BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 3754 of 2021
Date of decision : 06.02.2023

1. Shweta Tyagi
2. Ravindra Mohan Tyagi

Address:- EHF-267-A-FF-062, Amber Block, Emerald Hills Floors, Sector-65, Gurugram, Haryana — **Complainants**

Versus

Emaar India Ltd.

Address:- Emaar MGF Business Park, Mehrauli Gurgaon Road, Sector-28, Sikandarpur Chowk, Gurugram, Haryana. — **Respondent**

CORAM:

Shri Ashok Sangwan — **Member**
Shri Sanjeev Kumar Arora — **Member**

APPEARANCE:

Shri Varun Chugh — Advocate for the complainants
Shri Harshit Batra — Advocate for the respondent

HARERA
GURUGRAM

ORDER

1. The present complaint dated 15.09.2021 has been filed by the complainants/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 29 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 under the provision of the Act or the Rules and regulations made there under or to the allottee as per the agreement for sale executed *inter se*.

A. **Unit and project related details**

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

Sr. No.	Particulars	Details
1.	Name of the project	Emerald floors at emerald hills, Sector 65, Gurugram, Haryana
2.	Unit no.	EHF-267-A-FF-062 [page 18 of complaint]
3.	Provisional allotment letter dated	08.07.2009 [annexure R1, page 33 of reply]
4.	Date of execution of buyer's agreement	17.03.2010 [Page 17 of complaint]
5.	Possession clause	***13: POSSESSION*** ***(a) Time of handing over the possession*** *Subject to terms of this clause and subject to the Allottee(s) having complied with all the terms and conditions of this 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 independent floor within ***27 months from the date of execution of this Agreement.*** *The Allottee(s) agrees and understands that the Company shall be entitled to a* ***grace period of six months, for applying and obtaining the occupation certificate in respect of the Independent Floor and/or the Project.*** (Emphasis supplied) [Page 32 of complaint]
6.	Due date of possession	17.06.2012 [**Note:** Grace period is not included]
7.	Total consideration as per statement of account dated 05.10.2021 at page 213 of reply	Rs. 54,95,630/-
8.	Total amount paid by the complainant as per statement of account dated 05.10.2021 at page 213-215 of reply	Rs.55,03,900/-
9.	Occupation certificate	09.05.2019 [annexure R2, page 98 of reply]
10.	Offer of possession dated	11.05.2019 [annexure R2, page 100 of reply]
11.	Unit handover letter dated	06.07.2019 [annexure R2, page 108 of reply]
12.	Conveyance deed	07.08.2019 [annexure R2, page 114 of reply]
13.	Delay compensation already paid by the respondent in terms of the	Rs.10,60,407/- + Rs.5,30,204/-

	buyer's agreement as per statement of account dated 05.10.2021 at page 213 of reply	

B. **Facts of the complaint**

3. The complainants have made the following submissions in the complaint:-

   i. That, the property in question i.e. floor bearing No. EHF-267-A-FF-062 (First Floor) admeasuring 267 Sq. Yards, in the project of the respondent i.e. Emaar India Limited, known as "Emaar Hills Floors" (the "Project") situated at Sector-65, Gurugram, Haryana, was booked by the complainants in the year 2009.

   ii. That, thereafter, on 17.03.2010, the complainants entered into a builder buyer's agreement with the respondent, by virtue of which the respondent allotted a floor bearing No. EHF-267-A-FF-062 (First Floor) admeasuring 267 Sq. Yards, along-with car parking space in the project known as "Emerald Hills Floors" situated at Sector-65, Gurugram, Haryana.

   iii. That, on 07.08.2019, the respondent got the conveyance deed of the floor in question executed in favour of the complainants. That, subsequent to the aforesaid purchase, when the complainants visited the property in question, there was an open space adjacent to the property i.e. A-62 and upon enquiring about the same, got to know that the open space is meant for construction of road so as to internally connect that block from the other via the said 3 Mtr. access road and hence is a dedicated space for the

proposed road, though temporarily covered with aluminium sheets, by the respondent.

iv. That, the complainants independently verified this fact from the respondent, through its customer care team as well as its dedicated facilities management team and the same very fact was verbally re-affirmed by them too that a 3-meter-wide road is proposed to be constructed and would be made in another three-four months. That, it is pertinent to mention here that even in the schedule I attached to the conveyance deed as well as in the sanctioned layout plan uploaded by the respondent on its website, pertaining to the said licensed project in question, it has been categorically mentioned/shown that there is a 3 Mtr. wide road adjacent to building no. A-62.

v. That, post taking the possession of unit no. EHF-267-A-FF-062 (First Floor) by the complainants, besides other owners of the ground and second floor of the same building and because of other residents also moving into the floors constructed in the said block, the issue of shortage of car parking cropped up, since there was hardly any provision for extra car parking for the owners, let alone the issue pertaining to visitors car parking, hence required additional car parking space and so in the month of July-August, 2020 many emails were written to the respondent company bringing this critical issue to light and requested their indulgence for immediate construction of 3 Mtr. wide road adjacent to building no. A-62, so that their vehicles could be parked on the roadside, which would resolve their immediate problem for additional car parking space.

vi. That, thereafter a series of e-mails were written to the respondent, besides personal visits but yielded no results. In fact, the respondent vide its reply through emails dated 03.07.2020 and 15.02.2021, apprised the complainants that the open space adjacent to building no. A-62 does not forms the part of Amber block and since the layout plan has been modified, hence 3 Mtr. wide road cannot be constructed on the same.

vii. That, after coming to know regarding the respondent's stance with respect to the open space which might be converted into a plot, as told by the respondent's facilities management team, and which was meant for construction of the road, as depicted from the sanctioned layout plan submitted by the respondent as well as the mentioning of the same very fact in the schedule 1 of the conveyance deed/sale deed, on 29.06.2021, complaint was filed with the STP and DTP office Gurugram, against the respondent, for committing the above mentioned gross illegality, though no action has been taken on the same till date.

viii. That, it is imperative on the respondent's part that the project must be in consonance with the sanctioned layout plan and other specifications. The statutory provision under Section 14 of the Real Estate (Regulation and Development) Act states that irrespective of any agreement, contract or legislation, the builder/promoter shall not make any changes or modifications/alterations to the sanctioned plan, except:

- When due to architectural or structural reasons, with due recommendation from an engineer or architect and intimation to

the allottees, certain minor modifications can be made to the structural plan.

- With written consent of 2/3rd of the allottees (buyers) agreeing to make alterations or additions to the layout plan under sanctioned project;

which consent was never obtained from the complainants, besides other residents of Ground and first floor of building no. A-62, in the present case.

ix. That, the phrase 'prior written consent' in Section 14, is of pivotal importance, as it implies that home buyers must be informed of the proposed changes in the project, before they give their consent. The Bombay High Court, in the case of **Madhuvihar Cooperative Housing Society and others vs Jayantilal Investments and others, 2010 (6) Bom CR 517**, had the opportunity to interpret Section 7 of the Maharashtra Ownership of Flats Act (MOFA), 1963, which is similar to Section 14 of the RERA. It held that the consent of a home buyer must be an 'informed consent', i.e., one which is freely given after the flat purchaser is placed on notice by complete and full disclosure of the project or scheme that the builder plans to implement. Further, the consent must be specific and relatable to a particular project or scheme of the developer which is intended. That, since Section 7 of the MOFA is analogous to Section 14 of the RERA, the ruling of the **Madhuvihar Cooperative Housing Society** case will hold good for all cases that come before the Real Estate

Regulatory Authority and the Real Estate Appellate Tribunal. Therefore, should a developer desire to amend the project layout, he must obtain the prior written consent of all the allottees. Such consent should be obtained, after informing them about all the proposed modifications and amendments and the impact it will have on the developer. This will enable the allottees to take an informed decision, keeping in mind their interests.

x. That, in the case in hand, no prior intimation was ever given to the complainants or other residents of building no. A-62, thereby inviting objections regarding the change of the sanctioned layout plan, so as to render an opportunity to the residents to submit their concerns with regard to the proposed revision in the layout plan, in gross violations of the provisions of The Haryana Development and Regulation of Urban Areas Act, 1975. That, it is worth mentioning here that conversion of open space meant for construction of 3 Mtr. wide road for any other purpose either by merging or utilising it otherwise would be detrimental to the rights of the owners of building no. A-62 Amber Block as the same would tantamount to extinguishment of the exclusively of their property having a direct access through the proposed adjacent 3 Mtr. road, purchased by them keeping the same in mind.

xi. That, subsequent to purchasing the floor, the complainants time and again via numerous emails, calls and personal visits requested the respondent for construction of 3 Mtr. wide road but the plea was rejected by the company in an arbitrary manner and in gross violations to the principles of equity and good conscience. That, the above stated issue was timely brought to the notice of

the concerned officials of the respondent company and was even escalated to the higher management of the company via several mails but they all turned a deaf ear to the genuine grievance of the complainants and never addressed the same. That, the conversion of open space meant for construction of 3 Mtr. vide road by merging it with additional land or utilizing it otherwise for any other purpose can in no eventuality be done by the respondent company, as per its whims and fancies and in an arbitrary manner, violating the rule of law.

xii. That, the respondent has committed various acts of omission and commission by making incorrect and false statement in the emails, to the complainants as well as by committing other serious acts as mentioned in preceding paragraph. The complainants, therefore, seeks indulgence of this hon'ble authority to invoke powers of investigation enshrined under Section 35 of the Act, so as to investigate the matter and if in case the authority arrives at a conclusion that the respondent has violated the letter and spirit of section 14, may kindly impose penalty amounting to five per cent of the cost of the project, and; to further pass directions u/s 36 of the Act to restrain the respondent from converting the open space meant for proposed 3 Mtr. wide road by merging into another plot or utilizing it for any other purpose as an interim measure, till the pendency of the present complaint

C. Relief sought by the complainants:

4. The complainants have sought following relief(s)

i. Direct the respondent to pay interest for every month of delay at prevailing rate of interest.

ii. To invoke powers of investigation enshrined under section 35 of the Act, to investigate the matter and penalize the respondent for violation of the provisions of section 14, thereby imposing penalty in accordance with the provisions of the Act.

iii. To pass interim directions u/s 36 of the Act to restrain the respondent from converting the open space meant for proposed 3 mtr. wide road by merging into another plot or utilizing it for any other purpose as an interim measure, till the pendency of the present complaint.

iv. To direct the respondent to construct the 3 mtr. wide road on the open space, adjacent building no. A-62, amber block, emerald hills floors, sector 65, Gurugram, Haryana, in accordance with the sanctioned layout plan.

v. Direct the respondent to pay a sum of Rs.50,000/- to the complainants towards the cost of the litigation.

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

D. Reply by the respondent

6. The respondent contested the complaint on the following grounds.

i. That at the very outset, it is submitted that the instant complaint is untenable both in facts and in law and is liable to be rejected on

this ground alone. That the complainants are estopped by their own acts, conduct, acquiescence, laches, omissions etc. from filing the present complaint.

ii. That the complainants have not approached the court with clean hands as have nowhere divulged the authority with the fact that they have been in constant defaults in making good on their part of the obligations.

iii. That the allottee being interested in the real estate development of the respondent, where the land is developed into a residential plotted colony of villas, plots, commercial units, independent floors of "Emerald floors at Emerald Hills" situated at Sector 65, Gurugram, tentatively applied for provisional allotment and, in pursuance of the aforesaid application form was allotted an independent unit no. EHF-267-A-FF-062 on First floor of plot no. A-062 in Block A, having a super area of 1380 sq. ft. vide provisional allotment letter dated 08.07.2009 and consequently through the buyer's agreement dated 17.03.2010.

iv. That the respondent applied for the occupancy certificate (oc) on 04.04.2019 and subsequently received the OC on 09.05.2019. Thereafter, the respondent offered the unit to the complainant vide the letter for offer of possession dated 11.05.2019 and later the unit was handed over to the complainants vide a unit handover letter dated 06.07.2019, since then the complainants have been enjoying a peaceful possession of the property. Subsequently the conveyance deed was executed between the parties vide a conveyance deed dated 07.08.2019. The application for occupancy certificate dated 04.04.2019, occupancy certificate

dated 09.05.2019, the letter for offer of possession dated 11.05.2019, the unit handover letter dated 06.07.2019 and the conveyance deed dated 07.08.2019.

v. That the respondent intimidated the complainants that the layout plan approved earlier for the said plot colony is proposed to be revised vide a letter Ref. No. ANSMT/2017082198/704816 dated 13.08.2017. Moreover, the complainants were asked for objections and suggestions in lieu of the same, however, none were given. Thereafter, in furtherance to the revised plan, the construction of the project was done. Moreover, vide the clause 4 of the indemnity cum undertaking dated 10.06.2019, the increase and decrease in area of the said unit was mutually agreed by the complainants, the clause has been reiterated hereafter:

> *"4. I/we understand that there has been an increase/decrease in area of the said Unit and I/we do not have any objection to the same and undertake to pay the charges for the increased area as and when demanded by the Company."*

The Letter Ref. No. ANSMT/2017082198/704816 dated 13.08.2017, the Indemnity cum undertaking dated 10.06.2019 and the revised layout plan for license no. 10 of 2009.

vi. It needs to be categorically noted that the present complaint revolves around the frivolous alleged grievances of the complainants with respect to the development not being in accordance with the approved plans. However, is completely outrageous as the respondent is in receipt of the occupancy certificate, which mentions no deviations, whatsoever, from the sanctioned and approved plans. That the complainants alleged

that the respondent has merged open space meant for constructing 3meter wide road whatsoever into another plot or utilising it for any other purpose. However, it is submitted that the construction of the road on the open space is in accordance with the revised site/layout plan after the intimation and declaration of the same to the complainants. Further it is submitted that the occupancy certificate dated 09.05.2019 doesn't reflect any kind of change in the size of the road.

vii. That the modifications made to the sanction plan were in consensus with the proviso to section 14(2) and clause 5 of the agreement. Also, the construction plan of the road is not absolute however is subject to the conditions whatsoever. The complainants mutually agreed to it as per the clause 5 of the agreement. The same clause and proviso to section 14 (2) of the Act has been reiterated hereinbelow:

"5. ALTERATIONS/MODIFICATIONS IN THE LAYOUT PLANS AND DESIGNS

(a) The Company shall have the right to effect and/or carry out such additions, alterations, deletions and modifications, as the Company may, at its sole option and discretion, consider necessary or as directed by any competent authority and/or the architect at any time even after the building plans for the floors are sanctioned and till the grant of an occupation certificate, to which the Allottee(s) hereby consents and shall raise no objection. Such changes may include but shall not be limited to change in the building plan(s) of the Buildings/Floors, floor plans, location, preferential location, number, increase or decrease in number of floors, block or Super area of the Floor, designs and specifications annexed in Annexure-VII, however, this shall be without prejudice to any rights of the Company under clause 5(c) hereunder to

construct additional floors/additional spaces as sanctioned and approved by the competent authority.

(d) In case of any alteration/modification resulting in less than 10% increase in Super Area, then in such an event, the Company shall not be obliged to take any consent from the Allottee(s). The Allottee(s) agrees and acknowledges that he/she/they/it shall be obliged to make payments for such increase in area within thirty (30) days on the date dispatch of such notice by the Company.

(e) In case of any alteration/modification resulting in less than 10% decrease in Super Area, then in such an event, the Company shall not be obliged to take any consent from the Allottee(s). The excess amount towards the Total Consideration shall be adjusted by the Company at the time of final accounting before giving possession to Allottee(s). The Allottee(s) agrees and acknowledges that the Company shall not be obliged to pay any interest in this regard.

(f) The Company shall have right, without approval of any Allottee(s) in the Project to make any alteration, additions, improvements or repairs whether structural or non-structural, interior or exterior, ordinary or extraordinary in relation to any unsold floor within the Project and the Allottee(s) agrees not to raise objections or make any claims on this Account.

...

viii. That the relationship between the parties is contractual in nature and is governed by the agreements executed between the parties. the rights and obligations of the parties flow directly from such agreements. At the outset, it must be noted that the complainants willingly consciously and voluntarily entered into the application form, allotment letter, agreement and indemnity cum undertaking after reading and understanding the contents thereof to their full satisfaction. Hence, the complainants agreed to be bound by the terms and conditions in the application form and the agreement.

that contractual obligations cannot be excused. Moreover, the amount payable to the respondent was agreed upon by the parties via the agreement and the payment plan therein, so the respondent is entitled to the payment and it is clear from the facts that the respondent never intended to demand extra monies. In fact, the respondent has been*bonafide*, cooperative and transparent throughout as evident from his conduct.

ix. That in light of the same, It is important to note that conduct of the parties on a whole. That the payments against the unit have always been defaulted, which has gravely affected the respondent who has always acted in a very transparent manner and has ensured to keep its exemplary conduct as one of the leading real estate developers around the world. That the complainants cannot be allowed to take benefit of their own wrong. Hence, the complaint is liable to be dismissed with costs against the complainant. The payment request letters from 2009 to 2019 sent to the complainants.

x. That with respect to the delay cause in the project, the parties entered into a settlement cum amendment agreement vide which the due date of delivery of possession was amended and the grievances of the complainants were settled. That without prejudice to the contents of the present reply and without accepting and/or admitting the contentions of the complainant, the *bonafide* conduct of the respondent should be seen as evident from various credit memos raised in favour of the complainants and INR 10,60,407 and 5,30,204 as compensation credited on IOP as reflected in the statement of account dated 5.10.2021. That the

present complaint is a frivolous attempt of the complainants to extract monies out of the respondent. That there exists no cause of action for the complainants to file the present complaint. That the respondent has made good on all parts of his responsibilities and obligations under the agreement under the law, rules and regulations. That for the reason of non-existence of an existing cause of action and *coram non judice*, this complaint is liable to dismissedwith costs in favour of the respondent.

xi. The respondent has credited an amount of Rs 15,90,611 on account of compensation in the account of the complainants. Moreover, it is pertinent to mention that the respondent has also credited a sum of Rs. 1,99,476/- as benefit on account of anti-profiting. Without prejudice to the rights of the respondent, delayed interest if any has to calculated only on the amounts deposited by the allottees/complainants towards the basic principle amount of the unit in question and not on any amount credited by the respondent, or any payment made by the allottees/complainants towards delayed payment charges (dpc) or any taxes/statutory payments etc.

xii. It needs to be highlighted that an amount of Rs. **68,047 (inr 28,047 cam outstanding and Rs. 40,000 e-challan)** is due and payable by the complainants. the complainants have intentionally refrained from remitting the aforesaid amount to the respondent. It is submitted that the complainants have consciously defaulted in his obligations as enumerated in the buyer's agreement as well as under the act. the complainants cannot be permitted to take advantage of his own wrongs. The instant complaint constitutes a

gross misuse of process of law. Without admitting or acknowledging in any manner the truth or correctness of the frivolous allegations levelled by the complainants and without prejudice to the contentions of the respondent.

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 and submissions made by the parties.

E. Jurisdiction of the authority

8. The respondent has raised a preliminary submission/ objection the authority has no jurisdiction to entertain the present complaint. The objection of the respondent regarding rejection of complaint on ground of jurisdiction 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 The 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. 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.

11. The counsel for the respondent submitted that after the settlement-cum-amendment agreement (undated) which has been executed interse parties and accepted by parties, the compensation, if any, under the said agreement has been paid by the respondent and accepted by the complainants. Therefore, they are barred by principle of estoppel in raising any grievance qua the same.

The authority has considered the submissions made on behalf of both the parties. Before commenting on the validity of settlement agreement entered into between the parties may be considered, a reference to some clauses of settlement is must and which are as under:

"1. The Parties have agreed to extend the time period for handing over possession of the said Unit as per the schedule for possession shared by the Company and accepted by the Allottee. The 'Time for handing over the Possession' as stipulated in the Buyer's Agreement shall accordingly stand modified...
2. That the Company, without prejudice and in lieu of the Allottee agreeing to extend time line for handing over possession, the Parties have mutually arrived at a fair estimate for compensating the Allottee for the said delay in handover of possession of the Unit. In terms of the fair estimate arrived at between the Parties, the Company has agreed

pay an additional compensation @Rs.5/- per sq. ft. per month over and above the rate specified in the Buyer's Agreement commencing from the due date of possession as per Buyer's Agreement till the date of offer of possession to the Allottee, as a gesture of goodwill to compensate the Allottee for delay in handover of possession of the Unit..

3. ...

4. ...

5. The Allottee agrees that the above-mentioned benefit of additional compensation @ Rs.5/- per sq. ft. per month over and above the rate specified in the Buyer's Agreement given to the Allottee shall be towards the full and final settlement of his grievance regarding the delay in handover of possession of the Unit. That the Allottee shall be left with no other claims, benefits, compensation, etc. of any nature whatsoever with respect to the said delay in his individual capacity or as a part of any group. The Allottee further agrees and undertakes that he shall not raise any further claim against the Company towards compensation for delay under the Real Estate (Regulation and Development) Act, 2016 or any other law for the time being in force. The Allottee undertakes not to raise any claim of whatsoever nature against the company now or in future under any law for the time being in force other than what is mentioned in this Agreement. The compensation as mentioned herein will be adjusted at the time of final instalment after adjusting all due amounts to be payable by the Allottee at the time of offer of possession."

Vide settlement agreement, the parties agreed to extend time period of handing over possession of the said unit as per the schedule for possession shared by the company and in lieu of the allottee agreeing to extended timeline for handing over possession, the respondent has agreed to pay additional compensation @ Rs.5/- per sq. ft. per month over and above the rate specified in the buyer's agreement. It is pertinent to note that as per clause 15 of the buyer's agreement, the allottee(s) shall be entitled to payment of compensation for delay at the rate of Rs.10/- per sq. ft. per month of the super area till the date of notice of possession. The promoter cannot take advantage of its dominant position as it extended timeline of handing over possession but in lieu of that it failed to give advantage to the allottee. It is

observed that as per the settlement-cum-amendment agreement, the respondent is still giving compensation @ Rs.15/- per sq. ft. per month of super area and is still very nominal and unjust. The terms of the agreement have been drafted mischievously by the respondent and are completely one sided as also held in para 181 of ***Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and ors. (W.P 2737 of 2017),*** wherein the Bombay HC bench held that:

> *"...Agreements entered into with individual purchasers were invariably one sided, standard-format agreements prepared by the builders/developers and which were overwhelmingly in their favour with unjust clauses on delayed delivery, time for conveyance to the society, obligations to obtain occupation/completion certificate etc. Individual purchasers had no scope or power to negotiate and had to accept these one-sided agreements."*

Hon'ble Supreme Court and various High Courts in a plethora of judgments have held that the terms of a contract shall not be binding if it is shown that the same were one sided and unfair and the person signing did not have any other option but to sign the same. Reference can also be placed on the directions rendered by the Hon'ble Apex Court in civil appeal no. 12238 of 2018 titled as **Pioneer Urban Land and Infrastructure Limited Vs. Govindan Raghavan** (decided on 02.04.2019) as well as by the Hon'ble Bombay High Court in the **Neelkamal Realtors Suburban Pvt. Ltd.** (supra). A similar view has also been taken by the Apex court in **IREO Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Ors.** (supra) as under:

> *".........that the incorporation of such one-sided and unreasonable clauses in the Apartment Buyer's Agreement constitutes an unfair trade practice under Section 2(1)(r) of the Consumer Protection Act. Even under the 1986 Act, the powers of the consumer fora were in no manner constrained to declare a contractual term as unfair or one-sided as an incident of the power to discontinue unfair or restrictive*

trade practices. An "unfair contract" has been defined under the 2019 Act, and powers have been conferred on the State Consumer Fora and the National Commission to declare contractual terms which are unfair, as null and void. This is a statutory recognition of a power which was implicit under the 1986 Act.

In view of the above, we hold that the Developer cannot compel the apartment buyers to be bound by the one-sided contractual terms contained in the Apartment Buyer's Agreement."

The same analogy can easily be applied in the present case where the respondent is promising to give very nominal amount of compensation and the complainants cannot be bound by such one-sided clause.

Moreover, one of the essential requirements of the settlement deed/agreement is that the execution page must include the names and signatures of all parties to the deed/agreement of settlement and names and signatures of the attesting witnesses. A deed has no effect if it is against public policy, contrary to law or if its purpose is to conceal unlawful activities. It is pertinent to mention over here that in present case, the said settlement agreement does not inspire any confidence as there is no date on which it was signed therefore, we discard it even if any payment of any amount had been made to the complainants by the respondent. It is also worth consideration that the said settlement agreement needs to be attested by two witnesses but in the present case, it is signed by only one witness and the space for second attesting witness is left blank. The respondent has even failed to mention the new timeline of handing over possession given by the respondent at the time of settlement agreement. Therefore, it can be concluded that the respondent has not acted upon the settlement-cum-amendment agreement and the said agreement cannot be considered.

F. Findings on the relief sought by the complainants:

F. I Delay possession charges

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

> ***"Section 18: - Return of amount and compensation***
>
> *18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building, —*
>
> ....
>
> *Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."*

13. Clause 13 of the buyer's agreement provides for time period for handing over of possession and is reproduced below:

> ***(b)Time of handing over the possession***
>
> *Subject to terms of this clause and subject to the Allottee(s) having complied with all the terms and conditions of this 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 independent floor within* ***27 months from the date of execution of this Agreement.*** *The Allottee(s) agrees and understands that the Company shall be entitled to a* ***grace period of six months, for applying and obtaining the occupation certificate in respect of the Independent Floor and/or the Project.***

14. 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 allottee 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.

15. **Admissibility of grace period**: The promoter has proposed to hand over the possession of the said unit within 27 months from the date of execution and it is further provided in agreement that promoter shall be entitled to a period of six months, for applying and obtaining the occupation certificate in respect of the Independent Floor and/or the Project. The period of 27 months expired on 17.06.2012. As a matter of fact, the promoter has not applied to the concerned authority for obtaining completion certificate/occupation certificate with 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 six months cannot be allowed to the promoter at this stage.

16. **Admissibility of delay possession charges at prescribed rate of interest:** 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.*

17. 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.

18. **Admissibility of delay possession charges at prescribed rate of interest:** 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]***
>
> *(2) 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.*

19. The legislature in its wisdom in the subordinate legislation under rule 15 of the rules has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.

20. 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., 06.02.2023 is 8.60%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.60%.

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

> *"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.*
> *Explanation. —For the purpose of this clause—*
> *(i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*
> *(ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"*

22. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 10.60% by the respondent/ promoter which is the same as is being granted to the complainants in case of delayed possession charges.

23. Considering the above-mentioned facts, the authority calculated due date of possession according to clause 13 of the buyer's agreement dated 17.03.2010 i.e., 27 months from the date of execution and disallows the grace period of 6 months as 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. Therefore, the authority allows DPC w.e.f. 17.06.2012 till 11.07.2019 i.e., expiry of 2 months from the date of offer of possession (11.05.2019).

24. The complainants are directed to pay outstanding dues, if any, after adjustment of delay possession charges/interest for the period the possession is delayed. The rate of interest chargeable from the complainants/allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 10.60% by the

respondents/promoters which is the same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delay possession charges as per section 2(za) of the Act. The amount of compensation already paid to the complainants by the respondent as delayed compensation as per the buyer's agreement shall be adjusted towards delay possession charges payable by the promoter at the prescribed rate of interest to be paid by the respondent as per the proviso to section 18(1) of the Act.

25. **To invoke powers of investigation enshrined under section 35 of the Act, to investigate the matter and penalize the respondent for violation of the provisions of section 14, thereby imposing penalty in accordance with the provisions of the Act.**

26. The complainants in the present matter submitted that the respondent have made alterations in the building plans attached at schedule I of the conveyance deed and a complaint regarding the same have also been filed by the complainants before STP & CTP office, Gurugram on 29.06.2021. Accordingly, this act of the respondent is in violation of section 14 of the Act. On the contrary, the respondent has contented in its reply that the respondent has adhered to the sanctioned plan and project specifications. It is asserted by the respondent that as per the approved layout plan of 2011, there was a 3 mtrs. road shown on west side of plot no. A-62. However, the respondent started the process of revision of the plan in 2014 and the layout plan were revised on 30.05.2017. Pursuant to the revision in layout plan/demarcation plan, the public notices were issued on 11.08.2017 and the final approval was received on 14.10.2020. Furthermore, the layout plans were again

revised on 21.06.2021 pursuant to which public notice was again issued on 28.06.2021 for seeking any objection from the existing allottees. The complainants then filed two separate complaints before STP & CTP Haryana but did not receive any results and therefore, the complainants approached HARERA, Gurugram. The respondent also submitted that since this issue /matter is sub judice before DTP, Gurugram, the present complaint should be dismissed.

The primordial adjudication, as is presently requisite, commands the focus of the authority on the act of respondent in violation of provisions of section 14 of the Act. Before the authority delve into various facets of section 14, the authority thinks it appropriate to narrate the order dated 25.01.2021 issued by Principal Secretary, Town & country planning, Chandigarh regarding the procedure to be followed while altering the sanctioned plans, layout plans, building plans. The relevant part of the said order is reproduced herein below: -

"........

A. ***Procedure for addition/alteration in sanctioned plans, viz., layout plans, building plans etc: The following procedure shall be adopted for the purpose of considering objections / suggestions of the allottees, in fulfilment of the provisions of Section 14(2) of the RERA Act, 2016 as well as the requirements, if any, under the Act of 1975:***

I. *The revised layout/building plan is approved in-principle with the following conditions:*

   i. *That the colonizer shall invite objections from each existing allottee regarding the said amendment in the layout/ building plan through an advertisement to be issued at least in three National newspapers widely circulated in District, of which one should be in Hindi Language, within a period of 10 days from the issuance of approval.*

   ii. *Each existing allottee shall also be informed about the proposed revision through registered post with a copy endorsed to the Senior Town Planner, Circle office in case of layout/building plan within two days from the advertisement*

> *as per (a) above clearly indicating the last date for submission of objection. A certified list of all existing allottees shall also be submitted to the Senior Town Planner, Circle office……."*

After expansively referring to the facts and documents placed on record, the authority observes that the respondent has very well proceeded according to the order mentioned above for revision of the layout plans. Hence, there is no violation of provisions of section 14 of the Act by the respondent company.

27. **To pass interim directions u/s 36 of the Act to restrain the respondent from converting the open space meant for proposed 3 mtr. wide road by merging into another plot or utilizing it for any other purpose as an interim measure, till the pendency of the present complaint.**

28. **To direct the respondent to construct the 3 mtr. wide road on the open space, adjacent building no. A-62, amber block, emerald hills floors, sector 65, Gurugram, Haryana, in accordance with the sanctioned layout plan.**

    As far as the above two reliefs are concerned, since the matter is already sub judice before DTP, Gurugram and moreover, the approval of building plan and any objection with regard to the revision for the same are purely the subject matter to be dealt by DTP, Gurugram. The authority hereby directs the complainants to put the above-mentioned issues before the complaint already going on before DTP, Gurugram.

29. **Direct the respondent to pay a sum of Rs.50,000/- to the complainants towards the cost of the litigation.**

    The complainants in the aforesaid relief are seeking relief w.r.t compensation. Hon'ble Supreme Court of India in civil appeal nos. 6745-6749 of 2021 titled as ***M/s Newtech Promoters and Developers***

Pvt. Ltd. V/s State of UP & Ors. (Decided on 11.11.2021), has held that an allottee is entitled to claim compensation under sections 12, 14, 18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation. Therefore, the complainants are advised to approach the adjudicating officer for seeking the relief of compensation.

G. Directions of the authority

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

    i. The respondent shall pay interest at the prescribed rate i.e., 10.60% per annum for every month of delay on the amount paid by the complainants from due date of possession i.e., 17.06.2012 till 11.07.2019 i.e., expiry of 2 months from the date of offer of possession i.e., 11.05.2019 as per section 18(1) of the Act of 2016 read with rule 15 of the rules.

    ii. The respondent is directed to pay arrears of interest accrued within 90 days from the date of order.

    iii. The amount of compensation already paid to the complainants by the respondent as delayed compensation as per the buyer's agreement shall be adjusted towards delay possession charges payable by the promoter

at the prescribed rate of interest to be paid by the respondent as per the proviso to section 18(1) of the Act.

iv. The rate of interest chargeable from the allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 10.60% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottees, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

v. The complainants are also directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.

31. Complaint stands disposed of.

32. File be consigned to registry.

Sanjeev Kumar Arora
Member

Ashok Sangwan
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 06.02.2023

HARERA
GURUGRAM