

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

Order reserved on : 08.02.2023

Order pronounced on : 12.04.2023

1. Mrs. Radha Bhakuni
2. Mrs. Sonika Uppal
Both RR/O: 901-902, 10th Floor,
Jasmine Tower Green Valley,
Sector 41-42, Faridabad, Haryana -121010

Complainants

Versus

Emaar India Limited
(Formerly known as Emaar MGF Land Ltd.)
Address: 306-308, Square One, C-2,
District Centre, Saket, New Delhi-110017

Respondent

CORAM:

Shri Ashok Sangwan

Member

APPEARANCE:

Shri Rajan Gupta

Counsel for the complainants

Shri Ishaan Dang

Counsel for the respondent

HARERA
ORDER
GURUGRAM

1. The present complaint has been filed by the complainants/allottees 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 complainants, 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	Emerald Floors Premier, Sector 65, Gurugram, Haryana
2.	Unit no.	EFP-22-0302, 3 rd floor measuring 1975 sq. ft. [page 28 of complaint]
3.	Provisional allotment letter dated	27.10.2009 [page 41 of reply]
4.	Date of execution of buyer's agreement	09.02.2010 [page 67 of reply]
5.	Agreement to sell between the original allottee and the complainants	20.09.2012 [page 124 of reply]
6.	Nomination letter in favour of the complainants	27.09.2012 [page 132 of reply]
7.	Possession clause	11. POSSESSION (a) Time of handing over the Possession <i>Subject to terms of this clause and subject to the Allottee(s) having complied with all the terms and conditions of this Buyer's Agreement, and not being in default under any of the provisions of this Buyer's Agreement and compliance</i>



		<p>with all provisions, formalities, documentation etc., as prescribed by the Company, the Company proposes to hand over the possession of the Unit within 36 months from the date of execution of Buyer's Agreement. The Allottee(s) agrees and understands that the Company shall be entitled to a grace period of three months, for applying and obtaining the completion certificate / occupation certificate in respect of the Unit and/or the Project.</p> <p>(Emphasis supplied) [Page 41 of reply]</p>
8.	Due date of possession	09.02.2013 [Note: Grace period is not included]
9.	Total consideration as per statement of account dated 14.08.2020 at page 61- 63 of reply	Rs. 88,13,016/-
10.	Total amount paid by the complainants as per statement of account dated 14.08.2020 at page 61-63 of reply	Rs. 92,29,288/-
11.	Occupation certificate	05.03.2019 [page 27 of reply]
12.	Offer of possession	17.01.2020 [page 106 of complaint]
13.	Delay compensation already paid by the respondent in terms of the buyer's agreement as per SOA dated 14.08.2020, page 62 of reply	Rs.7,63,595/-



B. Facts of the complaint

3. The complainants have made the following submissions in the complaint:
- i. That the respondent had launched group housing colony known as "Emerald Floors Premier" in Sector-65, Gurugram-Haryana in the year 2008. One Mr. Ashutosh Setia, booked residential apartment in the above-mentioned project and the respondent allotted one flat bearing no. EFP-22-0302, on 3rd floor, super area admeasuring 1975 sq. ft. in "Emerald Floors Premier" in Sector-65, Gurugram, Haryana. That the total sale consideration of the said property was Rs. 82,62,525/-.
 - ii. That a buyer's agreement dated 09.02.2010 was also executed between the respondent and Mr. Ashutosh Setia. On 17.09.2012, the said property was endorsed in the name of complainants i.e., Mrs. Radha Bhakuni & Mrs. Sonika Uppal.
 - iii. That as per clause 11 (a) of buyer's agreement, the offer of the possession of the said unit was to be given in 36 months with grace period of 3 months from the date of execution of buyer's agreement i.e., by 08.05.2013 but the respondent failed to deliver the possession as promised.
 - iv. That complainants have already made payment of Rs. 84,88,400/- as per the demand raised by the respondent but the respondent failed to deliver the possession as promised in the Buyer agreement. However, it is pertinent to mention here that now the possession of the said unit has been offered by the respondent on 17.01.2020 and is to be taken by the complainants in due course.



- v. That the complainants have gone through immense mental agony, stress and harassment because of this huge delay on the part of respondent in handing-over the possession of the apartment. The complainants had also written an email dated 06.02.2020 to the respondent and asked to pay delayed possession charges at the same rate of interest i.e. 24 % p.a. which the respondent is charging from the complainants in case of delay payment on the part of payment default by the complainants. However, the respondent refused to listen to the legitimate demand of the complainants and informed to pay the delayed possession charges at the rate of Rs.5/- per sq. ft. per month only which comes to be less than 1%, and the said act and conduct on the part of respondent is arbitrary, illegal and against the principle of natural justice and the RERA Act.
- vi. That since the respondent failed to fulfil its promise to deliver the project on 08.05.2013, the complainants are entitled to just compensation and interest for every month of delay @ 24% p.a. w.e.f. 08.05.2013 till actual offer of possession.

C. Relief sought by the complainants:

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

- i. Direct the respondent to pay just compensation and interest for every month of delay @ 24% p.a. w.e.f. 08.05.2013 till actual offer of possession.
- ii. Direct the respondent to pay cost of the proceedings.
- iii. To pass such other order/direction/relief as deemed fit and proper in the facts and circumstances of the present case.



5. On the date of hearing, the authority explained to the respondent/promoter about the contraventions as alleged to have been committed in relation to section 11(4)(a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent

6. The respondent has contested the complaint on the following grounds.
- i. That the present complaint is not maintainable in law or on facts. It is submitted that the present complaint is not maintainable before this Hon'ble Authority. The complainants have filed the present complaint seeking interest on account of alleged delay in delivery of possession of the unit booked by the complainants. It is respectfully submitted that complaints pertaining to penalty, compensation and interest are to be decided by the adjudicating officer under section 71 of the Act read with rule 29 of the rules, 2017 and not by this Hon'ble Authority. The present complaint is liable to be dismissed on this ground alone. Moreover, the adjudicating officer derives his jurisdiction from the central act and the same cannot be negated by the rules and regulations made thereunder.
 - ii. That Mr. Ashutosh Setia (hereinafter "original allottee") had approached the respondent sometime in the year 2009 for purchase of a unit in its upcoming residential project "Emerald Floors Premier" (hereinafter "the project") situated in Emerald Estate, Sector 65, Gurugram. It is submitted that the original allottee prior to approaching the respondent, had conducted extensive and independent enquiries regarding the project and it was only after the original allottee was fully satisfied with



regard to all aspects of the project, including but not limited to the capacity of the respondent to undertake development of the same, that the original allottee took an independent and informed decision to purchase the unit, un-influenced in any manner by the respondent.

- iii. That thereafter the original allottee vide application form dated 05.10.2009 applied to the respondent for provisional allotment of a unit in the project. The original allottee, in pursuance of the aforesaid application form, was allotted an independent unit bearing no. EFP-22-0302, located on the 3rd Floor, in the project vide provisional allotment letter dated 27.10.2009. The original allottee 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 the original allottee shall remit every installment on time as per the payment schedule. The respondent had no reason to suspect the bona fide of the original allottee at the time.
- iv. That the original allottee was irregular regarding the remittance of installments on time. The respondent was compelled to issue demand notices, reminders etc. calling upon the original allottee to make payment of outstanding amounts payable by him under the payment plan/instalment plan opted by him. Payment requests/ reminders/notices had been got sent to the original allottee 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. Statement of account dated 14.08.2020 as maintained by the respondent in due course of its business reflects the delay in remittance of various instalments on the part of the original allottee.

- v. That the buyer's agreement dated 09.02.2010 was executed between the original allottee and the respondent. It is pertinent to mention that clause 13 of the buyer's agreement 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 certificate or any other permission/sanction from the competent authorities, no compensation or any other compensation shall be payable to the allottees. As delineated hereinabove, the Original allottee, having defaulted in timely remittance of instalment, was thus not entitled to any compensation or any amount towards interest as an indemnification for delay, if any, under the buyer's agreement.
- vi. That the complainants approached the original allottee for purchasing his rights and title in the unit in question. The original allottee acceded to the request of the complainants and agreed to transfer and convey his rights, entitlement and title in the unit in question to the complainants for a valuable sale consideration of Rs. 82,65,525/-. Agreement to sell dated



20.09.2012 was executed between the original allottee and the complainants.

- vii. That the complainants on executing the aforesaid agreement to sell had approached the respondent requesting it to endorse the provisional allotment of the unit in question in their name. The complainants had further executed an affidavit dated 17.09.2012 and an indemnity cum undertaking dated 17.09.2012 whereby the complainants had consciously and voluntarily declared and affirmed that they would be bound by all the terms and conditions of the provisional allotment in favour of the original allottee. It was further declared by the complainants that they, having been substituted in the place of the original allottee in respect of the provisional allotment of the unit in question, were not entitled to any compensation for delay, if any, in delivery of possession of the unit in question or any rebate under a scheme or otherwise or any other discount, by whatever name called, from the respondent. The complainants are conscious and aware of the fact that they are not entitled to any right or claim against the respondent.
- viii. That moreover, the respondent had intimated the complainants regarding the delay in remittance of the instalments by the original allottee and his, consequent, disentitlement from claiming any compensation under the buyer's agreement. The complainants were categorically informed that no compensation or interest or any other amount would be liable to be paid to the complainants on account of delay, if any, in delivery of possession of the unit in question. The complainants



had assured the respondent that they would not stake any claim in respect of delay in delivery of possession of the unit in question. The respondent, relying upon the deliberate representations of the complainants, proceeded to endorse the unit in question in their favor. The complainants have intentionally distorted the real and true facts and have filed the present complaint in order to harass the respondent and mount undue pressure upon it. It is submitted that the filing of the present complaint is nothing but an abuse of the process of law.

- ix. That the complainants were stepping into the shoes of the original allottee and therefore, all the rights and liabilities of the original allottee were transferred to the complainants. As has been delineated hereinabove, the original allottee was not entitled to any compensation or any interest for delay, if any, in offering possession of the unit in terms of the buyer's agreement on account of default of terms and conditions thereof by them. Thus, the complainants are estopped from advancing claims in contradiction and derogation of the rights and liabilities transferred to them from the original allottee.
- x. That the complainants too had defaulted in timely remittance of the instalments which was an essential and indispensable requirement of the buyer's agreement. Payment requests/reminders had been got sent to the complainants 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 them to



timely discharge their outstanding financial liability but to no avail. Statement of account dated 14.08.2020 correctly maintained by the respondent in due course of its business reflects the delay in remittance of various instalments by the complainants.

- xi. That the provisions of the Act are not retrospective in nature. The provisions of the Act cannot undo or modify the terms of an agreement duly executed prior to coming into effect of the Act. It is further submitted that merely because the Act applies to ongoing projects which are registered with the authority, the Act cannot be said to be operating retrospectively. The provisions of the Act relied upon by the complainants for seeking interest cannot be called in to aid, in derogation and ignorance of the provisions of the buyer's agreement. The interest is compensatory in nature and cannot be granted in derogation and ignorance of the provisions of the buyer's agreement. The interest for the alleged delay demanded by the complainants is beyond the scope of the buyer's agreement. The complainants cannot demand any interest or compensation beyond the terms and conditions incorporated in the buyer's agreement.

- xii. That the project has got delayed on account of the following reasons which were/are beyond the power and control of the respondent and hence the respondent cannot be held responsible for the same:

Firstly, The National Building Code (NBC) was revised in the year 2016, and in terms of the same, all high-rise buildings (i.e.,



buildings having a height of 15 meters and above), irrespective of the area of each floor, are now required to have two staircases. Furthermore, it was notified vide Gazette published on 15.03.2017 that the provisions of NBC 2016 supersedes those of NBC 2005. Notification dated 15.03.2017. In view of the practical difficulties in constructing a second staircase in a building that already stands constructed according to duly approved plans, the respondent made several representations to various Government Authorities requesting that the requirement of a second staircase in such cases be dispensed with. Eventually, the respondent took the decision to go ahead and construct the second staircase. The construction of the second staircase has been completed and thereafter, possession of the apartment has been offered to the complainants.

Secondly, the defaults on the part of the contractor M/s B L Kashyap and Sons (BLK/Contractor). The contractor was not able to meet the agreed timelines for construction of the project. The progress of work at the project site was extremely slow on account of various defaults on the part of the contractor, such as failure to deploy adequate manpower, shortage of materials etc. in this regard, the respondent made several requests to the contractor to expedite progress of the work at the project site. However, the contractor did not adhere to the said requests and the work at the site came to a standstill.



- xiii. That the construction of the tower in which the unit in question is situate is complete and the respondent had applied for occupation certificate in respect of the same on 29.06.2017. It is respectfully submitted that the grant of occupation certificate is the prerogative of the concerned statutory authority and the respondent does not exercise any control or influence over the same. Therefore, time period utilised by the concerned statutory authority in granting the occupation certificate to the respondent is necessarily required to be excluded from computation of time period utilised for implementation of the project.
- xiv. That the complainants were offered possession of the unit in question through letter of offer of possession dated 17.01.2020. The complainants were called upon to remit balance payment including delayed payment charges and to complete the necessary formalities/documentation necessary for handover of the unit in question to the complainants. However, the complainants approached the respondent with request for payment of compensation for the alleged delay in utter disregard of the terms and conditions of the buyer's agreement. The respondent explained to the complainants that they were not entitled to any compensation in terms of the buyer's agreement on account of defaults in timely remittance of instalments as per schedule of payment incorporated in the buyer's agreement. However, the complainants threatened the respondent with institution of unwarranted litigation. The instant complaint has been preferred by the complainants in



order to obtain wrongful gain and cause wrongful loss to the respondent. In any case, the respondent in order to avoid any unwarranted controversy had proceeded to credit an amount of Rs. 7,63,595/- to the account of the complainants as a gesture of goodwill. The complainants have accepted the said amount in full and final satisfaction of their alleged grievances. The instant complaint is nothing but an abuse of process of law.

- xv. That the complainants had executed an indemnity cum undertaking for possession of the unit in question on 05.02.2020. However, they have wilfully refrained from obtaining possession despite receipt of the offer of possession. The complainants have consciously and maliciously ignored the letter of offer of possession referred to above.
- xvi. That several allottees, including the complainants 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. There is no default or lapse on the part of the respondent and there is no equity in favour of the



complainants. It is evident from the entire sequence of events, that no illegality can be attributed to the respondent. The allegations levelled by the complainants 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

5. The preliminary objection raised by the respondent regarding jurisdiction of the authority to entertain the present complaint stands rejected. 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

6. 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

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

Section 11(4)(a)

Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all



the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

The provision of assured returns is part of the builder buyer's agreement, as per clause 15 of the BBA dated..... Accordingly, the promoter is responsible for all obligations/responsibilities and functions including payment of assured returns as provided in Builder Buyer's Agreement.

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.

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

F. Findings on the objections raised by the respondent:

F.I Objection regarding jurisdiction of authority w.r.t. buyer's agreement executed prior to coming into force of the Act

9. One of the contentions of the respondent is that the authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the buyer's agreement executed between the parties. 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.
10. The authority is of the view that the Act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules



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

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

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

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

"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi



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

12. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the buyer's 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.

G. Findings on the relief sought by the complainants:

G. I Delay possession charges

13. **Relief sought by the complainants:** Direct the respondent to pay just compensation and interest for every month of delay @ 24% p.a. w.e.f. 08.05.2013 till actual offer of possession.
14. In the present complaint, the complainants intend to continue with the project and are seeking delay possession charges as provided under the proviso to section 18(1) of the Act. 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."

15. **Due date of possession and admissibility of grace period:** Clause 11(a) of the buyer's agreement provides for time period for handing over of possession and is reproduced below:

11. POSSESSION

(a) Time of handing over the Possession

*Subject to terms of this clause and subject to the Allottee(s) having complied with all the terms and conditions of this Buyer's Agreement, and not being in default under any of the provisions of this Buyer's Agreement and compliance with all provisions, formalities, documentation etc., as prescribed by the Company, the Company proposes to hand over the possession of the Unit **within 36 months from the date of execution of Buyer's Agreement.** The Allottee(s) agrees and understands that the Company shall be entitled to a **grace period of three months, for applying and obtaining the completion certificate / occupation certificate in respect of the Unit and/or the Project.** (Emphasis supplied)*

16. The promoter has proposed to hand over the possession of the said unit within 36 months from the date of execution of buyer's agreement and it is further provided in agreement that promoter shall be entitled to a grace period of 3 months for applying and obtaining completion certificate/ occupation certificate in respect of said unit and/or project. The period of 36 months expired on 09.02.2013. As a matter of fact, the promoter has not applied to the concerned authority for obtaining



occupation certificate within the time limit prescribed by the promoter in the buyer's agreement. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 3 months cannot be allowed to the promoter at this stage. Therefore, the due date of possession comes out to be 09.02.2013.

17. Entitlement of delay possession charges to the complainants being subsequent allottee w.e.f. due date of handing over possession or w.e.f. the date of nomination letter/endorsement -

18. The counsel for the complainants states that the original allottee had booked a unit with the respondent on 27.10.2009 and subsequently the present allottee was endorsed on 17.09.2012. The buyer's agreement was signed on 09.02.2010 with the original allottee. In terms of the buyer's agreement, the due date for handing over of possession was 09.02.2013 (the due date is inadvertently recorded wrong '08.05.2013' in the proceedings dated 08.02.2023 and the same is being rectified vide present order under section 39 of the Act being clerical in nature) and the offer of possession was made on 17.01.2020. The counsel for the complainants' states that issues in the present complaint have been squarely covered under the orders dated 12.08.2021 in CR No.4031 of 2019 in case titled as Varun Gupta Versus Emaar MGF Land Ltd.

19. The counsel for the respondent points out an affidavit signed by the present complainants wherein under para no.2 of the same, it has been expressly provided that they shall not be entitled to any compensation for delay in handing over of possession or any rebate under a scheme or otherwise. Further, an indemnity-cum-undertaking was filed by the complainants where under para-No.2 of the same, these facts have



been reiterated. The complainants are bound by the terms of the contract. Citations in favour of the arguments have been placed on record.

20. The counsel for the complainants rebuts the arguments and states that the issues raised by the counsel for the respondent have been adequately covered under the judgments cited by him i.e. Varun Gupta Versus Emaar MGF Land Ltd.
21. The authority observes that the issue w.r.t. the entitlement of delay possession charges to the allottees being subsequent allottees is concerned despite the execution of indemnity-cum-undertaking/affidavit, the authority has exhaustively decided the said issue in **CR no. 4031 of 2019 titled as Varun Gupta Vs. Emaar MGF Land Ltd.** wherein it has been held that where the subsequent allottee has stepped into the shoes of the original allottee before the due date of handing over possession as per the buyer's agreement, the delayed possession charges shall be granted w.e.f. due date of handing over possession as per the builder buyer's agreement. The relevant para is reproduced as under:

'59. Therefore, keeping in view the aforesaid principles of law and arguments advanced by both the parties, the authority is of the view that four bifurcations can be made in respect to entitlement for delay possession charges to the subsequent allottee which are as follows:

a. Where the subsequent allottee had stepped into the shoes of original allottee before the due date of handing over possession:

.....So, the authority is of the view that in cases where the subsequent allottee had stepped into the shoes of original allottee before the due date of handing over possession, the delayed possession charges shall be granted w.e.f. due date of handing over possession.

.....

71. The authority holds that irrespective of the execution of the affidavit/undertaking by the subsequent allottee/re-allottee at the time of endorsement (transfer) of his name as an allottee in place of the original allottee in the record of the promoter does not disentitle him



from claiming the delay possession charges in case there occurs any delay in delivering the possession of the unit beyond the due date of delivery of possession as promised even after executing an indemnity-cum-undertaking.'

22. The authority observes that in the present complaint, the subject unit has been endorsed in favour of the complainants vide nomination letter dated 27.09.2012 i.e. prior to the due date of handing over possession (09.02.2013) as per the buyer's agreement. Therefore, in furtherance of *Varun Gupta Vs. Emaar MGF Land Ltd. (supra)*, the complainants are entitled to delay possession charges w.e.f., the due date of possession i.e., 09.02.2013.

23. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges at 24% p.a. 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.

24. 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.

25. 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., 12.04.2023 is 8.70%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.70%.

26. **Rate of interest to be paid by the complainants 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;"

27. Therefore, interest on the delay payments from the complainants 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 complainants in case of delayed possession charges.

28. 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 11(a) of the buyer's agreement executed between the parties on 09.02.2010, the possession of the subject unit to hand over within 36 months from the date of execution of buyer's agreement i.e., 09.02.2010. Therefore, the due date of handing over possession comes out to be 09.02.2013. Occupation certificate was granted by the concerned authority on 05.03.2019 and thereafter, the possession of the subject unit was offered to the complainants on 17.01.2020. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the complainants as per the terms and conditions of the buyer's agreement dated 09.02.2010 executed between the parties.

29. 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 05.03.2019. However, the respondent offered the possession of the unit in question to the complainants only on 17.01.2020, so it can be said that the complainants came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, 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 complainants keeping in mind that even after intimation of possession practically they have to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to 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. 09.02.2013 till the expiry of 2 months from the date of offer of possession (17.01.2020) which comes out to be 17.03.2020.

30. As the possession has already been offered to the complainants on 17.01.2020 after receipt of occupation certificate dated 05.03.2019 and fact being that the complainants have paid more than the total sale consideration i.e. Rs. 92,29,288/- against the total sale consideration of Rs. 88,13,017/- as per statement of account dated 14.08.2020, the respondent is directed to handover possession of the subject unit to the complainants within 30 days from the date of this order and both the parties shall participate towards execution of the conveyance deed as per provisions of section 17 of the Act.
31. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainants are entitled to delay possession charges at prescribed rate of the interest @ 10.70 % p.a. w.e.f. 09.02.2013 till 17.03.2020 as per provisions of section 18(1) of the Act read with rule 15 of the rules.

G. II Compensation

32. **Relief sought by the complainants:** Direct the respondent to pay cost of the proceedings.
33. The complainants in the aforesaid relief are seeking relief w.r.t compensation. Hon'ble Supreme Court of India in civil appeal nos. 6745-6749 of 2021 titled as *M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP & Ors.* (Decided on 11.11.2021), has held that an allottee is entitled to claim 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. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation. Therefore, the complainants are advised to approach the adjudicating officer for seeking the relief of compensation.

H. Directions of the authority

34. Hence, the authority hereby passes this order and issue 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 handover possession of the subject unit to the complainants within 30 days from the date of this order and both the parties shall participate towards execution of the conveyance deed as per provisions of section 17 of the Act.
- ii. 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 complainants from due date of possession i.e., 09.02.2013 till 17.03.2020 i.e., expiry of 2 months from the date of offer of possession (17.01.2020). The arrears of interest accrued so far shall be paid to the complainants within 90 days from the date of this order as per rule 16(2) of the rules.
- iii. The respondent shall not charge anything from the complainants which is not part of the buyer's agreement. However, holding charges shall not be charged by the promoter at any point of time



**HARERA
GURUGRAM**

Complaint no. 2914 of 2020

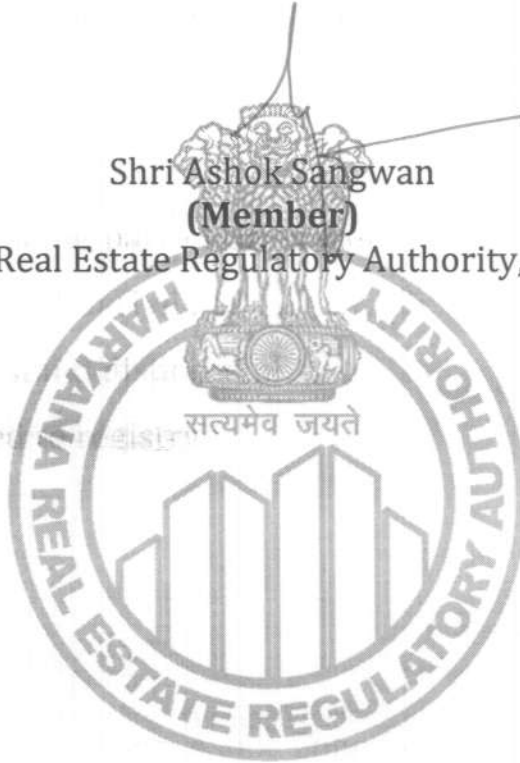
even after being part of agreement as per law settled by hon'ble
Supreme Court in civil appeal nos. 3864-3899/2020.

35. The complaints stand disposed of.
36. File be consigned to registry.

Shri Ashok Sangwan
(Member)

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 12.04.2023



**HARERA
GURUGRAM**