BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. :	989 of 2019
Date of filing complaint:	11.03.2019
First date of hearing:	02.09.2019
Date of decision :	07.09.2022

1. Anil Sachdeva
2. Monika Sachdeva

Both R/o: 26/65, House no. 26, road no. 65, Punjabi Bagh, West Delhi, Delhi-110026. **Complainants**

Versus

M/s Experion Developers Private Limited
Office address: First India Place, 1st Floor, Block B, Sushant Lok 1, M.G. Road, Gurugram, Haryana-122002. **Respondent**

CORAM:

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

APPEARANCE:

Shri. Sanchit Dhawan (Advocate)	Complainants
Shri. Vishnu Kant (Advocate)	Respondent

ORDER

1. The present complaint has been filed by the complainants/allottees 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 under the provision of the Act or the rules and regulations made thereunder or to the allottee as per the agreement for sale executed inter se.

A. Unit and project 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 and delay period, if any, have been detailed in the following tabular form:

S. N.	Particulars	Details
1.	Name and location of the project	Windchants, Sector 112, Gurugram, Haryana
2.	Nature of the project	Group Housing Colony
3.	DTCP license no.	i.) **21 of 2008** dated 08.02.2008 Valid upto 07.02.2020 ii.) **28 of 2012** dated 07.04.2012 Valid upto 06.04.2025
4.	RERA Registered/ not registered	i.) **64 of 2017** dated 18.08.2017 Valid upto 17.08.2018 ii.) **73 of 2017** dated 21.08.2017 Valid upto 20.08.2019 iii.) **112 of 2017** dated 28.08.2017 Valid upto 27.08.2019
5.	Date of approval of building plan	07.06.2012
6.	Date of environment clearance	27.12.2012
7.	Apartment no.	WT – 02/2402
8.	Unit area admeasuring	4650 sq. ft. (Page 87 of complaint)

9.	Increase in area of the unit	4739 sq. ft. (Super area) [As per annexure F vide applicant ledger dated 26.03.2019 on page no. 103 of reply]
10.	% increase in area	1.92% (89 sq. ft.)
11.	Date of apartment buyers agreement	26.12.2012 (Page 54 of complaint)
12.	Agreement to sell	22.05.2013 [As per annexure P1 on page 23 of complaint]
13.	Possession clause	**PROJECT COMPLETION PERIOD** **10.1** Subject to Force Majeure, timely payment of the Total Sale Consideration and other provisions of this Agreement, based upon the Company's estimates as per present Project plans, the Company Intends to hand over possession of the Apartment **within a period of 42 (forty two) months from the date of approval of the Building Plans or the date of receipt of the approval of the Ministry of Environment and Forests, Government of India for the Project or execution of this Agreement, whichever is later ("Commitment Period").** The Buyer further agrees that the Company shall additionally be entitled to a time period of 180 (one hundred and eighty) days ("Grace Period") after expiry of the Commitment Period for unforeseen and unplanned Project realities. However, in case of any default under this Agreement that is not rectified or remedied by the Buyer within the time

		period as may be stipulated, the Company shall not be bound by such Commitment Period. (Page 71 of complaint)
14.	Due date of possession	27.06.2016 (The due date has been calculated from the environment clearance date (27.12.2012) being later)
15.	Total sale consideration	Rs. 3,10,66,026/- [As per annexure F vide applicant ledger dated 26.03.2019 on page no. 103 of reply]
16.	Amount paid by the complainants	Rs. 3,10,66,024/- [As per annexure F vide applicant ledger dated 26.03.2019 on page no. 103 of reply]
17.	Occupation certificate	23.07.2018 [As per annexure D on page no. 94 of reply]
18.	Offer of possession	24.07.2018 [As per annexure- E on page no. 96 of reply]

B. Facts of the complaint:

3. That the complainants were represented and swayed by the brokers and the representatives of the respondent company to purchase residential units with them and since the complainants were looking for an independent house, the representatives of the respondent coloured a rosy picture and allured the complainants by making them

believe that the unit of the respondent is more comfortable luxury space and is full of amenities and facilities which would not be available in an independent house and moreover the complainants were lured by representing that they can have multiple units for a cost equivalent to a house and hence were induced into purchasing two units. Based on the representations of representatives of the respondent and the brokers associated with the respondent, the complainant no. 1 was lured into purchasing unit bearing no. WT: 02/2402 in a project being developed by the respondent by the name "Windchants" in Sector 112, Gurugram, Haryana.

4. That the complainants were made to believe that the entire project has been sold, however the representatives of the respondent company shall arrange two unit for the complainants and in the month of April - May 2013, the respondent represented to the complainant no. 1 that the representatives of the respondent have list of prospective sellers to whom they can ask to transfer the allotment in favour of the complainant no. 1. It is submitted that the complainant no. 1 was so influenced with the false representations of the representatives of the respondent that he readily agreed for the purchase of a unit which shall be made available through transfer and the complainant no. 1 was informed that prospective unit no. WT - 02/2402 is available and the same can be purchased by the complainant no. 1. It is worth to note here that the respondent company has charged an amount of Rs.5,22,474/- as administrative charges) to transfer the allotment and has failed to give any justification of such exorbitant charges on transfer. That the

complainant no. 1 was introduced to Mr. Jatinder Bhasin, who had agreed to transfer his allotment in favour of the complainant no.1. It is submitted that the complainant no. 1 executed an agreement to sell dated 22.05.2013 and made payment to Mr. Jatinder Bhasin of the amount he had already given to the respondent and upon transfer of the allotment stepped into the shoes of the original allottee and thus was entitled to the possession in terms of the apartment buyers agreement.

5. That the complainant no. 1 was informed and was shown the payment plan annexed to the apartment buyers agreement that he was to adhere to and it was specifically mentioned in the apartment buyers agreement as well as Schedule V annexed to it that taxes, cess, levies, duties, VAT, service tax, fee, charges and impositions to be charged or imposed by the competent authority shall be paid by the buyer and are not included in the BSP and other than these statutory duties, taxes and charges, the Schedule V mentioned the entire payment that was to be paid by the complainant no. 1 which was mentioned as Rs.3,00,56,115/-. It is submitted that the complainants have made a payment of Rs. 3,26,36,161/- towards the sale consideration and which also includes an amount of Rs.3,89,204/- paid towards maintenance, though the complainants have paid the said amount under different head as per the receipts issued by the respondent.

6. That the respondent to dupe the complainants in their nefarious activities and to create a false belief that the project shall be completed in time bound manner and in the garb of the apartment

buyers agreement persistently raised demands due to which they were able to extract huge amount of money from the complainants.

7. That the respondent in an endeavour to extract money from allottees devised a payment plan under which respondent citing milestone for construction progress stages, or development of the site, and after taking the same, the respondent has not bothered to committed development of the project in time bound manner. The respondent raised demands without complying payment plan as per Schedule VI of the apartment buyers agreement dated 26.12.2012.

8. That it is further not out of place to mention here that the complainants after having no other alternative wrote to the respondent vide letter dated 24.09.2018 and categorically stated that the complainants are making full and final payment for an amount of Rs.32,53,776/-.

9. That despite making the entire payment vide letter dated 24.09.2018, the respondent again raised illegal demands upon the complainants and forced and pressurized them to make the payment to get the possession of the unit and again the complainants were forced to release payment to the tune of Rs.3,87,926 /- and Rs.3,89,204/- both drawn on Axis bank Ltd., Pitampura Branch, Delhi.

10. That the respondent has arbitrarily increased the area of the unit and despite repeated reminders by the complainants, the respondent has failed to give any explanation or working as to how the area has increased and whether the increase is only in the super area or the carpet area or both. The builder has provided a floor plan for the unit

WT-02/2402 with the apartment buyers agreement (Schedule IV) and no details of any change in the said floor plan has been provided by the respondent to justify the demand raised for alleged increase in area. In case there is no increase in actual carpet area to the complainants, the alleged demand raised by the respondent is illegal and unjustified and thus the money paid by the complainants of Rs.5,48,240/- is liable to be refunded by the respondent along with penal interest as being charged from the complainants.

11. It is submitted that as per terms of apartment buyers agreement, the respondent had committed in clause no. 10.1 and was accordingly obliged and liable to give possession of said unit within 42 months from execution of apartment buyers agreement. Accordingly, the unit should have been delivered way back before December 2015. However, it is a matter of record that the respondent has failed to handover the possession of the unit till date and despite making payment of an amount more than the sale consideration, the respondent is demanding more money and thus pressuring and harassing the complainants to part with money over and above the agreed sale price of the unit. That the complainants with good intentions have paid all the demands raised by respondent, however respondent has failed to meet their obligations and commitments. This undue delay in handing over the possession of the unit for more than 2 years from committed date as per agreement is not only a breach of trust but is also indicative of ill intentions of the respondent. The act on part of respondent has caused undue financial losses and mental agony to the complainants.

C. Relief sought by the complainants:

12. The complainants have sought following relief(s):

    i. Direct the respondent to pay delay possession charges along with interest.

    ii. Direct the respondent to refund anything which is not a part of apartment buyers agreement.

    iii. Direct the respondent to refund amount charged towards alleged increase area.

    iv. Direct the respondent to waive holding charges.

D. Reply by respondent:

13. The respondent by way of reply made the following submissions:

    i. That the complainants purchased the apartment in question from the secondary market and not from the respondent directly. Therefore, to even suggest that the respondent lured the complainants in any manner whatsoever is ex-facie absurd and is liable to be rejected outright. These allegations show the malafide intention of the complainants that they are ready to resort to blatant falsehood only to cause prejudice against the respondent, especially in the present case, when such prejudice is neither warranted nor justified.

    ii. That the complaint is liable to be dismissed for the reason that the apartment in question was sold and the apartment buyers agreement was executed on 26.12.2012 i.e., prior to coming into

effect of the Act and the rules. As such, the terms of the agreement would prevail and govern the payment of the delay compensation, if any, to the complainants. The terms and conditions of the agreements executed prior to applicability of the Act and the rules shall be binding between the parties and the delayed possession compensation shall be payable only as per the agreed terms and conditions of the said agreement and not as per the Act and the rules, as claimed by the complainants.

iii. That all the demands raised by the respondent are strictly in accordance with the terms of the agreement entered into between the parties, and there is no anomaly in the same. The construction updates were regularly sent to the allottees of the project including the complainants.

iv. That all the demands were raised only after achieving the respective milestones. It is further denied that the payment plan was devised to extract money from any allottee, as alleged or otherwise. It is denied that the project has not been developed in a time bound manner. The delay, if any, is solely attributable to the complainants for failing to adhere to the payment schedule and committing numerous wilful defaults, which are continuing.

v. That the possession was offered to the complainants vide notice of possession dated 24.07.2018, however the complainants failed to make the due payments in time and as per statement of account dated 26.3.2019, an amount of Rs. 2,04,362/- on account of delayed payment interest and holding charges etc. are still due. The respondent is ready and willing to execute the conveyance

deed and handover possession subject to the complainants making complete payment. It is vehemently denied that the respondent has received more payment that what was agreed between the parties.

vi. That the parties hereto had executed an apartment buyers agreement dated 26.12.2012. In terms of clause 10.1 of the apartment buyers agreement, the tentative date of completion of the apartment was 42 months from the date of approval of the Building Plans or the date of receipt of the approval of the Ministry of Environment and Forests for the project or execution of buyer's agreement, whichever is later ("Commitment Period") subject to a grace period of 180 days after the expiry of the commitment period in order to account for unforeseen and unplanned events ("Grace Period"). It is also pertinent to note that as per the clause 10.1 of the said agreement, this agreed time period for handing over possession of the apartment is subject to force majeure, timely payment of the total sale consideration and the other provisions of the agreement. In present case, the approval from the Ministry of Environment and Forests was granted on 27.12.2012, therefore, in terms of the application and apartment buyers agreement, the date of handing over of possession would have been on or before 27.12.2016.

vii. That the complainants want to use this hon'ble authority to get what they are unable from the open market. The complainants are investors who are unable to offload their investment, due to recessionary market conditions. The complainants are trying to

alter the transaction from being an investment in a residential apartment to a finance scheme. Seeking such a relief itself shows the oblique motives which the complainants are seeking to achieve from the present complaint. Such conduct cannot be countenanced. No relief can be given to the complainants. The present complaint ought to be dismissed outright, with exemplary costs. Thus, the complainants are not bonafide 'allottees' under the Act and the rules but are 'investors'. Thus, the present complaint is not maintainable.

viii. That in so far as the demand towards increase in area is concerned, it is submitted that the letter of allotment as well as clause 3.1 of apartment buyers agreement specifically provides that sale area of the apartment was tentative and liable to change. Clause 8 of the said agreement provides that in case of increase/decrease in sale area of the apartment, there shall be corresponding increase/decrease in the sale consideration payable by the buyer. Furthermore, in case where the change in sale area is less than 10% of the tentative slae area at the time of allotment, consent of the buyer was not required to be taken.

E. Jurisdiction of the authority:

14. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below:

E. I Territorial jurisdiction

15. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, 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 completed territorial jurisdiction to deal with the present complaint.

E. II Subject matter jurisdiction

16. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

> **Section 11(4)(a)**
>
> *Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;*
>
> **Section 34-Functions of the Authority:**
>
> 34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

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

F. Findings on the objections raised by the respondent

F.I Objection regarding jurisdiction of authority w.r.t. apartment buyers agreement executed prior to coming into force of the Act

18. An objection has been raised the respondent 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 apartment buyers 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 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)*** decided on 06.12.2017 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."*

19. 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."*

20. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the 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 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 any other Act, rules, statutes, instructions, directions issued thereunder and are not unreasonable or exorbitant in nature.

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

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

22. 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 apartment buyers agreement, it is revealed that the complainants are allottees/buyers and they have paid total price of Rs. 3,10,66,024 /- 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,"

23. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment buyers agreement executed between respondent and complainants, it is crystal clear that the complainants are allottees 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 complainants-allottees being investor is not entitled to protection of this Act stands rejected.

G. Findings on relief sought by complainants:

G.1. Direct the respondent to pay delayed possession charges at prescribed rate of interest

24. In the present complaint, the complainants intend to continue with the project and are seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Section 18(1) of the Act reads as under:

"Section 18: - Return of amount and compensation

18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building, —

.....

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."

25. As per clause 10.1 of the apartment buyers agreement dated 26.12.2012 provides for handing over of possession and is reproduced below.

10.1. Possession

Subject to Force Majeure, timely payment of the Total Sale Consideration and other provisions of this Agreement, based upon the Company's estimates as per present Project plans, the Company Intends ***to hand over possession of the Apartment within a period of 42 (forty two) months from the date of approval of the Building Plans or the date of receipt of the approval of the Ministry of Environment and Forests, Government of India for the Project or execution of this Agreement, whichever is later*** *("Commitment Period"). The Buyer further agrees that the Company shall additionally be entitled to a time of 180 (one hundred and eighty) days ("Grace Period") after expiry of the Commitment Period for unforeseen and unplanned Project realities. However, in case of any default under this Agreement that is not rectified or remedied by the Buyer within the time as may be stipulated, the Company shall not be bound by such Commitment Period.*

26. **Admissibility of grace period:** The promoter has proposed to handover the possession of the said unit with a period of 42 months from the date of approval of building plans or the date of receipt of the approval of the Ministry of Environment and Forests, Government of India for the project or execution of this agreement. It is further provided in agreement that promoter shall be entitled to a grace period of 180 days for unforeseen and unplanned project realities. In the present complaint, the apartment buyers agreement was

executed between the parties on 26.12.2012. The building plans and environmental clearance was granted by the competent authority on 07.06.2012 and 27.12.2012 respectively. The due date of possession has been calculated from date of environment clearance being later. Therefore, the due date of handing over possession comes out to be 27.06.2016. There is neither anything on record nor the same have been argued during the proceeding of the court to show that any unforeseen and unplanned realities have occurred. Thus, the grace period is disallowed.

27. **Entitlement to delay possession charges on complainants being subsequent allottees:** The complainants are subsequent allottees. The said unit was transferred in favour of the complainants on 22.05.2013 i.e., before the due date of handing over of the possession (27.06.2016) of the allotted unit. As decided in ***complaint no. 4031 of 2019 titled as Varun Gupta Vs. Emaar MGF Land Limited***, the authority is of the considered view that in cases where the subsequent allottee had stepped into the shoes of original allottee before the due date of handing over possession, the delayed possession charges shall be granted w.e.f. due date of handing over possession.

28. **Payment of delay possession charges at prescribed rate of interest:** Proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been

prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

> ***Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]***
> *(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.:*
> *Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.*

29. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.

30. Consequently, as per website of the State Bank of India i.e., https://sbi.co.in, the marginal cost of lending rate (in short, MCLR) as on date i.e., 07.09.2022 is **8%.** Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **10%.**

31. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

> *"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.*
> *Explanation. —For the purpose of this clause—*
> *(i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*

(ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"

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

33. On consideration of the circumstances, the documents, submissions made by the parties and based on the findings of the authority regarding contravention as per provisions of rule 28(2), the authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of clause 10.1 of the agreement executed between the parties on 26.12.2012, the due date of handing over possession of the subject apartment comes out to be 27.06.2016 as decided in aforesaid paras of this order. Occupation certificate has been received by the respondent on 23.07.2018 and the possession of the subject unit was offered to the complainants on 24.07.2018. Copies of the same have been placed on record. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the complainants as per the terms and conditions of the apartment buyers agreement dated 26.12.2012 executed between the parties. It is the failure on part of the promoter to fulfil its obligations and responsibilities as per the apartment buyers agreement dated 26.12.2012 to hand over the possession within the stipulated period.

34. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 23.07.2018. The respondent offered the possession of the unit in question to the complainants only on 24.07.2018, 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. This 2 month of reasonable time is being given to the complainants keeping in mind that even after intimation of possession, practically they have to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit, but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e., 27.06.2016 till the expiry of 2 months from the date of offer of possession (24.07.2018) which comes out to be 24.09.2018.

35. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainants are entitled to delay possession at prescribed rate of interest i.e., 10% p.a. w.e.f. 27.06.2016 till the expiry of 2 months from the date of offer of possession (24.07.2018) which comes out to be 24.09.2018 as per provisions of section 18(1) of the Act read with rule 15 of the rules.

G.2. Direct the respondent to refund anything which is not a part of apartment buyers agreement.

36. The authority is of the view that the agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments and are not in contravention of any Act, rules, statutes, directions issued thereunder and are not unreasonable or exorbitant in nature. The respondent shall not charge anything from the complainants which is not the part of apartment buyers agreement as per the directions of the authority.

G.3. Direct the respondent to refund amount charged towards alleged increase area.

37. In the present complaint, as per apartment buyers agreement dated 26.12.2012, the complainants were allotted the subject unit admeasuring 4650 sq. ft. which was later increased to 4739 sq. ft vide letter dated 26.03.2019. There is an increase of 89 sq. ft. which constitutes increase by 1.92 % of original area.

38. The authority has gone through the relevant clauses of the agreement and the same is reproduced below for ready reference:

> *"8.6 While every attempt shall be made to adhere to the Sale Area, in case any Changes result in any revision in the Sale Area, the Company shall advise the Buyer in writing along with the commensurate increase/decrease in Total Sale Consideration based, however, upon the BSP as agreed herein.* ***Subject otherwise to the terms and conditions of this Agreement, a maximum of 10% variation in the Sale Area and the commensurate variation in the Total Sale***

Consideration is agreed to be acceptable to the Buyer and the Buyer undertakes to be bound by such increase / decrease in the Sale Area and the commensurate increase/decrease in the Total Sale Consideration*. For any increase/decrease in the Sale Area, the payment for the same shall be required to be adjusted at the time of Notice of Possession or immediately in case of any Transfer of the Apartment before the Notice of Possession or as otherwise advised by the Company."*

39. The final super area of the subject unit was to be confirmed by the respondent only upon grant of occupation certificate by the competent authority after the completion of construction of the said building. As per clause 8.6 of the agreement, it is evident that the respondent has agreed to intimate the allottee in case of any major alteration/modification resulting in excess of +/- 10% change in the super area of the apartment.

40. In ***Varun Gupta Vs. Emaar MGF Land Limited 4031/2021,*** the authority has held that the demand for extra payment on account of increase in the super area by the respondent-promoter from the allottee(s) is legal but subject to condition that before raising such demand, details have to be given to the allottee(s) and without justification of increase in super area, any demand raised in this regard is liable to be quashed.

41. Considering the above-mentioned facts, the authority observes that the respondent has intimated the increase in super area vide letter dated 04.10.2017 wherein the super area of the unit was increased to 3647 sq. ft. from earlier area of 3525 sq. ft. The area of the said unit can be said to be increased by 122 sq. ft. In other word, the area of the said unit is increased by 3.46%. The respondent, therefore, is entitled

to charge for the same at the agreed rates since the increase in area is 122 sq. ft. which is less than 10%. However, this remains subject to the conditions that the flats and other components of the super area on the project have been constructed in accordance with the plans approved by the competent authorities. The authority is of the opinion that each and every minute detail must be apprised, schooled and provided to the allottee regarding the increase in the super area and he should never be kept in dark or made to remain oblivious about such an important fact i.e., the exact super area till the receipt of the offer of possession letter in respect of the unit.

42. In view of the above discussion, the authority holds that the demand for extra payment on account of increase in super area from 3525 sq. ft. to 3647 sq. ft. is legal but subject to providing complete details of increase in super area to the complainants-allottees.

G.4. Direct the respondent to waive holding charges.

43. The respondent shall not charge anything from the complainants which is not part of the apartment buyers agreement. The holding charges shall not be recoverable from the allottees even being part of apartment buyers agreement as per the directions of the Hon'ble Supreme Court in civil appeal nos. 3864-3899/2020 decided on 14.12.2020.

H. Directions of the authority:

44. 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 promoters as per the functions entrusted to the authority under section 34(f) of the Act:

i. The respondent is directed to pay the interest at the prescribed rate i.e., 10% per annum for every month of delay on the amount paid by the complainants from due date of possession i.e. 27.06.2016 till 24.09.2018 i.e. expiry of 2 months from the date of offer of possession (24.07.2018).

ii. The respondent is directed to pay arrears of interest accrued within 90 days from the date of order.

iii. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.

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

v. The respondent shall not charge anything from the complainants which is not the part of the apartment buyers 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 apartment buyers agreement as per law settled by hon'ble

Supreme Court in civil appeal no. 3864-3889/2020 decided on 14.12.2020.

45. Complaint stands disposed of.

46. File be consigned to the registry.

(Sanjeev Kumar Arora)
Member

(Ashok Sangwan)
Member

(Vijay Kumar Goyal)
Member

(Dr. K. K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 07.09.2022