

**BEFORE THE HARYANA REAL ESTATE
APPELLATE TRIBUNAL**

Appeal No.296 of 2020
Date of Decision: 27.10.2022

Emaar India Limited, Registered Office: 306-308, Square one, C-2 District Centre, Saket, New Delhi-110017.

2nd Address:

Corporate Office Emaar Business Park, MG Road, Sikanderpur, Sector 28, Gurugram-122002, Haryana.

...Appellant-Promoter

Versus

1. Dinesh Kumar Yadav;
2. Richa

Both the residents of 7, Palika Sadan, Harish Chandra Mathur Lane, Janpath New Delhi

2nd Address:

2/8, Olearia Way, Aberlasslyn, NSW, Australia, Post Code 2320

...Respondents-Allottees

CORAM:

**Shri Inderjeet Mehta,
Shri Anil Kumar Gupta,**

**Member (Judicial)
Member (Technical)**

Argued by: Shri Rupali Shekhar Verma, Advocate,
Ld. counsel for appellant-promoter.

Shri Ashwani Prashar, Advocate,
Ld. counsel for respondents-allottees.

ORDER:**Anil Kumar Gupta, Member (Technical):**

This appeal has been preferred by the appellant-promoter against the order dated 04.02.2020 passed by the Ld. Haryana Real Estate Regulatory Authority, Gurugram (hereinafter called 'the Authority'), whereby complaint No.2631 of 2019 filed by the respondents-allottees was disposed of by issuing the following directions: -

- “i. The respondent is directed to pay the interest at the prescribed rate i.e. 10.20% per annum for every month of delay on the amount paid by the complainants from due date of possession i.e. 26.11.2012 till the offer of possession. The arrears of interest accrued so far shall be paid to the complainants within 90 days from the date of this order.*
- ii. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.*
- iii. The respondent shall not charge anything from the complainants which is not part of the buyer's agreement.*
- iv. Interest on the due payments from the complainants shall be charged at the prescribed rate @ 10.20% by the promoter*

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which is the same as is being granted to the complainants in case of delayed possession charges.”

2. As per averments in the complaint filed by the respondents-allottees that Mr. Roji Pappachan Koshy and Ms. Binitha Baby/Binitha Koshy “first purchasers” had approached the appellant-promoter vide application dated 07.06.2009 for purchase of a unit measuring 1380 sq. ft., in the project, namely, Emerald Floors at Emerald Hills, Sector 65, Gurugram which is being developed by the appellant-promoter. The “first purchasers”, in pursuance of the application form dated 07.06.2009 was allotted an independent unit bearing No.EHF-267-C-GF-030 located on ground floor in the said project vide allotment letter dated 03.07.2009 for total sale consideration of Rs.53,00,000/- exclusive of external development charges and infrastructure development charges. The Builder Buyer’s Agreement (for short, the BBA) was executed between the “first purchasers” and the appellant-promoter on 26.02.2010. The respondents-allottees had purchased the said unit from the “first purchasers” vide Agreement to sell dated 12.04.2013 and executed the requisite documents for the said transfer including indemnity-cum-undertakings. The appellant-promoter on the date of agreement to sell dated 12.04.2013 had received an

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amount of Rs.16,62,000/- from the “first purchasers” and the payment of Rs.38,78,000/- was remaining. The respondents-allottees purchased the above said unit from the “first purchasers” after paying a consideration of Rs.86,62,000/- and signed indemnity-cum-undertaking during the course of the said transfer and undertook to make the balance payment of Rs.38,78,000/- to the appellant-promoter. The respondents-allottees and the first purchasers collectively paid a total sum of Rs.57,08,906/- to the appellant-promoter as on 09.04.2019.

3. It was further pleaded that as per Clause 13 (i) of the BBA, the possession was to be handed over within a period of 27 months from the date of execution of BBA dated 26.02.2010 plus grace period of 6 months which comes out to be 26.11.2012.

4. It was further pleaded that in the complaint the appellant has miserably failed to complete the project within stipulated period of 27 months from the date of execution of BBA dated 26.02.2010 plus 6 months grace period and the possession should have been given to the respondents-allottees latest by November, 2012. However, the possession was not given by that time and, therefore, the respondents-allottees became entitled to interest due to delay in construction and handing over of possession.

Hence, the respondents-allottees inter-alia sought following relief in the complaint:

- i. Direct the respondents to pay amount for delay in construction and handing over of possession along with interest as applicable under the Act calculated till date of actual payment.*
- ii. Pass such order or further directions as this Hon'ble authority may deem [sic] deem fit and proper in the facts and circumstances of the present case.*

5. The appellant contested the complaint on the grounds that the complaint pertaining to refund, compensation and interest are to be decided by the Adjudicating Officer under Section 71 of the Act read with Rule 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (for short, the Rules) and not by the Ld. Authority.

6. It was further pleaded that Mr. Roji Pappachan Koshy and Ms. Binitha Baby/Binitha Koshy (first purchasers) had approached the appellant/promoter in the year 2009 for purchase of unit in its project. The first purchasers in pursuance of the application form dated 07.06.2009, was allotted the independent unit bearing No.

EHF-267-C-GF-030, located on ground floor in the project vide allotment letter dated 03.07.2009. The allotment was transferred in favour of the respondents-allottees on the basis of transfer documents executed between both the parties.

7. It was further pleaded that the respondents-allottees have executed an indemnity-cum-undertaking whereby the respondents-allottees agreed and undertook to be bound by the terms and conditions of the original allotment and further admitted and acknowledged that they were not entitled to claim any compensation for delay in handing over possession or any rebate or discount from the respondent and further agreed and undertook not to raise any claim with regard to the same from the appellant-promoter.

8. It was further pleaded that the respondents-allottees repeatedly defaulted in making timely payment of instalments as per the payment plan, consequently, the appellant-promoter was constrained to issue demand notices and payment reminders and even notices for cancellation to the respondents-allottees.

9. It was further pleaded that as per Clause 13(v), in case of any default/delay in payment of instalments as

per the schedule of payment incorporated in the BBA, the date of delivery of possession shall be extended accordingly.

10. It was further pleaded that as per Clause 15 of the BBA, the compensation for any delay in delivery of possession shall only be given to such allottees who are not in default of their obligations under the agreement and who have not defaulted in payment of instalments as per the payment plan incorporated in the agreement.

11. On the above said grounds, it was pleaded that the respondents-allottees are not entitled for any relief and, thus, prayed for dismissal of the complaint at the very threshold.

12. Ld. Authority after considering the aforesaid pleadings of the parties passed the impugned order and issued directions as reproduced in the upper part of this appeal.

13. We have heard Ld. counsel for the parties and have meticulously examined the record of the case.

14. Initiating the arguments, Ms. Rupali Shekhar Verma, Advocate, Ld. counsel for the appellant contended that in view of judgment passed by Hon'ble Supreme Court in case of *M/s Newtech Promoters and Developers Pvt. Ltd.*

v. State of UP & others 2021 SCC Online SC 1044, wherein it has been held that in case of payment of interest for delay in delivery of possession, it is the regulatory authority which has the power to examine and determine the outcome of the complaint, the issue of jurisdiction of Ld. Authority is not being pressed.

15. It was further contended that the possession of unit has been offered on 08.04.2019 and the present appeal has been filed on 21.06.2019. The Appellant is entitled to charging of CAM charges etc. and this is in consonance with the direction of the Ld. Regulatory Authority.

16. It was further contended that a perusal of Clause 7.1 of the Model Agreement for Sale attached to the Rules as Annexure A would also support the above said contentions, inasmuch as, it provides that the appellant-promoter assures to handover possession as per the agreed terms and conditions and further, Clause 7.2 (A) & (B) of the Model Agreement for Sale provides that upon receipt of statutory permission/Occupation Certificate possession is just to be offered to the respondents-allottees and in case, there is failure on the part of the respondents-allottees to accept possession after receiving intimation of offer of

possession, he shall be liable to pay maintenance charges and holding charges.

17. It was further contended that that the aforesaid charges shall be recovered from the respondents-allottees from the date of offer of possession and these amounts will be adjusted at the time of final calculation before execution of conveyance deed as the charges are recurring in nature. The respondents-allottees has accepted the order and the directions passed therein.

18. It was further contended that without prejudice to the grounds taken above, the respondents-allottees being subsequent purchaser entered into the shoes of original allottees on 17.04.2013 and the due date of offer of possession as alleged by the respondent-allottees had already been lapsed on 26.11.2012. Further, it is an admitted fact the respondent-allottees have started making the payments from 12.08.2014 onwards and the Ld. Authority has directed to pay the delayed possession charges on the total amount paid by the respondent from 26.11.2012, till offer of possession. The delay possession interest, if any, shall be calculated from the respective date of payments/instalments made by the respondents-allottees after alleged due date of offer of possession.

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19. It was further pleaded that the delayed possession charges, if any, is payable only after 17.04.2013 as on this date, the appellant-promoter had issued nomination letter in favour of the respondents-allottees.

20. With these pleas, she contended that the present appeal may be allowed.

21. Per contra, Shri Ashwani Prashar, Advocate, Ld. counsel for the respondents-allottees has defended the impugned order on the ground that the possession of the unit was offered to the respondents-allottees by the appellant with the condition of payment of holding charges, maintenance charges etc. However, the physical possession of the unit was not given. This Tribunal directed the appellant-promoter to handover possession of the unit to the respondents-allottees on or before 10.05.2021 vide order dated 20.04.2021. The appellant-promoter filed appeal No. RERA-APPL-41-2021 against order dated 20.04.2021 before the Hon'ble High Court of Punjab and Haryana. The Hon'ble High Court Vide its order 05.07.2021 stayed the above said order dated 20.04.2021 of this Tribunal. The appellant-promoter has handed over possession of unit bearing No.EHF-267-C-GF-030 to the respondents-allottees on payment of Rs.11,37,505/- as demanded by the appellant-promoter,

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which includes charges on account of principal amount, delayed payment charges, maintenance, HVAT and holding charges, besides, respondents-allottees have also paid an amount of Rs.5,71,300/- towards Stamp Duty and E-Challan. The Hon'ble High Court on the statement of both the parties vide order dated 22.04.2022 has rendered the appeal to be infructuous.

22. With the above said contentions, Ld. counsel for the respondents-allottees has contended for dismissal of the appeal and also contended that the order of the Ld. Authority is correct and be upheld and modified to the extent that the respondents-allottees be awarded interest w.e.f. 26.11.2012 till 23.02.2022. The handling and maintenance charges charged by the appellant-promoter under pressure from the respondents-allottees at the time of giving physical possession may kindly be ordered to be given back to the respondents-allottees.

23. We have duly considered the aforesaid contentions.

24. The brief admitted facts of the case are that Mr. Roji Pappachan Koshy and Ms. Binitha Baby/Binitha Koshy "first purchasers" has approached the appellant-promoter vide application dated 07.06.2009 for purchase

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of a unit measuring 1380 sq. ft., in the project, namely, Emerald Floors at Emerald Hills, Sector 65, Gurugram which is being developed by the appellant-promoter. The “first purchasers”, in pursuance of the application form dated 07.06.2009 was allotted an independent unit bearing No.EHF-267-C-GF-030 located on ground floor in the said project vide allotment letter dated 03.07.2009 for total sale consideration of Rs.53,00,000/- exclusive of external development charges and infrastructure development charges. The BBA was executed between the “first purchasers” and the appellant-promoter on 26.02.2010. The respondents-allottees had purchased the said unit from the “first purchasers” vide Agreement to sell dated 12.04.2013. The allotment in the name of the respondents-allottees was transferred by the appellant-promoter and nomination letter dated 12.04.2013 in the name of the respondents-allottees was issued by the appellant-promoter. The respondents-allottees and the first purchasers collectively paid a total sum of Rs.57,08,906/- to the appellant-promoter as on 09.04.2019. As per Clause 13 (i) of the BBA, the possession was to be handed over within a period of 27 months from the date of execution of BBA dated 26.02.2010 plus grace period of 6 months which comes out to be 26.11.2012. The appellant failed to

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complete the project within stipulated period of 27 months from the date of execution of BBA dated 26.02.2010 plus 6 months grace period i.e. by 26.11.2012.

25. The BBA was executed on 26.02.2010 between the first purchasers and the appellant-promoter. The agreement to sell between the first purchasers and the respondents-allottees was executed on 12.04.2013. The allotment in the name of the respondents-allottees was transferred by the appellant-promoter and nomination letter dated 12.04.2013 in the name of the respondents-allottees was issued by the appellant-promoter. The original allottees had paid only Rs.16,62,000/- towards the sale consideration up to September, 2009. The rest of the sale consideration amounting to Rs 40,73,725/- (up to 24.08.2019) has been paid by the respondents-allottees. The allotment has been transferred by the appellant-promoter on 12.04.2013 in the name of the respondents-allottees, though after the schedule completion period i.e. 26.11.2012 as per BBA dated 26.02.2010. Therefore, the respondents-allottees has stepped into the shoes of the first purchasers and, therefore, all the terms and conditions including payment of balance sale consideration and further consequences of delay in payment or delay in handing over of the possession of the unit shall be

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applicable as per the terms and conditions of the BBA dated 26.02.2010 and as per the Act and Rules. Therefore, the contention of the appellant-promoter that the delay possession charges, if any, is payable only after 17.04.2013 the day on which the appellant-promoter had issued the nomination letter in favour of the respondents-allottees does not hold good. The respondents-allottees are entitled for delay possession charges as per the due date of offer of possession i.e. 26.11.2012 as per BBA dated 26.02.2010.

26. The appellant-promoter has brought to our notice the statement of account (SOA) dated 22.05.2020 placed at page Nos.164-165 of the paper book to indicate the dates on which various payments have been made by the respondents-allottees and the first purchasers. The relevant part of the SOA is being reproduced as under:

| Sr. No. | Description | Date | Amount (Rs.) |
|---------|-----------------------------|-----------|--------------|
| 1. | Booking Amount | 10-JUN-09 | 500,000 |
| 2. | Booking Receipt (Cheque) | 15-JUL-09 | 54,000 |
| 3. | Receipt (Cheque) | 22-SEP-09 | 1,108,000 |
| 4. | DPC Received | 04-FEB-13 | 16,756 |
| 5. | Receipt (Rtgs) | 14-AUG-14 | 569,677 |
| 6. | Receipt (Rtgs) | 24-MAR-17 | 553,850 |
| 7. | Receipt (Rtgs) | 24-MAR-17 | 24,700 |
| 8. | Receipt (Rtgs) | 04-APR-17 | 577,850 |
| 9. | DPC Received | 26-OCT-17 | 14,866 |

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| | | | |
|--------------|---|-----------|------------------|
| 10. | HVAT Received | 27-OCT-17 | 17,451 |
| 11. | Receipt (Rtgs) | 01-FEB-18 | 593,600 |
| 12. | Receipt (Rtgs) | 07-FEB-18 | 24,000 |
| 13. | Receipt (Rtgs) | 19-MAR-18 | 18,000 |
| 14. | Receipt (Rtgs) | 19-MAR-18 | 445,200 |
| 15. | Receipt (Rtgs) | 30-JUL-18 | 593,600 |
| 16. | Receipt (Rtgs) | 30-JUL-18 | 24,000 |
| 17. | Receipt (Rtgs) | 15-OCT-18 | 463,200 |
| 18. | Credit Memo (Credit on Account of-Anti Profiting) | 18-DEC-18 | 110,156 |
| 19. | DPC Received | 10-APR-19 | 5,592 |
| 20. | Delayed Payment Charges upto 22-May-20 | 15-APR-19 | 21,227 |
| Total | | | 5,735,725 |

27. The contentions of the appellant-promoter is that the delay possession interest, if any, on the payment received prior to due date of possession i.e. 26.11.2012 should be calculated from 26.11.2012 and the interest on payments received after 26.11.2012 should be from the date of receipt of respective payments. Ld. counsel for the respondents-allottees also could not contest this argument of the Ld. counsel for the appellant-promoter. This argument of the appellant-promoter is correct, therefore, it is held that the respondents-allottees shall be entitled for the delay possession interest at the prescribed rate of

interest 10.20% per annum as awarded by the Ld. Authority from the date 26.11.2012 for the payment received up to that date. The interest, at the prescribed rate of 10.20% per annum as given by the Ld. Authority, on the payments which has been made after the due date of possession i.e. 26.11.2012 shall be payable from the date on which the respective payments have been made.

28. During the hearing on 20.04.2021, Shri Ashwani Prashar, Advocate, Ld. counsel for the respondents-allottees pointed out that though the possession was offered by the appellant vide offer of possession letter dated 08.04.2019 but so far the actual possession has not been delivered to the respondents-allottees. Shri Sekhar Verma, Advocate, Ld. counsel for the appellant-promoter stated that they have issued the letter of offer of possession subject to condition mentioned therein. The respondents-allottees were required to deposit a sum of Rs.4,37,698/-. The said amount was never deposited by the respondents-allottees, so the possession could not be delivered. The order with regard to the possession was passed on 20.04.2021 and the relevant part of the said order is reproduced as under:

“At the stage, Sh. Ashwani Prashar, ld. counsel for the respondent has pointed out that though the possession was offered on

08.04.2019 but so far the possession has not been delivered to the respondent/allottee. Sh. Shekhar Verma, Advocate has stated that they have issued the letter of offer of possession subject to conditions mentioned therein. The respondent(s) were required to deposit a sum of Rs.4,37,698/-. The said amount was never deposited by the respondent, so possession could not be delivered.

As per the calculations made by the office of this Tribunal, the appellant/promoter was required to pay a sum of Rs.37,25,047 towards delayed interest. The appellant/promoter is directed to deliver the possession of the disputed unit to the respondent/allottee on or before 10.05.2021. The amount payable by the allottee mentioned above and holding charges as per the agreement, if any, shall be adjusted towards the amount of interest for delay in delivery of possession.

This adjustment shall be subject to the final decision of the appeal.”

29. The appellant-promoter did not offer the possession to the respondents-allottees, but an appeal bearing no RERA-APPL-41-2021 titled as 'Emaar India Ltd. Vs. Dinesh Kumar Yadav and another' was filed before the Hon'ble High Court of Punjab and Haryana. The Hon'ble High Court stayed the operation of the order dated 20.04.2021 passed by this Tribunal vide order dated

05.07.2021. However, in the meantime, the appellant-promoter handed over the possession of the unit to the GPA of the respondents-allottees on 22.03.2022. At the time of taking possession of the dwelling unit, the respondents-allottees allege to have paid an amount of Rs.11,37,505/- as demanded by the appellant-promoter for taking the possession, which includes charges on account of principal amount, delayed payment, maintenance, HVAT and holding charges. The respondents-allottees also paid an amount of Rs.5,71,300/- towards stamp duty and E-challan. The Hon'ble High Court vide order dated 22.04.2022 disposed of the above said RERA appeal bearing No.RERA-APPL-41-2021 which reads as under:

“The learned counsel representing the parties are ad idem that the present appeal is rendered infructuous.

Ordered accordingly.

All the pending miscellaneous applications, if any, are also disposed of.”

30. The offer of possession was made by the appellant-promoter vide its letter dated 08.04.2019 which is placed at page Nos.158 to 162 of the paper book. In the said offer of possession, the respondents-allottees have been asked to make payment as per Annexure-1 and to complete the documentation to enable them to initiate the

process of handover of the unit to the respondents-allottees. As per Annexure-1 of the offer of possession, a total amount of Rs.11,16,133/- was payable by the respondents-allottees. Thus, it is clear that the respondents-allottees would not be handed over the possession unless the respondents-allottees paid the demanded amount of Rs.11,16,133/-. There is delay of six years, four months and thirteen days in offering the possession of the unit, if the delayed possession interest @ 10.20% per annum is added to the amount already paid by the respondents-allottees then the total amount credited into the account of the respondents-allottees at the time of offer of possession will be much more than the total sale consideration of the unit. The delayed possession interest was payable to the respondents-allottees as per section 18 of the Act and rule 15 of the rules. Thus, we are of the view that the demand of Rs.11,16,133/- raised by the appellant-promoter with the offer of possession was not correct, justified and unreasonable as much amount was payable by the appellant-promoter to the respondents-allottees than payable by them to the appellant-promoter.

31. It has been held above that the demand of Rs.11,16,133/- raised by the appellant-promoter with the offer of possession letter dated 08.04.2019 was not justified

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and was unreasonable as much amount was payable by the appellant-promoter to the respondents-allottees than payable by them to the appellant, therefore, the demand of holding charges and common area maintenance (CAM) charges from the offer of possession dated 08.04.2019 till handing over of the possession i.e. 22.03.2022 is not correct and therefore, the amount charged on account of holding charges and maintenance charges for the above said period may be refunded back to the respondents-allottees.

32. No other point was argued before us by any of the parties.

33. Thus, keeping in view our aforesaid discussion, the present appeal filed by appellant-promoter is partly allowed and the impugned order dated 04.02.2020 is modified to the extent that the delayed possession interest at the prescribed rate i.e. 10.20 % per annum would be payable from the due date of offer of possession i.e. 26.11.2012 on the payments made prior to 26.11.2012. The interest at the prescribed i.e. 10.20 % per annum on the payments made after 26.11.2012 shall be payable from the dates of each respective payments. The holding charges and CAM charges charged by the appellant from the respondents-allottees for the period from 26.11.2012 till

22.03.2022 shall not be payable which may be refunded to the respondents-allottees.

34. No order as to costs.

35. The amount deposited by the appellant-promoter i.e. Rs.37,25,047/- with this Tribunal to comply with the provisions of Section 43(5) of the Act be remitted to the learned Haryana Real Estate Regulatory Authority, Gurugram, along with interest accrued thereon for disbursement to the respondents-allottees as per their entitlement and if there is any surplus amount, the same may be returned/refunded to the appellant-promoter, in accordance with law/rules and of course subject to tax liability.

36. The copy of this order be communicated to the parties/learned counsel for the parties and the learned Haryana Real Estate Regulatory Authority, Gurugram, for compliance.

37. File be consigned to the record.

Announced:
October 27, 2022

Inderjeet Mehta
Member (Judicial)
Haryana Real Estate Appellate Tribunal
Chandigarh

Anil Kumar Gupta
Member (Technical)