BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no: 3984 of 2021
Date of decision: 17.08.2022

Mam Chand Mehra
Address: - 401, Shivalik Apartments,
Sector: 10a, Pataudi Road, Gurugram-122002 **Complainant**

Versus

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

CORAM:
Dr. K.K. Khandelwal **Chairman**
Shri Vijay Kumar Goyal **Member**

APPEARANCE:
Complainant in person with Shri K.K. Kohli Advocate for the complainant
Shri Dhruv Rohatgi Advocates for the respondent

ORDER

1. The present complaint dated 04.10.2021 has been filed by the complainant/allottee in Form CRA under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions to the allottee as per the agreement for sale executed inter se them.

A. Project and unit related details

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

Sr. No.	Particulars	Details
1.	Name of the project	Palm Hills, Sector 77, Gurugram, Haryana
2.	Unit no.	PH3-66A-0201 [annexure C2, page 59 of complaint]
3.	Provisional allotment letter dated	27.10.2010 [annexure C1, page 53 of complaint]
4.	Date of execution of buyer's agreement	30.12.2010 [annexure C2, page 57 of complaint]
5.	Possession clause	***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 33 months from the date of start of construction,*** *subject to timely*

		compliance of the provisions of the Buyer's Agreement by the Allottee. The Allottee(s) agrees and understands that the Company shall be entitled to a grace period of ***three months, for applying and obtaining the completion certificate/ occupation certificate*** *in respect of the Unit and/or the Project.* (Emphasis supplied) [annexure C2, page 70 of complaint]
6.	Date of start of construction as per the statement of account dated 08.12.2021 at page 163 of reply	25.02.2011
7.	Due date of possession	25.11.2013 [**Note:** Grace period is not included]
8.	Total consideration as per the statement of account dated 08.12.2021 at page 163 of reply	Rs. 76,73,258/-
9.	Total amount paid by the complainant as per statement of account dated 08.12.2021 at page 163 of reply	Rs.77,95,741/-
10.	Occupation certificate	24.12.2019 [annexure R9, page 160 of reply]
11.	Offer of possession	28.12.2019 [annexure R6, page 126 of reply]
12.	Unit handover letter signed by the complainant on	09.02.2020 [annexure R7, page 134 of reply]
13.	Conveyance deed executed on	17.03.2020

		[annexure R8, page 138 of reply]
14.	Compensation given by the respondent in terms of the buyer's agreement as per statement of account dated 08.12.2021 at page 164 of reply	Rs.7,50,107/-

B. Facts of the complaint

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

i. In 2009, the respondent company issued an advertisement announcing a group housing colony project called 'Palm Hills, in a land parcel admeasuring a total area of approximately 29.3475 acres, situated at Sector 77, Gurugram, Haryana and thereby invited applications from prospective buyers for the purchase of floors in the said project.

ii. That the complainant having a dream of owning a residential unit, signed the agreement on 30.12.2010 in the hope that they shall be delivered the unit within 33 months from the start of construction which is 25.02.2011., by 25.11.2013 plus 3 months grace period as per clause 11 (a) of the buyer's agreement. The complainant was also handed over one detailed payment plan, which was construction linked plan.

iii. That it is pertinent to note that while under clause 1.2 (b) of the buyer's agreement, upon delay of payment by the allottee, the respondent can charge 24% interest per annum, however, on account of delay in handing over possession by the respondent, is liable to pay merely Rs. 7.50/-per sq. ft. per month of the super area for the period of delay as per clause 13(a) of the said

agreement. It is submitted that such clauses are totally unjust, arbitrary and amounts to unfair trade practice as held by the Hon'ble NCDRC in the case titled as ***Shri Satish Kumar Pandey & Anr. v/s M.s Unitech Ltd. (14.07.2015)*** as also in the judgement of Hon'ble Supreme Court in ***Neelkamal Realtors Suburban Pvt Ltd Vs. UOI and Ors. (W.P 2737 of 2017).***

iv. As per the demands raised by the respondent, based on the payment plan, the payments were made regularly to the respondent and a sum of Rs. 79,08,841/- out of a total demand of Rs. 76,38,261.00 towards the said unit was paid from 2009 till 2019. That after timely payment against each and every demand letter, the complainant was in the hope that they will get possession of their unit as per the delivery date provided in the buyer's agreement. Unfortunately, on visiting the site each time, it was realized that the construction on the site is not as per the payment being collected. This fact was brought to the knowledge of the respondent repeatedly through personal visits but the respondent, as usual, assured and then re-assured that the delivery of the unit would be given as per the dates specified in the buyer's agreement.

v. The complainant contacted the respondent on several occasions and were in touch with the respondent on a regular basis. The respondents were never able to give any satisfactory response to the complainant regarding the status of construction and was never definite about the delivery of possession. That by then it was realized by the complainant that their dreams of owning a unit of their own soon are likely

to be shattered and scattered as the respondent was nowhere nearing the completion of the unit and that the respondent had left no stone unturned to cheat the complainant and extract money from their pocket repeatedly assuring that the unit would be delivered as promised. It is very unfortunate that the complainant had become helpless and had to run from pillar to post within the organization of the respondent for the possession of his unit though the complainant had made almost 90% of the payment of the agreed amount/consideration but the delivery was nowhere in sight.

vi. That despite submitting all the documents for property transfer, no information was ever shared at the mentioned email or postal address of the complainant till the time of getting the indemnity bond signed (at the time of visiting the respondent's office). By that time, the complainant has already paid a significant amount to the original allottee from whom he purchased the unit, thus there was no option left with the complainant but to sign the indemnity bond. That complainant after many requests and emails finally received the offer of possession on 28.12.2019. The respondent company issued a unit handover letter dated 09.02.2020 to the complainant. That the complainant signed all the documents issued by the respondent company in order to get possession of the flat. That the complainant had paid a significant amount to the respondent towards the purchase of the unit, which has put tremendous financial pressure on the complainant. The complainant accepted all the conditions put forward by the

respondent company as they were trying to relieve the financial burden, however, the respondent took advantage of the vulnerable position of the complainant and offered a miniscule relief for the delay caused by them.

vii. 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 that the complainant is entitled for interest in case of delay in possession and being aware of more than 200 judgments issued by The Haryana Real Estate Regulatory Authority, Gurugram has not given the complainant the interest that he is eligible for in the intimation of possession letter dated 28.12.2019. That losing all hope from the respondent company in terms of getting the interest on the delay in delivery period of almost six years and having shattered and scattered dreams of proper delivery of the unit as per the buyer's agreement and the details provided in the brochure at the time of offering the unit for sale, the complainant are constrained to approach this authority for redressal of their grievance and file a complaint.

viii. That the respondents are guilty of deficiency in service within the purview of provisions of the Real Estate (Regulation and Development) Act, 2016 (Central Act 16 of 2016) and the provisions of Haryana Real Estate (Regulation and Development) Rules, 2017. The complainant has suffered on account of deficiency in service by the respondent and as such the respondent is fully liable to cure the deficiency as per the

provisions of the Real Estate (Regulation and Development) Act, 2016 (Central Act 16 of 2016) and the provisions of Haryana Real Estate (Regulation and Development) Rules, 2017. That the present complaint sets out the various deficiencies in services, unfair and/or restrictive trade practices adopted by the respondents in sale of their floors and the provisions allied to it. The modus operandi adopted by the respondents, 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.

ix. That the cause of action accrued in favour of the complainant and against the respondent on the date when the respondents advertised the said project, it again arose on diverse dates when the apartments 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 continuing to this day, it continues to arise as the apartment owners have not been delivered the apartments and the infrastructure facilities in the project have not been provided till date and the cause of action is still continuing and subsisting on day to day basis.

C. Relief sought by the complainant

4. The complainant has filed the present compliant for seeking following relief:

   i. It is most respectfully prayed that authority be pleased to order the respondent to pay the entire amount of interest due to the complainant with effect from the committed date of possession as per the buyer's agreement to the actual delivery of possession, at the prescribed rate of interest as per the guidelines laid in RERA, 2016.

   ii. It is most respectfully prayed that authority be pleased to order the respondent to remit the charges mentioned in the offer of possession and on the payment of charges which the unit buyer was not legally bound to pay.

   iii. It is most respectfully prayed that authority be pleased to declare this offer of possession as invalid and direct the respondent to reissue a valid offer of possession.

   iv. It is most respectfully prayed that authority be pleased to order the respondent to not to charge the HVAT, advance maintenance, GST, IFMS, as the same is not legally bound to pay the same.

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 present complaint pertains to the alleged delay in delivery of possession for which the complainant has filed the present complaint, before the hon'ble authority, inter-alia seeking possession of the unit in question as well as delayed interest towards delay in handing over the property.

II. Subsequently, buyers' agreement dated 30.12.2010 was executed between the complainant and the respondent. That the buyer's agreement was consciously and voluntarily executed between the parties. However, the complainant was irregular in payment of instalments which is why the respondent was constrained to issue reminders and letters to the complainant requesting him to make payment of demanded amounts. that the respondent applied for the grant of occupation certificate on 21.02.2019, which was received on 24.12.2019. Thereafter, the respondent offered possession of the said unit to the complainant vide offer of possession letter dated 28.12.2019 subject to making payments and submission of necessary documents. The conveyance deed in respect of the unit in question has also been executed. that after execution of the unit handover letter and obtaining of possession of the unit in question after the execution of the conveyance deed, the complainant is left with no right, entitlement or claim against the respondent. The transaction between the complainant and the respondent stands concluded and no right or liability can be asserted by the respondent or the complainant against the other. 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. That the complainant has already

been given compensation of Rs 7,50,107 /- towards the delayed possession. The complainant has further been given benefit of Rs. 24,095/- towards anti profiting etc. That without prejudice, after the enforcement of the Act, each developer was required to register its project if the same was an "ongoing project" and give the date of completion of the said ongoing project in terms of section 4(2)(l)(c) of the Act. Accordingly, the respondent had duly registered the said project, in which the said unit in question is situated having registration no. 256 of 2017 dated 03.10.2017.

III. That without admitting or acknowledging in any manner the truth or legality of the allegations levelled by the complainants and without prejudice to the contentions of the respondent, it is submitted that the project has got delayed on account of the following reasons which were/are beyond the power and control of the respondent:

a. The building plans for the apartment/tower in question was approved by the competent authority under the then applicable national building code in terms of which buildings having height of 15mtrs or above but having area of less than 500 sq. mt. on each floor, were being approved by the competent authorities with a single staircase and construction was being carried out accordingly.

b. Subsequently, the national building code (NBC) was revised in the year 2016 and in terms of the same, all high-rise buildings (i.e buildings having height of 15 mtrs and above), irrespective of the area of each floor, are now required to have two staircases.

IV. That it is also pertinent to mention herein that the respondent had engaged the services of Mitra Guha, a reputed contractor in real estate, to provide multi-level car parking in the project. The said contractor started raising certain false and frivolous issues with the respondent due to which the contractor slowed down the progress of work at site. In spite of repeated reminders from the respondent to the contractor to expedite work at the site, the contractor continued to work at a slow pace due to reasons best known to him and due to his lackadaisical performance, the construction of the project was slowed down and the whole project got delayed. The respondent, in good faith, hired the services of the contractor believing him to be a reputed contractor in the real estate industry and any lack in performance from a reputed contractor cannot be attributed to the respondent as the same was beyond its control. Thus, it is evident that the respondent is committed towards fulfilment of its contractual obligations under the buyer's agreement and there is no default or lapse on the part of the respondent.

V. It is submitted that the registration of the project is valid till 02.10.2022 and the respondent has already offered possession of the unit in question within the period of registration and therefore no cause of action can be construed to have arisen in favour of the complainant to file a complaint for seeking any interest as alleged more so when compensation payable under the buyer's agreement has already been credited to the complainant by the respondent.

VI. That the respondent on receipt of the occupation certificate, offered possession of the said unit to the complainant vide the letter of

offer of possession dated 05.10.2016 subject to making payments and submission of necessary documents. The complainant has duly taken the possession of the unit in question. The conveyance deed in respect of the unit in question has also been executed. That after execution of the unit handover letter and obtaining of possession of the unit in question after the execution of the conveyance deed, the complainant is left with no right, entitlement or claim against the respondent. The transaction between the complainant and the respondent stands concluded and no right or liability can be asserted by the respondent or the complainant against the other. 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. That the complainant has been given a huge compensation of Rs. 21,60,411/- for delay in possession, much beyond the terms of compensation under the buyer's agreement. The present complaint has been filed with malafide intent to extort more and more money from the respondent.

VII. It is imperative to mention herein that the terms and conditions set out in the agreement clearly provided compensation to be paid in the event of delay in handing over of the possession and the complainant after having understood the clauses had executed the agreement and therefore, the relief being claimed by the complainant did not take into account the contractual position and as such the relief claimed is not maintainable before the hon'ble authority.

VIII. That the complaint is also liable to be dismissed for the reason that for the unit in question, the buyer's agreement was executed on 30.12.2010 i.e prior to coming into effect of the act and the rules. as such, the terms and conditions of the agreement executed prior to the applicability of the act and the rules, would prevail and shall be binding between the parties. in view thereof, the hon'ble authority has no jurisdiction to entertain the present complaint as the complainant has no cause of action to file the present complaint under the act/rules. It is a settled law that the act and rules are not retrospective in nature. Therefore, the application of the sections/rules of the act/rules relating to interest /compensation, cannot be made retrospectively. as such, the complainant is not entitled to any relief whatsoever. In view thereof, the complainant does not deserve any relief whatsoever. the present complaint merits outright dismissal, with costs and strictures against the complainant. That in terms of clause 11(a) the respondent proposed to offer possession of the unit in question within 33 months from the date of execution of the agreement with 3 months grace period. The said clause only prescribes an estimated time period for handing over of possession. The time period mentioned therein is neither cast in stone nor fixed and is only a tentative estimate provided by the respondent. More importantly, the same was subject to not only force majeure, but primarily on "compliance" of clauses of the agreement by the complainant with a 3-month grace period thereon, for applying and obtaining completion/ occupation certificate in respect of the unit and/or the project. The complainant has completely misconstrued,

misinterpreted and miscalculated the time period as determined in the buyer's agreement.

IX. The terms and conditions as set out in the agreement were accepted by the complainant and the complainant agreed and undertook to scrupulously comply with the same. The said agreement was followed by an indemnity cum undertaking dated 22.01.2020, duly executed by the complainant at the time of taking the possession of the unit in question, whereby, the complainant had undertaken to comply with the terms of the buyer's agreement and further to pay HVAT demand as and when the same becomes due and payable, maintenance charges to the concerned agency and to come forward for the execution of the conveyance deed in their favour. Therefore, they are now barred by estoppel in raising any grievance qua the same. It does not now lie in the mouth of the complainant to allege default on part of the respondent. the above circumstances, it is clear that there is no default or lapse on the part of the respondent and there in no equity in favour of the complainant. It is evident from the entire sequence of events, that no illegality can be attributed to the respondent. the allegations levelled by the complainant are totally baseless. Thus, it is most respectfully submitted that the present complaint deserves to be dismissed at the very threshold.

X. That the present complaint is not maintainable in law or on facts. The complainant has filed the present complaint seeking possession and interest for alleged delay in delivering possession of the unit booked by the complainant. It is respectfully submitted that complaints pertaining to interest, compensation etc. are to be

decided by the adjudicating officer under Section 71 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as "the Act" for short) read with Rule 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017, (hereinafter referred to as "the Rules") and not by this authority.

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

E. Jurisdiction of the authority

8. The preliminary objections raised by the respondent regarding jurisdiction of the authority to entertain the present complaint stands rejected. The authority 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. One of the contentions of the respondent is that the authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the buyer's agreement executed between the parties and no agreement for sale as referred to under the provisions of the Act or the said rules has been executed inter se parties. The respondent further submitted that the provisions of the Act are not retrospective in nature and the provisions of the Act cannot undo or modify the terms of buyer's agreement duly executed prior to coming into effect of the Act.

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 hon'ble Bombay High Court in ***Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)*** which provides as under:

"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter.....

122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."

13. Also, in appeal no. 173 of 2019 titled as ***Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya*** dated 17.12.2019, the Haryana Real Estate Appellate Tribunal has observed-

"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."

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

15. The respondent contended that at the time of taking possession of the subject unit vide unit hand over letter dated 09.02.2020 the complainants have certified themselves to be fully satisfied with regard to the measurements, location, direction, developments et cetera of the unit and also admitted and acknowledge that they do not have any claim of any nature whatsoever against the respondent and that upon acceptance of possession, the liabilities and obligations of the respondent as enumerated in the allotment letter/buyer's agreement, stand fully satisfied. The relevant para of the unit handover letter relied upon reads as under:

> *"The Allottee, hereby, certifies that he / she has taken over the peaceful and vacant physical possession of the aforesaid Unit after fully satisfying himself / herself with regard to its measurements, location, dimension and development etc. and hereafter the Allottee has no claim of any nature whatsoever against the Company with regard to the size, dimension, area, location and legal status of the aforesaid Home.*
>
> *Upon acceptance of possession, the liabilities and obligations of the Company as enumerated in the allotment letter/Agreement executed in favour of the Allottee stand satisfied."*

16. In the complaint bearing no. ***4031 of 2019*** titled as ***Varun Gupta V/s Emaar MGF Land Ltd.,*** the authority has comprehensively dealt with this issue and has held that the aforesaid unit handover letter does not preclude the complainants from exercising their right to claim delay possession charges as per the provisions of the Act.

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

G. Findings on the reliefs sought by the complainant

G.I It is most respectfully prayed that authority be pleased to order the respondent to pay the entire amount of interest due to the complainant with effect from the committed date of possession as per the buyer's agreement to the actual delivery of possession, at the prescribed rate of interest as per the guidelines laid in RERA, 2016.

17. In the present complaint, the complainant intends to continue with the project and is seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under.

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

18. 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 33 months from the date of start of construction, subject to timely compliance of the provisions of the Buyer's Agreement by the Allottee. The Allottee(s) agrees and understands that the Company shall be entitled to a grace period of three months, for applying and obtaining the completion certificate/ occupation certificate in respect of the Unit and/or the Project.*

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

how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

20. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within 33 months from the date of start of construction, and further provided in agreement that promoter shall be entitled to a grace period of 3 for applying and obtaining the completion certificate/ occupation certificate in respect of the Unit and/or the Project. The date of execution of buyer's agreement is 30.12.2010. The period of 33 months expired on 25.11.2013. 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 3 months cannot be allowed to the promoter at this stage.

21. **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.

22. 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.

23. Consequently, as per website of the State Bank of India i.e., https://sbi.co.in, the marginal cost of lending rate (in short, MCLR) as on date i.e., 17.08.2022 is 8%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10%.

24. 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;"*

25. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 10% by the respondent/promoter which is the same as is being granted to the complainant in case of delayed possession charges.

26. Considering the above-mentioned facts, the authority calculated due date of possession according to clause 11 of the buyer's agreement dated 30.12.2010 i.e., 33 months from the date of start of construction execution and disallows the grace period of 3 months 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. 25.11.2013 till handover of possession i.e. 09.02.2020.** The amount of compensation already paid to the complainant by the respondent as delayed compensation as per the buyer's agreement shall be adjusted towards delay possession charges payable by the promoter at the prescribed rate of interest to be paid by the respondent as per the proviso to section 18(1) of the Act.

- It is most respectfully prayed that authority be pleased to order the respondent to not to charge the HVAT, advance maintenance, GST, IFMS, as the same is not legally bound to pay the same.
  - **HVAT**

  The authority has decided the issue w.r.t. HVAT in the complaint bearing no. ***4031 of 2019*** titled as ***Varun Gupta V/s Emaar MGF Land Ltd.*** wherein the authority has held that the promoter is entitled to charge VAT from the allottee for the period up to 31.03.2014 @ 1.05% (one percent VAT + 5 percent surcharge on VAT). However, the promoter cannot charge any VAT from the allottees/prospective buyers for the period 01.04.2014 to 30.06.2017 as the same was to be borne by the promoter-developer only. The respondent-promoter is bound to

adjust the said amount, if charged from the allottee with the dues payable by him or refund the amount if no dues are payable by him.

In the present complaint, the respondent vide letter of offer of possession dated 28.12.2019 has demanded lien marked FD of Rs. 46,225/- towards future liability of HVAT for liability post 01.04.2014 till 30.06.2017. In light of judgement stated above, the respondent shall not demand the same and the lien so marked be removed. Also, information about the same be sent to the concerned bank by the promoter as well as complainant along with the copy of this order.

- **Advance maintenance charges**

With respect to advance maintenance charges, the relevant clause of the buyer's agreement is reproduced below:

> ***18. Maintenance***
> *(a) .....*
> *(b) The Allottee(s) further agrees and undertakes to pay the indicative and approximate maintenance charges as may be levied by the Maintenance Agency for the upkeep and maintenance of the Project, its common areas, utilities, equipment installed in the Building and such other facilities forming part of the Project. Such charges payable by the Allottee(s) will be subject to escalation of such costs and expenses as may be levied by the Maintenance Agency. The Company reserves the right to change, modify, amend, and impose additional conditions in the Tripartite Maintenance Agreement at its sole discretion from time to time."*

This issue has been decided by the authority in complaint titled as ***Varun Gupta Versus Emaar MGF Land Ltd. (CR/4031/2019)***, wherein it was held that the respondent is right in demanding advance maintenance charges at the rate prescribed therein at the time of offer of possession. However, the respondent shall not demand the advance maintenance charges for more than one (1) 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.

In the present complaint, the respondent has demanded a sum of Rs.1,13,100/- (@ Rs.3.25 per sq. ft. + GST @ 18%) for a period of 24 months vide letter of offer of possession dated 28.12.2019. Therefore, in light of the judgement (supra), the respondent shall not demand advance maintenance charges for more than one year.

- **GST**

The complainant submitted that GST came into force on 01.07.2017 and the possession was supposed to delivered by 25.11.2013. Therefore, the tax which has come into existence after the due date of possession and this extra cost should not be levied on complainant. On the contrary, the respondent denied that any amount towards GST is liable to be returned to the complainant.

The authority has decided this issue in the complaint bearing no. ***4031 of 2019*** titled as ***Varun Gupta V/s Emaar MGF Land Ltd.*** wherein the authority has held that for the projects where the due date of possession was prior to 01.07.2017 (date of coming into force of GST), the respondent/promoter is not entitled to charge any amount towards GST from the complainant/allottee as the liability of that charge had not become due up to the due date of possession as per the buyer's agreements.

In the present complaint, the possession of the subject unit was required to be delivered by 25.11.2013 and the incidence of GST came into operation thereafter on 01.07.2017. So, the complainant cannot be burdened to discharge a liability which had accrued solely due to

respondents' own fault in delivering timely possession of the subject unit. So, the respondent/promoter is not entitled to charge GST from the complainant/allottee as the liability of GST had not become due up to the due date of possession as per the said agreement as has been held by **Haryana Real Estate Appellate Tribunal, Chandigarh in appeal bearing no. 21 of 2019 titled as M/s Pivotal Infrastructure Pvt. Ltd. Vs. Prakash Chand Arohi.** Also, the authority concurs on this issue and holds that the difference between Post-GST and Pre-GST shall be borne by the promoter. The promoter is entitled to charge from the allottee the applicable combined rate of VAT and service tax fixed by the government.

- **IFMS**

With respect to interest free maintenance advance security('IFMS'), the relevant clause of the builder buyer's agreement is reproduced below.

> *"18. MAINTENANCE*
>
> .....
>
> *(c). In addition to the payment of the maintenance charges to be paid by the Allottee(s), the Allottee(s) agrees and undertakes to pay interest free maintenance advance security ('IFMS') as applicable, which shall be intimated at the time of handover of the possession of the said Unit."*

This issue has been decided by the authority in complaint titled as ***Varun Gupta Versus Emaar MGF Land Ltd. (CR/4031/2019)***, wherein it was held that the promoter may be allowed to collect a reasonable amount from the allottees under the head "IFMS". However, the authority directs that the promoter must always keep the amount collected under this head in a separate bank account and shall maintain that account regularly in a very transparent manner. If any allottee of

the project requires the promoter to give the details regarding the availability of IFMS amount and the interest accrued thereon, the promoter must provide details to the allottee. It is further clarified that out of this IFMS/IBMS, no amount can be spent by the promoter for the expenditure, it is liable to incur to discharge its liability and obligations as per the provisions of section 14 of the Act.

Keeping in view the dictum laid down by the authority is judgement (supra), the complainant is liable to pay a sum of Rs.72,500/- towards IFMS as demanded vide letter of offer of possession dated 28.12.2019.

- **Declare the offer of possession as invalid and direct the respondent to reissue valid offer of possession.**

  In the present complaint, the possession was offered by the respondent vide letter dated 28.12.2019 after receipt of occupation certificate dated 24.12.2019 from the concerned competent authority. Thereafter, the complainant had taken possession of the subject unit vide unit handover letter dated 09.02.2020 and subsequently, conveyance deed was executed on 17.03.2020. Thus, the relief cannot be allowed in view of the facts of the present complaint.

27. 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 complainant is entitled to delay possession charges at prescribed rate of the interest @ 10 % p.a. w.e.f. 25.11.213 till handing over of possession i.e. 09.02.2020.

H. Directions of the authority

28. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of

obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

i. The respondent is directed to pay the interest at the prescribed rate i.e. 10% per annum for every month of delay on the amount paid by the complainant from 25.11.2013 till handing over of possession i.e. 09.02.2020. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order as per rule 16(2) of the rules after adjustment the amount which is already paid to the complainant.

ii. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 10% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delay possession charges as per section 2(za) of the Act.

iii. **Charging of HVAT:** The the respondent has not charged any amount towards HVAT for the period of 01.04.2014 till 30.06.2017, however, vide letter of offer of possession dated 28.112.2019 has demanded lien marked FD of Rs. 46,225/- towards future liability of HVAT for liability post 01.04.2014 till 30.06.2017. In light of judgement stated above, the respondent shall not demand the same and the lien so marked be removed.

iv. **Advance maintenance Charges:** The respondent has demanded Rs.1,13,100/- towards advance maintenance charges (@ Rs. 3.25 per sq. ft. + GST @ 18%) for period of 24 months as per letter of offer of possession dated 28.12.2019.

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.

V. **GST:** In the present complaint, the possession of the subject unit was required to be delivered by 25.11.2013 and the incidence of GST came into operation thereafter on 01.07.2017. So, the complainant cannot be burdened to discharge a liability which had accrued solely due to respondents' own fault in delivering timely possession of the subject unit. So, the respondent/promoter is not entitled to charge GST from the complainant/allottee as the liability of GST had not become due up to the due date of possession as per the said agreement. The promoter is entitled to charge from the allottee the applicable combined rate of VAT and service tax fixed by the government.

vi. **Interest Free Maintenance Security (IFMS):** It is held that the promoter may be allowed to collect a reasonable amount from the allottees under the head "IFMS". However, the authority directs that the promoter must always keep the amount collected under this head in a separate bank account and shall maintain that account regularly in a very transparent manner. If any allottee of the project requires the promoter to give the details regarding the availability of IFMS amount and the interest accrued thereon, the promoter must provide details to the allottee. It is further clarified that out of this IFMS/IBMS, no amount can be spent by the

promoter for the expenditure it is liable to incur to discharge its liability and obligations as per the provisions of section 14 of the Act. Keeping in view the dictum laid down by the authority is judgement (supra), the complainant is liable to pay a sum of Rs.72,500/- towards IFMS as demanded vide letter of offer of possession dated 28.12.2019.

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

29. Complaint stands disposed of.
30. File be consigned to registry.

(Vijay Kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman
Haryana Real Estate Regulatory Authority, Gurugram

Dated: 17.08.2022