BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	:	**5525 of 2022**
Complaint filed on	:	**12.08.2022**
First date of hearing	:	**27.10.2022**
Date of decision	:	**21.02.2023**

Mr. Bhardwaj
R/o: 71, Raghbir Marg, Near Police Chowki,
Patiala-147001, Punjab. **Complainant**

Versus

M/s Emaar India Ltd.
(Earlier known as Emaar MGF Land Ltd.)
Address: 306-308, 3rd floor, Square One,
C2, District Centre, Saket, New Delhi -110017. **Respondent**

CORAM:
Shri Vijay Kumar Goyal **Member**
Shri Ashok Sangwan **Member**
Shri Sanjeev Kumar Arora **Member**

APPEARANCE:
Shri Jagdeep Kumar Advocate for the complainant
Shri J.K. Dang Advocate for the respondent

ORDER

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

obligations, responsibilities and functions to the allottee as per the agreement for sale executed inter se them.

A. **Project and unit related details**

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

S.No.	Heads	Information
1.	Project name and location	Gurgaon Greens, Sector 102, Gurugram, Haryana.
2.	Project area	13.531 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no.	75 of 2012 dated 31.07.2012
	Valid till	30.07.2020
	Name of licensee	Kamdhenu Projects Pvt. Ltd. and another C/o Emaar MGF Land Ltd.
5.	HRERA registered/ not registered	**Registered vide no. 36(a) of 2017 dated 05.12.2017 for 95829.92 sq. mtrs.**
	HRERA registration valid up to	**31.12.2018**
	HRERA extension of registration vide	**01 of 2019 dated 02.08.2019**
	Extension valid up to	**31.12.2019**
6.	Unit no.	GGN-09-0402, 4th floor, tower no. 09 [annexure P2, page 41 of complaint]
7.	Unit measuring (super area)	1650 sq. ft.
8.	Provisional allotment letter dated	28.01.2013 [annexure P1, page 22 of complaint]

9.	Date of execution of buyer's agreement	04.04.2013 [annexure P2, page 38 of complaint]
10.	Possession clause	***14. POSSESSION*** ***(a) Time of handing over the Possession*** *Subject to terms of this clause and barring force majeure conditions, subject to the Allottee having complied with all the terms and conditions of this Agreement, and not being in default under any of the provisions of this Agreement and compliance with all provisions, formalities, documentation etc., as prescribed by the Company, the Company proposes to hand over the possession of the Unit within **36 (Thirty Six) months from the date of start of construction,** subject to timely compliance of the provisions of the Agreement by the Allottee. The Allottee agrees and understands that the Company shall be entitled to a **grace period of 5 (five) months, for applying and obtaining the completion certificate/occupation certificate in respect of the Unit and/or the Project.*** (Emphasis supplied) [annexure P2, page 54 of complaint]
11.	Date of start of construction as per statement of account dated 02.08.2022 at page 89 of complaint	14.06.2013
12.	Due date of possession	14.06.2016 [**Note:** Grace period is not included]

13.	Total consideration as per statement of account dated 02.08.2022 at page 89 of complaint	Rs.99,21,916/-
14.	Total amount paid by the complainant as per statement of account dated 02.08.2022 at page 90 of complaint	Rs.99,54,458/-
15.	Occupation certificate	30.05.2019 [annexure R7, page 141 of reply]
16.	Offer of possession	31.05.2019 [annexure R9, page 145 of reply]
17.	Unit handover letter dated	09.08.2019 [annexure R10, page 150 of reply]
18.	Conveyance deed executed on	22.08.2019 [annexure R11, page 151 of reply]
19.	Delay compensation already paid by the respondent in terms of the buyer's agreement as per statement of account dated 02.08.2022 at page 90 of complaint	Rs. 3,77,963/-

B. Facts of the complaint

3. The complainant made following submissions in the complaint:

   i. That somewhere in the month of February 2012, the respondent through its business development associate approached them with an offer to invest and buy a flat in the proposed project of the respondent. On 13.02.2012, the complainant had a meeting with respondent where the respondent explained the project details and highlighted the amenities of the project like joggers park, joggers track, rose garden, 2 swimming pool, amphitheater and

many more. Relying on these details, the complainant enquired about the availability of flat on 4th in tower 9 which was a unit consisting area of 1650 sq. ft. It was represented to the complainant that the respondent has already processed the file for all the necessary sanctions and approvals from the appropriate and concerned authorities for the development and completion of said project on time with the promised quality and specification. The respondent had also shown the brochures and advertisement material of the said project to him and assured that the allotment letter and builder buyer agreement for the said project would be issued to him within one week of booking to made by him. The complainant, relying upon those assurances and believing them to be true, booked a residential flat bearing no. 0402 on 4th floor in tower – 9 in the proposed project of the respondent measuring approximately super area of 1650 sq. ft. Accordingly, he has paid Rs. 7,50,000/- as booking amount on 13.02.2012.

ii. That on 28.01.2013, approximately after one year, the respondent issued a provisional allotment letter containing very stringent and biased contractual terms which are illegal, arbitrary, unilateral and discriminatory in nature because every clause was drafted in a one-sided way and a single breach of unilateral terms of provisional allotment letter by the complainant, will cost him forfeiture of 15% of total consideration value of unit. Respondent

exceptionally increased the net consideration value of flat by adding EDC, IDC and PLC and when complainant opposed the unfair trade practices of respondent, he was informed that EDC, IDC and PLC are just the government levies, and they are as per the standard rules of government. Further, the delay payment charges will be imposed @ 24% which is standard rule of company and company will also compensate at the rate of Rs. 7.50/- per sq. ft. per month in case of delay in possession of flat by company. Complainant opposed these illegal, arbitrary, unilateral and discriminatory terms of provisional allotment letter but there was no other option left with him because if he stops the further payment of installments then in that case, respondent may forfeit 15% of total consideration value from the total amount paid by him. Thereafter, on 04.04.2013, the buyer's agreement was executed on similar illegal, arbitrary, unilateral and discriminatory terms narrated by respondent in provisional allotment letter.

iii. That as per the clause 14 of the buyer's agreement dated 04.04.2013, the respondent had agreed and promised to complete the construction of the said flat and deliver its possession within a period of 36 months with a five (5) months grace period thereon from the date of start of construction. The proposed possession date as per buyer's agreement was due on 14.06.2016. However, the respondent has breached the terms of said buyer's agreement

and failed to fulfill its obligations and has not delivered possession of said flat within the agreed time frame of the buyer's agreement.

iv. That as per annexure-III (Schedule of Payments) of buyer's agreement, the total sale consideration of the said flat was Rs.92,58,383/- (exclusive of service tax and GST but includes the charges towards the basic price- Rs.77,59,983/-, car parking Rs.3,00,000/-, Governmental charges (EDC & IDC) Rs.5,70,900/-, club membership Rs.50,000/-, IFMS Rs.82,500/- and PLC for central greens- Rs.4,95,000/-). But later at the time of possession, the respondent increased the sale consideration to Rs.92,88,459/- without any reason for the same, and respondent also charged IFMS @ Rs.82,500/- separately, whereas IFMS charges were already included in sale consideration and that way respondent charged IFMS twice from complainant. In total, the respondent increased the sale consideration by Rs.1,12,576/- (Rs.30,076/- + Rs.82,500/-) without any reason which is illegal, arbitrary, unilateral and unfair trade practice. Complainant opposed the increase in sales consideration at time of possession, but respondent did not pay any attention towards his claims.

v. That as per the statement dated 02.08.2022, issued by the respondent, the complainant has already paid Rs.95,76495/- towards total sale consideration as demanded by the respondent

from time to time and now nothing is pending to be paid on the part of complainant.

vi. That the possession was offered by respondent through letter "Intimation of Possession" dated 31.05.2019 which was not a valid offer of possession because respondent had offered the possession with stringent condition to pay certain amounts which were never part of agreement. At the time of offer of possession, builder did not adjusted the penalty for delay possession. Respondent demanded Rs.1,44,540/- towards two-year advance maintenance charges from complainant which was never agreed under the buyer's agreement and respondent also demanded a lien marked FD of Rs. 2,52,929/- on pretext of future liability against HVAT which are also unfair trade practice.

vii. That respondent left no other option to complainant, but to pay the payment of two-year maintenance charges Rs. 1,44,540/- and fixed deposit of Rs.2,52,929/- with a lien marked in favour of Emaar MGF Land Limited and Rs.4,27,750/- towards e-stamp duty and Rs.45,000 towards registration charges of above said unit in addition to final demand raised by respondent along with offer of possession. Respondent gave physical handover of aforesaid property on 09.08.2019.

viii. That after taking possession of flat on 09.08.2019, the complainant also identified some major structural changes which were done by

respondent in project in comparison to features of project narrated to them on 13.02.2012 at the office of respondent. Area of central park was told to be 8 acres but in reality, the area of central green is 1.82 acres. In comparison of promised area of 8 acres, there is a clear shortfall of 6.18 Acres of space in central greens area and above all the view of major portion of central greens is also restricted due to design of staircase of tower no. 7. The proportionate claim for 6.18 Acres of shortfall is Rs. 3,82,387/- (considering PLC for 8 Acre Central Greens = Rs. 4,95,000/-).

ix. That the respondent charged exceptionally high PLC from complainant without even transferring the ownership rights of amenities to complainant on the common area of project. Respondent compelled almost every flat owner (total 672) through unilateral buyer's agreement to pay PLC.

x. That the respondent did not provide the final measurement of above said unit. Respondent charged all IDC, EDC and PLC and maintenance charges as per area of unit i.e. 1650 sq. ft. but there is no architect confirmation provided by respondent about the final unit area which respondent was going to handover to the complainant.

xi. That the GST Tax which has come into force on 01.07.2017, it is a fresh tax. The possession of the apartment was supposed to be delivered to complainant on 14.06.2016, therefore, the tax which

has come into existence after the due date of possession (14.06.2016) of flat, this extra cost should not be levied on complainant, since the same would not have fallen on the complainant if respondent had offer the possession of flat within the time stipulated in the agreement.

xii. On 24.06.2019, the complainant informed the respondent telephonically that respondent is creating anomaly by not compensating the complainant for delay possession charges at the rate of interest specified in the RERA Act. The complainant made it clear to the respondent that if it does not compensate him for delay possession interest then he will approach the appropriate forum to get redressal. Whenever complainant enquired about the delay possession charges, the respondent made excuses of getting approval from Directors, but till date the respondent has not credited the delay possession interest.

xiii. That the respondent has acted in a very deficient, unfair, wrongful, fraudulent manner by not delivering the said flat within the timelines agreed in the agreement and otherwise. The cause of action accrued in the favour of the complainant and against the respondent on 13.02.2012 when the said flat was booked by him, and it further arose when respondent failed/ neglected to deliver the said flat on proposed delivery date. The cause of action is continuing and is still subsisting on day-to-day basis.

C. Relief sought by the complainant

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

   i. Direct the respondent to pay interest at the rate of 18% on account of delay in offering possession on amount paid by the complainant from the date of payment till the date of delivery of possession.

   ii. Direct the respondent to return Rs.1,12,576/- unreasonably charged by respondent by increasing sale price after execution of buyer' s agreement.

   iii. Direct the complainant's bank to remove the lien marked over Fixed Deposit of Rs. 2,52,929/- dated 17.06.2019 in favour of respondent on the pretext of future payment of HVAT for the period of (01.04.2014 to 30.06.2017) and also order to direct the respondent to assist the process of removing lien from complainant's bank by providing NOC for the same.

   iv. Direct the respondent to return entire amount paid as GST Tax by complainant between 01.07.2017 to 24.07.2019.

   v. Direct the respondent to return Rs.4,95,000/- for reducing the size of central greens from 8 acres to 1.22 acres.

   vi. Direct the respondent to pay an amount of Rs.55,000/- to the complainant as cost of the present litigation.

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 based on an erroneous interpretation of the provisions of the Act as well as an incorrect understanding of the terms and conditions of the buyer's agreement dated 04.04.2013. The complainant is not "allottee" but is investor who has purchased the apartment in question as a speculative investment. The complainant had purchased the unit in question as a speculative investment with an intent to gain monetary benefits by reselling/leasing out the same. The complainant is wilful and persistent defaulter who has failed to make payment of the sale consideration as per the payment plan opted by him.

   ii. That the complainant was provisionally allotted apartment no. GGN-09-0402, admeasuring super area of 1650 sq. ft. approximately. The complainant consciously and willfully opted for a construction linked plan for remittance of the sale consideration for the unit in question and further represented to the respondent that he shall remit every installment on time as per the payment schedule. The respondent had no reason to suspect

the bonafide of the complainant and proceeded to allot the unit in question in his favor. Thereafter, the buyer's agreement was executed between the complainant and the respondent on 04.04.2013.

iii. That the complainant was irregular in payment of instalments. The respondent was constrained to issue reminders and letters to the complainant requesting him to make payment of the amounts due and payable by him. Payment request letters, reminders etc. had been got sent to the complainant by the respondent clearly mentioning the amount that was outstanding and the due date for remittance of the respective amounts as per the schedule of payments, requesting him to timely discharge his outstanding financial liability but to no avail.

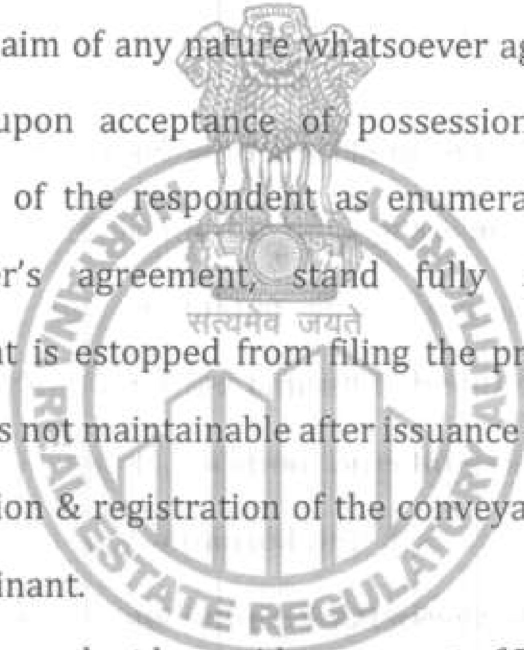
iv. That despite there being a number of defaulters in the project, the respondent itself infused funds into the project and has diligently developed the project in question. The respondent had applied for occupation certificate on 31.12.2018. Occupation certificate was thereafter issued in favour of the respondent vide memo bearing no. ZP-835/AD(RA)/2018/13010 dated 30.05.2019. That once an application for grant of occupation certificate is submitted for approval in the office of the concerned statutory authority, the respondent ceases to have any control over the same. The grant of sanction of the occupation certificate is the prerogative of the

concerned statutory authority over which the respondent cannot exercise any influence. As far as the respondent is concerned, it has diligently and sincerely pursued the matter with the concerned statutory authority for obtaining of the occupation certificate. No fault or lapse can be attributed to the respondent in the facts and circumstances of the case. Therefore, the time period utilised by the statutory authority to grant occupation certificate to the respondent is necessarily required to be excluded from computation of the time period utilised for implementation and development of the project.

v. Upon receipt of the occupation certificate, the respondent offered possession of the subject unit to the complainant vide letter dated 31.05.2019. The complainant was called upon to remit balance amount and also to complete the necessary formalities and documentation so as to enable the respondent to hand over possession of the apartment to the complainant. However, the complainant consciously delayed the matter for reasons best known to him. The complainant took possession of the apartment in question on 09.08.2019. Thereafter, conveyance deed has also been registered in favour of the complainant on 22.08.2019. Therefore, the transaction between the complainant and the respondent has been concluded in August 2019 and the

complainant is not left with any claim against the respondent. The present complaint is nothing but a gross misuse of process of law.

vi. That at the time of taking possession of the apartment, the complainant has admitted himself to be fully satisfied with regard to the measurements, location, direction, developments et cetera of the unit and also admitted and acknowledge that he does not have any claim of any nature whatsoever against the respondent and that upon acceptance of possession, the liabilities and obligations of the respondent as enumerated in the allotment letter/buyer's agreement, stand fully satisfied. Thus, the complainant is estopped from filing the present complaint. The complaint is not maintainable after issuance of the handover letter and execution & registration of the conveyance deed in favour of the complainant.



vii. That the respondent has paid an amount of Rs. 57,840/- as benefit on account of Anti-Profiting and Rs. 492/- on account of Early Payment Rebate (EPR). Furthermore, an amount of Rs. 3,77,963/- has been credited by the respondent to the account of the complainant as a gesture of goodwill. The aforesaid amount has been accepted by the complainant in full and final satisfaction of his alleged grievances. The instant complaint is nothing but a gross misuse of process of law.

viii. That several allottees, including the complainant, have defaulted in timely remittance of payment of installments which was an essential, crucial and an indispensable requirement for conceptualisation and development of the project in question. Furthermore, when the proposed allottees default in their payments as per schedule agreed upon, the failure has a cascading effect on the operations and the cost for proper execution of the project increases exponentially whereas enormous business losses befall upon the respondent. The respondent, despite default of several allottees, has diligently and earnestly pursued the development of the project in question and has constructed the project in question as expeditiously as possible. It is submitted that the construction of the tower in which the unit in question is situated is complete and the respondent has already offered possession of the unit in question to the complainant. Therefore, there is no default or lapse on the part of the respondent and there in no equity in favour of the 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 is totally baseless. Thus, it is most respectfully submitted that the present complaint deserves to be dismissed at the very threshold.

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

E. Jurisdiction of the authority

8. 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

9. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram District, therefore this authority has complete territorial jurisdiction to deal with the present complaint.

E.II Subject-matter jurisdiction

10. Section 11(4)(a) of the Act 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) The promoter shall-*
>
> *(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.

11. 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 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 entitlement of DPC on ground of complainant being investors

12. 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.

13. 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 he has paid total price of Rs.99,54,458/- 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;"*

14. 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 investor is not entitled to protection of this Act stands rejected.

F.II Objection regarding exclusion of time taken by the competent authority in processing the application and issuance of occupation certificate

15. As far as contention of the respondent with respect to the exclusion of time taken by the competent authority in processing the application and issuance of occupation certificate is concerned, the authority observed that the respondent had applied for grant of occupation certificate on 31.12.2018 and thereafter vide memo no. ZP-835-AD(RA)/2018/13010 dated 30.05.2019, the occupation certificate has been granted by the competent authority under the prevailing law. The authority cannot be a silent spectator to the deficiency in the application submitted by the promoter for issuance of occupancy certificate. It is evident from the occupation certificate dated 30.05.2019 that an incomplete application for grant of OC was applied on 31.12.2018 as fire NOC from the competent authority was granted only on 19.03.2019 which is subsequent to the filing of application for occupation certificate. Also, the Chief Engineer-I, HSVP, Panchkula has submitted his requisite report in respect of the said project on 22.03.2019. The District Town Planner, Gurugram and Senior Town Planner, Gurugram has submitted requisite report about this project on 19.04.2019 and 22.04.2019 respectively. As such, the application

submitted on 31.12.2018 was incomplete and an incomplete application is no application in the eyes of law.

16. The application for issuance of occupancy certificate shall be moved in the prescribed forms and accompanied by the documents mentioned in sub-code 4.10.1 of the Haryana Building Code, 2017. As per sub-code 4.10.4 of the said Code, after receipt of application for grant of occupation certificate, the competent authority shall communicate in writing within 60 days, its decision for grant/ refusal of such permission for occupation of the building in Form BR-VII. In the present case, the respondent has completed its application for occupation certificate only on 22.04.2019 and consequently the concerned authority has granted occupation certificate on 30.05.2019. Therefore, in view of the deficiency in the said application dated 31.12.2018 and aforesaid reasons, no delay in granting occupation certificate can be attributed to the concerned statutory authority.

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

17. The respondent contended that at the time of taking possession of the subject unit vide unit hand over letter dated 09.08.2019, the complainant has certified himself to be fully satisfied with regard to the measurements, location, direction, developments et cetera of the unit and also admitted and acknowledge that he does not have any claim of any nature whatsoever against the respondent and that upon

acceptance of possession, the liabilities and obligations of the respondent as enumerated in the allotment letter/buyer's agreement, stand fully satisfied.

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

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

F.IV Whether the execution of the conveyance deed extinguishes the right of the allottee to claim delay possession charges.

19. The respondent submitted that the complainant has executed the conveyance deed on 22.08.2019 and therefore, the transaction between the complainant and the respondent have been concluded and no right or liability can be asserted by respondent or the complainant against the other. Therefore, the complainant is estopped from claiming any interest in the facts and circumstances of the case. The present complaint is nothing but a gross misuse of process of law.

20. In the complaint bearing no. ***4031 of 2019*** titled as ***Varun Gupta V/s Emaar MGF Land Ltd.,*** the authority has comprehensively dealt with this issue and has held that taking over the possession and thereafter

execution of the conveyance deed can best be termed as respondent having discharged its liabilities as per the buyer's agreement and upon taking possession, and/or executing conveyance deed, the complainant never gave up his statutory right to seek delayed possession charges as per the provisions of the said Act. Also, the same view has been upheld by the Hon'ble Supreme Court in case titled as **Wg. Cdr. Arifur Rahman Khan and Aleya Sultana and Ors. Vs. DLF Southern Homes Pvt. Ltd. (now Known as BEGUR OMR Homes Pvt. Ltd.) and Ors. (Civil appeal no. 6239 of 2019) dated 24.08.2020,** the relevant paras are reproduced herein below:

> *"35. The flat purchasers invested hard earned money. It is only reasonable to presume that the next logical step is for the purchaser to perfect the title to the premises which have been allotted under the terms of the ABA. But the submission of the developer is that the purchaser forsakes the remedy before the consumer forum by seeking a Deed of Conveyance. To accept such a construction would lead to an absurd consequence of requiring the purchaser either to abandon a just claim as a condition for obtaining the conveyance or to indefinitely delay the execution of the Deed of Conveyance pending protracted consumer litigation."*

21. Therefore, in furtherance of ***Varun Gupta V/s Emaar MGF Land Ltd. (supra)*** and the law laid down by the hon'ble Apex Court in the **Wg. Cdr. Arifur Rahman (supra)**, the authority holds that even after execution of the conveyance deed, the complainant cannot be precluded from his right to seek delay possession charges from the respondent-promoter.

G. Findings on the reliefs sought by the complainant

G.I Delay possession charges

22. **Relief sought by the complainant**: Direct the respondent to pay interest at the rate of 18% on account of delay in offering possession on amount paid by the complainant from the date of payment till the date of delivery of possession.

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

24. Clause 14(a) of the buyer's agreement provides for time period for handing over of possession and is reproduced below:

> **"14. POSSESSION**
>
> ***(a)* Time of handing over the possession**
>
> *Subject to terms of this clause and barring force majeure conditions, and subject to the Allottee having complied with all the terms and conditions of this Agreement, and not being in default under any of the provisions of this Agreement and compliance with all provisions, formalities, documentation etc., as prescribed by the Company. The Company proposes to hand over the possession of the Unit within 36 (Thirty Six) months from the date of start of construction., subject to timely compliance of the provisions of the Agreement by the Allottee. The Allottee agrees and understands that the Company shall be entitled to a grace period of 5 (five)*

months, for applying and obtaining the completion certificate/occupation certificate in respect of the Unit and/or the Project."

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

26. **Due date of possession and admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within 36 (thirty-six) months from the date of start of construction and

further provided in agreement that promoter shall be entitled to a grace period of 5 months for applying and obtaining completion certificate/occupation certificate in respect of said unit. The date of start of construction is 14.06.2013 as per statement of account dated 02.08.2022. The period of 36 months expired on 14.06.2016. As a matter of fact, the promoter has not applied to the concerned authority for obtaining completion certificate/ occupation certificate within the time limit (36 months) prescribed by the promoter in the buyer's agreement. The promoter has moved the application for issuance of occupation certificate only on 31.12.2018 when the period of 36 months has already expired. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, the benefit of grace period of 5 months cannot be allowed to the promoter due to aforesaid reasons.

27. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges at the rate of 18%. However, 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.

28. The legislature in its wisdom in the subordinate legislation under 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.

29. Taking the case from another angle, the complainant-allottee was entitled to the delayed possession charges/interest only at the rate of Rs.7.50/- per sq. ft. per month of the super area as per clause 16 of the buyer's agreement for the period of such delay; whereas, as per clause 13 of the buyer's agreement, the promoter was entitled to interest @ 24% per annum at the time of every succeeding instalment from the due date of instalment till date of payment on account for the delayed payments by the allottee. The functions of the authority are to safeguard the interest of the aggrieved person, may be the allottee or the promoter. The rights of the parties are to be balanced and must be equitable. The promoter cannot be allowed to take undue advantage of his dominant position and to exploit the needs of the home buyers. This

authority is duty bound to take into consideration the legislative intent i.e., to protect the interest of the consumers/allottees in the real estate sector. The clauses of the buyer's agreement entered into between the parties are one-sided, unfair and unreasonable with respect to the grant of interest for delayed possession. There are various other clauses in the buyer's agreement which give sweeping powers to the promoter to cancel the allotment and forfeit the amount paid. Thus, the terms and conditions of the buyer's agreement are ex-facie one-sided, unfair and unreasonable, and the same shall constitute the unfair trade practice on the part of the promoter. These types of discriminatory terms and conditions of the buyer's agreement will not be final and binding.

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., 21.02.2023 is 8.70%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.70%.

31. **Rate of interest to be paid by the complainant in case of 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;"*

32. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 10.70% by the respondent/ promoter which is the same as is being granted to the complainant in case of delayed possession charges.

33. 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 section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 14(a) of the buyer's agreement executed between the parties on 04.04.2013, the possession of the subject flat was to be delivered within a period of 36 months from the date of start of construction plus 5 months grace period for applying and obtaining the completion certificate/ occupation certificate in respect of the unit and/or the project. The construction was started on 14.06.2013. 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 14.06.2016. Occupation certificate was granted by the concerned authority on 30.05.2019 and thereafter, the

possession of the subject flat was offered to the complainant on 31.05.2019. 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 subject flat and it is failure on part of the promoter to fulfil its obligations and responsibilities as per the buyer's agreement dated 04.04.2013 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 30.05.2019. The respondent offered the possession of the unit in question to the complainant only on 31.05.2019, 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, the complainant 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 he has to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e.

14.06.2016 till the expiry of 2 months from the date of offer of possession (31.05.2019) which comes out to be 31.07.2019.

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 complainant is entitled to delayed possession at prescribed rate of interest i.e. 10.70 % p.a. w.e.f. 14.06.2016 till 31.07.2019 as per provisions of section 18(1) of the Act read with rule 15 of the rules.

36. Also, the amount of Rs.3,77,963/- (as per statement of account dated 02.08.2022) so paid by the respondent to the complainant towards compensation for delay in handing over possession shall be adjusted towards the delay possession charges to be paid by the respondent in terms of proviso to section 18(1) of the Act.

G.II Return of amount unreasonably charged by increasing sale price.

37. **Relief sought by the complainant:** Direct the respondent to return Rs.1,12,576/- unreasonably charged by respondent by increasing sale price after execution of buyer' s agreement.

38. With respect to the said relief sought by the complainant, the complainant submitted that as per Annexure-III (Schedule of Payments) of buyer's agreement, the sales consideration exclusive of ST and GST is Rs.92,58,383/- (which includes IFMS of Rs.82,500/-) but later at the time of intimation of possession, the respondent increased it to Rs.92,88,459/- without any reason for the same. The respondent

also charged IFMS of Rs.82,500/- separately, whereas IFMS charges were already included in sale consideration as per buyer's agreement and that way respondent charged IFMS twice from complainant. In total, the respondent increased the sale consideration by Rs.1,12,576/ (Rs.30,076/ +Rs.82,500/). On the other hand, the respondent has denied that any amount has been added or the sale consideration has been increased by the respondent in the manner claimed by the complainant and it was also denied that IFMS charges have been collected twice.

39. The authority observes that as per Annexure-III (Schedule of Payments) of buyer's agreement, the IFMS was payable along with the last instalment and in fact, the same was demanded by the respondent vide 'Letter of Offer of Possession' dated 31.05.2019 i.e., last instalment. The authority observes that per schedule of payment annexed with the buyer's agreement (annexure P2, page 69 of complaint), the total sale consideration is Rs.92,58,383/- which is inclusive of basic sale price, EDC and IDC, club membership, IFMS, car parking, PLC and additional charges & excluding taxes. Whereas as per statement of account dated 02.08.2022 (annexure P3, page 89 of complaint), the sale consideration has been increased to Rs.92,88,459/- (excluding taxes) i.e. an increase of Rs.30,076/-. Further IFMS of Rs.82,500/- has also been again added. Accordingly, Rs.1,12,576/- have been charged extra. Therefore, the

respondent is directed to deduct the said amount from the total sale consideration.

G.III Whether respondent is justified in creating lien over fixed deposit on pretext of future payment of HVAT

40. **Relief sought by the complainant:** Direct the complainant's bank to remove the lien marked over Fixed Deposit of Rs. 2,52,929/- dated 17.06.2019 in favour of respondent on the pretext of future payment of HVAT for the period of (01.04.2014 to 30.06.2017) and also order to direct the respondent to assist the process of removing lien from complainant's bank by providing NOC for the same.

41. The authority has decided this in the complaint bearing no. ***4031 of 2019*** titled as ***Varun Gupta V/s Emaar MGF Land Ltd.*** wherein the authority has held that the promoter is entitled to charge VAT from the allottee for the period up to 31.03.2014 @ 1.05% (one percent VAT + 5 percent surcharge on VAT). However, the promoter cannot charge any VAT from the allottees/prospective buyers for the period 01.04.2014 to 30.06.2017 as the same was to be borne by the promoter-developer only. The respondent-promoter is bound to adjust the said amount, if charged from the allottee with the dues payable by him or refund the amount if no dues are payable by him.

42. In the present complaint, the respondent has not charged any amount towards HVAT for the period of 01.04.2014 till 30.06.2017, however, vide letter of offer of possession dated 31.05.2019 has demanded lien

marked FD of Rs. 2,52,929/- towards future liability of HVAT for liability post 01.04.2014 till 30.06.2017. The complainant has made the lien marked FD in State Bank of India for an amount of Rs.2,52,929/- in favour of the respondent and the same is annexed as Annexure P6 at page 98 of complaint. In light of judgement stated above, the respondent shall not demand the same and the lien so marked be removed. Also, information about the same be also sent to the concerned bank by the respondent as well as complainant along with copy of this order.

G.IV Return the amount paid towards GST

43. **Relief sought by the complainant:** Direct the respondent to return entire amount paid as GST Tax by complainant between 01.07.2017 to 24.07.2019.

44. The complainant submitted that GST came into force on 01.07.2017 and the possession was supposed to be delivered by 14.06.2016. Therefore, the tax which came into existence after the due date of possession and this extra cost should not be levied on the complainant. On the other hand, the respondent denied that any amount towards GST is liable to be returned to the complainant and the demand towards GST are statutory demands which cannot be evaded.

45. The authority has decided this issue in the complaint bearing no. ***4031 of 2019*** titled as ***Varun Gupta V/s Emaar MGF Land Ltd.*** wherein the authority has held that for the projects where the due date of possession was prior to 01.07.2017 (date of coming into force of GST), the

respondent/promoter is not entitled to charge any amount towards GST from the complainant/allottee as the liability of that charge had not become due up to the due date of possession as per the buyer's agreements.

46. In the present complaint, the possession of the subject unit was required to be delivered by 14.06.2016 and the incidence of GST came into operation thereafter on 01.07.2017. So, the complainant cannot be burdened to discharge a liability which had accrued solely due to respondents' own fault in delivering timely possession of the subject unit. So, the respondent/promoter is not entitled to charge GST from the complainant/allottee as the liability of GST had not become due up to the due date of possession as per the said agreement as has been held by **Haryana Real Estate Appellate Tribunal, Chandigarh in appeal bearing no. 21 of 2019 titled as M/s Pivotal Infrastructure Pvt. Ltd. Vs. Prakash Chand Arohi**. The authority also concurs on this issue and holds that the difference between Post-GST and Pre-GST shall be borne by the promoter. The promoter is entitled to charge from the allottee the applicable combined rate of VAT and service tax fixed by the government.

G.V PLC

Relief sought by the complainant: Direct the respondent to return Rs.4,95,000/- for reducing the size of central greens from 8 acres to 1.22 acres.

47. With respect to the aforesaid reliefs sought by the complainant, the counsel for the complainant has not pressed the same at the time of arguments. Therefore, the authority has not deliberated on the aforesaid reliefs.

G.VI Compensation

Relief sought by the complainant: Direct the respondent to pay an amount of Rs.55,000/- to the complainant as cost of the present litigation.

48. Hon'ble Supreme Court of India, in case titled as ***M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP & Ors.*** (civil appeal nos. 6745-6749 of 2021, decided on 11.11.2021), has held that an allottee is entitled for claiming compensation under sections 12, 14, 18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. Therefore, the complainant is at liberty to approach the adjudicating officer for seeking compensation.

H. Directions of the authority

49. 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. 10.70% per annum for every month of delay on the amount paid by the complainant from due date of possession i.e. 14.06.2016 till 31.07.2019 i.e. expiry of 2 months from the date of offer of possession (31.05.2019). 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. Also, the amount of Rs.3,77,963/- so paid by the respondent towards compensation for delay in handing over possession shall be adjusted towards the delay possession charges to be paid by the respondent in terms of proviso to section 18(1) of the Act.

iii. The respondent shall deduct an amount of Rs.1,12,576/- from the total sale consideration on account of increase in sales consideration without any justification and double charging of IFMS.

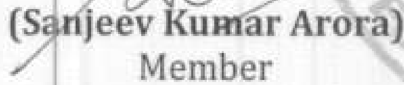
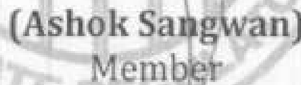
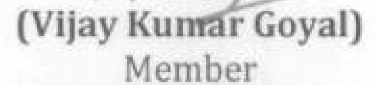
iv. The respondent cannot charge any HVAT from the allottees/ prospective buyers for the period 01.04.2014 to 30.06.2017 as the same was to be borne by the promoter-developer only. Therefore, the respondent shall not demand the same and the lien marked on FD in State Bank of India for an amount of Rs.2,52,929/- in favour of the respondent be removed. Information about the same be also sent to the concerned bank by the promoter as well as complainant along with copy of this order.

v. The respondent is not entitled to charge GST from the complainant as the liability of GST had not become due upto the due date of possession as per the agreement. The difference between Post-GST and Pre-GST shall be borne by the promoter. The promoter is entitled to charge from the allottee the applicable combined rate of VAT and service tax fixed by the government.

vi. The respondent shall not charge anything from the complainant which is not the part of the buyer's agreement.

50. Complaint stands disposed of.

51. File be consigned to registry.

(Sanjeev Kumar Arora) Member | (Ashok Sangwan) Member | (Vijay Kumar Goyal) Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 21.02.2023

HARERA
GURUGRAM