findings on the objections raised by the respondent

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

18. The respondent contended that 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.

19. 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 ***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."*

20. Also, in appeal no. 173 of 2019 titled as ***Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya***, in order 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."*

21. 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.

H.II Objection regarding handing over possession as per declaration given under section 4(2)(l)(C) of the Act.

22. The respondent submitted that the respondent has duly fulfilled its obligation under the buyer's agreement by completing construction and offering possession in accordance with the buyer's agreement, within the period of validity of registration of the project under the Act, i.e., before 23.08.2022.

23. Therefore, next question of determination is whether the respondent is entitled to avail the time given to him by the authority at the time of registering the project under section 3 & 4 of the Act. It is now settled law that the provisions of the Act and the rules are also applicable to ongoing project and the term ongoing project has been defined in rule 2(1)(o) of the rules. The new as well as the ongoing project are required to be registered under section 3 and section 4 of the Act.

24. Section 4(2)(l)(C) of the Act requires that while applying for registration of the real estate project, the promoter has to file a declaration under section 4(2)(l)(C) of the Act and the same is reproduced as under: -

> *Section 4: - Application for registration of real estate projects*
>
> *(2)The promoter shall enclose the following documents along with the application referred to in sub-section (1), namely: —.....*
>
> *(l): -a declaration, supported by an affidavit, which shall be signed by the promoter or any person authorised by the promoter, stating: — .....*

(C) the time period within which he undertakes to complete the project or phase thereof, as the case may be...."

25. The time period for handing over the possession is committed by the builder as per the relevant clause of apartment buyer agreement and the commitment of the promoter regarding handing over of possession of the unit is taken accordingly. The new timeline indicated in respect of ongoing project by the promoter while making an application for registration of the project does not change the commitment of the promoter to hand over the possession by the due date as per the apartment buyer agreement. The new timeline as indicated by the promoter in the declaration under section 4(2)(l)(C) is now the new timeline as indicated by him for the completion of the project. Although, penal proceedings shall not be initiated against the builder for not meeting the committed due date of possession but now, if the promoter fails to complete the project in declared timeline, then he is liable for penal proceedings. The due date of possession as per the agreement remains unchanged and promoter is liable for the consequences and obligations arising out of failure in handing over possession by the due date as committed by him in the apartment buyer agreement and he is liable for the delayed possession charges as provided in proviso to section 18(1) of the Act. The same issue has been dealt by hon'ble Bombay High Court in case titled as ***Neelkamal Realtors Suburban Pvt. Ltd. and anr. vs Union of India and ors***. and has observed 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..."

H.III Whether signing of indemnity-cum-undertaking at the time of possession extinguishes the right of the allottee to claim delay possession charges

26. At times the allottee is asked to give the affidavit or indemnity-cum-undertaking before taking possession. The allottee has waited for long for his cherished dream home and now when it is ready for taking possession, he has either to sign the indemnity-cum-undertaking and take possession or to keep struggling with the promoter if indemnity-cum-undertaking is not signed by him. Such an undertaking/ indemnity bond given by a person thereby giving up their valuable rights must be shown to have been executed in a free atmosphere and should not give rise to any suspicion. If a slightest of doubt arises in the mind of the adjudicator that such an agreement was not executed in an atmosphere free of doubts and suspicions, the same would be deemed to be against public policy and would also amount to unfair trade practices. No reliance can be placed on any such indemnity-cum-undertaking and the same is liable to be discarded and ignored in its totality. Therefore, this authority does not place reliance on such indemnity cum undertaking. To fortify this view, the authority place reliance on the NCDRC order dated 03.01.2020 in case titled as **Capital Greens Flat Buyer Association and Ors. Vs. DLF Universal Ltd., Consumer case no. 351 of 2015**, it was held that the execution of indemnity-cum-undertaking would defeat the provisions of

sections 23 and 28 of the Indian Contract Act, 1872 and therefore would be against public policy, besides being an unfair trade practice. The relevant portion of the said judgment is reproduced herein below.

> *"Indemnity-cum-undertaking*
>
> *30. The developer, while offering possession of the allotted flats insisted upon execution of the indemnity-cum-undertaking before it would give possession of the allotted flats to the concerned allottee.*
>
> *Clause 13 of the said indemnity-cum-undertaking required the allottee to confirm and acknowledge that by accepting the offer of possession, he would have no further demands/claims against the company of any nature, whatsoever. It is an admitted position that the execution of the undertaking in the format prescribed by the developer was a pre-requisite condition, for the delivery of the possession. The opposite party, in my opinion, could not have insisted upon clause 13 of the Indemnity-cum-undertaking. The obvious purpose behind such an undertaking was to deter the allottee from making any claim against the developer, including the claim on account of the delay in delivery of possession and the claim on account of any latent defect which the allottee may find in the apartment. The execution of such an undertaking would defeat the provisions of Section 23 and 28 of the Indian Contract Act, 1872 and therefore would be against public policy, besides being an unfair trade practice. Any delay solely on account of the allottee not executing such an undertaking would be attributable to the developer and would entitle the allottee to compensation for the period the possession is delayed solely on account of his having not executed the said undertaking-cum-indemnity."*

27. The said judgment of NCDRC was also upheld by the Hon'ble Supreme Court vide its judgement dated 14.12.2020 passed in civil appeal nos. **3864-3889 of 2020** against the order of NCDRC.

28. It is noteworthy that section 18 of the Act stipulates for the statutory right of the allottee against the obligation of the promoter to deliver the possession within stipulated timeframe. Therefore, the liability of the promoter continues even after the execution of indemnity-cum-undertaking at the time of possession. Therefore, the authority is of the

view that the indemnity cum undertaking dated 24.12.2020 executed by the complainants does not preclude them from exercising their right to claim delay possession charges as per the provisions of the Act.

I. Findings on the reliefs sought by the complainants

I.I Possession and delay possession charges

29. **Relief sought by the complainants**: Direct the respondent to handover the possession of the property in question to the complainants in a time bound manner and direct the respondent to pay interest @18% p.a. as interest towards delay in handing over the property in question as per the provisions of the Act and the rules.

30. In the present complaint, the complainants intend to continue with the project and are 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."*

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

> "**11. POSSESSION**
>
> ***(a)* Time of handing over the Possession**
>
> *Subject to terms of this clause and subject to the Allottee(s) having complied with all the terms and conditions of this Buyer's Agreement,*

and not being in default under any of the provisions of this Buyer's Agreement and compliance with all provisions, formalities, documentation etc., as prescribed by the Company, the Company proposes to hand over the possession of the Unit within 36 months from the date of commencement of construction and development of the Unit. The Allottee(s) agrees and understands that the Company shall be entitled to a grace period of six months, for applying and obtaining the completion certificate/occupation certificate in respect of the Unit and/or the Project."

32. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement, and the complainants not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment time period for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject floor 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.

33. **Admissibility of grace period**: The promoter has proposed to hand over the possession of the said unit within 36 months from the date of commencement of construction and it is further provided in agreement that promoter shall be entitled to a grace period of six months for applying and obtaining completion certificate/occupation certificate in respect of said floor. The construction commenced on 26.08.2010 as per statement of account dated 24.02.2021. The period of 36 months expired on 26.08.2013. As a matter of fact, the promoter has not applied to the concerned authority for obtaining completion certificate/occupation certificate within the time limit prescribed by the promoter in the buyer's agreement. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of six months cannot be allowed to the promoter at this stage.

34. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges at the rate of 18% p.a. However, 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.

35. 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.

36. Taking the case from another angle, the complainants-allottees were entitled to the delayed possession charges/interest only at the rate of Rs.5/- per sq. ft. per month as per clause 13(a) of the buyer's agreement for the period of such delay; whereas, the promoter was entitled to interest @ 24% per annum at the time of every succeeding instalment from the due date of instalment till the date of payment as per clause 1.2(c) of the buyer's agreement. The functions of the authority are to safeguard the interest of the aggrieved person, may be the allottee or the promoter. The rights of the parties are to be balanced and must be equitable. The promoter cannot be allowed to take undue advantage of his dominate position and to exploit the needs of the home buyers. This authority is duty bound to take into consideration the legislative intent i.e., to protect the interest of the consumers/allottees in the real estate sector. The clauses of the buyer's agreement entered into between the parties are one-sided, unfair and unreasonable with respect to the grant of interest for delayed possession. There are various other clauses in the buyer's agreement

which give sweeping powers to the promoter to cancel the allotment and forfeit the amount paid. Thus, the terms and conditions of the buyer's agreement are ex-facie one-sided, unfair and unreasonable, and the same shall constitute the unfair trade practice on the part of the promoter. These types of discriminatory terms and conditions of the buyer's agreement will not be final and binding.

37. 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%.

38. **Rate of interest to be paid by complainants/allottees for 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;"*

39. Therefore, interest on the delay payments from the complainants 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.

40. 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 11(a) of the buyer's agreement executed between the parties on 08.06.2010, possession of the said unit was to be delivered within a period of 36 months from the date of commencement of construction and it is further provided in agreement that promoter shall be entitled to a grace period of six months for applying and obtaining completion certificate/occupation certificate in respect of said floor. 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 26.08.2013. In the present case, the complainants were offered possession by the respondent on 20.11.2020 after obtaining occupation certificate dated 11.11.2020 from the competent authority. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the complainants as per the terms and conditions of the buyer's agreement dated 08.06.2010 executed between the parties.

41. 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 11.11.2020. However, the respondent offered the possession of the unit in question to the complainants only on 20.11.2020, so it can be said that the complainants came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, they 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. 26.08.2013 till the expiry of 2 months from the date of offer of possession (20.11.2020) which comes out to be 20.01.2021. Also, the complainants are directed to take possession of the unit in question within 2 months from the date of this order as per section 19(10) of the Act.

42. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainants are entitled to delay possession

charges at prescribed rate of the interest @ 10 % p.a. w.e.f. 26.08.2013 till 20.01.2021 i.e., expiry of 2 months from the date of offer of possession (20.11.2020) as per provisions of section 18(1) of the Act read with rule 15 of the rules.

I.II Preferential location charges

43. On the date of the hearing i.e., 01.02.2022, local commission was appointed with respect to the preferential location of the unit and the local commission has submitted the report on 30.05.2022. The relevant portion of the report is reproduced below:

> *"6. CONCLUSION:*
> *The site of project named "Emrald Estate" being developed by M/s Emaar MGF Land Limited has been inspected and it is found that:*
> *a. The complainant unit is 3BHK unit which consist of two balconies and as per the sanctioned plan the community building has been proposed adjacent to the complainant's tower and the swimming pool is integral part of the community building. The view from the balcony is obstructed by the community building whereas some portions of swimming pool is visible from the extreme corners of the balconies.*
> *b. It is submitted that no park is visible from the complainant tower whereas a 6.0-meter-wide fire tender path is approved adjacent to the complainant tower as per the sanctioned plan and the promoter has developed that portion into green area which visible from the complainant's unit.*
> *c. The complainant has not been allotted car parking under the basement of tower G and he has been allotted parking in the basement of the other tower i.e., tower K."*

44. In the present complaint, unit no. EEA-G-F03-04 is located in building no. G. As per the report of the Local Commission, the view of the swimming pool from the balcony of unit is obstructed by the community building whereas, some portion of swimming pool is visible from the extreme

corners of the balcony. Also, no park is visible from the complainant tower whereas a 6.0-meter-wide fire tender path is approved adjacent to the complainant tower as per the sanctioned plan and the promoter has developed that portion into green area which visible from the complainant's unit. Therefore, in light of the said report, the authority is of the view that as the unit in question has ceased to be preferentially located, the respondent shall not charge PLC for the subject unit. Furthermore, the respondent has charged for car parking which has been allotted by the respondent to the complainant in tower K as per the LC report accordingly the respondent is right in charging the car parking.

45. There are two PLC charges involved in the unit

i) Pool facing charges Rs. 67,657/-

ii) Park facing charges Rs. 2,70,630/-

The counsel for the respondent concurs with the opinion of the authority that the unit is pool facing but not park facing accordingly, the PLC charges amounting to Rs. 2,70,630/- are abrogated to be charged from the complainant.

I.III Cost of litigation of Rs. 50,000/-

46. With respect to the **aforesaid relief**, the counsel for the complainants are claiming compensation in the above-mentioned reliefs. 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.*** (Decided on 11.11.2021), has held that an allottee is entitled to claim compensation

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 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. Therefore, the complainants are advised to approach the adjudicating officer for seeking the relief of compensation

J. Directions of the authority

47. 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 complainants from due date of possession i.e. 26.08.2013 till 20.01.2021 i.e. expiry of 2 months from the date of offer of possession (20.11.2020). The arrears of interest accrued so far shall be paid to the complainants within 90 days from the date of this order as per rule 16(2) of the rules.

ii. The 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 not levy/recover any charges 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.

48. Complaint stands disposed of.

49. 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