BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no : 1664 of 2021
Date of decision : 13.12.2022

1. Kusum Bali
2. Jagdeep Bali

Address:- H.no. 843, Sector:17A, Gurugram-122001

Complainants

Versus

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

Respondent

CORAM:
Shri Vijay Kumar Goyal — **Member**
Shri Sanjeev Kumar Arora — **Member**

APPEARANCE:
Shri Geetansh Nagpal — Advocate for the complainants
Shri J.K.Dang — Advocates for the respondent

ORDER

1. The present complaint dated 24.03.2021 has been filed by the complainants/allottees in Form CRA under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions to the allottee as per the agreement for sale executed inter se them.

A. Project and unit related details

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

Sr. No.	Particulars	Details
1.	Name of the project	Emerald Plaza, Sector 65, Gurugram, Haryana
2.	Unit no.	EPO-03-040 [Page 60 of complaint]
3.	Provisional allotment letter dated	06.12.2010 [page 57 of complaint]
4.	Date of execution of buyer's agreement	24.12.2010 [page 51-86 of reply]
5.	Possession clause	**16. POSSESSION** **(a) Time of handing over the possession** *i. That the possession of the Retail Spaces in the Commercial Complex shall be delivered and handed over to the Allottee(s),* ***within thirty (30) months of the execution hereof****, subject however to the Allottee(s) having strictly complied with all the terms and conditions of this Agreement and not being in default under any of the provisions of this Agreement and all amounts due and payable by the Allottee(s) under this Agreement having been paid in time to the Company. The Company shall give notice to the Allottee(s), offering in writing, to the*

		Allottee to take possession of the Retail Spaces for his occupation and use ("Notice of Possession"). ii. *The Allottee(s) agrees and understands that the Company shall be entitled to* ***a grace period of one hundred and twenty (120) days over and above the period more particularly specified here-in-above in sub-clause (a)(i) of clause 16, for applying and obtaining necessary approvals in respect of the Commercial Complex.*** (Emphasis supplied)
6.	Due date of possession	24.06.2013 [Note: Grace period is not allowed]
7.	Total consideration as per SOA dated 15.04.2021 on 121-122 of reply	Rs. 34,84,988/-
8.	Total amount paid by the complainant as per SOA dated 15.04.2021 on 121-122 of reply	Rs. 34,99,259/-
9.	Occupation certificate	08.01.2018
10.	Offer of possession	09.03.2018
11.	Unit handover letter dated	25.09.2018
12.	Conveyance deed executed on	05.10.2018

B. Facts of the complaint

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

I. That the original allottees Mrs. Niharika Khera and Mr. Gaurav Khera, paid an initial amount of Rs. 5,00,000/- (five lakh only) vide cheque no: 00213 and accordingly filled the application form for

one office space/unit and opted for construction linked payment plan. The original allottees were allotted one unit being epo-03-040 in the above said project. That the original allottees Mrs. Niharika Khera and Mr. Gaurav Khera subsequently sold this allotment to the complainants vide sale agreement dated 24.11.2010.

II. That the respondent company issued an allotment letter in favour of the complainants however the nomination formalities were completed subsequently. That the complainant made a payment of Rs. 361,000/- vide cheque no:398473. dated 08.12.2010 in accordance with payment plan which was acknowledged by the respondent vide statement of account dated 18.01.2021. That the original allottees and complainant entered into a buyer's agreement with the respondent and active promoters private limited on 24.12.2010. Subsequently, the endorsement and nomination formalities were complete by the respondent company in favour of the complainants. That the complainant made a payment of rs. 22,167 vide cheque no: 878630. In accordance with payment plan which was acknowledged by the respondent vide statement of account dated 18.01.2021. That the complainant made another payment of Rs. 295,384/- vide cheque no:819114 in accordance to payment plan and against the reminder dated 10.02.2011 which was acknowledged by the respondent vide statement of account dated 18.01.2021.

III. That the complainant made a payment of Rs. 220,669/- vide cheque no:004132 on account of completion of 3rd basement roof slab which was acknowledged by the respondent vide statement of account

dated 18.01.2021. That the complainant made payment of rs. 423,400/- vide cheque no:113507 on account of completion of 1st basement roof slab which was acknowledged by the respondent vide statement of account dated 18.01.2021. That the complainant made a payment of Rs. 150,000/- vide cheque no: 113519 on account of completion of and ground floor roof slab which was acknowledged by the respondent vide statement of account dated 18.01.2021. That the complainant executed a general power of attorney and appoints her husband Sh. Jagdeep Bali to be the legal attorney. That the complainant made a payment of Rs. 200,000/- vide Cheque No:022597 on account of intimation of possession including GST. Also, the respondent credited two amounts of Rs. 100,000/- and Rs. 90,000/- vide Voucher No:798507 and 798508 on account of OTPR and compensation on IOP respectively which was acknowledged by the respondent vide statement of account dated 18.01.2021. That a deed of conveyance has been executed between the respondent and the complainant. That the respondent made a unit handover letter in favour of the complainant. That the respondent credited an amount of rs.14,271/- vide voucher no:923067 for compensation on account of anti-profiting which was acknowledged by the respondent vide statement of account dated 18.01.2021.

IV. That the respondent being very well aware of the guidelines laid in The Real Estate (Regulation and Development) Act, 2016 and The Haryana Real Estate (Regulation & Development) Rules, 2017, and the interest the Complainants is entitled for as well as being aware of more than 200 judgments issued by HARERA Gurugram has not

given the complainants the interest that he is eligible for in the intimation of possession letter dated 09.03.2018 and have rather decided the delayed compensation based on the BBA which has been ruled by all the courts in the country as being too low and the term in the agreement being one sided.

V. That no offer of possession has been made in the letter of offer of possession letter dated 09.03.2018, which is in the nature of a notice informing the complainants that all the steps so mentioned in the letter have to be completed within a period of 30 days of this letter and further stating that adhering to the timelines is very important. That offering possession by the respondent on payment of charges which the office space buyer is not contractually bound to pay, cannot be considered to be a valid offer of possession. HVAT was never, as per the Act, payable by the complainants and hence the offer of possession is not valid offer of possession. That the respondent knowing well that HVAT is not payable by the complainants has included the HVAT element in the IOP letter, as the HVAT came into existence much before the plaza unit was sold to the complainants and hence to any stretch of imagination it cannot be believed, that if the VAT is payable by the complainants, the respondent would not have included the same in the cost on the plaza unit sold in 2010. In any case the supreme court had ruled that value added tax (vat) cannot be imposed on buyers and builders, developers have to pay the tax (5%) for under construction project units sold during 20 June 2006 to 31 March 2010.

VI. That the respondent is insisting advance monthly maintenance charges for a period of 12 months which was never a part of the bba and hence this demand is illegal and therefore for this reason as well the intimation of possession is an invalid offer. That the respondent asking for interest free maintenance security as the maintenance security is also illegal and amounts to unjust enrichment depriving the complainants of a huge loss of interest on a sum of Rs. 90,944.00 which condition was never a part of the bba and hence for this reason as well the intimation of possession is not a valid offer of possession.

VII. That the present complaint sets out the various deficiencies in services, unfair and/or restrictive trade practices adopted by the respondent in sale of their floors and the provisions allied to it. The modus operandi adopted by the respondent, from the respondents point of view may be unique and innovative but from the consumers point of view, the strategies used to achieve its objective, invariably bears the irrefutable stamp of impunity and total lack of accountability and transparency, as well as breach of contract and duping of the consumers, be it either through not implementing the services/utilities as promised in the brochure or through not delivering the project in time. That the cause of action accrued in favour of the complainants and against the respondent on the date when the respondents advertised the said project, it again arose on diverse dates when the office space owners entered into their respective agreement, it also arose when the respondents inordinately and unjustifiably and with no proper and reasonable

legal explanation or recourse delayed the project beyond any reasonable measure.

VIII. That one of the salient features of the amnesty scheme vide notification dated 12.09.2016 of haryana government dealing with vat on developers, is that in condition no. 4, it says that a contractor/developer opting under this scheme shall pay year wise, in lieu of tax, interest or penalty arising from his business, by way of one time settlement, a lump sum amount at the rate of one percent of the entire aggregate amount received or receivable from business carried out during a year, without deduction of any kind. The other provision of the scheme says that no input tax credit shall be allowed to the contractor under this scheme, on purchase of goods used in the works contract. It may be concluded with the text of this scheme that this is a composition scheme in which department has allowed the taxpayer to pay lump-sum tax @ 1% of total turnover instead of going into the complications of taking input credits on purchases and other deductions & then paying taxes as applicable on goods transferred. It is very well known that when a composition scheme is opted by a dealer /taxable person, then no other input tax credits or deductions are allowed to that person & moreover, he cannot charge tax from his customers.

IX. These provisions were there under rule 49/49A of HVAT as well as under the corresponding provision of GST also, wherever, the Govt. has allowed composition tax to a dealer, it debars them from charging that tax from their customers. Thus, to conclude, looking into the text of the amnesty scheme and intent of the legislature, it

can be argued that the developer cannot charge the HVAT paid as per the said amnesty from its customers as discussed above. It must be noted that under the composition scheme, the developer is prohibited from collecting any amount by way of tax under the Act from the customer. It is therefore requested/prayed that the respondent/company may kindly withdraw this demand of Rs. 7,721/- towards HVAT from your offer of possession and refund the entire amount back in favour of the complainants.

X. That as per the buyer's agreement, the IFMS (interest free maintenance security) was payable on the offer of possession. hence even the letter of possession cannot be considered to be a valid offer of possession as the IFMS (interest free maintenance security) was payable on the valid offer of possession. Since the offer of possession is not valid, hence the demand of IFMS contained in the so-called offer of possession letter would also be illegal and unjustified and the amount shall be refunded at the prescribed rate of HARERA under the provisions of the Act, to the complainants until such time a valid offer is made.

XI. The respondent has stated at annexure 1 of offer of possession that, 12 months of advance maintenance charges @ Rs. 12 per Sq. Ft Plus GST @ 18% for 12 months amounting to Rs. 108,948.00 has to be paid by the complainants. As per, the clause 23(b) of BBA it is stated that: maintenance charges as may be levied by the maintenance agency for the upkeep and maintenance of the commercial complex, its common areas, utilities, equipment installed in the commercial complex and such other facilities forming part of the land. Hence

these are paid monthly once the expenses have been incurred and billed to the owner of the unit and therefore demanding an unspecified amount as a deposit of annual common area maintenance charges along with the final payment is unjustified and illegal.

XII. That the respondent is guilty of not providing the amenities as agreed upon in the builder buyer's agreement hence the same must be provided to the complainants. The company sells dreams to home buyers. Implicit in their representations is that the facilities which will be developed by the company will provide convenience of living and a certain lifestyle based on the existence of those amenities. Having sold the flats, the company may find it economically unviable to provide the amenities.

XIII. The grievance of the complainant relates to breach of contract, false promises, gross unfair trade practices and deficiencies in the services committed by the respondent in regard to the flat offered to him, including few demands which are not as per the builder buyer agreement and hence are unjustified and illegal. There is no second thought to the fact that the complainant has paid more than 90% of the total payment of Rs. 3,484,983/- as per details attached with the offer of possession. The emerald plaza project was launched in the year 2009 with the promises to deliver in time and huge funds were collected over the period by the respondent. That, the builder offered the possession after a delay of more than four years three months as per letter of possession dated 09.03.2018

C. **Relief sought by the complainants/allottees**

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

   i. Direct the respondent to pay the balance amount due to the complainants from the respondent on account of the interest, as per the guidelines laid in the RERA, 2016, before signing the sale deed together with the unambiguous intimation / offer of possession.

   ii. It is most respectfully prayed that this authority be pleased to order the respondent to remit the charges the HVAT and advance maintenance, as the same is not legally bound to pay the same.

   iii. Direct the respondent to allow the complainants of parking benefits provided free of cost.

   iv. Direct the respondent not to ask for any charges which is not as per the buyer agreement.

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

D. **Reply by the respondent/promoter**

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

   I. That the present complaint is not maintainable in law or on facts. The provisions of the real estate (regulation and development) act, 2016 (hereinafter referred to as the 'act') are not applicable to the project in question. The application for issuance of occupation certificate in respect of the project in question was made on

22.05.2017 **(annexure r1)**, i.e. well before the notification of the haryana real estate regulation and development rules 2017 (hereinafter referred to as the 'rules'). The occupation certificate has been thereafter issued on 8.01.2018. The project has not been registered under the provisions of the act. This authority does not have the jurisdiction to entertain and decide the present complaint. the present complaint is liable to be dismissed on this ground alone.

II. That the present complaint is not maintainable in law or on facts. The present complaint raises several such issues which cannot be decided in summary proceedings. The said issues require extensive evidence to be led by both the parties and examination and cross-examination of witnesses for proper adjudication. Therefore, the disputes raised in the present complaint are beyond the purview of this authority and can only be adjudicated by the adjudicating officer/civil court. The present complaint deserves to be dismissed on this ground alone. That the complainants are not an "allottee" but an investor who have booked the commercial unit in question as a speculative investment in order to earn rental income/profit from its resale. The unit in question has been booked by the complainants as a speculative investment and not for the purpose of self use.

III. That Ms. Niharika Khera (hereinafter "original allottee") had booked the unit in question, bearing number EPO-03-040, situated in the project developed by the Respondent, known as "Emerald Plaza", Sector 65, Gurugram, Haryana. It is submitted that the original allottee prior to approaching the respondent, had conducted extensive and independent enquiries regarding the project and it

was only after the original allottee was fully satisfied with regard to all aspects of the project, including but not limited to the capacity of the Respondent to undertake development of the same, that the original allottee took an independent and informed decision to purchase the unit, un-influenced in any manner by the respondent. Buyer's agreement dated 24.12.2010 was executed between the parties. The original allottee consciously and wilfully opted for a construction linked plan for remittance of the sale consideration for the unit in question and further represented to the respondent that the original allottee shall remit every instalment on time as per the payment schedule. The respondent had no reason to suspect bonafide of the original allottee.

IV. The original allottee acceded to the request of the complainants and agreed to transfer and convey her rights, entitlement and title in the unit in question in their favour. An agreement to sell dated 24.12.2010 was executed by the original allottee with the complainants. Furthermore, it needs to be highlighted that the complainants had executed an affidavit on 24.12.2010 whereby the complainants had consciously and voluntarily declared and affirmed that they would be bound by all the terms and conditions of the provisional allotment in favour of the original allottee. Without admitting or acknowledging in any manner the legality or truth of the allegations levelled by the complainants and without prejudice to the contentions of respondent, it is submitted that the interest demanded by the complainants in the instant complaint is compensatory in nature for indemnifying the complainants for the

alleged delay and hence the complaint preferred by the complainants is barred by estoppel.

V. That it is submitted that the complainants had defaulted in remittance of installments on time. the respondent was compelled to issue demand notices, reminders etc. calling upon the complainants to make payment of outstanding amounts payable by them under the payment plan/instalment plan opted by them. However, the complainants despite having received the payment request letters, reminders etc. failed to remit the instalments on time to the respondent. That it needs to be highlighted that since the complainants were not forthcoming with the outstanding amounts. The respondent was constrained to issue final notice dated 15.11.2012 to them. The respondent had categorically notified the complainants that they had defaulted in remittance of the amounts due and payable by them. It was further conveyed by the respondent to the complainants that in the event of failure to remit the amounts mentioned in the said notice, the respondent would be constrained to cancel the provisional allotment of the unit in question.

VI. That it is submitted that the complainants had defaulted in timely remittance of installments to the respondent which was an indispensable requirement under the buyer's agreement. The complainants, therefore, are not entitled to any compensation/interest in accordance with clause 18 of the buyer's agreement. It is further submitted that the complainants consciously and maliciously chose to ignore the payment request letters and reminders issued by the respondent and flouted in making timely

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

VII. That, without admitting or acknowledging the truth or legality of the allegations advanced by the complainants and without prejudice to the contentions of the respondent, it is respectfully submitted that the provisions of the act are not retrospective in nature. The provisions of the Act cannot undo or modify the terms of an agreement duly executed prior to coming into effect of the Act. It is further submitted that merely because the Act applies to ongoing projects which are registered with the authority, the Act cannot be said to be operating retrospectively. The provisions of the Act relied upon by the complainants for seeking interest cannot be called in to aid, in derogation and ignorance 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. It is further submitted that the interest demanded by the complainants for the alleged delay is beyond the scope of the buyer's agreement. The complainants cannot demand any interest beyond the terms and conditions incorporated in the buyer's agreement.

VIII. That it needs to be highlighted that the respondent had applied to the statutory authority for grant of occupation certificate in respect of the tower in which the unit in question is located on 22.05.2017 and the same was granted on 08.01.2018. It is reiterated that once an application for issuance of occupation certificate is submitted before the concerned competent authority, the respondent ceases to have any control over the same. The grant of occupation certificate is the prerogative of the concerned statutory authority and the respondent does not exercise any control over the matter. Therefore, the time period utilised by the concerned statutory authority for granting the occupation certificate needs to be necessarily excluded from computation of the time period utilised in the implementation of the project in terms of the buyer's agreement. As far as the respondent is concerned, it has diligently and sincerely pursued the development and completion of the project in question.

IX. That it is pertinent to take into reckoning that the complainants were offered possession of the unit in question through letter of offer of possession dated 09.03.2018. The complainants were called upon to remit balance payment including delayed payment charges and to complete the necessary formalities/documentation necessary for handover of the unit in question to them. However, the complainants

consciously refrained from obtaining possession of the unit in question for reasons best known to them.

X. That without admitting or acknowledging in any manner the truth or correctness of the frivolous allegations levelled by the complainants and without prejudice to the contentions of the respondents, it is submitted that the alleged interest frivolously and falsely sought by the complainants was to be construed for the alleged delay in delivery of possession. It is pertinent to note that an offer for possession marks termination of the period of delay, if any. The complainants are not entitled to contend that the alleged period of delay continued even after receipt of offer for possession. the complainants have consciously and maliciously refrained from obtaining possession of the unit in question. Consequently, the complainants are liable for the consequences including holding charges, as enumerated in the buyer's agreement, for not obtaining possession.

XI. That a unit handover letter dated 25.09.2018 was executed by the complainants, specifically and expressly agreeing that the liabilities and obligations of the respondent as enumerated in the allotment letter or the buyer's agreement stand satisfied. the complainants have intentionally distorted the real and true facts in order to generate an impression that the respondent has reneged from its commitments. No cause of action has arisen or subsists in favour of the complainants to institute or prosecute the instant complaint. The complainants have preferred the instant complaint on absolutely false and extraneous grounds in order to needlessly victimise and

harass the respondent. That it is pertinent to mention that after execution of the unit handover letter dated 25.09.2018 and obtaining of possession of the unit in question, the complainants are left with no right, entitlement or claim against the respondent. It needs to be highlighted that the complainants have further executed a conveyance deed dated 05.10.2018 in respect of the unit in question. The transaction between the complainants and the respondent stands concluded and no right or liability can be asserted by the respondent or the complainant against the other. The instant complaint is a gross misuse of process of law. The contentions advanced by the complainant in the false and frivolous complaint are barred by estoppel.

XII. That in addition thereto, it is respectfully submitted that the complainant has executed an indemnity cum undertaking on 07.09.2018 whereby the complainants had declared and acknowledged that they have no ownership right, title or interest in any other part of the project except in the unit area of the unit in question. Moreover, the complainants have admitted his obligation to discharge their HVAT liability thereunder. The complainants have preferred the instant complaint in complete contravention of their earlier representations and documents executed by them. The complainants have filed the instant false and frivolous complaint in order to mount undue pressure upon respondent in order to make it succumb to his unjust and illegitimate demands.

XIII. That it is submitted that several allottees have defaulted in timely remittance of payment of installments which was an essential, crucial and an indispensable requirement for conceptualisation 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. It is submitted that the construction of the tower in which the unit in question is situated has been completed by the respondent. The respondent has already delivered possession of the unit in question to the complainant. 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. The allegations levelled by the complainants are totally baseless. Thus, it is most respectfully submitted that the present complaint deserves to be dismissed at the very threshold.

7. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. hence, the complaint can be decided on the basis of these undisputed documents.

8. **Jurisdiction of the authority**

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

E.I Territorial jurisdiction

9. As per notification no. 1/92/2017-1tcp dated 14.12.2017 issued by town and country planning department, Haryana the jurisdiction of real estate regulatory authority, Gurugram shall be entire Gurugram district for all purpose with offices situated in Gurugram. in the present case, the project in question is situated within the planning area of Gurugram district, therefore this authority has complete territorial jurisdiction to deal with the present complaint.

E.II Subject-matter jurisdiction

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

F. Findings on the objections raised by the respondent

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

11. 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.

12. 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."

13. 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."*

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

F.II Objection regarding entitlement of DPC on ground of complainants being investor

15. The respondent submitted that the complainants are investor and not consumer/allottee, thus, the complainants are not entitled to the protection of the Act and thus, the present complaint is not maintainable.

16. 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 complainants are an allottees/buyers and they have paid total price of Rs. 34,99,259/- 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;"*

17. 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 complainants, it is crystal clear that the complainants are allottee as the subject unit was allotted to them 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.

G. Findings on the reliefs sought by the complainants/allottees

G.I Direct the respondent to pay the balance amount due to the complainants from the respondent on account of the interest, as per the guidelines laid in the RERA, 2016, before signing the sale deed together with the unambiguous intimation / offer of possession.

18. In the present complaint, the complainants intend to continue with the project and is seeking delay possession charges as provided under the proviso to section 18(1) of the act. sec. 18(1) proviso reads as under.

> *"**Section 18: - Return of amount and compensation***
>
> *18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building, —*
>
> .....
>
> *Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."*

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

> **Time of handing over the possession**
>
> i. *That the possession of the Retail Spaces in the Commercial Complex shall be delivered and handed over to the Allottee(s),* ***within thirty (30) months of the execution hereof*** *subject however to the Allottee(s) having strictly complied with all the terms and conditions of this Agreement and not being in default under any of the provisions of this Agreement and all amounts due and payable by the Allottee(s) under this Agreement having been paid in time to the Company. The Company shall give notice to the Allottee(s), offering in writing, to the Allottee to take possession of the Retail Spaces for his occupation and use ("Notice of Possession").*
>
> ii. *The Allottee(s) agrees and understands that the Company shall be entitled to a grace period of one hundred and twenty (120) days over and above the period more particularly specified here-in-above in sub-clause (a)(i) of clause 16, for applying and obtaining necessary approvals in respect of the Commercial Complex.*

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

buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

21. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within 30 months from the date of execution of this agreement and further provided in agreement that promoter shall be entitled to a grace period of 120 days for applying and obtaining the necessary approvals in respect of the commercial complex. The date of execution of buyer's agreement is 24.12.2010. The period of 30 months expired on 24.06.2013. As a matter of fact, the promoter has not applied to the concerned authority for obtaining completion certificate/ occupation certificate within the grace period prescribed by the promoter in the buyer's agreement. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 120 days cannot be allowed to the promoter at this stage.

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

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

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

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

23. 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.

24. 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., 13.12.2022 is 8.35%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.35%.

25. 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;"

26. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 10.35% by the respondent/promoter which is the same as is being granted to the complainants in case of delayed possession charges.

27. Considering the above-mentioned facts, the authority calculated due date of possession according to clause 16(a) of the buyer's agreement dated 24.12.2010 i.e., 30 months from the date of execution and disallows the grace period of 120 days as the promoter has not applied to the concerned authority for obtaining completion certificate/occupation certificate within the time limit prescribed by the promoter in the buyer's agreement. As per the settled law one cannot be allowed to take advantage of his own wrong. Therefore, the authority allows DPC **w.e.f. 24.06.2013 till 09.05.2018** i.e., expiry of 2 months from the date of offer of possession (09.03.2018).

G.II HVAT

28. 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 allottees with the dues payable by them or refund the amount if no dues are payable by them.

- **Advance Maintenance charges**

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

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

G.III Direct the respondent to allow the complainants of parking benefits provided free of cost.

30. The counsel for the respondent states that the complainants can use the Parking over the space earmarked for parking free of cost in terms of clause 1.3 (a) of the BBA.

G.IV Direct the respondent not to ask for any charges which is not as per the buyer agreement.

31. The respondent shall not levy any charges from the complainants which is not the part of the buyer's agreement.

32. 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 08.01.2018. However, the respondent offered the possession of the unit in question to the complainants only on 09.03.2018. So, it can be said that the complainants came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the complainants should be given 2 months' time from the date of offer of possession. These 2 months of reasonable time is being given to the complainants keeping in mind that even after intimation of possession practically he has to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit, but this is subject to that the unit being handed over at the time of taking possession is in habitable condition.

33. 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 @ 10.35 % p.a. w.e.f. 24.06.2013 till 09.05.2018 i.e., expiry of 2 months from the date of offer of possession (09.03.2018). The amount of compensation already paid to the complainants 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.

H. Directions of the authority

34. 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. 10.35 % per annum for every month of delay on the amount paid by the complainants from 24.06.2013 till 09.05.2018 i.e., expiry of 2 months from the date of offer of possession (09.03.2018). 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 amount of compensation already paid to the complainants 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.

iii. The respondent shall not levy/recover any charge 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.

35. Complaint stands disposed of.

36. File be consigned to registry.

Sanjeev Kumar Arora
(Member)

Vijay Kumar Goyal
(Member)

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 13.12.2022