

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

Order reserved on : 08.12.2022
Order pronounced on : 07.04.2023

NAME OF THE BUILDER
PROJECT NAME

EMAAR INDIA LIMITED,
PREMIER TERRACES AT THE PALM DRIVE

S. No.	Case No.
1	CR/4839/2021
2	CR/4773/2021

Case title

Rohit Balyan
V/S

Emaar India Limited

Rohit Balyan and Abhinav Balyan
V/S

Emaar India Limited

CORAM:

Shri Ashok Sangwan
Shri Sanjeev Kumar Arora

Member
Member

APPEARANCE:

Shri K.K. Kohli

Shri Dhruv Rohatgi

Counsel for the complainant

Counsel for the respondent

ORDER

1. This order shall dispose both complaints titled as above filed before this authority under section 31 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred as "the Act") read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (hereinafter referred as "the rules") since the core issues emanating from these complaints are similar in nature and the complainants in the above referred matters are allottee of Palm Studio in the project Palm Drive, Sector 66, Gurugram, Haryana being

developed by the same respondent. The terms and conditions of the buyers' agreement that had been executed between the parties *inter se* are also almost similar with some additions or variation. The fulcrum of the issue involved in both these complaints pertain to failure on the part of the respondent/promoter to deliver timely possession of the units in question, seeking return of the amount paid by the allottee along with interest at the prescribed rate as per section 18 of the Act and other charges demanded at the time of offer of possession.

2. Both the aforesaid complaints were filed under section 31 of the Act read with rule 28 of the rules by the complainants-allottee against the respondents on account of violation of the buyer's agreement executed between the parties *inter se* in respect of said units for not handing over possession by the due date which is an obligation on the part of the promoter under section 11(4)(a) of the Act *ibid* apart from contractual obligation. Since, the buyer's agreements have been executed prior to the commencement of the Act *ibid*, therefore, the penal proceedings cannot be initiated retrospectively for violation of provisions of section 11(4)(a) of the Act.
3. The details of the complaints, reply status, unit no., date of agreement, possession clause, due date of possession, total sale consideration, total paid amount, and relief sought are given in the table below:

Project name and location	"Palm Studio in The Palm Drive", Sector 66, Gurugram, Haryana.*
Possession Clause: -	
14. POSSESSION	
(a) Time of handing over the Possession	
<i>Subject to terms of this clause and the Allottee(s) having complied with all the terms</i>	

*and conditions of this Agreement, and not being in default under any of the provisions of this Agreement and upon complying with all provisions, formalities, documentation etc., as prescribed by the Developer, the Developer proposes to hand over the possession of the Unit **within 30 months from the date of allotment**. The Allottee(s) agrees and understands that the Developer shall be entitled to a **grace period of ninety (90) days, for applying and obtaining the occupation certificate in respect of the Complex.***

(Emphasis supplied)

S.no.	Complaint No. & Case Title	CR/4839/2021 Rohit Balyan Vs. Emaar India Ltd.	CR/4773/2021 Rohit Balyan and Abhinav Balyan Vs. Emaar India Ltd.
1.	Complaint filed on	13.12.2021	13.12.2021
2.	Reply filed on	22.02.2022	22.02.2022
3.	Provisional allotment letter	09.08.2009 [page 54 of reply]	27.10.2009 [page 56 of reply]
4.	Unit no. and unit size	TPD SA-F06-01, 6 th floor measuring 1125 sq. ft. [page 54 of reply]	TPD SA-F04-07, 4 th floor measuring 1200 sq. ft.* [page 50 of complaint]
5.	Date of execution of buyer's agreement	31.08.2010 [page 57 of reply]	28.05.2010* [page 85 of reply]
6.	Agreement to sell between the original/ previous allottee and the complainant	01.02.2012 [page 131 of reply]	18.11.2011 [page 144 of reply]
7.	Nomination letter issued in favour of the complainant	04.02.2012 [page 145 of reply]	29.11.2011 [page 162 of reply]



8.	Due date of possession as per clause 14(a) of the buyer's agreement	09.02.2012 (Note: 30 months from date of allotment i.e., 09.08.2009 and grace period is not included)	27.04.2012 (Note: 30 months from date of allotment i.e., 27.10.2009 and grace period is not included)
9.	Total sale consideration	₹ 54,03,445/-	₹ 54,34,619/-
10.	Amount paid by the complainant	₹ 55,44,192/-	₹ 56,25,862/-
11.	Occupation certificate	13.02.2017 [page 174 of reply]	13.02.2017 [page 164 of reply]
12.	Offer of possession	28.04.2017 [page 176 of reply]	20.04.2017 [page 166 of reply]
13.	Unit handover letter	25.08.2018 [page 185 of reply]	25.07.2017 [page 174 of reply]
14.	Conveyance deed executed on	08.01.2019 [page 189 of reply]	10.11.2017 [page 177 of reply]
15.	Delay compensation paid by the respondent in terms of the buyer's agreement as per statement of account	₹ 1,70,800/-	Not paid

16.	Relief sought	1. DPC 2. Refund following charges <ul style="list-style-type: none"> • Gas connection charges • Electrification charges • Club charges • Advance maintenance charges • HVAT 	1. DPC 2. Refund following charges <ul style="list-style-type: none"> • Gas connection charges • Electrification charges • Club charges • Advance maintenance charges • HVAT
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Note: The * marked were inadvertently recorded wrong in the proceedings dated 08.12.2022 and the same are being rectified vide present order under section 39 of the Act being clerical in nature.

4. The facts of both the complaints filed by the complainant/allottee(s) are also similar. So, out of the above-mentioned case, the facts of the lead case bearing no. **CR/4839/2021 case titled as Rohit Balyan Vs. Emaar India Limited** are being taken into consideration for determining the rights of the allottee(s) qua delay possession charges and other reliefs sought by the complainant in the abovementioned complaints.

A. Project and unit related details

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

Sr. No.	Particulars	Details
1.	Name of the project	Palm Studio in the project Palm Drive, Sector 66, Gurugram, Haryana
2.	Unit no.	TPD SA-F06-01, 6 th floor measuring 1125 sq. ft [page 54 of reply]



3.	Provisional allotment letter dated	09.08.2009 [page 54 of reply]
4.	Date of execution of buyer's agreement	31.08.2010 [page 57 of reply]
5.	Agreement to sell between the original allottee and the subsequent allottee	09.07.2010 [page 117 of reply]
6.	Agreement to sell between the subsequent allottee and the complainant	01.02.2012 [page 131 of reply]
7.	Nomination letter in favour of the complainant	04.02.2012 [page 145 of reply]
8.	Possession clause	14. POSSESSION (a) Time of handing over the Possession <i>Subject to terms of this clause and the Allottee(s) 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 upon complying with all provisions, formalities, documentation etc., as prescribed by the Developer, the Developer proposes to hand over the possession of the Unit within 30 months from the date of allotment. The Allottee(s) agrees and understands that the Developer shall be entitled to a grace period of ninety (90) days, for applying and obtaining the occupation certificate in respect of the Complex.</i> (Emphasis supplied) [Page 77 of reply]
9.	Due date of possession	09.02.2012 [Note: Grace period is not included]



10.	Total consideration as per statement of account dated 12.01.2022 at page 170 of reply	Rs.54,03,445/-
11.	Total amount paid by the complainant as per statement of account dated 12.01.2022 at page 171 of reply	Rs.55,44,192/-
12.	Occupation certificate	13.02.2017 [page 174 of reply]
13.	Offer of possession	28.04.2017 [page 176 of reply]
14.	Unit hand over letter	25.08.2018 [page 185 of reply]
15.	Conveyance deed execute on	08.01.2019 [page 189 of reply]

B. Facts of the complaint

6. The complainant has made the following submissions in the complaint:
- That the complainant is the second buyer who has bought the unit from the original allottee and hence fall within the definition of allottee under section 2(d) of the Act. The original allottee got provisionally allotted unit no. 601 in the said project and made a payment of Rs.5,00,000/- towards the booking amount. Thereafter, the buyer's agreement was executed with the original allottee on 31.08.2010 for a total consideration of Rs.48,40,091/-. According to clause 14(a) of the buyer's agreement, the possession was required to be delivered within 30 months from the date of allotment i.e., on or before January 2012.

- ii. That a sale agreement was executed between the original allottee and the complainant. The respondent vide email dated 04.02.2012 confirmed that the nomination formalities in respect of unit no. 601 which stood completed on 04.02.2012 and the unit was transferred to the complainant. Further, the respondent company confirmed the receipt of Rs. 39,07,686/- towards the unit till the said date.
- iii. That the complainant issued an email dated 05.03.2013 and 05.08.2013 to the respondent raising the grievances regarding the transparency of the promoter as the promoter had failed to provide timely updates on the construction of the unit. The complainant in the mail further questioned the intention for the promoter not issuing timely updates regarding the construction of the unit allotted to him.
- iv. That the respondent vide offer of possession letter dated 28.04.2017 offered possession of the said unit to the complainant after a delay of more than 5 years. The complainant vide the letter, was informed for the first time that the captioned unit area stood revised from 1125 sq. ft. to 1175.06 sq. ft. and accordingly more payment was sought from the complainant. A further demand of Rs. 14,50,472/- was raised from the complainant which was completely unjustified as no prior information about the increase in captioned unit area was conveyed to the complainant. Further, the respondent raised an illegal demand of Rs.1,110/- towards the common area electricity charges for the month of June 2017 vide electricity bill dated 26.07.2017.

- v. That the complainant vide email dated 02.11.2017 requested the respondent to arrange a visit to the unit but the respondent failed to arrange the same in time. The lackadaisical approach of the respondent caused immense hardship to the complainant, not only in delivery of possession and other aspects of their service as well.
- vi. That the complainant sought payment for delayed possession charges as per the agreement vide email dated 12.11.2017. However, the respondent company has not provided any response to the same till date.
- vii. That after having taken the possession for the unit, the complainant vide email dated 20.04.2018 sought clarification from the respondent on the precondition of the delivery of stamp papers for the conveyance deed to take possession of his apartment. Further, emails were sent by the complainant on 27.04.2018 and 28.04.2018 trying to convince the respondent to allow him to buy the stamp papers on a later date along with any indemnity amount payable to the respondent company on account of any loss thereto. However, the complainant was forced to buy the stamp papers for the conveyance deed immediately as a precondition to take the handover while he had made multiple requests to the respondent. The complainant vide email dated 14.08.2018 conveyed to the respondent that he had finally been forced to adhere to the demand and had to arrange the hefty sum on an immediate basis as his possession was put in jeopardy. For the same, the complainant had to pay the registration and administrative charges amounting to Rs. 29,501/- which was also

- exorbitant. The respondent after a delay of more than 5 years handed over the said unit to the complainant after taking more than 100% of the payments from the complainant.
- viii. That the respondent provided false and incorrect statements in respect of said unit and said project and the complainant has thereby lost his hard-earned money facing humiliation and harassment, physical as well as mental in the hands of respondent(s) and therefore the respondent is liable to compensate the losses caused to the complainant due to the fraudulent and unfair trade practice on the part of respondent as per section 12 of the Act and rules thereunder.
- ix. That the respondent acted in a very deficient, unfair, wrongful, fraudulent manner by allotting the said unit to the complainant. Respondent is, therefore, liable to pay the damages and compensation for the monetary loss and harassment suffered by the complainant due to the aforesaid illegal and wrongful acts of respondent.
- x. That the respondent is guilty of deficiency in service, unfair trade practice, giving incorrect and false statement while selling the said unit to the complainant within the purview of provisions of the Act, 2016 and applicable rules. The complainant has suffered losses on account of deficiency in service, unfair trade practice, giving incorrect and false statement.
- xi. That the inordinate delay on part of the respondent in delivering the possession in violation of the terms of the buyer's agreement amounts to deficiency in the services offered by the respondent. That as per section 18 of the Act, the respondent is

liable to pay interest to the allottees of an apartment, building or project for a delay or failure in handing over of possession as per the terms and agreement of the sale. The complainant is therefore entitled for interest for the delayed period till the actual proper handover of the unit which the complainant is entitled to as per the provisions of the Act.

- xii. That under the composition scheme, the department has allowed the taxpayer to pay lump sum tax @ 1% of total turnover instead of going into the complications of taking input credits on purchases and other deductions and then paying taxes as applicable on goods transferred. It is very well known that when a composition scheme is opted by the taxable person, then no other input tax credits or deductions are allowed to that person and moreover, the respondent cannot charge tax from its customers. The complainant submitted that under the composition scheme, the developer is prohibited from collecting any amount by way of tax under the Act from the complainant.
- xiii. That the respondent has stated at Annexure I of the offer of possession that 12 months of advance maintenance charges @ Rs.3 per sq. Ft. Plus ST @ 15% for 12 months amounting to Rs. 53,318/- for a period from 01.06.2017 to 31.05.2018 without having handed over the possession of the unit to the complainant. That a demand for annual maintenance charges which were executed in advance from the complainant. The maintenance has to be charged on incurred basis and not in anticipation. This makes the act by the respondent illegal enrichment.

- xiv. That the respondent has made unjust demands on account of electrification charges, gas connection charges and club membership charges. Hence, the offer of possession is not a valid offer of possession. The Hon'ble Authority in the matter of complaint no.3989 of 2019 titled as Richa Rana and Anr. Vs. Emaar MGF Land Ltd. Vide its order dated 12.08.2021, it was held that the promoter cannot charge electrification charges from the allottee while issuing offer of possession. The respondent should be directed to withdraw the demand from the offer of possession and remit the charges back to the complainant.
- xv. That the complainant aggrieved by the unfair trade practices of the respondent, the complainant has been constrained to file the present complaint.

C. Relief sought by the complainant:

7. The complainant has sought following relief(s):
- i. Direct the respondent to pay interest at the prescribed rate for every month of delay from the due date of possession till the date of actual possession in accordance with rule 15 of the Rules 2017.
 - ii. Direct the respondent to return the following charges such as Gas connection charges, Electrification charges, Club charges, Advance common maintenance charges, and HVAT through intimation of possession.
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 instant complaint is barred by limitation. The complainant has alleged that the respondent was obligated to offer possession of the unit in question by July, 2012 and by way of the instant complaint have sought interest for indemnifying them for the alleged delay in delivery of the unit in question. It is submitted that cause of action, if any, for seeking interest accrued in favour of the complainant in 2013 and consequently the instant complaint is barred by limitation. It is also submitted that the present complaint has been filed only to harass the respondent.
- ii. That the complainant is not an "allottee" but an investor who has booked the apartment in question as a speculative investment in order to earn rental income/profit from its resale. The apartment in question has been booked by the complainant as a speculative investment and not for the purpose of self-use as his residence. Therefore, no equity lies in favour of the complainant.
- iii. That the original allottee approached the respondent and expressed interest in booking of an apartment in the residential group housing colony developed by respondent known as "Palm Drive" situated in Sector 66, Tehsil & District Gurgaon. Prior to the booking, the original allottee/complainant conducted extensive and independent enquiries

with regard to the project, only after being fully satisfied on all aspects, that they took an independent and informed decision, uninfluenced in any manner by the respondent, to book the unit in question.

- iv. Thereafter, a buyer's agreement dated 31.08.2010 was executed between the original allottee and the respondent. It is pertinent to mention that the buyer's agreement was consciously and voluntarily executed between the parties. That pursuant thereto, the original allottee, made a request for transfer of the said allotment in the name of Mr. Inderaj Bishnoi and Mrs. Urmila Bishnoi ("subsequent allottees"). Accordingly, the parties submitted the agreement to sell dated 09.07.2010 along with necessary indemnities and affidavits. The respondent vide its letter dated 31.08.2010, confirmed the said transfer in favour of the subsequent allottees.
- v. That thereafter the subsequent allottees approached the respondent for transfer of the said allotment in favour of the complainant for transferring and conveying rights, entitlement and title of the original allottee and thereafter the subsequent allottees in the unit in question to the complainant. Thus, it is relevant to submit that the complainant at the time of the said transfer in their favour, were fully aware of the status of the project and the delays so occasioned in its completion. The complainant being fully aware of the facts and circumstances, still chose to purchase the said unit and hence, it is submitted that they are not entitled to any benefits for delay in completion of the project. The complainant out of their own

free will and volition, without any inducement, force, misrepresentation or coercion of the respondent purchased the said unit from the erstwhile allottee, with open eyes and hence, cannot claim any compensation from the respondent. The said position was duly accepted and acknowledged by complainant. The complainant is conscious and aware of the fact that he is not entitled to any right or claim against respondent. The complainant has intentionally distorted the real and true facts and has 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. The respondent vide the nomination letter dated 04.02.2012, confirmed the said transfer in favour of the complainant. That in the manner as aforesaid, the complainant stepped into the shoes of the original allottee.

- vi. That it needs to be highlighted that the original allottee, subsequent allottees and the complainant were not forthcoming with the outstanding amounts as per the schedule of payments. The respondent was constrained to issue reminders to them. Statement of account dated 12.01.2022 maintained by the respondent in due course of its business depicts the delay in remittance of various payments by the complainant. The respondent had categorically notified the original allottee that he had defaulted in remittance of the amounts due and payable by him. It was further conveyed by the respondent to the original allottee that in the event of failure to remit the amounts mentioned in the said notice, the

respondent would be constrained to cancel the provisional allotment of the unit in question.

- vii. That despite there being a number of defaulters in the project, the respondent had to infuse funds into the project and have diligently developed the project in question. The respondent applied for occupation certificate on 04.06.2015 and the same was thereafter issued vide memo bearing no. **ZP-308/SD(BS)/2017/2699 dated 13.02.2017**. It is pertinent to note that once an application for grant of occupation certificate is submitted for approval in the office of the concerned statutory authority, 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.
- viii. That, without admitting or acknowledging the truth or legality of the allegations advanced by the complainant and without prejudice to the contentions of the respondent, it is respectfully submitted 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. 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 complainant 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. It is submitted that the interest for the alleged delay or compensation demanded by the complainant is beyond the scope of the buyer's agreement and the same cannot be demanded by the complainant being beyond the terms and conditions incorporated in the buyer's agreement.

- ix. That without prejudice to the contentions of the respondent, it is submitted that the allegations of the complainant that possession was to be delivered by January 2012 are wrong, malafide and result of afterthought in view of the fact that the complainant had made several payments to respondent even after January 2012. In fact, the last payment was received from the complainant in April 2018, if there was in fact a delay in delivery of project as alleged by the complainant, then the complainant would not have remitted instalments after January 2012. The allegations put forth by the complainant qua the respondent are absolutely illogical, irrational and irreconcilable in the facts and circumstances of the case. It is

reiterated that the alleged due date of proposed handover of possession is misconceived.

- x. That the complainant was offered possession of the unit in question through letter of offer of possession dated 28.04.2017. The complainant was called upon to remit balance payment and to complete the necessary formalities/documentation necessary for handover of the unit in question to the complainant. It is pertinent to note that an offer for possession marks termination of the period of delay, if any. The complainant is not entitled to contend that the alleged period of delay continued even after receipt of offer for possession. The complainant was 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 complainant. However, the complainant 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 complainant that they are not entitled to any compensation in terms of the buyer's agreement on account of default in timely remittance of instalments as per schedule of payment incorporated in the buyer's agreement. The respondent earnestly requested the complainant to obtain possession of the unit in question and further requested the complainant to execute a conveyance deed in respect of the unit in question after completing all the formalities regarding delivery of possession. However, the complainant did not pay

any heed to the legitimate, just and fair requests of the respondent and threatened the respondent with institution of unwarranted litigation. Moreover, it is pertinent to mention that the respondent has also credited a sum of Rs. 1,70,800/- as compensation for delay in possession to the complainant. Without prejudice to the rights of the respondent, delayed interest if any has to be calculated only on the amounts deposited by the allottees/complainant towards the basic principle amount of the unit in question and not on any amount credited by the respondent, or any payment made by the allottees/complainant towards delayed Payment Charges (DPC) or any taxes/statutory payments etc.

- xi. That upon completion of formalities, the complainant approached the respondent requesting it to deliver the possession of the unit in question. A unit handover letter dated 25.08.2018 was executed by the complainant, specifically and expressly agreeing that the liabilities and obligations of the respondent as enumerated in the allotment letter or the buyer's agreement stand satisfied. The complainant has intentionally distorted the real and true facts in order to generate an impression that the respondent has reneged from its commitments. No cause of action has arisen or subsists in favour of the complainant to institute or prosecute the instant complaint.
- xii. That it is pertinent to mention that after execution of the unit handover letter dated 25.08.2018 and obtaining of possession of the unit in question, the complainant is left with no right,



entitlement or claim against the respondent. It needs to be highlighted that the complainant has further executed a conveyance deed bearing vasika number 11616 dated 08.01.2019 in respect of the unit in question. The transaction between the complainant and the respondent stands concluded and no right or liability can be asserted by the respondent or the complainant against the other. It is pertinent to take into reckoning that the complainant has obtained possession of the unit in question and the complaint is a gross misuse of process of law. The contentions advanced by the complainant in the false and frivolous complaint are barred by estoppel.

- xiii. 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 is no equity in favour of the complainant. The allegations levelled by the complainant are totally baseless. Thus, it is most respectfully submitted that the present complaint deserves to be dismissed at the very threshold.

E. Jurisdiction of the authority

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, 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.

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 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 the complaint being barred by limitation

12. In respect of complaint no. CR/4773/2021, the counsel for the respondent submitted that the complainant has filed the present complaint on 13.12.2021 after execution of conveyance deed on 10.11.2017 i.e., after a lapse of 4 years 1 month and 3 days. Therefore, the present complaint is barred by limitation.
13. Though both the parties through their respective counsel advanced submissions with regard to the maintainability of the complaint on the ground of the limitation but in view of settled proposition of law, the case of complainant cannot be thrown away being barred by limitation. The subject unit was allotted on 27.10.2009, a buyer's agreement in this regard was executed on 28.05.2010. Though the possession of the unit was to be offered on or before 27.04.2012 after completion of the project but the same was offered only on 20.04.2017 after receipt of occupation certificate on 13.02.2017 and ultimately leading to execution of conveyance deed of the same on 10.11.2017. So, limitation if any, for a cause of action would accrue to the complainant w.e.f. 10.11.2017. The present complaint seeking delay possession charges and other reliefs was filed on 13.12.2021 i.e., beyond three years w.e.f. 10.11.2017. But in view of authoritative pronouncement of the hon'ble apex court in suo moto proceedings vide order dated 10.01.2022, the period in between 15.03.2020 till 28.02.2022 would stand excluded while calculating the period of limitation and the relevant para is reproduced as under:

"III. In the cases where the limitation would have expired during the period between 15.03.2020 till 28.02.2022, notwithstanding the actual

balance period of limitation remaining, all persons shall have a limitation period of 90 days from 01.03.2022. In the event the actual balance period of limitation remaining, with effect from 01.03.2022 is greater than 90 days, that longer period shall apply."

14. In view of the above, both the complaints are filed within the limitation.

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

15. 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.
16. 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 complainants are an allottees/buyers and they have paid a considerable price to the promoter towards purchase of the subject units in the project of the promoter. At this stage, it is important to stress upon the definition of term allottee under the Act and 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;"

17. 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 complainants, it is crystal clear that the complainants are allottee as the subject units were allotted to them by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled as *M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr.* has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the complainants-allottees being investors are not entitled to protection of this Act stands rejected.

G. Findings on the relief sought by the complainant:

G. I Delay possession charges

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

"Section 18: - Return of amount and compensation

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

.....

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for

every month of delay, till the handing over of the possession, at such rate as may be prescribed."

19. 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 the Allottee(s) 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 upon complying with all provisions, formalities, documentation etc., as prescribed by the Developer, the Developer proposes to hand over the possession of the Unit **within 30 months from the date of allotment**. The Allottee(s) agrees and understands that the Developer shall be entitled to a **grace period of ninety (90) days, for applying and obtaining the occupation certificate in respect of the Complex.***

20. **Due date of possession and admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within 30 months from the date of allotment and it is further provided in agreement that promoter shall be entitled to a grace period of 90 days for applying and obtaining occupation certificate in respect of said complex. The period of 30 months expired on 09.02.2012. 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 90 days cannot be allowed to the promoter at this

stage. Therefore, the due date of possession comes out to be 09.02.2012.

21. **Entitlement of delay possession charges to the complainant being subsequent allottee w.e.f. due date of handing over possession or w.e.f. the date of nomination letter/endorsement (i.e. date on which he became allottee)-**
22. The authority observes that the issue w.r.t. the entitlement of delay possession charges to the allottees being subsequent allottees is concerned, 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.
23. The authority observes that in the present complaint, the subject unit has been endorsed in favour of the complainants vide nomination letter dated 04.02.2012 i.e. prior to the due date of handing over possession as per the buyer's agreement. Therefore, in furtherance of **Varun Gupta Vs. Emaar MGF Land Ltd. (supra)**, the complainant is entitled to delay possession charges w.e.f., the due date of possession i.e., 09.02.2012.
24. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges at the prescribed rate. 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.

25. 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.
26. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., 07.04.2023 is 8.70%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.70%.
27. **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;"*

28. 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.
29. 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 31.08.2010, the possession of the subject unit to hand over within 30 months from the date of allotment i.e., 09.08.2009. Therefore, the due date of handing over possession comes out to be 09.02.2012. Occupation certificate was granted by the concerned authority on 13.02.2017 and thereafter, the possession of the subject unit was offered to the complainant on 28.04.2017. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the complainant as per



the terms and conditions of the buyer's agreement dated 31.08.2010 executed between the parties.

30. 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 13.02.2017. However, the respondent offered the possession of the unit in question to the complainant only on 28.04.2017, so it can be said that the complainant came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, he 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 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. 09.02.2012 till the expiry of 2 months from the date of offer of possession (28.04.2017) which comes out to be 28.06.2017.
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 complainant is entitled to delay possession charges at prescribed rate of the interest @ 10.70 % p.a. w.e.f. 09.02.2012 till 28.06.2017 as per provisions of section 18(1) of the Act read with rule 15 of the rules.

G. II Direct the respondent to return the following charges such as Gas Connection Charges, Electrification charges, Club charges, Advance common maintenance charges, and HVAT through intimation of possession.

- **Electrification charges**

32. 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 the basic sale price of a unit also include electrification as street lighting is an integral part of internal development works and also includes disposal of sewage and sullage, water, fire protection and fire safety requirements, streetlight, electricity supply, transformers, etc. These internal development works have to be done by the promoter.

33. In the considered opinion of this authority, the promoter cannot charge electrification charges from the allottees while issuing offer of possession letter in respect of the subject unit even though there is any provision in the builder buyer's agreement to the contrary. The respondent-promoter is bound to adjust the amount charged on account of electrification amounting to Rs. 52,785/- from the allottee with the dues payable by him or refund the amount if no dues are payable by him.

- **Gas connection charges**

34. The complainant is contending that the respondent has wrongly demanded gas connection charges from the complainant at the time of offer of possession. The respondent contended that the same has been charged as per the provisions of the buyer's agreement.

35. The authority is of the view that the gas connection charges are payable by the complainant in terms clause 11(d)(iii) of the buyer's



agreement wherein it is stated that '*The Allottee(s) undertakes to pay additionally to the Developer on demand the actual cost of the electricity, water and sewer consumption charges and/or any other charge which may be payable in respect of the same Unit*'. On the same analogy, the gas connection charges are to be borne by the allottees. Therefore, the complainant is liable to pay the same.

• **Club charges**

36. In the present complaint, the respondent has demanded a sum of Rs. 1,75,000/- towards club membership charges as per letter of offer of possession dated 28.04.2017.

37. The authority observes that the complainant had agreed to pay club membership registration charges in terms of clause 3 of the buyer's agreement. While deciding the issue of club membership charges in **CR/3203/2020** titled as **Vijay Kumar Jadhav Vs. M/s BPTP Limited and anr.** decided on 26.04.2022, the authority has observed as under:

"79. The authority concurs with the recommendation made by the committee and holds that the club membership charges (CMC) shall be optional. The respondent shall refund the CMC if any request is received from the allottee. Provided that if an allottee opts out to avail this facility and later approaches the respondent for membership of the club, then he shall pay the club membership charges as may be decided by the respondent and shall not invoke the terms of flat buyer's agreement that limits CMC to Rs.1,00,000/-."

38. In view of the above, the authority holds that the club membership charges (CMC) shall be optional. The respondent shall refund the CMC if any request is received from the complainant-allottee. Provided that if he opts out to avail this facility and later approaches the respondent for membership of the club, then he shall pay the club membership charges as may be decided by the respondent and shall not invoke the terms of buyer's agreement that limits CMC to Rs.1,75,000/-.

- **Advance maintenance charges**

39. 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 the respondent is right in demanding advance maintenance charges at the rates' prescribed in the builder buyer's agreement at the time of offer of possession. However, the respondent shall not demand the advance maintenance charges for more than one year from the allottee even in those cases wherein no specific clause has been prescribed in the agreement or where the AMC has been demanded for more than a year.
40. The authority observes that the respondent has demanded a sum of Rs. 53,318/- w.e.f. 01.06.2017 till 31.05.2018 i.e., the same is demanded for a period of one year only. Keeping in view the facts above, the authority holds that the respondent is right in demanding advance maintenance charges at the rate prescribed therein at the time of offer of possession in view of the judgement (supra). Therefore, the complainant is liable to pay the same.

- **HVAT**

41. The authority has decided the issue w.r.t. liability of payment of HVAT in complaint titled as **Varun Gupta. Versus Emaar MGF Land Ltd. (CR/4031/2019)** wherein it has been 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) under the amnesty scheme. However, the promoter shall not charge any VAT from the allottees/prospective buyers during the period 01.04.2014 to 30.06.2017 since the same was to be borne by the promoter-developer only.

42. In the present complaint, the respondent has demanded Rs.44,817/- towards HVAT liability post 01.04.2014 vide letter of offer of possession dated 28.04.2017. In light of order stated above, 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.

H. Directions of the authority

43. 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 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., 09.02.2012 till 28.06.2017 i.e., expiry of 2 months from the date of offer of possession (28.04.2017). The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order as per rule 16(2) of the rules.
- ii. Also, the amount of compensation already 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.
- iii. **Electrification charges:** The respondent cannot charge electrification charges from the allottees while issuing offer of possession letter in respect of the subject unit even though there is any provision in the builder buyer's agreement to the contrary.

The respondent-promoter is bound to adjust the amount charged on account of electrification amounting to Rs. 52,785/- from the allottee with the dues payable by him or refund the amount if no dues are payable by him.

- iv. **Club membership charges-** The respondent shall refund the club membership charges if any request is received from the complainants-allottee. Provided that if he opts out to avail this facility and later approaches the respondent for membership of the club, then he shall pay the club membership charges as may be decided by the respondent and shall not invoke the terms of buyer's agreement that limits club membership charges to Rs.1,75,000/-.
- v. **HVAT:** The respondent-promoter is bound to adjust the amount charged on account of HVAT liability post 01.04.2014 amounting to Rs. 44,817/- from the allottee with the dues payable by him or refund the amount if no dues are payable by him.
- vi. The respondent shall not charge anything from the complainant which is not the part of the buyer's agreement.
44. This decision shall mutatis mutandis apply to cases mentioned in para 3 of this order.
45. The complaints stand disposed of. True certified copies of this order be placed on the case file of each matter. File be consigned to registry.


Sanjeev Kumar Arora
(Member)


Shri Ashok Sangwan
(Member)

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 07.04.2023