BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**:**	**4837 of 2022**
Complaint filed on	**:**	**21.07.2022**
First date of hearing	**:**	**27.10.2022**
Date of decision	**:**	**21.02.2023**

Rajan Gupta and Alka Gupta
R/o: C4, F-89, Janak Puri, New Delhi- 110058. **Complainants**

Versus

1. M/s Emaar India Ltd.
   (Formerly known as M/s Emaar MGF Land Ltd.)
2. Gurgaon Greens Condominium Association

Both Address: Emaar Business Park, MG Road, Sikanderpur Chowk, Sector 28, Gurugram - 122002. **Respondent**

CORAM:

Shri Vijay Kumar Goyal	**Member**
Shri. Ashok Sangwan	**Member**
Shri Sanjeev Kumar Arora	**Member**

APPEARANCE:

Shri Garvit Gupta	Advocate for the complainants
Shri J.K. Dang	Advocate for the respondent no. 1

ORDER

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:

S.No.	Heads	Information
1.	Project name and location	Gurgaon Greens, Sector 102, Gurugram.
2.	Project area	13.531 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no.	75 of 2012 dated 31.07.2012
	Valid till	30.07.2020
	Name of licensee	Kamdhenu Projects Pvt. Ltd. and another C/o Emaar MGF Land Ltd.
5.	HRERA registered/ not registered	**Registered vide no. 36(a) of 2017 dated 05.12.2017 for 95829.92 sq. mtrs.**
	HRERA registration valid up to	**31.12.2018**
	HRERA extension of registration vide	**01 of 2019 dated 02.08.2019**
	Extension valid up to	**31.12.2019**
6.	Unit no.	GGN-11-0202, 2nd floor, tower no. 11 [annexure C6, page 53 of complaint]
7.	Unit measuring (super area)	1650 sq. ft.
8.	Provisional allotment letter dated	25.01.2013 [annexure C5, page 45 of complaint]
9.	Date of execution of buyer's agreement	26.03.2013 [annexure C6, page 51 of complaint]
10.	Possession clause	***14. POSSESSION***

		(a) Time of handing over the Possession *Subject to terms of this clause and barring force majeure conditions, subject to the Allottee having complied with all the terms and conditions of this Agreement, and not being in default under any of the provisions of this Agreement and compliance with all provisions, formalities, documentation etc., as prescribed by the Company, the Company proposes to hand over the possession of the Unit within* ***36 (Thirty Six) months from the date of start of construction,*** *subject to timely compliance of the provisions of the Agreement by the Allottee. The Allottee agrees and understands that the Company shall be entitled to a* ***grace period of 5 (five) months, for applying and obtaining the completion certificate/occupation certificate in respect of the Unit and/or the Project****.* (emphasis supplied) [annexure C6, page 60 of complaint]
11.	Date of start of construction as per statement of account dated 29.06.2022 at page 83 of complaint	14.06.2013
12.	Due date of possession	14.06.2016 [**Note:** Grace period is not included]
13.	Total consideration as per statement of account dated 29.06.2022 at page 83 of complaint	Rs.1,00,47,678/-
14.	Total amount paid by the complainants as per statement	Rs.1,00,47,681/-

	of account dated 29.06.2022 at page 85 of complaint	
15.	Occupation certificate	30.05.2019 [annexure R10, page 151 of reply]
16.	Offer of possession	20.06.2019 [annexure R11, page 154 of reply]
17.	Unit handover letter dated	18.11.2019 [annexure R14A, page 166 of reply]
18.	Conveyance deed executed on	17.12.2019 [annexure R15, page 170 of reply]
19.	Delay compensation already paid by the respondent for delay in handing over possession	Rs. 9,66,183/- [Rs.6,44,122/- (As per settlement agreement dated 25.09.2019) + 3,86,473/- (As per letter of offer of possession)]
20.	Settlement agreement executed between the complainants and the respondent on	25.09.2019 [annexure R12, page 159 of reply]
21.	The complaint bearing no. 3230 of 2017 was filed by the allottee complainants before Hon'ble NCDRC, New Delhi and the same was disposed of in the terms of settlement agreement dated 25.09.2019 on	01.11.2019 [annexure R13, page 165 of reply]

B. Facts of the complaint

3. The complainants made following submissions in the complaint:

i. That the present complaint has been filed by the complainants under section 31 of the Act read with rule 28 rules seeking relief in respect of the lapses, defaults and unjust and unfair trade practices on the part of the respondents.

ii. That respondent no.1 offered for sale units in a group housing complex known as 'Gurgaon Greens' which claimed to comprise of multi-storied apartments, residential units, car parking spaces, recreational facilities, gardens etc. on a piece and parcel of land situated in Sector 102, Gurugram, Haryana. It was claimed that the project would be spread across approx. 13 acres and would consist of several world class facilities. Respondent no.1 misrepresented to the complainants that it was acting in accordance with the provisions of the Haryana Development and Regulation of Urban Areas Act, 1975 and Rules made thereunder in 1976.

iii. That the complainants received a marketing call from the office of respondent no.1 in the month of January, 2012 for booking in residential project of the respondent, 'Gurgaon Greens', situated at Sector 102, Gurugram. The complainants had also been attracted towards the aforesaid project on account of publicity given by respondent no.1 through various means like various brochures, posters, advertisements etc. The complainants visited the sales gallery and consulted with the marketing staff of respondent no.1. The marketing staff of respondent no.1 painted a very rosy picture of the project and made several representations with respect to the innumerable world class facilities to be provided by respondent no.1 in their project. The marketing staff of respondent no.1 also assured timely delivery of the unit. It is pertinent to mention herein

that the project was pre-launched and respondent no.1 acted completely in violation of section 7 of the Haryana Development and Regulation of Urban Areas Act, 1975. It is submitted the license bearing no. 75/2012 was obtained by the respondent no.1 on 31.07.2012. However, respondent no.1 took the booking amount of Rs. 7.5 lacs from the complainants on 19.02.2012 and issued receipt dated 20.03.2012 to the complainants.

iv. That the complainants, induced by the assurances and representations made by respondent no.1, decided to book a residential unit in the project of respondent no.1 as the complainants required the same in a time bound manner for their own use and occupation and of their family members. This fact was also specifically brought to the knowledge of the officials of respondent no.1 who confirmed that the possession of the apartment to be allotted to the complainants would be positively handed over within the agreed time frame. The complainants signed several blank and printed papers at the instance of respondent no.1 who obtained the same on the ground that the same were required for completing the booking formalities. The complainants were not given chance to read or understand the said documents and they signed and completed the formalities as desired by respondent no.1.

v. That on the basis of the booking made by the complainants, respondent no.1 vide the provisional allotment letter dated 28.01.2013, allotted a unit bearing no. GGN-11-0202 admeasuring 1650 sq. ft. which was a 3BHK + Servant room apartment. It is pertinent to mention herein that terms included in the allotment letter were absolutely unilateral, one sided and arbitrary and the complainants were not given a chance to seek any change or modification in the same. When the complainants confronted respondent no.1 about the same, it was assured to the complainants that the terms in the agreement would be more balanced and detailed.

vi. That the complainants kept on making payment towards the total sale consideration as demanded by respondent no.1 from time to time. It is pertinent to mention herein that apart from the first three instalments, which were time linked, the payment plan was the construction linked plan which meant that the payment demands were to be send only after the completion of the respective construction milestones.

vii. That a copy of the apartment buyer's agreement was sent to the complainants. Although respondent no.1 had categorically assured the complainants that the terms of the agreement would be more balanced, it came as a shock to the complainants when they realized that respondent no.1 has not change any provision of the

agreement. The agreement which was shared with the complainants was a wholly one-sided document containing totally unilateral, arbitrary, one-sided, and legally untenable terms favoring respondent no.1 and was totally against the interest of the purchaser, including the complainants herein. That in the case of the complainants making the delay in the payment of instalments, respondent no.1 is shown to be entitled to charge interest @ 24% per annum whereas the complainants are shown to be only entitled to a meagre amount of Rs. 7.5/- per sq. ft per month of the super area of the apartment (which comes to around 1.6%) for the period of delay in offering the possession of the apartment beyond the period stated by respondent no.1.

viii. That the complainants made vocal their objections to the arbitrary and unilateral clauses of the apartment buyer's agreement to respondent no.1. The complainants repeatedly requested respondent no.1 for execution of an apartment buyer agreement with balanced terms. However, during such discussions, respondent no.1 summarily rejected the bonafide request of the complainants and stated that the agreement terms were non-negotiable and would remain as they were and further threatened the complainants to forfeit the previous amounts paid by them if further payments are not made. The complainants felt trapped and had no other option but to sign on the dotted lines. Hence, the

apartment buyer agreement dated 26.03.2013 was executed between the parties.

ix. That the complainants made all the payments strictly as per the terms of the allotment and the construction linked payment plan and no default in making timely payment towards the instalment demands was committed by the complainants. It is submitted that respondent no.1 used to only provide a short time span to make the payment of all the payment demands. Yet, all the payments were made by the complainants without any delay.

x. That as per clause 14(a) of the agreement, the possession of the unit was to be handed over by respondent no.1 within a period of 36 months from the date of start of construction along with a grace period of 5 months for applying and obtaining the occupation certificate. Thus, as per the terms and conditions of the apartment buyer's agreement, the due date to handover the possession of the allotted unit is to be computed from the date of start of construction. It is pertinent to mention herein that the demand for 'start of PCC for Foundation' was raised by respondent no.1 on 14.06.2013. Hence, as per the terms of the agreement, the due date is to be computed from 14.06.2013. The due date of delivery of possession as per the agreed terms of the apartment buyer's agreement thus elapsed way back on 14.12.2016. Throughout the period, the complainants kept on making payment towards the

total sale consideration in complete adherence to their contractual obligations.

xi. That on the lapse of the due date to handover the possession, the complainants visited the project site in December 2016 and were shocked to see that no construction activity was going on there and the work was at standstill. The actual ground reality at the construction site was way different than what respondent no.1 had claimed to the complainants regarding the completion of the project. The fact that there was a considerable delay is also evident as till 14.12.2016 i.e., the date by which respondent no.1 was to handover the possession of the unit to the complainants, it had only sent the payment demand against 'Completion of Brickwork'. However, the actual reality was way different. There was inordinate delay in developing the project well beyond what was promised and assured to the complainants. This further shows that the demands which were raised by respondent no.1 didn't correspond to the actual construction status on the site.

xii. That since, respondent no.1 had committed various acts of omission and commission by making incorrect and false statements at the time of booking and due to inordinate delay in handing over the possession of the allotted unit, the complainants were left with no other option but to file a complaint against respondent no.1 in 2017 before the Hon'ble NCDRC. A detailed

complaint and reply were filed by the parties and the matter was fixed for final arguments. However, respondent no.1 in the middle of no-where offered the possession of the unit to the complainants vide its letter dated 20.06.2019. On going through the terms of the offer of possession, the complainants realized that respondent no.1 had unilaterally increased the sale consideration of the unit by demanding illegal charges which were not attributable to the complainants. Moreover, respondent no.1 further threatened the complainants vide the said offer of possession that in case the complainants fail to make the payment, respondent no.1 would be at the liberty to charge interest, holding charges and invoke the provisions of the agreement against the complainants. It is pertinent to mention herein that on one hand, respondent no.1 stated in the said offer of possession that time was the essence and on the other hand it itself committed grave illegalities and delay in offer the possession. Respondent no.1 tried to claim premium of its own wrongs, delays and laches and the same was very well brought out by the complainants to respondent no.1 vide their emails dated 27.06.2019 and 06.07.2019.

xiii. That the offer of possession contained several illegalities which are as follows:

a. **Increase in the amount to be demanded at the last instalment stage** - It is pertinent to mention herein that as per

the schedule of payment attached as Annexure III with the agreement, respondent no.1 was bound to demand payment of Rs. 5,16,599.38 which was to include 5% of PLC, 5% basic sale price and 100% of IFMS. However, respondent no.1 vide the offer of possession demanded Rs. 14,82,317/- i.e., an increase of Rs. 9,65,718/-. The said increase of the instalment demand was not agreed upon by the complainants.

b. **Other charges-** Respondent no.1 vide its offer of possession demanded 'other charges' from the complainants to the tune of Rs. 1,22,622/-. It is submitted that the said charges have been imposed unilaterally and arbitrarily by Respondent no.1 as the agreement finds no mention or gives any power to respondent no.1 to charge any amount from respondent no.1 under the head 'other charges'.

c. **Imposition of GST charges-** Another classic case of respondent no.1 taking advantage of its own wrongs and delays is evident from the fact that respondent no.1 had imposed GST charges of Rs. 71,056/- at the time of offer of possession. Moreover, all the payment demands raised by respondent no.1 after July, 2017 were inclusive of the GST charges. It is submitted that the due date to handover the possession of the unit to the complainants was 14.12.2016. The GST came into force on 01.07.2017. Therefore, if respondent no.1 would have abided by its

contractual obligations and handed over the possession to the complainants within the stipulated time period, the question of payment towards the GST by the complainants would not have even arisen. The tax which has come into existence after the due date of possession cannot be imposed on the complainants as the complainants cannot be held accountable for any amount not attributable to them on account of defaults and wrongs committed by respondent no.1. Therefore, respondent no.1 is bound to refund the amount charged by them from the complainants towards the GST.

d. **Lien Marked FD for HVAT-** It is submitted that respondent no.1 demanded Rs. 2,56,016/- towards the lien marked FD for HVAT for the period from 01.04.2014 till 30.06.2017. It is submitted that the said amount was not payable by the complainants. It has been held by this Hon'ble Authority in several of its judgments including the orders pertaining to the project in question that respondent no.1 cannot demand the liability of HVAT for the liability post 01.04.2014 till 30.06.2017 and the lien marked is to be removed. Respondent no.1 is to refund the said amount paid by the complainants back to the complainants.

e. **Advance Monthly Maintenance Charges @ Rs.3.65 per sq. ft. + GST @18% for 24 months**- Respondent no.1 has charged

Rs.1,44,540/- towards the advance monthly maintenance charges for a period of 24 months. Clause 21 of the agreement states that advance maintenance charges can be demanded by respondent no.1 only for a period of one year. However, Respondent no.1 has demanded AMC for a period of two years, in contrast to what was agreed upon by the parties in question. Respondent no.1 cannot be allowed to charge any additional amount only because it deems fit to do so. Even this Hon'ble Authority in its judgment titled 'Varun Gupta vs Emaar MGF Land Ltd', has held that an embargo has to be placed on the entitlement of respondent no.1 in this regard and held that respondent no.1 could not demand the advance maintenance charges for more than one year from the allottee. Thus, respondent no.1 is to refund back the advance maintenance charges for extra period of one year received by it along with interest from the complainants.

f. **Registration charges**- Respondent no.1 has demanded Rs. 45,000/- from the complainants as registration charges. It is pertinent to mention herein that the Haryana Government vide its notification no. S.O.65/C.A.16/1908/Ss. 78 and 79/2018 dated 03.10.2018 had increased the maximum limit of the registration fees payable to Rs. 50,000/- which was, prior to the said notification was Rs. 15,000/-. As already stated above, the

due date to handover the possession of the unit was much before 03.10.2018 and if respondent no.1 would have adhered to its contractual obligations, the increase in the registration charges for the unit in question would not have occurred. The complainants cannot be held accountable for no fault attributable to it. Respondent no.1 is bound to return the extra amount charged from the complainants regarding the registration charges.

xiv. That since respondent no.1 had no answer to the queries raised by the complainants vide their emails dated 27.06.2019 and 06.07.2019 and realizing that it would lose the case pending before Hon'ble NCDRC, respondent no.1 drafted a settlement agreement containing absolutely unilateral and arbitrary terms. It became evident that the non-completion of the project was not attributable to any circumstance except the deliberate lethargy, negligence and unfair trade practices adopted by respondent no.1. It is pertinent to mention herein that respondent no.1 admitted that there was delay on its part in completing the construction of the unit. However, the compensation derived by respondent no.1 and offered to the complainants as per the settlement agreement was not as per the prevailing laws. The complainants confronted respondent no.1 about the unfair terms of the settlement agreement. However, respondent no.1 threatened the

complainants that if the complainants fail to take the possession of the unit, it would invoke clause 17.1 of the agreement by cancelling the allotment and forfeiting huge amount of Rs. 94,21,925/- paid by the complainants till then. Respondent no.1 willingly and knowingly exercised 'undue influence' upon the complainants. The complainants were given an unfair choice to either forsake the claims which they were entitled to or to perfect their allotment by taking possession. The complainants were left with no other option but to accept the one-sided terms of the settlement agreement which was executed with the sole motive to compel the complainants to withdraw the complaint filed by them before Hon'ble NCDRC. The said settlement agreement was not executed in an atmosphere free of doubts and the same would be deemed as against public policy. Hence, settlement agreement was signed between the parties on 25.09.2019. Respondent no.1 brushed aside all the requisite norms and stipulations by accumulating huge amount of hard-earned money of various buyers in the project including the complainants and by not giving reliefs to the complainants which they were entitled to.

xv. That the terms of the said settlement agreement are unfair, arbitrary, absolutely one-sided and does not bar the complainants to approach this hon'ble authority for seeking reliefs which the law grants to an aggrieved allottee. It is submitted that respondent no.1

had exercised undue influence on the complainants to sign the settlement agreement. Respondent no.1 clearly in a dominant position as it placed the complainants under the threat of forfeiture and cancellation if the settlement agreement was not signed and possession not taken. It is submitted that the same does not bind the complainants and the said settlement agreement is even voidable at the option of the complainants as per section 19A of the Indian Contract Act, 1872. Furthermore, as per section 23 of the Indian Contract Act, 1872, a consideration or an object of an agreement is considered to be lawful only if it is of such nature if it doesn't defeat the provisions of any law. It is submitted that the very essence of the settlement agreement was to defeat the rights of the allottees guaranteed by the provisions of law. Moreover, it is pertinent to mention herein that vide the said settlement agreement, respondent no.1 constrained the complainants to approach any court or forum to seek any remedy which they are entitled to. It is submitted that the same is illegal and is squarely covered under section 28 of the Indian Contract Act, 1872. As per the said section, any agreement in restraint of legal proceedings is void.

xvi. That this hon'ble authority cannot be a silent spectator to the illegalities committed by respondent no.1. It is submitted that this Hon'ble Authority in the judgment titled Jasmine Kurian Paul and

Anr. Vs M/s Emaar MGF Land Ltd. held that if the terms of the settlement agreement between the parties are one-sided and in favour of the developer, then such settlement Agreement cannot be given effect to which is of repressive nature. Furthermore, it is reasserted that the compensation given to the complainants was very nominal and unjust. The Hon'ble Supreme Court and High Courts have held in several judgments that the terms of the Contract would not be binding if the same were one-sided and unfair and the person signing the same had no other option but to sign the same. This Hon'ble Authority in its judgment titled 'Kurian John and Anr. Vs M/s Emaar MGF Land Ltd' held that a settlement agreement cannot take away the statutory rights of the one who is in recessive position.

xvii. That after the settlement agreement, the complaint filed by the complainants before Hon'ble NCDRC was withdrawn and the physical possession of the unit was offered to the complainants vide letter dated 05.11.2019. It is pertinent to mention herein that when the complainants inspected the unit before taking the physical possession of the unit, they realized that the servant room, which was located outside the allotted unit, was not in a habitable condition. The complainants again confronted the representative of respondent no.1 who stated that nothing can be done to rectify the same as the unit as a whole was in habitable condition. The

complainants, tired and frustrated with the conduct of respondent no.1 all this while, had no other option but to take the possession of the unit under protest. The physical possession of the unit was obtained by the complainants only on 18.11.2019. The complainants are bound to delayed payment charges at the interest as provided by the Act and the Haryana RERA Rules, 2017 from the due date of possession till actual handing over of possession i.e., from 14.12.2016 to 18.11.2019. The said room was always represented as a 'Habitable Servant Room' with an attached bathroom and the same is evident from the layout plan. Even as per the brochure shared by respondent no.1 with the complainants, specifications of servant room have been stated. It is submitted that the Servant room is without ventilation and was delivered by Respondent no.1 in such a way that it is not humanely possible for any person to even stay in the room without opening the door of the room which ultimately leads to compromising the security and privacy. On account of the same, the complainants have been restrained from using the same room for habitation purposes. The complainants are entitled to appropriate compensation for the same and have the right to approach the appropriate forum.

xviii. That moreover, the respondent no.1 or a valid association was entitled to charge common area maintenance (CAM) charges from

the complainants. As per clause 21(i) of the agreement, the scope of maintenance and general upkeep of various common services within the project for which CAM could be charged included but not limited to operation and maintenance of generators including diesel, firefighting system, garbage disposal and upkeep of common areas, water supply, sewerage system, common area lighting etc. It is pertinent to mention herein that as per the terms of the agreement also, the cost pertaining to common area lighting /electricity was to be a part of CAM. However, respondent no.2 in collusion with respondent no.1 illegally have been raising separate payment demands towards the Common Area Electricity charges and Common Area Maintenance charges when the demand towards the electricity charges is already a part of the Common Area Maintenance charges. The fact that the common area electricity charges were a part of common area maintenance charges is also evident from the fact that respondent no.2 in collusion with respondent no.1 has adjusted the same from the IFMS amount paid by the complainants as per clause 21(j) of the agreement. The respondents could have deducted/adjusted the IFMS amount with the common area electricity charges only if it formed part of common area maintenance charges. Therefore, the complainants are under no obligation to make any payment towards the CAE charges when the same could not have even in

first place been demanded by the respondents. The IFMS amount deducted for the purpose of adjustment of CAE charges is to be restored. Moreover, the CAM and CAE charges were demanded from the complainants on the offer of possession when the actual scenario was that the unit was not even in habitable condition. Hence, respondent no.1 demanded CAM and CAE charges from the time when the complainants could have otherwise not resided therein. The complainants took the possession of the unit on 19.11.2019. However, the charges have been demanded by respondent no.1 from 20.06.2019. Hence, respondent no.1 is to refund the extra CAM charges demanded from the complainants for the months when the unit was not in a habitable condition. Moreover, a direction is to be issued by this Hon'ble Authority that respondent no.2 in collusion with respondent no.1 cannot demand CAE charges from the complainants.

xix. That the respondent no.1 has violated several provisions of RERA 2016 and Haryana RERA Rules 2017 and is liable for the same. As per section 18 of the Act and rules 15(1) and 15(3) of Haryana RERA Rules, 2017, the respondent no.1 is liable to pay interest for every month of delay till the date of handing over of the possession.

xx. That the cause of action for the present complaint is recurring one on account of the failure of respondent no.1 to perform its obligations within the agreed time frame. The cause of action again

arose when the respondents failed to give delayed possession charges, compensation and refund of illegal charges and finally about a week ago when the respondents refused to compensate the complainants with the delayed possession interest amount, compensation and refund of illegal charges. The complainants reserve their right to approach the appropriate Forum to seek compensation.

C. Relief sought by the complainant

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

i. Direct the respondent to pay delay possession charges amounting to Rs.17,70,567/- (after adjustment with the amount adjusted by respondent no.1 as per the settlement deed).

ii. The illegal charge of Rs.1,22,622/- (inclusive of GST) demanded by the respondent no.1 and eventually paid by the complainants under the threat of forfeiture of the amount paid by them is liable to be returned to the complainants.

iii. Respondent no.1 is bound to refund the amount charged by them from the complainants towards GST.

iv. Direction that respondent no.1 cannot demand the liability of HVAT for the liability post 01.04.2014 till 30.06.2017 and the lien marked is to be removed.

v. Direct respondent no.1 to refund back the advance maintenance charges for extra period of one year received by it along with interest from the complainants.

vi. Respondent no.1 is bound to return the extra amount charged from the complainants regarding the registration charges.

vii. Direction that the settlement agreement between the parties was one-sided and in favour of developer and that agreement cannot be given effect to is of repressive nature.

viii. Observation that the service room was not habitable and was delivered by respondent no.1 in such a way that it is not humanly possible for any person to even stay in the room.

ix. The IFMS amount deducted for the adjustment of CAE charges is to be restored.

x. Respondent no.1 is to refund the extra CAM charges demanded from the complainants for the month when the unit was not in a habitable condition.

xi. A direction is to be issued by this Hon'ble Authority that respondent no.2 in collusion with respondent no.1 cannot demand CAE charges from the complainants.

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

D. Reply by the respondent no.1

6. The respondent has raised certain preliminary objections and has contested the present complaint on the following grounds:

i. That the present complaint is not maintainable in law or on facts. The complainants have filed the present complaint seeking interest and compensation for alleged delay in delivering possession of the unit booked by the complainants. It is respectfully submitted that complaint pertaining to compensation and interest are to be decided by the adjudicating officer under section 71 of the Act read with rule 29 of the rules and not by this hon'ble authority. The present complaint is liable to be dismissed on this ground alone.

ii. That the complainants are not "allottees" but investors who have purchased the unit in question as a speculative investment. The present complaint is based on an erroneous interpretation of the provisions of the Act as well as an incorrect understanding of the terms and conditions of the buyer's agreement dated 26.03.2013.

iii. That the complainants were provisionally allotted unit no GGN-11-0202, admeasuring 1650 sq. ft. approx. (super area). The complainants had opted for a construction linked payment plan. The buyer's agreement was executed between the complainants and the answering respondent on 26.03.2013. It is pertinent to mention herein that the complainants willingly and consciously executed by the buyer's agreement without raising any objections

to the terms and conditions thereof, which are binding upon the complainants with full force and effect. The complainants had agreed and undertaken to make payment of sale consideration as per the payment plan. However, the complainants failed to make timely payment of sale consideration. Consequently, the answering respondent was compelled to issue reminders for payment. As per the terms and conditions of the buyer's agreement, the complainants/ allottee were under a contractual obligation to make timely payment of all amounts payable under the buyer's agreement, on or before the due dates of payment failing which the answering respondent is entitled to levy delayed payment charges in accordance with clause 1.2(c) read with clauses 12 and 13 of the buyer's agreement.

iv. That the answering respondent registered the project under the provisions of the Act. The project had been initially registered till 31.12.2018. Subsequently, the registration of the project was extended up till 31.12.2019. Despite there being a number of defaulters in the project, the answering respondent itself infused funds into the project and has diligently developed the project in question. The answering respondent completed construction and had applied for the occupation certificate on 31.12.2018. occupation certificate was thereafter issued in favour of the respondent on 30.05.2019.

v. That upon receipt of the occupation certificate, the answering respondent had offered possession of the unit in question through offer of possession letter dated 20.06.2019 to the complainant. The offer of possession letter dated 20.06.2019 mentioned the amount to be payable by the complainants and the complainants were called upon to complete certain formalities/documentation so as to enable the answering respondent to hand over possession of the unit in question. It is pertinent to mention herein that the complainants being willful and chronic defaulters having defaulted in timely payment of installments as per the schedule of payments incorporated in the buyer's agreement were not entitled to any compensation in terms of clause 16(c) of the buyer's agreement. Nevertheless, the answering respondent credited compensation amounting to Rs.3,86,100/- at the time of offer of possession. Moreover, an amount of Rs. 58,569/- was credited to the complainants on account of anti profiting.

vi. That pertinently, at the time when possession of the unit had been offered to the complainants, the complainants had instituted a false and frivolous complaint before the Hon'ble NCDRC being complaint no. 3230 of 2017 demanding, inter alia, compensation for delayed possession. It is pertinent to mention here that at the time when the offer of possession was made by the answering respondent, the proceedings before the Hon'ble NCDRC were still

pending and it was open to the complainants to have challenged the offer of possession before the Hon'ble NCDRC on the grounds which are now sought to be put forward in the present false and frivolous complaint. Instead of doing so, the complainants proceeded to execute a settlement agreement dated 25.09.2019 with the answering respondent whereby the complainants willingly and voluntarily accepted additional compensation amounting to Rs.6,44,122/- over and above compensation amounting to Rs 3,86,473/- already credited to the complainants at the time of offer of possession amounting to Rs.9,66,183/- after TDS. The answering respondent also proceeded to waive off holding charges amounting to Rs.2240/- and delayed payment charges amounting to Rs.3361/-. The complainants agreed and undertook to make payment of balance amounts payable by them under the buyer's agreement dated 26.03.2013 and to take possession of the unit and not to claim any further compensation from the answering respondent towards delayed possession or any other account and proceeded to unconditionally withdraw the complaint filed by them before the Hon'ble NCDRC. The complainants are thus estopped from filing the present complaint and all claims /grounds which the complainants could have raised before the Hon'ble NCDRC are deemed to have been

relinquished/given up by the complainants under Order 2 Rule 2 of the CPC, 1908.

vii. That the complaint filed by the complainants before the Hon'ble NCDRC was disposed off in terms of the settlement between the parties and the same forms part of the order dated 01.11.2019 passed by the Hon'ble NCDRC. Hence, if the settlement agreement is to be challenged by the complainants on any ground, it is submitted that the same can only be done by way of filing an appeal against the order dated 01.11.2019 passed by the Hon'ble NCDRC.

viii. That after execution of the settlement agreement referred to above, the complainants obtained possession of the unit in question and unit handover letter dated 18.11.2019 had been duly executed by the complainants. It is submitted that prior to execution of the unit handover letter, the complainants had satisfied themselves regarding the measurements, location, dimension, development etc. of the unit in question. The complainants only after satisfying themselves with all the aspects including shape, size, location etc. of the unit in question, executed the unit handover letter stating that all the liabilities and obligations of respondent as enumerated in the allotment letter/buyer's agreement stood satisfied and that the complainants did not have any claim of any nature whatsoever against the respondent. Thereafter, the conveyance deed bearing Vasika no.

11075 dated 17.12.2019 was also registered in favour of the complainants. Therefore, the transaction between the complainants and the respondent has been concluded in December 2019 and the complainants are not left with any claim against the respondent. The present complaint is nothing but a gross misuse of process of law.

ix. That in so far as payment of compensation/interest to the complainants is concerned, it is submitted that the complainants, being in default, are not entitled to any compensation in terms of clause 16(c) of the buyer's agreement. Furthermore, in terms of clause 16(d) of the buyer's agreement, no compensation is payable due to delay or non-receipt of the occupation certificate, completion certificate and/or any other permission/sanction from the competent authority. Nevertheless, the respondent has credited compensation amounting to Rs.9,66,183/- after TDS in accordance with the settlement agreement dated 25.09.2019 with the answering respondent. The complainants have accepted the aforesaid amount in full and final satisfaction of so-called grievances. It is submitted that the complainants are left with no right and claim against the respondent after receipt of the aforesaid amount. The instant complaint is nothing but a gross misuse of process of law.

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

E. Jurisdiction of the authority

8. The preliminary objections 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

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

E.II Subject-matter jurisdiction

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

> ***Section 11***
> .....
> *(4) The promoter shall-*

(a) be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

11. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as per provisions of section 11(4)(a) of the Act leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

F. Findings on the maintainability of the complaint

12. The counsel for the complainant states that settlement agreement was signed between the complainant and the respondent and in pursuance of which an amount of Rs.9,66,183/- was also received and the settlement was taken on record before NCDRC in CR No.3230 of 2017 and the said complaint was disposed off by Hon'ble NCDRC vide order dated 01.11.2019 in terms of settlement agreement dated 25.09.2019. However, the respondent promoter is demanding extra charges at the time of handing over of possession which are not part of the buyer's agreement and were not part of complaint before NCDRC and is thus, seeking the relief as has been granted by the authority in CR No.4031 of 2019.

13. The counsel for the respondent states that all the dues demanded are part of offer of possession which was made on 20.06.2019 after obtaining OC from the competent authority and much prior to the above settlement agreement reached between the parties before NCDRC and the order of NCDRC had been passed in terms of above settlement agreement and hence, the above complaint is not maintainable before this authority. Moreover, the complainants have approached this authority by filing present complaint almost 3 years after execution of conveyance deed as well as amicable settlement reached between the parties without any external influence and conditions of above settlement cannot be agitated at this stage as has been held before Hon'ble Supreme Court in SLP No. 9758 of 2022.

14. The authority observes that vide allotment letter dated 25.01.2013, the complainants were allotted unit bearing no. GGN-11-0202, 2nd floor, tower 11 admeasuring 1650 sq. ft. (super area). Thereafter a buyer's agreement was executed on 26.03.2013. As per clause 14(a) of the buyer's agreement, promoter has proposed to hand over the possession of the said unit within 36 months from the date of start of construction and it is further provided in the agreement that promoter shall be entitled to a grace period of 5 months for applying and obtaining completion certificate/occupation certificate in respect of said unit/project. The construction commenced on 14.06.2013 as per the statement of account dated 29.06.2022. The period of 36 months

expired on 14.06.2016. As a matter of fact, the promoter has not applied to the concerned authority for obtaining completion certificate/ occupation certificate within the time limit 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 5 months cannot be allowed to the promoter. Therefore, the due date of handing over possession as per the buyer's agreement comes out to be 14.06.2016.

15. It is matter of fact that the respondent has failed to offer possession of the subject unit on or before 14.06.2016. Aggrieved by the same, the complainants had approached the Hon'ble NCDRC by filing complaint bearing no. 3230 of 2017. During the pendency of complaint before Hon'ble NCDRC, the respondent had offered possession of the subject unit vide letter of offer of possession dated 20.06.2019 after receipt of occupation certificate dated 30.05.2019. Thereafter, the said complaint was disposed of by Hon'ble NCDRC on 01.11.2019 in the terms of settlement agreement dated 25.09.2019. Subsequently, the possession was taken by the complainants on 18.11.2019 and conveyance deed was executed on 17.12.2019.

16. It is not disputed that prior to filing of the present complaint before the authority on 21.07.2022, the complainants had already filed a complaint before Hon'ble NCDRC bearing no. 3230 of 2017 in respect to the subject property seeking compensation for delay in handing over

possession. To settle the said complaint, the parties entered into a settlement on 25.09.2019 reduced the same into writing which led to the said complaint being disposed of on 01.11.2019 in the terms of the settlement. *Firstly*, it is also not disputed that the in pursuance of the settlement agreement dated 25.09.2019, the complainants have received an additional compensation of Rs.6,44,122/- besides compensation of Rs.3,86,473/- as per the buyer's agreement given at the time of offer of possession. Net amount of compensation being Rs.9,66,183/-. Also, the respondent had waived of holding charges of Rs.2,240/- and delayed payment charges of Rs.3,361/-. The respondent has also acted upon the said settlement agreement as the amount agreed to be payable as per the settlement agreement has also been paid to the complainants as is evident from the statement of account dated 29.06.2022. It is also a matter of record that after settlement on 25.09.2019, the complainants did not file any civil or criminal case against the respondent-builder challenging the terms and conditions of that settlement before any authority except the present complaint on 21.07.2022 before the authority. If there has been any coercion or duress of any kind on the complainants, then they should have approached some authority for redressal of their grievances. But they kept mum and filed the present complaint only on 21.07.2022 i.e. after a gap of about 3 years. A reference in this regard may be made to the principles of waiver and estoppel and the same applies when a party

knows the material facts and is cognizant of the legal rights in that matter and yet for some consideration consciously abandons the existing legal rights, advantage, benefit, claim or privilege. The waiver can be contractual as in the present case or by express conduct in consideration of some compromise. However, a statutory right may also be waived by implied conduct like by wanting to take a change of a favorable decision. The fact that the other side had acted on it is sufficient consideration. The waiver being an intentional relinquishment is not to be inferred by mere failure to take action. These observations were made by the Hon'ble Apex Court of the land in case ***Arce Polymers Private Limited Vs. Alphine Pharmaceuticals Private Limited and Ors. MANU/SC/1184/2021***. Earlier, the same view was taken by the Hon'ble Apex Court of land in cases of ***Jayesh H. Pandya and Ors. Versus Subhtex India Ltd. and Ors. MANU/SC/1162/2019*** and ***Kalpraj Dharamshi and Ors. Versus Kotak Investment Advisors Ltd. and Ors. MANU/SC/0174/2021*** and wherein it was observed that "*the essential element of waiver is that there must be a voluntary and intentional relinquishment of a right. The voluntary choice is the essence of waiver. There should exist an opportunity for choice between the relinquishment and an enforcement of the right in question. It cannot be held that there has been a waiver of valuable rights where the circumstances show that what was done was involuntary. That apart, the doctrine of "waiver" or "deemed waiver" or*

"estoppel" is always based on facts and circumstances of each case, conduct of the parties in each case and as per the agreement entered into between the parties and this exposition has been affirmed by this Court in ***NBCC Ltd. versus J. G. Engineering Private Limited MANU/SC/0013/2010.***

17. Moreover, the cause of action for claiming delay possession charges and other reliefs against the respondent/builder had already arisen while the pendency of complaint before the Hon'ble NCDRC. After receiving occupation certificate, the possession of the allotted unit was offered to complainants on 20.06.2019. Also, it is to be noted that only after the offer of possession on 20.06.2019, the parties have settled the dispute inter se vide settlement agreement dated 25.09.2019. It is not the case of complainants that the cause of action to file the present complaint arose after the decision of the complaint on 01.11.2019 by Hon'ble NCDRC. Even the complainants did not take any permission to omit the reliefs now being claimed in the present complaint and sought liberty to sue afterwards in respect of portion so omitted or relinquished. Thus, the present complaint is barred by the order II rule 2 of the Civil Procedure Code,1908. The relevant provisions are reproduced below:

> ***ORDER II***
>
> ***1. Frame of suit.*** *—Every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them.*
>
> ***2. Suit to include the whole claim.*** —

> (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff *may relinquish* any portion of his claim in order to bring the suit within the jurisdiction of any Court.
>
> (2) Relinquishment of part of claim. —Where a plaintiff *omits to sue* in respect of, or ***intentionally*** *relinquishes*, any portion of his claim, *he shall not afterwards sue in respect of the portion so omitted or relinquished*.
>
> *(3) Omission to sue for one of several reliefs. —A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits,* except with the leave of the Court, *to sue for all such reliefs, he shall not afterwards* sue *for any relief so omitted.*

18. In the light of the above-mentioned reasoning and provisions, it is to be noted that the reliefs for which the present complaint has been filed ought to be taken in the earlier complaint before NCRDC as order II rule 2 provides for the suit to include whole claim. Therefore, the present complaint is not maintainable.
19. Complaint stands disposed of.
20. File be consigned to registry.

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

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 21.02.2023