

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

Complaint no. : 2303 of 2022
Complaint filed on : 25.05.2022
First date of hearing : 08.09.2022
Order reserved on : 08.12.2022
Order pronounced on : 21.02.2023

1. Mr. Ram Kishan Munjal
2. Mrs. Kamlesh Kumari Munjal
Both RR/o: L-49D, Saket, New Delhi.

Complainants

Versus

1. M/s Emaar India Ltd.
2. Kamdhenu Projects Pvt. Ltd.
(Formerly known as Emaar MGF Land Ltd.)
Address: 306-308, 3rd floor, C-2,
Square One, District Centre, Saket,
New Delhi-110017.

Respondents

Coram:

Shri Ashok Sangwan
Shri Sanjeev Kumar Arora

Member
Member

Appearance:

Shri Nilotpall Shyam
Shri Harshit Batra
None

Advocate for the complainants
Advocate for the respondent no.1
For respondent no.2

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.

2. Since the buyer's agreement has been executed on 29.04.2013 i.e., prior to the commencement of the Act ibid, therefore, the penal proceedings cannot be initiated retrospectively. Hence, the authority has decided to treat the present complaint as an application for non-compliance of statutory obligation on part of the promoters/respondents in terms of section 34(f) of the Act ibid.

A. Project and unit related details

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

Sr. No.	Particulars	Details
1.	Name of the project	Imperial Garden, Sector 102, Gurugram, Haryana
2.	Total area of the project	12 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no.	107 of 2012 dated 10.10.2012
	Validity of license	09.10.2020
	Licensee	Kamdhenu Projects Pvt. Ltd.
	Area for which license was granted	12 acres



5.	Registered/not registered	Registered in two phases i. 208 of 2017 dated 15.09.2017 [Valid up to 31.12.2018 for 49637 sq. mtrs. and extension granted vide no.3/2019 dated 02.08.2019 which is extended up to 31.12.2019] ii. 14 of 2019 dated 28.03.2019(Phase II) [Valid up to 17.10.2018 for 4.57 acres]
6.	Occupation certificate granted on	17.10.2019 [annexure R9, page 153 of reply]
7.	Unit no.	IG-07-1401, 14 th floor, tower no. 07 [Annexure 1, page 33 of complaint]
8.	Area of the unit	2000 sq. ft
9.	Provisional allotment letter	27.02.2013 [annexure R2, page 34 of reply] Note: - the complainant no.1 requested to the respondent no.1-promoter to delete the name of Ankur Munjal and requested addition of Kamlesh Kumari Munjal on 27.06.2015 as a co-allottee of the unit on 27.06.2015. The said request was accepted by the respondent no.1, accordingly the new allotment letter was issued in the name of complainants on 10.07.2015 (page 101 of reply).
10.	Date of execution of buyer's agreement	29.04.2013 [annexure 1, page 30 of complaint]
11.	Possession clause	14. POSSESSION (a) Time of handing over the Possession

		<p><i>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 <u>42 (Forty Two) months from the date of start of construction</u>, 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 <u>grace period of 3 (three) months after the expiry of said period of 42 months, for applying and obtaining the completion certificate/ occupation certificate in respect of the Unit and/or the Project.</u></i></p> <p>(Emphasis supplied)</p>
12.	Date of start of construction as per statement of account dated 06.03.2021 at page 68 of complaint	11.11.2013
13.	Due date of possession	11.05.2017 [Note: Grace period is not included]
14.	Total consideration as per statement of account dated 06.03.2021 at page 68 of complaint	Rs.1,60,71,759/-
15.	Total amount paid by the complainants-allottees as per statement of account dated	Rs.1,60,71,759/-

	06.03.2021 at page 70 of complaint	
16.	Offer of possession	25.10.2019 [annexure R10, page 156 of reply]
17.	Unit handover letter	15.01.2020 [annexure R11, page 161 of reply]
18.	Conveyance deed	08.07.2020 [annexure R12, page 165 of reply]
19.	Delay compensation already paid by the respondent in terms of the buyer's agreement as per statement of account dated 06.03.2021 at page 70 of complaint	Rs. 3,96,493/-

B. Facts of the complaint

4. The complainants have made the following submissions in the complaint:
- i. That the respondents through their representative had approached the complainant no.1 and one Mr. Ankur Munjal (hereinafter referred as 'erstwhile allottee') and represented that the respondent's project in question will effectively serve the residential purpose of complainant no.1 and his family. It was further represented that the impugned project has the best of the amenities.
 - ii. That the respondent company claimed that they have obtained a license from DTCP, Chandigarh for development of the project land into group housing complex comprising of multi-storied residential apartments in accordance with law bearing no. 102 of 2012 dated 15.10.2012. Further, M/s Kamdhenu Projects Pvt. Ltd. which is

- respondent no.2 is the wholly owned subsidiary of respondent no. 1 and is the owner of impugned project land whereby respondent no.1 entered into a collaboration agreement. All the payments by the complainants have been made to the respondent no.1.
- iii. That based on the aforementioned representations and enquiries made, the complainant no.1 started payment from 30.10.2012 and signed buyer's agreement on 29.04.2013. The complainants made first payment of Rs.1,00,000 on 30.10.2012 for booking of the said unit.
- iv. That the complainant no. 1 along with the erstwhile allottee and respondent no.1 entered into agreement i.e., buyer's agreement dated 29.04.2013 for the sale of said unit bearing no. IG-07-1401. All the clauses of said agreement are not in accordance with the mandate as prescribed under model agreement of the rules made under the Act.
- v. That as per the buyer's agreement, the respondent no.1 agreed to sell/ convey/ transfer the apartment/unit no. IG-07-1401, 14th floor, Imperial Garden in the complex situated at Sector-102, Village-Kherki, Gurugram, Haryana having carpet area of approximately 2000 sq. ft. for a total consideration of Rs. 1,45,71,000/- in accordance with annexure-III of the buyer's agreement.
- vi. That the complainant no. 1 vide request dated 27.06.2015 submitted documents for substitution of the name of co-allottee to the respondent no.1 in accordance with clause 26 and 28 of the buyer's

agreement. The respondent no.1 vide letter dated 10.07.2015 accepted the request and substituted the name of erstwhile allottee Mr. Ankur Munjal with Mrs. Kamlesh Kumari Munjal i.e., complainant no.2. Consequently, the said unit no. IG-07-1401 stood in the joint names of the complainants herein.

- vii. That as per clause 14(a) of the buyer's agreement, the possession date for the impugned unit was agreed to be 42 months from the date of start of construction i.e., 11.11.2013.
- viii. The aforementioned clause of the buyer's agreement is not binding on the complainants as the same being one sided, unfair and arbitrary giving right to the respondent no.1 to illegally gratify themselves from the money received from them till the start of the construction. Thus, the time period of 42 months as provided under clause 14 of the buyer's agreement shall run from the date of the execution of the said agreement. Further, clause 16 of the buyer's agreement provides that the respondent, if failed to deliver the possession of the impugned unit within the stipulated time frame, shall pay compensation for the entire period of delay @ Rs.7.5 per sq. ft. of super area per month, the said clause of the buyer's agreement is not binding on the complainants as the same being one sided, unfair and arbitrary and also in direct conflict with the Act.
- ix. That the complainants pursuant to the buyer's agreement made a total payment of Rs.1,60,71,759/- to the respondent no.1. The said

amount was paid towards the impugned unit in accordance with the demand raised by it.

- x. That the complainants made all payments toward the sale consideration of the impugned unit in the impugned project including costs towards other facilities wherein all the payments were made in accordance with the demand made by the respondent no.1. Despite the said payments, the respondent no.1 failed to deliver the possession in agreed time-frame for reasons best known to them and the respondent no.1 never bothered to intimate reasons and reasoning for the delay to the complainants. While calculating, 42 months from the date of execution of the buyer's agreement, the proposed date of delivery of possession shall be taken as 28.10.2016. Therefore, the respondent no.1 has breached the sanctity of the agreement.
- xi. That without prejudice to the above, the respondent no.1 even failed to provide the possession of the impugned unit even within the arbitrary timeline provided under clause 14 of the agreement i.e., within 42 months from the start of the construction i.e., 11.05.2017. As per the statement of account supplied by the respondent no.1, the date of start of foundation was 11.11.2013.
- xii. That the offer of possession was made to the complainants by the respondent no.1 only on 25.10.2019 pursuant to the receipt of the occupation certificate of the impugned tower as communicated by the

- respondent no.1. However, the actual physical handover of the said unit was made to complainants on 15.01.2020.
- xiii. That the complainants have made clear to the respondent no.1 that the complainants are eligible to get the delayed possession interest for the said period. But the respondent no.1 never bothered to honour the said demand or provide any appropriate reply for the same.
- xiv. That the complainants took the handover of the impugned unit even without getting the delayed possession charges for delay in handing over the possession of the impugned unit. The respondent no.1 only provided for meagre Rs. 3,96,493/- towards compensation on intimation of offer of possession. There is more than 2 years of unexplained delay in handing over the possession by the respondent no.1. Therefore, the complainants have genuine grievance which require the intervention of the authority in order to do justice with them.
- xv. That the complainants have paid the demands raised within the stipulated time without any default in accordance with buyer's agreement and thus entitled to the interest at prescribed rate for the unreasonable delays in delivering the possession by the respondent no.1. Henceforth, the respondent no.1 is liable to pay interest for delayed period of handing over the possession i.e. from 11.05.2017 till the date of handing over the possession i.e. till 15.01.2020 in accordance with section 18 of the Act.

- xvi. That the conveyance deed dated 08.07.2020 was executed between the complainants and respondent no.1. The execution of conveyance deed between the parties does not discharge the respondent company from its liabilities as per the buyer's agreement as has been held by Apex Court in Wg. Cdr. Arifur Rahman Khan and Aleya Sultana and Ors. Vs. DLF Southern Homes Pvt. Ltd. (Civil appeal no.6239 of 2019 dated 24.8.2020). They were also compelled to pay Rs. 4,47,531/- towards HVAT security demanded by the respondent no.1 for the period of 01.04.2014 to 30.06.2017.
- xvii. That it is a fit case wherein authority shall order respondent no.1 to pay interest at prescribed rate for delayed period of handing over the possession till the actual date of handing over the possession in view of the mandatory obligation as provided under section 18 of the Act as well as on account of the acrimony of respondent no.1, wherein they obliterated the trust reposed on them by handing over their hard earned money always on time and in accordance with the buyer's agreement. The respondent no.1 did not perform the required reciprocity which goes to very root of any bilateral agreement.

C. Relief sought by the complainants

5. The complainants have filed the present compliant for seeking following reliefs:
- i. Direct the respondent to pay interest at prescribed rate for the delayed period of handing over the possession calculated from the

- proposed date of delivery of possession as per the buyer's agreement till the date of handing over the possession of the impugned unit i.e. till 15.01.2020 on the amount paid by the complainants towards the impugned unit no. IG-07-1401.
- ii. Direct refund of Rs. 4,47,531/- paid towards HVAT security charged by the respondent.
 - iii. Any other order or relief which the Authority may deem fit and proper in the facts and circumstances of the case, may kindly be passed in favour of the complainants and against the respondents.
6. 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. Despite service of notice to the respondent no.2, the respondent has failed to file reply till date, hence, the defence is struck off.
- D. Reply by the respondent no.1**
7. The respondent no.1 has raised certain preliminary objections and has contested the present complaint on the following grounds:
- i. That the complainants have no locus standi or cause of action to file the complaint. It 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 agreement dated 29.04.2013.
 - ii. That Mr. Ram Kishan Munjal and Ankur Munjal, the erstwhile allottees being interested in the real estate development of the

- respondent known under the name and style of "Imperial Garden" situated at Sector 102, Gurugram, Haryana applied for provisional allotment of the unit vide application form and was consequently allotted unit no. IG-07-1401 having a super area of 2000 sq. ft. vide an allotment letter dated 27.02.2013 and consequently through the buyer's agreement dated 29.04.2013. The project has also been registered vide registration no. 208 of 2017 dated 15.09.2017 vide memo no. HRERA-140/2017/1083 and was extended vide extension number 03 of 2019 dated 02.08.2019.
- iii. That thereafter, the respondent no. 1 was requested to delete the name of Ankur Munjal and the addition of Kamlesh Kumari Munjal on 27.06.2015, as an allottee of the unit. The said request was accepted by the respondent no. 1. The complainants submitted affidavit in this regard, accordingly, a new allotment letter of unit was issued in the name of the complainants on 10.07.2015.
- iv. That according to the cause 14(a) of the buyer's agreement, the delivery of possession of the unit was proposed to be within 42 + 3 months from the date of start of construction subject to force majeure and compliance of all the terms and conditions by the allottees including but not limited to the timely payment of the total price payable in accordance with the payment plan. Accordingly, the proposed due date of delivery of possession comes out to be

- 11.08.2017. This date was only proposed and extended in terms with the agreement.
- v. That despite the default caused by the complainants in fulfilling their obligations, the respondent no. 1 did not default and instead completed the construction of the project without having regular payment of monies by the allottees like the complainants. The delay has been caused by the complainants as well in making payments against the unit. The complainants, hence, are liable for all the defaults caused by them. The respondent gave multiple request letters and reminders in case of delay caused in making payments against the unit, in which circumstance, the proposed due date of delivery of possession is liable to be extended. As is known and practically understood that regular and timely payments by the allottees are pertinent towards the completion of a real estate project, yet, without the same being done in the present case, the respondent no. 1 has shown exemplary conduct as a real estate promoter which should be duly taken into account.
- vi. That due to the delays cause by the complainants in making payment against the unit, the respondent no. 1 was gravely affected. The complainants have had *malafide* conduct since the very beginning. Upon delay caused in making the payment, they wanted to escape the obligation of making payments towards delay payment charges and requested the respondent no. 1 to waive off the same. The respondent

- no. 1, in utmost bonafide, accepted the request of the complainants and accordingly, waived the delay payment charges, upon which, an undertaking cum indemnity dated 11.07.2015 was executed between the parties. Being completely aware of the direct nexus of the delayed payments to the delay in the project, the complainants agreed to not raise any claims against the company, however, in violation of the same, the present claim has been raised.
- vii. The respondent no. 1 was adversely affected by various construction bans, lack of availability of building material, regulation of the construction and development activities by the judicial authorities including NGT in NCR on account of the environmental conditions, restrictions on usage of ground water by the High Court of Punjab & Haryana, demonetization, contractor issues etc. and other force majeure circumstances, yet, the respondent no. 1 completed the construction of the project diligently and timely, without imposing any cost implications of the aforementioned circumstances on the complainants and demanding the prices only as and when the construction was being done.
- viii. The moreover, the respondent no. 1 was additionally gravely affected due to its dispute with the contractor. It is submitted that the respondent had appointed a contractor operating under the name and style of Capacite Infraprojects Ltd. for construction and implementation of the project. The said contractor had assured,



represented, warranted and claimed that it has the necessary resources, competence, capacity, capability and expertise for undertaking, performing, effectuating and completing the work undertaken by it. The respondent no. 1 had no reason to suspect the *bona fide* of the said contractor at the relevant time and awarded the work to the said contractor. However, the said contractor was not able to meet the agreed timeline for construction of the project. The said contractor failed to deploy adequate manpower, shortage of material, etc. The respondent was constrained to issue several notices, requests etc. to the said contractor to expedite progress of the work at the project site but to no avail.

- ix. That the respondent no. 1, despite defaults on part of the complainants, earnestly fulfilled its obligation under the buyer's agreement and completed the project as expeditiously as possible in the facts and circumstances of the case. The default committed by the allottees and due to various factors beyond the control of the respondent no. 1 are the factors responsible for delayed implementation of the project. The respondent no. 1 cannot be penalised and held responsible for the default of its customers or due to force majeure circumstances. Thus, it is most respectfully submitted that the present application deserves to be dismissed at the very threshold.



- x. That the respondent no. 1 has complied with all of its obligations, not only with respect to the buyer's agreement with the complainants but also as per the concerned laws, rules and regulations thereunder and the local authorities. Despite innumerable hardships being faced by the respondent no. 1, the respondent no. 1 completed the construction of the project and applied for the occupation application vide an application dated 11.02.2019 before the concerned authority and successfully attained the occupation certificate dated 17.10.2019. It is respectfully submitted that once an application for grant of occupation certificate is submitted to the concerned statutory authority, the respondent ceases to have any control over the same. The grant of occupation certificate is the prerogative of the concerned statutory authority and the respondent no. 1 does not exercise any influence in any manner whatsoever over the same. There is a delay of around 8 months caused due to the non-issuance of the occupation certificate by the statutory authority while calculating the period of delay. Therefore, it is respectfully submitted that the time period utilised by the concerned statutory authority for granting the occupation certificate is liable to be excluded from the time period utilised for implementation of the project.
- xi. That thereafter, only after obtaining the requisite permissions, the respondent no. 1 legally offered the possession of the unit to the complainants on 25.10.2019. It is pertinent to note that as per clause

14(a), the respondent proposed to offer the possession within 42 months from the date of start of construction plus grace period of 3 months for applying and obtaining occupancy certificate. It is pertinent to mention that vide letter dated 25.10.2019 regarding offer of possession, the complainants were asked to make the requisite payment based on the statement of final dues and complete the documentation required to enable the respondent no. 1 to initiate the process of handover of unit.

- xii. That thereafter, the complainants took the physical possession of the unit and executed the Indemnity cum Undertaking for possession on 30.11.2019. The complainants had satisfied themselves about the measurement, location, dimension and development etc. of the unit and the complainants had no claim of any nature whatsoever against the company with regard to the size, dimension, area, location and legal status of the unit, and had taken the peaceful possession of the unit, as is evident in the unit handover letter.
- xiii. That the absolute title over the unit was transferred to the complainants through conveyance deed dated 08.07.2020 vide. Since over two years, the complainants have been living in peaceful possession of the unit and now, after over two years, they have come to the Authority with the claim of delay possession charges which clearly shows their fraudulent and deceptive motive to wrongfully gain from the respondent no. 1. The complainants should not be

entitled to claim the interest on the delayed possession. Thus, the complaint is devoid of any cause of action and is nothing but an abuse process of law. It is submitted that a contract is deemed to be concluded after execution of the conveyance deed and hence the complaint is liable to be dismissed with heavy costs. After having slept on their rights for a number of years, they cannot be rightly allowed to have the present claims.

- xiv. Moreover, without accepting the contents of the complaint in any manner whatsoever, the *bonafide* conduct of the respondent has to be highlighted. As per clause 16(b) of the agreement delay compensation shall only be given to allottees who have not defaulted and/or breached any of the terms of this agreement or who have not defaulted in payment of installments as per the schedule of the payment incorporated in the agreement. Even though the complainants have defaulted in payment of installments, the respondent credited Rs. 37,035 as credit memo on account of anti-profiting, Rs. 11,279/- as credit memo on account of EPR and Rs.3,96,493/- as credit memo on account of compensation on intimation of possession. This shows the goodwill and *bonafide* intention of the respondent. Without prejudice to the rights of the respondent, delayed interest if any has to be calculated only on the amounts deposited by the allottee/complainants towards the basic principal amount of the unit in question and not on any amount

credited by the respondent, or any payment made by the allottees/complainants towards delayed payment charges or any taxes/statutory payments etc.

E. Jurisdiction of the authority

8. The authority observed that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I Territorial jurisdiction

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 complainants at a later stage.

F. Findings on the objections raised by the respondent no.1

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

12. The respondent no.1 contended that the absolute title over the unit was transferred to the complainants through conveyance deed dated 08.7.2020. It was further contended that the complainants after having executed the conveyance deed, taking peaceful possession of the unit, and having enjoyed(ing) such possession, the complainants should not be entitled to claim the interest on the delayed possession. Thus, the present complaint is devoid of any cause of action and is nothing but an abuse of process of law.
13. The authority has already decided the said issue in the complaint titled as **Varun Gupta. Versus Emaar MGF Land Ltd. (CR/4031/2019)** wherein it was held that taking over the possession and thereafter execution of the conveyance deed can best be termed as respondent no. 1 having

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

14. The authority is of the view that allottees have invested their hard-earned money which there is no doubt that the promoter has been enjoying benefits of and the next step is to get their title perfected by executing a conveyance deed which is the statutory right of the allottee. Also, the obligation of the developer – promoter does not end with the execution of a conveyance deed. The essence and purpose of the Act was to curb the menace created by the developer/promoter and safeguard the interests of the allottees by protecting them from being exploited by the dominant position of the developer which he thrusts on the innocent allottees. Therefore, in furtherance to the Hon'ble Apex Court judgement and the law laid down in the **Wg. Cdr. Arifur Rahman (supra)**, this authority holds that even after execution of the conveyance deed, the complainants cannot be precluded from their right to seek delay possession charges from the respondent-promoter.

G. Findings on the reliefs sought by the complainants

G.I Possession and delay possession charges

15. **Relief sought by the complainants:** Direct the respondent to pay interest at prescribed rate for the delayed period of handing over the possession calculated from the proposed date of delivery of possession as per ABA till the date of handing over the possession of the impugned unit i.e., till 15.01.2020 on the amount paid by the complainants towards the impugned unit no. IG-07-1401.
16. In the present complaint, the complainants intend to continue with the project and are seeking delay possession charges as provided under the proviso to section 18(1) of the Act. 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.”

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

“14. POSSESSION

(a) Time of handing over the Possession

*Subject to terms of this clause and barring force majeure conditions, 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 **42 (Forty Two) 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 3 (three) months after the expiry of said period of 42 months, for applying and obtaining the completion certificate/ occupation certificate in respect of the Unit and/or the Project.**"*

18. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement, and the complainants not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment time period for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject floor and to deprive the allottees of their right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.
19. **Due date of possession and admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within 42 months from the date of commencement of construction and it is

further provided in agreement that promoter shall be entitled to a grace period of 3 months for applying and obtaining completion certificate/occupation certificate in respect of said unit and/or project. The construction commenced on 11.11.2013 as per statement of account dated 06.03.2021. The period of 42 months expired on 11.05.2017. 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 3 months cannot be allowed to the promoter at this stage. Therefore, the due date of possession comes out to be 11.05.2017.

20. **The amount on which delay possession charges are payable:** On 08.12.2022, the counsel for the respondent no.1 argued that DPC may not be allowed on the statutory charges paid to the government. The same was objected by the counsel for the complainants in support of citation RERA appeal no. 95 of 2021 wherein DPC interest was allowed on the total amount deposited.
21. The authority elucidating the definition of term 'interest' as defined under section 2(za)(ii) of the Act which provides that the rate of interest payable by promoter to the allottee, in case of default, 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. 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) ...;

*(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;"*

22. The authority is of the view that while computing the amount on which delay possession charges are payable, the Act does not preclude the statutory charges paid by the allottee to the promoter. Thus, the delay possession charges shall be payable on the amount or part thereof paid by the allottee to the promoter.
23. Moreover, the Hon'ble Punjab and Haryana High Court in **RERA Appeal no. 95 of 2021 (O&M) titled as Emaar India Limited (formerly known as Emaar MGF Land Ltd.) Vs. Kaushal Pal Singh alias Kushpal Singh** has held as under:

On a careful reading of the proviso to Section 18(1) of the 2016 Act, it is evident that an allottee who does not intend to withdraw from the project, is entitled to be paid by the promoter the interest for every month of delay till the delivery of possession at such rate as may be prescribed. It is in the nature of damages or compensation for delay in delivery of the possession of the apartment/unit. Such interest for every month of delay is payable on the entire amount paid by the allottee. The interest has been defined in Section 2(za) of the 2016 Act. Explanation(i) of Section 2(Aa) of the 2016 Act provides that in case of default, the interest is payable by the promoter to the allottee at the rate equal to the rate of interest as shall be prescribed in this behalf. Explanation (ii) Section 2(Za) of the 2016 Act provides that the

*interest shall be payable to the allottee from the date the promoter received the amount or any part thereof. The proviso to Section 18(1) of the 2016 Act clearly enables the authority to compensate the allottee for the losses suffered on account of delay in delivery of possession by the promoter. **The interest shall be payable on the complete amount paid by the allottee to the promoter. The learned counsel representing the appellant has failed to draw the attention of the Court towards any statutory provision prohibiting the payment of interest on the amount of H-VAT, GST, EDC etc. under proviso to Clause (1) of Section 18 of the 2016 Act to the allottee. Section 2(g) of the 1975 Act defines the external development works. Section 3(3)(a)(ii) of the 1975 Act provides that the owner who wants to develop his land into a colony is liable to pay the proportionate development charges. In other words, the liability to pay the amount is on the licensee (owner-promoter).***

24. In furtherance of the citation mentioned above and law laid down by the Hon'ble Punjab and Haryana High Court, *interest for every month of delay is payable on the entire amount paid by the allottee.*
25. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges at the prescribed rate. However, proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

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

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

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

26. The legislature in its wisdom in the subordinate legislation under the rule 15 of the rules has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.
27. Taking the case from another angle, the complainants-allottees were entitled to the delayed possession charges/interest only at the rate of Rs.7.50/- per sq. ft. per month as per clause 16(a) of the buyer's agreement for the period of such delay; whereas, the promoter was entitled to interest @ 24% per annum at the time of every succeeding instalment from the due date of instalment till the date of payment as per clause 13(i) of the buyer's agreement. The functions of the authority are to safeguard the interest of the aggrieved person, may be the allottee or the promoter. The rights of the parties are to be balanced and must be equitable. The promoter cannot be allowed to take undue advantage of his dominate position and to exploit the needs of the home buyers. This authority is duty bound to take into consideration the legislative intent i.e., to protect the interest of the consumers/allottees in the real estate sector. The clauses of the buyer's agreement entered into between the parties are one-sided, unfair and unreasonable with respect to the grant of interest for delayed possession. There are various other clauses in the buyer's agreement which give sweeping powers to the promoter to cancel the allotment and forfeit the amount paid. Thus, the terms and conditions of the buyer's agreement are

ex-facie one-sided, unfair and unreasonable, and the same shall constitute the unfair trade practice on the part of the promoter. These types of discriminatory terms and conditions of the buyer's agreement will not be final and binding.

28. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., 21.02.2023 is 8.70%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.70%.

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

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

Explanation. —For the purpose of this clause—

(iii) 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;

(iv) 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;"

30. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 10.70% by the respondents/promoters

which is the same as is being granted to the complainants in case of delayed possession charges.

31. 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 no.1 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 29.04.2013, the possession of the said unit was to be delivered within a period of 42 months from the date of commencement of construction and it is further provided in agreement that promoter shall be entitled to a grace period of 3 months for applying and obtaining completion certificate/occupation certificate in respect of said floor. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over possession comes out to be 11.05.2017. In the present case, the complainants were offered possession by the respondent no.1 on 25.10.2019 after obtaining occupation certificate dated 17.10.2019 from the competent authority. Thereafter, the complainants have taken the possession of the subject unit vide unit handover letter dated 15.01.2020 and have subsequently executed the conveyance deed on 08.07.2020. The authority is of the considered view that there is delay on the part of the respondent no.1 to offer physical possession of the allotted unit to the

complainants as per the terms and conditions of the buyer's agreement dated 29.04.2013 executed between the parties.

32. 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 17.10.2019. However, the respondent no.1 offered the possession of the unit in question to the complainants only on 25.10.2019, so it can be said that the complainants came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, they should be given 2 months' time from the date of offer of possession. These 2 months' of reasonable time is being given to the complainants keeping in mind that even after intimation of possession practically they have to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e. 11.05.2017 till the expiry of 2 months from the date of offer of possession (25.10.2019) which comes out to be 25.12.2019.
33. 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 no.1 is established. As such the complainants are entitled to delay

possession charges at prescribed rate of the interest @ 10.70 % p.a. w.e.f. 11.05.2017 till 25.12.2019 as per provisions of section 18(1) of the Act read with rule 15 of the rules.

34. Also, the amount of Rs. 3,96,493/- (as per statement of account dated 06.03.2021) so paid by the respondent no.1 to the complainants towards compensation for delay in handing over possession in terms of the buyer's agreement shall be adjusted towards the delay possession charges to be paid by the respondent no.1 in terms of proviso to section 18(1) of the Act.

G.II Direct refund of Rs. 4,47,531/- paid towards HVAT security charged by the respondent

35. The authority has decided this in the complaint bearing no. **4031 of 2019** titled as **Varun Gupta V/s Emaar MGF Land Ltd.** wherein the authority has held that the promoter is entitled to charge VAT from the allottee for the period up to 31.03.2014 @ 1.05% (one percent VAT + 5 percent surcharge on VAT). However, the promoter cannot charge any VAT from the allottees/prospective buyers for the period 01.04.2014 to 30.06.2017 as the same was to be borne by the promoter-developer only. The respondent-promoter is bound to adjust the said amount, if charged from the allottees with the dues payable by him or refund the amount if no dues are payable by him.
36. In the present complaint, the respondent has not charged any amount towards HVAT for the period of 01.04.2014 till 30.06.2017, however, vide letter of offer of possession dated 25.10.2019 has demanded lien marked FD of Rs. 4,47,531/- towards future liability of HVAT for liability post

01.04.2014 till 30.06.2017. In light of judgement stated above, the respondent shall not demand the same and the lien so marked be removed. Also, information about the same be sent to the concerned bank by the promoter as well as complainants along with a copy of this order.

H. Directions of the authority

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

- i. The respondent no.1 is directed to pay the interest at the prescribed rate i.e. 10.70 % per annum for every month of delay on the amount paid by the complainants from due date of possession i.e. 11.05.2017 till 25.12.2019 i.e. expiry of 2 months from the date of offer of possession (25.10.2019). The arrears of interest accrued so far shall be paid to the complainants within 90 days from the date of this order as per rule 16(2) of the rules.
- ii. Also, the amount of Rs.3,96,493/- so paid by the respondent no.1 to the complainants towards compensation for delay in handing over possession shall be adjusted towards the delay possession charges to be paid by the respondent no.1 in terms of proviso to section 18(1) of the Act.
- iii. The respondent no.1 is directed to remove the lien over FD of Rs. of Rs. 4,47,531/- towards future liability of HVAT for liability post



01.04.2014 till 30.06.2017. Also, information about the same be sent to the concerned bank by the promoter as well as complainants along with a copy of this order.

38. Complaint stands disposed of.

39. File be consigned to registry.


(Sanjeev Kumar Arora)

Member

Haryana Real Estate Regulatory Authority, Gurugram


(Ashok Sangwan)

Member

Dated: 21.02.2023