

**BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY,
GURUGRAM**

Complaint no. : 3205 of 2021
Date of decision : 08.12.2022

Mrs. Madhu Poddar W/o Shri Krishna Poddar
Address:- R/o 130, Sunder Nagar,
New Delhi – 110003

Complainant

Versus

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

Respondent

Coram:

Shri Vijay Kumar Goyal
Shri Ashok Sangwan
Shri Sanjeev Kumar Arora

Member
Member
Member

Appearance:

Shri Abhay Jain
Shri Dhruv Rohatgi and Shri Nikhil
Mittal

Advocate for the complainant
Advocates for the respondent

ORDER

1. The present complaint dated 17.08.2021 have 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	Digital Greens, Sector 61, Village Ghata, Gurugram, Haryana
2.	Unit no.	TWR B-09-016, 9 th floor [page 29 of complaint]
3.	Provisional allotment letter dated	17.07.2008 [annexure R4, page 36 of reply]
4.	Date of execution of buyer's agreement	25.08.2009 [page 33 of complaint]
5.	Date of supplementary agreement	26.08.2009 [page 91 of complaint]
6.	Possession clause as per supplementary agreement	3. <i>That the possession of the unit in the complex shall be delivered and handed over to the allottee(s), within eighteen (18) months of the execution hereof, subject however to the force majeure conditions as stated to the allottee(s) having strictly complied with all the terms and conditions of this agreement and not being in default under any provisions of this agreement and all amounts due and payable by the allottee(s) under the buyer's agreement and/or this supplementary agreement having been paid in time to the company. The company</i>

		<p><i>shall give notice to the allottee(s), offering in writing, to the allottee to take the possession of the unit for his occupation and use (Notice of possession). The Allottee agrees and understands that the Company shall be entitled to a <u>grace period of 120 days over and above the period more particularly specified here-in-above in sub-clause (a)(i) of clause 15, for applying and obtaining necessary approvals in respect of the complex.</u></i></p> <p>(Emphasis supplied) [page 93 of complaint]</p>
7.	Due date of possession	<p>26.02.2011</p> <p>[Note: Grace period is not included]</p>
8.	Total consideration as per statement of account dated 13.10.2021 at page 111 of reply	Rs. 1,060,1,319/-
9.	Total amount paid by the complainant as per statement of account dated 13.10.2021 at page 111 of reply	Rs.97,05,579/-
10.	Occupation certificate	<p>20.03.2017</p> <p>[annexure R2, page 26 of reply]</p>
11.	Offer of possession	<p>08.07.2017</p> <p>[annexure R8, page 113 of reply]</p>
12.	Delay compensation already paid by the respondent in terms of the buyer's agreement as per statement of account dated 13.10.2021 at page 111 of reply	Rs.2,92,022/-

B. Facts of the complaint



3. The complainant has made the following submissions in the complaint:
- i. That the complainant is a senior citizen aged about 70 years and is law abiding citizen who has been denied her rightful claim under the buyer's agreement and had no option but to approach the authority to seek justice as against the respondent owing to harassment caused by the acts and omissions of respondent. That the present complaint is another classic example of a builder's dubious attitude towards the buyer/consumer/complainant herein by avoiding its liability under the buyer's agreement.
 - ii. That on 25.8.2009 the buyer's agreement was executed by and between Emaar Mgf land limited (respondent /seller) and the buyers Mr. Mahender Kumar Gupta and Mrs. Madhu Poddar (complainant) with respect to allotment of a unit situated at project 'digital greens', Gurugram, in complex bearing no. 09-016 on nineth floor(s) (hereinafter referred to as the 'subject property') amounting to a sale consideration of Rs. 12277325/- as per the initial schedule of payment in the buyer's agreement, alongwith undivided proportionate share in the land underneath the complex. The buyer's agreement was later supplemented by the supplementary agreement dated 26.8.2009 and the original BSP of Rs. 8500/- per sq. ft., stood revised to Rs. 7225/- per sq. ft for the subject property admeasuring 1469.93 sq. ft. Copy of the buyer's agreement dated 25.8.2009 and supplementary agreement dated 26.8.2009 are enclosed herewith, and forms part of the list of documents, to this complaint.
 - iii. The respondent extended a discount of 15% under the supplementary agreement dated 26.8.2009 whereby the respondent

revised the original BSP of Rs.8500/- per sq. ft. to Rs.7225/- per sq. ft. In addition to it the respondent vide the supplementary agreement supplemented the time for delivery and handing over the possession of the subject property under clause 15 of the agreement from thirty six (36) months to within a period of eighteen (18) months from the date of the buyer's agreement.

- iv. That the pursuant to documents submitted by Mr. Mahender Kumar Gupta to the Respondent in favour of the complainant herein the subject property stood transferred in the name of Mrs. Madhu Poddar/Complainant, who became the sole owner of the subject property. The same was validated by the respondent's nomination letter dated 10.9.2012. As in accordance with the Schedule of payment under the Agreement the complainant paid to the respondent a sum of Rs. 96,35,691/- and the account stood settled as clear from respondent's statement of account dated on 9.6.2017.
- v. That the buyer's agreement was executed on 25.8.2009 and as per Clause 15(a)(i) of the agreement the possession of the subject property was to be delivered within 36 months of the execution of the agreement. The said clause was then supplemented by the supplementary agreement dated 26.8.2009 and the time for delivery and handing over the possession was 18 months from the date of the buyer's agreement. In addition to the above, as per clause 15(a)(ii) the respondent was entitled to a grace period of maximum 120 days over and above the period mentioned in clause 15(a)(i) that ended on 25.06.2011. That the complainant was promised possession by 25.06.2011 but was offered possession after a long wait of almost 6

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years from the scheduled date of delivery and possession under the agreement. The respondent vide letter of offer of possession dated 8.6.2017 proposed possession of the subject property. Thus, the respondent defaulted in timely handing over the possession of the subject property.

- vi. That the complainant received the subject letter of offer of possession on 12.6.2017. By the said letter the complainant was intimated about the completion of the project and was offered unit no. DG-B-09-017 (TWR B-09-016) situated at project 'Digital Greens', Gurugram, Haryana. To the surprise and shock of the complainant, the respondent raised an additional demand of Rs. 18,34,767/- upon the complainant without giving any consideration to the fact that the respondent delayed in handing over the possession of the subject property for almost 6 years.
- vii. The respondent while raising the above stated demand failed to take into consideration the compensation the complainant is entitled to be awarded under the agreement. Under the agreement the respondent is obligated to pay compensation to the complainant for the delay in handing over the possession. As per the agreement in case the company/ respondent is not able to hand over the possession of the subject property to the allottee/complainant within the stipulated timeline (that ended on 25.06.2011) then the complainant is also entitled to compensation on account of delayed possession as per clause 17 read with clause 15 of the agreement. A perusal of the statement of account dated 9.6.2017 filed alongwith the letter of offer of possession would show that no compensation has been offered by



the respondent/company to the complainant in terms of clause 17 (a) and (b) of the agreement. Thus, in accordance with clause 17 of the agreement the respondent has agreed to pay the complainant an interest calculated @ 9% on Rs. 96,35,691/- (which is the amount paid by the complainant to the respondent). However, the complainant is entitled to an interest @ 15% on rs.96,35,691/- from the scheduled date of delivery of possession till the date of actual possession since the complainant is being charged compound interest @ 15% for delay in payment under clause 14 of the agreement. The interest is calculated from 25.06.2011 (scheduled date for delivery of possession under the buyer's agreement) till date i.e. **28.06.2021**. The respondent is liable to pay interest on amount paid by the complainant/allottee for such period of delay. The buyer's agreement was executed on 25.8.2009 and supplementary agreement was executed on 26.8.2009. As per clause 15(a)(i) of the agreement the possession of the subject property was to be delivered within 18 months of the execution of the agreement. In addition, to the above as per clause 15(a)(ii) the respondent was entitled to a grace period of maximum 120 days over and above the period mentioned in clause 15(a)(i) that ended on 25.06.2011. Vide letter of offer of possession of the respondent the proposed possession of the subject property was offered on 8.6.2017, which was after a delay of almost 6 years from the scheduled date of delivery of the subject property. It is pertinent to note that the subject property still remains in the possession of the respondent.

- viii. The complainant is entitled to an interest @ 15% on account of delay in handing over the possession to balance equity as per the terms of

the agreement since the respondent under the agreement is very conveniently charging the complainant compound interest @ 15% on delay in payment. Thus, for the purpose of the present claim the complainant is thus claiming compensation @ 15% interest. It is unfair but noteworthy that under the agreement the complainant is entitled to an interest calculated only @ 9% (simple interest) on Rs. 96,35,691/- (which is the amount paid by the complainant to the respondent) whereas on the contrary the respondent is charging compound interest @ 15% from the complainant on delay in payment. In furtherance of the unilateral demand raised by the respondent, the respondent set a time-line for the payment of the amount i.e. on or before 30.6.2017. To add to the above stated violation/breach of the terms of the agreement, the respondent to further pressurize the complainant to pay the amount as stipulated by the respondent in the letter of offer of possession stated 'in the event of failure to pay the amounts within the stipulated time, same shall be payable along with delayed payment charges & holding charges in terms of the buyers agreement.

- ix. The respondent being the dominant party under the agreement has been pressurizing the complainant/buyer into taking the possession of the subject property at the higher demand raised by the respondent in its letter of offer of possession. the respondent has not only denied payment of compensation to the complainant but in addition to it the respondent has raised an additional demand for revision of the unit area from 1469.93 sq ft to 1512.94 sq ft which was never brought to the notice of the complainant prior to the letter of offer of possession





much less the consent of the complainant was taken by the respondent for such revision.

- x. In addition to the above the respondent vide letter of offer of possession dated 8.6.2017 has added maintenance charges to be paid by the complainant for the period between 1.7.2017 to 1.6.2018. It is submitted that the physical possession of the subject property till date remains with the respondent. The actual physical possession will be handed over by the respondent to the complainant only on execution of the conveyance deed and thus the complainant is not liable to pay the said charges. To add to the above unreasonable mode of extracting money from the complainant the actual condition of the subject property remains unfit for habitation. On receiving the letter of offer of possession the complainant visited the subject property to find that the subject property is not yet ready to move-in and there still remains major portion of unfinished work at the subject property. Thus, the question of maintenance charges does not arise.
- xi. The respondent taking the advantage of being the dominant party and the drafter of the agreement had drafted the terms of the agreement on an unequal footing which are not at all favorable to the complainant. On one hand under Clause 14(a)(i) of the agreement, the respondent imposes 15% compound interest upon the buyer for delay in any payment made, on the other hand the respondent agrees to compensate the complainant to a simple interest calculates at only 9% under clause 17 of the agreement. The complainant was in a state of shock and surprise to see the enhanced amount demanded in the letter of offer of possession wherein taking the advantage of it's

dominant position the respondent had unilaterally raised the demand at the time of offering the possession with an additional term imposed/added to the said agreement with respect to delayed payment charges and holding charges in case of failure to pay the said enhanced amount/demand raised. The said term was unilaterally imposed by the respondent upon the complainant in the letter of offer of possession.

- xii. The complainant time and again wrote e-mails to the respondent addressing the complainant's concern regarding delay in handing over the possession and the additional demand raised by the respondent. The respondent replied to the said e-mails in an arbitrary manner and paid no heed to the complainant's concerns. The respondent, admittedly in breach of the agreement refused to provide any compensation as per the terms of the agreement for the delay in handing over the possession and to add to it kept pressing that the amount of Rs. 18,34,767/- be deposited by the complainant.
- xiii. That the complainant through her counsel served a written notice dated 28.6.2017 upon the respondent. The notice has been duly received by the respondent. The respondent through it's counsel replied to notice vide reply notice dated 7.11.2017 providing frivolous explanation to justify the delay in order to disentitle the complainant of her rightful claim over the compensation under the agreement for delay in handing over the possession. The respondent in it's reply has sought to deny the claim of the complainant on a frivolous ground of default in payment of an installment for which the complainant has already paid the delayed interest due as in



accordance with the agreement which was over and above the installment amount. Thus, the account stood settled in the year 2012. The same is clear from the Statement of account provided by the respondent alongwith the letter of offer of possession dated 8.6.2017. The said notice was replied to by the complainant through her counsel vide notice dated 18.12.2017.

- xiv. That the respondent in order to further harass the complainant issued an email dated 20.11.2020 asking the complainant to deposit property tax despite in their knowledge that the dispute is pending between the parties as to handing over of the possession of the subject property. The complainant replied on the same day to the email of the respondent stating that it is the respondent's responsibility to pay the property tax till the time possession is not given to the complainant herein.
- xv. That the respondent sent another email dated 01.12.2020 wrongly demanding Rs.15,84,263/- towards the electricity, common area maintenance charges and other facilities. The complainant on the same day replied that she is not liable to pay the said amount as till date possession of the subject property is not given by the builder and further owing to a dispute pending between the parties.
- xvi. That the respondent again sent an email dated 11.03.2021 to the complainant wrongly asking for EBC bill of Rs.33,470/- for the period 01.01.2021 to 31.01.2021. The respondent highhandedness doesn't end as once again an email dated 15.06.2021 is received by complainant asking for CAM charges for the period of 01.04.2021 to

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30.06.2021 despite the possession not be given to complainant and further owing to dispute pending between the parties.

xvii. That the respondent is adopting pick and choose policy against its customer as the respondent has allotted units to various allottee's who were also not given possession in time and are been duly paid compensation and possession by the respondent whereas is rejecting the requests of the complainant who is a senior citizen of 70 years of age and is neither given possession nor compensation and the respondent in order further harass the complainant is also demanding excessive charges which the complainant is not bound to pay to the respondent.

xviii. That the cause of action arose on 12.6.2017 when the complainant received letter of offer of possession dated 8.6.2017 and was offered possession of the subject property after a delay of almost 6 years. The cause of action further arose when the complainant visited the site and found that the project site was not yet ready to move-in nor fit for habitation. The cause of action also arose on various dates there-after when the complainant expressed her concern over additional demand raised by the respondent and respondent's refusal to provide compensation to the complainant for delay in handing over the possession under the agreement. The cause of the action is still continuing as the respondent has failed to provide compensation to the complainant in accordance with the terms of the buyer's agreement and is continuously adopting tactics to harass the complainant and make illegal demands. The cause of action further

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continues as the respondent has yet not delivered the possession of the subject property.

- xix. That the respondent has failed to deliver possession of the subject property to the complainant, and they are comfortably sitting on over Rs. 96,35,691/- paid by the complainant for almost 10 years. The complainant also submits that the respondent has siphoned off and diverted funds collected from the innocent buyers and are enjoying the fruits of the money collected from different people. The act of the respondent by not handing over possession of the subject property to the complainant with compensation as agreed under the agreement has resulted in huge loss to the complainant. That it is crystal clear from the events narrated hereinabove and also from the documents enclosed with the present complaint that the complainant is suffering huge financial losses, social stigma and mental agony because of the deficient services rendered by the respondent's negligent and callous behavior and downright failure to handover possession of the property to the complainant, inspite of having made all the requisite payments and for no fault of their own.
- xx. That the above acts of omission and commission on the part of the respondent have caused undue, avoidable and serious hardship and mental agony to the complainant. The complainant has also suffered considerable loss due to acts of respondent. Thus, the complainant is suffering monetary as well as non-pecuniary losses in terms of loss of time, inconvenience, mental agony, trauma, humiliation and harassment. The complainant also reserves her right to claim compensation and damages before the adjudicating officer.

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xxi. That being aggrieved by the callous response, inaction of the respondent and failure or inordinate delay in handing over the possession of the subject property; the complainant has no other alternative but to seek redressal from this authority by filing the present complaint seeking possession of the subject property at the earliest along with interest till handing over of the possession. In light of the afore stated facts and circumstances, the complainant wishes to exercise the remedy provided there under Section 18(1) of the Real Estate (Regulation and Development) Act, 2016 and the complainant had already deposited a substantial amount of Rs. 96,35,691/- with the respondent at the time of booking of the subject property and the complainant legitimately demands possession of the said property along with interest from this authority.

C. Relief sought by the complainant

4. The complainant has filed the present compliant for seeking following reliefs:
 - i. Direct the respondent to handover possession of the subject property and interest on ₹ 96,35,691/- till handing over of the possession as per the Haryana Real Estate (Regulation and Development) Rules,2017.
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 is not maintainable in law or on facts. The provisions of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as the 'Act') are not applicable to the project in question. The respondent submitted the application for issuance of occupation certificate in respect of the project in question on 09.09.2014, i.e. well before the notification of the Haryana Real Estate Regulation and Development Rules 2017 (hereinafter referred to as the 'Rules'). The occupation certificate in respect of the said project has been issued on 20.03.2017.
 - ii. Thus, the project does not fall in the definition of "Ongoing project" under Rule 2(1)(o) of the Rules. The project has not been registered under the provisions of the Act. This authority, therefore, does not have the jurisdiction to entertain and decide the present complaint. It is further relevant to submit that proceedings regarding issue of registration and ongoing projects have been stayed by Hon'ble Punjab & Haryana High Court at Chandigarh vide its order dated 13.02.2020 in CWP no. 19958/2017. The present complaint is liable to be dismissed on this ground alone.
 - iii. That the complainant is estopped by her own acts, conduct, acquiescence, laches, omissions etc. from filing the present complaint. That the complainant vide application form applied to the respondent for provisional allotment of the unit in the project 'Digital Greens' situated in Sector-61, Gurgaon, Haryana (hereinafter referred to as "the project"). The said booking application contained detailed terms and conditions and was subject to unit buyers agreement (hereinafter

referred to as "agreement") to be executed later. Pursuant thereto, the complainants were allotted a unit bearing no. 09-016 on 9th floor in the project vide allotment letter dated 17.07.2008. Subsequently, buyers agreement dated 25.08.2009 and a supplementary agreement dated 26.08.2009 was executed between the complainants and the respondent.

- iv. That as per the statement of account dated 13.10.2021, there is still outstanding dues of Rs. 45,46,680/- against the complainant, which she has deliberately failed to pay to the respondent. Apart from the above principle amount, the complainant is further liable to pay delay payment charges to the tune of Rs.3,27,065/-. It is apparent that the complainant does not have adequate funds to remit the outstanding amount and in order to needlessly victimize and harass the respondent, has preferred the present complaint. The present complaint is an abuse of the process of law.
- v. That the respondent upon completion of the project applied for grant of occupation certificate with the competent authority. It is pertinent to mention that the respondent on receipt of the occupation certificate, offered possession of the said unit to the complainants vide offer of possession letter dated 08.06.2017 and subsequent possession reminder letters dated 12.04.2018, 01.05.2018, 18.06.2018, 01.03.2019, 02.04.2019, 01.05.2019, 01.06.2019, 01.07.2019, 01.08.2019, 01.09.2019, 01.10.2019, 01.11.2019 and 01.12.2019 subject to making payments and submission of necessary documents. However, till date the complainant has failed to comply with the requirements as detailed in the offer of possession notice and take possession of the said unit.





- vi. The complainant is needlessly avoiding the conclusion of the transaction with the intent of evading the consequences as enumerated in the buyer's agreement for delay in obtaining of possession on the part of the respective allottee. therefore, there is no equity in favour of the complainant. The complainant never had any intention of purchasing the unit in question for his own use. The complainant is not an "aggrieved person" under the act but an investor who has purchased the said unit in question as an investment to be further sold in order to earn profit.
- vii. That the complaint is also liable to be dismissed for the reason that for the unit in question, the agreement was executed on 25.08.2009 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 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 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.
- viii. That clause 17 of the agreement further provides that compensation for any delay in delivery of possession shall only be given to such allottees who are not in default of their obligations envisaged under the agreement and who have not defaulted in payment of instalments as per the payment plan incorporated in the agreement. In case of delay caused due to non-receipt of occupation certificate, completion

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certificate or any other permission/ sanction from the competent authorities, no compensation shall be payable to the allottees. Complainant having defaulted in payment of instalments, is thus not entitled to any compensation or any amount towards interest under the buyer's agreement. It is further submitted that despite there being number of defaulters in the project, the respondent itself infused funds into the project and has diligently developed the project in question.

- ix. That it is submitted that several allottees have defaulted in timely remittance of payment of instalments which was an essential, crucial and an indispensable requirement for conceptualization and development of the project in question. Furthermore, when the proposed allottees default in their payments as per schedule agreed upon, the failure has a cascading effect on the operations and the cost for proper execution of the project increases exponentially whereas enormous business losses befall upon the respondent. The respondent, despite default of several allottees, has diligently and earnestly pursued the development of the project in question and has constructed the project in question as expeditiously as possible.
- x. That it needs to be highlighted that the respondent had applied to the statutory authority for grant of occupation certificate in respect of the tower in which the unit in question is located on 09.09.2014 and the same was granted on 20.03.2017. It is reiterated that once an application for issuance of occupation certificate is submitted before the concerned competent authority, the respondent ceases to have any control over the same. The grant of occupation certificate is the prerogative of the concerned statutory authority, and the respondent

does not exercise any control over the matter. Therefore, the time period utilized by the concerned statutory authority for granting the occupation certificate needs to be necessarily excluded from computation of the time period utilized in the implementation of the project in terms of the buyer's agreement. As far as the respondent is concerned, it has diligently and sincerely pursued the development and completion of the project in question.

- xi.** That the above circumstances, it is clear that there is no default or lapse on the part of the respondent and there is 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.

E. Jurisdiction of the authority

7. 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

8. 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

9. 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

10. The respondent contended that authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the buyer's agreement executed between the parties and no agreement for sale as referred to under the provisions of the Act or the said rules has been executed inter se parties. The respondent further submitted that the provisions of the Act are not retrospective in nature and the provisions of the Act cannot undo or modify the terms of buyer's agreement duly executed prior to coming into effect of the Act.
11. The authority is of the view that the Act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the

Act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of ***Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)*** which provides as under:

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

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

12. 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."

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

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

14. The respondent submitted that the complainant is investor and not consumer/allottee, thus, the complainant is not entitled to the protection of the Act and thus, the present complaint is not maintainable.
15. The authority observes that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states main aims and objects of enacting a statute but at the same time preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that under



section 31 of the Act, any aggrieved person can file a complaint against the promoter if the promoter contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the buyer's agreement, it is revealed that the complainant is an allottee/buyer and they have paid total price of Rs. 97,05,579/- 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;"

16. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the buyer's agreement executed between respondent and complainant, it is crystal clear that the complainant is allottee as the subject unit was allotted to him by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled as ***M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr.*** has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the complainant-allottee being investors is not entitled to protection of this Act stands rejected.

G. Findings on the reliefs sought by the complainant

G.I Possession and delay possession charges

17. **Relief sought by the complainant:** Direct the respondent to handover possession of the subject property and interest on ₹ 96,35,691/- till handing over of the possession as per the Haryana Real Estate (Regulation and Development) Rules,2017.
18. In the present complaint, the complainant intends to continue with the project and are seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under.

"Section 18: - Return of amount and compensation

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

.....

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

19. Clause 3 of the supplementary agreement provides for time period for handing over of possession and is reproduced below:

"3. That the possession of the unit in the complex shall be delivered and handed over to the allottee(s), within eighteen (18) months of the execution hereof, subject however to the force majeure conditions as stated to the allottee(s) having strictly complied with all the terms and conditions of this agreement and not being in default under any provisions of this agreement and all amounts due and payable by the allottee(s) under the buyer's agreement and/or this supplementary agreement having been paid in time to the company. The company shall give notice to the allottee(s), offering in writing, to the allottee to take the possession of the unit for his occupation and use (Notice of possession). The Allottee agrees and understands that the Company shall be entitled to a grace period of 120

days over and above the period more particularly specified here-in-above in sub-clause (a)(i) of clause 15, for applying and obtaining necessary approvals in respect of the complex.

20. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement, and the 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 floor and to deprive the allottee of their right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

21. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within 18 months from the date of execution and it is further provided in agreement that promoter shall be entitled to a grace period of 120 days for applying and obtaining necessary approvals

in respect of the complex. The period of 18 months expired on 26.02.2011. As a matter of fact, the promoter has not applied to the concerned authority for obtaining completion certificate/occupation certificate with the time limit prescribed by the promoter in the buyer's agreement. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 120 days cannot be allowed to the promoter at this stage.

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

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

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

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

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



24. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., 08.12.2022 is 8.35%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.35%.

25. **Rate of interest to be paid by complainant/allottee for delay in making payments:** The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.

Explanation. —For the purpose of this clause—

- (i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*
- (ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"*

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

27. On consideration of the documents available on record and submissions made by the parties regarding contravention as per provisions of the Act, the authority is satisfied that the respondent is in contravention of the

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section 3 of the supplementary Act by not handing over possession by the due date as per the agreement. By virtue of clause 3 of the supplementary agreement executed between the parties on 26.08.2009 possession of the said unit was to be delivered within a period of 18 months from the date of execution and it is further provided in agreement that promoter shall be entitled to a grace period of 120 days for applying and obtaining necessary approvals in respect of the complex. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over possession comes out to be 26.02.2011. In the present case, the complainant was offered possession by the respondent on 08.07.2017 after obtaining occupation certificate dated 20.03.2017 from the competent authority. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the complainant as per the terms and conditions of the buyer's agreement dated 26.08.2009 executed between the parties.

28. 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 20.03.2017. However, the respondent offered the possession of the unit in question to the complainant only on 08.07.2017 so it can be said that the complainant came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, they should be given 2 months' time from the date of offer of possession. These 2 months'



of reasonable time is being given to the complainant keeping in mind that even after intimation of possession practically they have to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e. 26.02.2011 till 08.09.2017 i.e. expiry of 2 months from the date of offer of possession (08.07.2017). Also, the complainant is directed to take possession of the unit in question within 2 months from the date of this order as per section 19(10) of the Act.

29. The amount of compensation already paid to the complainant by the respondent as delay compensation as per the buyer's agreement shall be adjusted towards delay possession charges payable by the promoter at the prescribed rate of interest (DPC) to be paid by the respondent as per the proviso to section 18(1) of the Act. The respondent shall issue a revised account statement after adjusting the DPC as per above order and the allottee shall make the payment of outstanding amount, if any, remains after adjustment of DPC amount. The interest on outstanding amount shall be charged from the complainant at equitable rate of interest along with due maintenance charges and possession shall be handed over in next four weeks and revised account statement shall be sent to the complainant within two weeks.

30. 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 @10.35 % p.a. w.e.f. 26.02.2011 till 08.09.2017 i.e. expiry of 2 months from the date of offer of possession (08.07.2017) as per provisions of section 18(1) of the Act read with rule 15 of the rules.

H. Directions of the authority


31. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):


- i. The respondent is directed to pay the interest at the prescribed rate i.e. 10.35 % per annum for every month of delay on the amount paid by the complainant from due date of possession i.e. 26.02.2011 till 08.09.2017 i.e. expiry of 2 months from the date of offer of possession (08.07.2017). 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.
- ii. The complainant/allottee is directed to pay outstanding dues, if any, after adjustment of interest for the delayed installment.
- iii. Interest on the delay payments from the complainant shall be charged at the prescribed rate i.e. 10.35% by the respondent/promoter which is the same as is being granted to the complainant in case of delayed possession charges as per section 2(za) of the Act.

iv. The respondent shall not levy/recover any charges from the complainant which is not the part of the buyer's agreement. The respondent is also not entitled to claim holding charges from the complainant/allottee 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.

32. Complaint stands disposed of.

33. File be consigned to registry.


Sanjeev Kumar Arora
Member


Ashok Sangwan
Member


Vijay Kumar Goyal
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 08.12.2022