BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**:**	**205 of 2021**
First date of hearing	**:**	**19.04.2021**
Order reserved on	**:**	**24.11.2022**
Order pronounced on:		**28.03.2023**

1. Mansi
2. Chander Kant Takkar
Both RR/o: H.No. 79, opposite Waryam Singh Hospital, Yogesh Nagar, Jagadhri, Yamuna Nagar, Haryana. **Complainants**

Versus

M/s Emaar MGF Land Ltd.
Office: Emaar MGF Business Park, M.G. Road, Sikanderpur Chowk, Sector 28, Gurugram, Haryana-122102. **Respondent**

CORAM:
Shri Ashok Sangwan **Member**
Shri Sanjeev Kumar Arora **Member**

APPEARANCE:
Shri Sanjeev Dhingra Advocate for the complainants
Shri J.K. Dang Advocate for the respondent

ORDER

1. The present complaint dated 13.01.2021 has been filed by the complainants/allottees in Form CRA under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible

for all obligations, responsibilities and functions to the allottee as per the agreement for sale executed inter se them.

A. Project and unit related details

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

S. No.	Heads	Information
1.	Project name and location	Emerald Floors Premier III at Emerald Estate, Sector 65, Gurugram.
2.	Project area	25.499 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no.	06 of 2008 dated 17.01.2008
	License valid till	16.01.2025
	Licensee name	Active Promoters Pvt. Ltd. and 2 others C/o Emaar MGF Land Ltd.
	Area for which license was granted	25.499
5.	HRERA registered/ not registered	**Registered vide no. 104 of 2017 dated 24.08.2017 for 82768 sq. mtrs.**
	HRERA registration valid up to	**23.08.2022**
6.	Applied for occupation certificate on	20.07.2020 [Annexure R17, page 177 of reply]
7.	Occupation certificate granted on	11.11.2020 [Annexure R18, page 24-26 of additional document filed by the respondent]

8.	Date of provisional allotment letter in favour of original allottee i.e., Mr. Arvind Krishnan	13.09.2011 [annexure R2, page 40 of reply]
9.	Unit no.	EFP-III-43-0002, ground floor, building no. 43 [Page 46 of complaint]
10.	Unit measuring (super area)	1975 sq. ft.
11.	Date of execution of buyer's agreement between the respondent and the original allottee	08.02.2012 [Annexure R4, page 42 of reply]
12.	Possession clause	***11. POSSESSION*** ***(a) Time of handing over the Possession*** *Subject to terms of this clause and subject to the Allottee(s) having complied with all the terms and conditions of this Buyer's Agreement, and not being in default under any of the provisions of this Buyer's Agreement and compliance with all provisions, formalities, documentation etc. as prescribed by the Company, the Company proposes to hand over the possession of the Unit* ***within 24 months from the date of execution of buyer's agreement.*** *The Allottee(s) agrees and understands that the Company shall be entitled to a grace period of* ***three months, for applying and obtaining the occupation certificate*** *in respect of the Unit and/or the Project.* (Emphasis supplied) [page 59 of reply]
13.	Due date of possession	08.02.2014 [**Note:** Grace period is not included]
14.	Complainants are subsequent allottees	In pursuance of agreement to sell dated 20.08.2018 (page 126 of reply)

		executed between the complainants and the original allottee, the complainants' name was endorsed on the buyer's agreement in terms of affidavit dated 22.09.2018. Thereafter, the respondent has issued nomination letter in favour of the complainants on **29.10.2018** (Page 87 of complaint).
15.	Total consideration as per the statement of account dated 23.11.2022 as per list of documents filed by the respondent	Rs.1,59,34,993/-
16.	Total amount paid by the complainants as per statement of account dated 23.11.2022 as per list of documents filed by the respondent	Rs.1,60,61,299/-
17.	Offer of possession	**28.07.2021** [annexure R18, page 27 of additional documents filed by the respondent]
18.	Delay compensation already paid by the respondent in terms of the buyer's agreement as per statement of account dated 23.11.2022 as per list of documents filed by the respondent	Rs.8,98,041/- [Rs. 7,00,000/- + Rs. 1,98,041/-]

B. Facts of the complaint

3. The complainants have made followings submissions in the complaint:

i. That on 15.06.2011 Mr. Arvind Krishnan was approached by the respondent in relation of booking of flat/unit bearing no. EFP-III-43-0002 in the project Emerald Floors Premier-III situated at

Sector 65 in the revenue estate of Village Maidawas, Tehsil & District Gurgaon, Haryana, In pursuance of the same, on 15.06.2011, Mr. Arvind Krishnan paid the booking amount of Rs.10,00,000/- in favour of the respondent.

ii. That on 08.02.2012, Mr. Arvind Krishnan entered into an agreement with the respondent and as per Annexure-3 of agreement dated 08.02.2012, the total sale consideration price was Rs. 1,51,97,511/- including PLC and other charges. As per clause 11(a) of the said agreement, the respondent was liable to handover the possession of the said unit within 24 months from the date of execution of this agreement.

iii. That the present complaint arises out of the consistent and persistent non-compliance of the respondent herein with regard to the flat buyer agreement executed between the parties. According to the said agreement, the complainants ought to have received the physical possession of the flat/unit within 24 months from the date of execution of buyer's agreement or within an extended period of 3 months subject to applying and obtaining the occupation certificate in respect of the unit and/or the project but the respondent failed to handover physical possession of the unit/flat as per buyer's agreement dated 08.02.2012, booked by the

complainants in the project of respondent till 08.05.2014, including the three month extension period.

iv. That on 22.09.2018, the flat booking was transferred by Mr. Arvind Krishnan to the complainants. The complainants paid all the amount to Mr. Arvind Krishnan which was paid by Mr. Arvind Krishnan to respondent against the above said unit and in respect of that respondent made endorsement on the last page of buyer's agreement dated 08.02.2012.

v. That on 29.10.2018, the respondent issued the letter of nomination confirmation for the said to the complainants in the project in question and assured that possession of the flat will be handed over to the complainants till December 2018 after receiving the O.C. which was already applied by the respondent.

vi. That till 08.04.2020, total amount of Rs. 1,37,74,951/- was paid by the complainants to the respondent including PLC in view of the installments towards the payment of flat and when the demand letter was raised by the respondent herein. It is pertinent to mention here that only the complainants have been in compliance with the terms of the buyer's agreement.

vii. That the complainants were again cheated by the respondent by not providing the exclusive access rights for the front and rear lawns for which the respondent charged PLC from the

complainants and for the same on 28.03.2020, the complainants wrote an email to the respondent regarding not providing the exclusive access rights for the front and rear lawns for which respondent charged the PLC from the complainants as per clause 1.2(e) of the buyer's agreement and the respondent shall be liable to refund the preferential location charges (PLC) to the complainants. The clause 1.2(e) of the buyer's agreement is reproduce as under:

"1.2(e) Preferential location charges

(i) There are certain units in the project on which the preferential location charges (PLC) are applicable and if the Allotee(s) opts for any such Unit, the PLC for the same shall, in addition to the basic sale price, be included in the Total Consideration payable by the Allottee(s) as set out in the clause 1.2(a)(i) above for the said Unit.

(ii) The Allottee(s) understands that exclusive access rights for the front and rear lawns that form part of preferentially located ground floor units is charged @ Rs. 1000/- per sq. ft. and exclusive access rights for top floor terrace area that form part of preferentially located top floor units is charged @ Rs. 4,00,000 / - for 1650 sq. ft units and Rs. 5,00,000/- for 1600 sq. ft. and 1975 sq. ft. units and in case the Allottee(s) opts for such preferentially located ground floor / top floor then the aforesaid PLC shall be added to the Total Consideration for such preferentially located unit.

(iii) The Allottee(s) understands that if due to change in layout plan, the location of any Unit, whether preferentially located or otherwise is changed to any other preferential location, where the PLC are higher than the rate as mentioned hereinabove, then in such a case the Allottee(s) shall be liable to pay the PLC as per the revised PLC decided by the Company within thirty (30) days of any such communication received by the Allottee(s) in this regard. However, if due to the change in the layout plan the Unit ceases to be preferentially located, then in such an event the Company shall be liable to refund only the amount of PLC paid by the Allottee(s) without any interest and / or compensation and /or damages and

/or costs of any nature whatsoever and such refund shall be adjusted in the following installment of the Unit."

viii. That on 28.03.2020, the complainants wrote an email to the respondent regarding not providing the possession of the unit and PLC. In response of this, the respondent sent an email to the complainants on 29.03.2020 in which respondent mentioned that they will provide the possession of the flat by the end of June 2020 after obtaining the occupation certificate and concern related to PLC shall be confirmed at the time of offer of possession.

ix. That the complainants took possession on 29.10.2021 and executed the conveyance deed on 31.12.2021 and found that the respondent is not providing the exclusive access rights for the front and rear lawns for which they charged PLC due to objection raised by the fire department. After that complainants have approached the respondent but they did not give satisfactory answer to the respondent.

x. That the acts of the respondent herein have caused severe harassment both physically and mentally and that respondent has duped the complainants of the hard-earned money invested by the complainants herein by its act of not handing over the physical possession and also in near future it does not look likely that the respondent would be able to handover the physical possession of the flat to the complainants.

C. Relief sought by the complainants

4. The complainants are seeking the following relief:

   i. Direct the respondent to refund the entire deposited amount of Rs.19,75,000/- towards PLC of the said unit along with interest at the prescribed rate.

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

D. Reply filed by the respondent

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

   i. That this hon'ble authority does not have the jurisdiction to entertain and decide the present complaint. The complaints pertaining to refund, compensation and interest are to be decided by the adjudicating officer under section 71 of the Act read with rule 29 of the rules and not by this hon'ble authority. The present complaint is liable to be dismissed on this ground alone.

   ii. That the present complaint is based on an erroneous interpretation of the provisions of the Act as well as an incorrect understanding of the terms and conditions of the buyer's agreement dated 08.02.2012. The provisions of the Act are not retrospective in nature. The provisions of the Act cannot undo or modify the terms of an agreement duly executed prior to coming into effect of the Act. The provisions of the Act relied upon by the

complainants for seeking interest or compensation cannot be called in to aid in derogation and in neglection of the provisions of the buyer's agreement. The complainants cannot claim any relief which is not contemplated under the provisions of the buyer's agreement, as amended. Assuming, without in manner admitting any delay on the part of the respondent in delivering possession, it is submitted that the interest for the alleged delay demanded by the complainants is beyond the scope of the buyer's agreement. The complainants cannot demand any interest or compensation beyond or contrary to the agreed terms and conditions between the parties.

iii. That the complainants are not "allottees" but investors who have booked the apartment in question as a speculative investment in order to earn rental income/profit from its resale.

iv. That the original allottee, Arvind Krishnan, had approached the respondent and expressed an interest in booking an apartment in the residential group housing colony developed by the respondent known as "Emerald Floors Premier" at Emerald Estate, situated in Sector 65, Gurugram. Prior to making the booking, the original allottee conducted extensive and independent enquiries with regard to the project and it was only after the original allottee was fully satisfied about all aspects of the project, that the original allottee took an independent and informed decision, uninfluenced in any manner by the respondent, to book the unit in question. The apartment bearing no. EFP-III-43-0002 was provisionally allotted to the original allottee vide provisional allotment letter dated

13.09.2011. Thereafter, the buyer's agreement was executed inter se them on 08.02.2012.

v. That the original allottee had opted for a construction linked payment plan and had agreed and undertaken to make payment in accordance therewith. However, the original allottee started defaulting in payments right from the very beginning and consequently became liable for payment of delayed payment charges. The respondent was compelled to issue demand notices, reminders etc. calling upon the complainants to make payment of outstanding amounts payable by them under the payment plan/instalment plan opted by them. The statement of account reflects the payments made by the original allottee /the complainants and the delayed payment accrued thereon as on 03.09.2020.

vi. That the original allottee entered into an agreement to sell dated 20.08.2018 in respect of the apartment in question in favour of the complainants. On the basis of the transfer documents executed by both parties, the allotment was transferred in favour of the complainants and the same was confirmed vide letter dated 29.10.2018. The complainants, inter alia, executed an affidavit affirming and acknowledging that they shall not be entitled to any compensation for delay in offering possession. The complainants further agreed and undertook to execute the buyer's agreement with amended terms and conditions as and when desired by the respondent. In other words, by purchase of the apartment in question in resale from the original allottee after the expiry of the

time period as set out in the buyer's agreement, by executing the affidavit and also by undertaking to execute the buyer's agreement upon amended terms and conditions as required by the respondent, it is evident that the complainants have waived all time lines for delivery of possession as well as any claim for compensation for any alleged delay.

vii. That the contractual relationship between the complainants and the respondent is governed by the terms and conditions of the buyer's agreement as amended by the transfer documents executed by the complainants. Clause 11 of the buyer's agreement provides that subject to force majeure conditions and delay caused on account of reasons beyond the control of the respondent, and subject to the allottee not being in default of any of the terms and conditions of the same, the respondent expects to deliver possession of the apartment within a period of 24 months plus three months grace period, from the date of execution of the buyer's agreement. In the case of delay by the allottee in making payment or delay on account of reasons beyond the control of the respondent, the time for delivery of possession stands extended automatically. In the present case, the original allottee is a defaulter who has failed to make timely payment of sale consideration as per the payment plan. The time period for delivery of possession automatically stands extended in the case of the complainants. On account of delay and defaults by the original allottee/the complainants, the due date for delivery of possession stands extended in accordance with clause 11(b)(iv) of the buyer's

agreement, till payment of all outstanding amounts to the satisfaction of the respondent.

viii. That in so far as payment of compensation/interest to the complainants is concerned, the original allottees, being in default, are not entitled to any compensation in terms of clause 13(c) of the buyer's agreement. The complainants cannot claim any right, title or interest which was not available to their predecessors in interest. Moreover, the complainants have executed an affidavit affirming and acknowledging that they shall not be entitled to any compensation for delay in offering possession. Furthermore, in terms of clause 13(d) of the buyer's agreement, no compensation is payable due to delay or non-receipt of the occupation certificate, completion certificate and/or any other permission/sanction from the competent authority.

ix. That the respondent has also credited a sum of Rs. 8,98,041/- as compensation. Furthermore, the respondent has also credited a sum of Rs. 1,86,767/- 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 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 (DPC) or any taxes/statutory payments etc.

x. That the delay, if any, in the project has got delayed on account of the following reasons which were/are beyond the power and control of the respondent and hence the respondent cannot be held responsible for the same. *Firstly*, the National Building Code was revised in the year 2016 and in terms of the same, all high-rise buildings (i.e. buildings having area of less than 500 sq. mtrs. and above), irrespective of area of each floor, are now required to have two staircases. In view of the practical difficulties in constructing a second staircase in a building that already stands constructed according to duly approved plans, the respondent made several representations to various Government Authorities requesting that the requirement of a second staircase in such cases be dispensed with. Eventually, the respondent took the decision to go ahead and construct the second staircase. It is stated that the construction of the second staircase has already been completed and OC has already been applied on 20.07.2020. Thereafter, the occupation certificate has been granted on 11.11.2020. *Secondly*, the defaults on the part of the contractor M/s B L Kashyap and Sons (BLK/Contractor). The progress of work at the project site was extremely slow on account of various defaults on the part of the contractor, such as failure to deploy adequate manpower, shortage of materials etc. in this regard, the respondent made several requests to the contractor to expedite progress of the work at the project site. However, the contractor did not adhere to the said requests and the work at the site came to a standstill. The arbitration proceedings titled as B L Kashyap and Sons Vs Emaar

MGF Land Ltd (arbitration case number 1 of 2018) before Justice A P Shah (Retd), Sole Arbitrator have been initiated. Hon'ble arbitrator vide order dated 27.04.2019 gave liberty to the respondent to appoint another contractor w.e.f. 15.05.2019.

xi. That in the meanwhile, the project was registered under the Act vide memo no. HRERA(Reg)482/2017/829 and the registration is valid up till 23.08.2022. The respondent has completed construction of the apartment/tower and has made an application to the competent authority for issuance of the occupation certificate on 20.07.2020. The occupation certificate was thereafter granted on 11.11.2020. Upon receipt of the occupation certificate, possession of the apartment has been duly shall be offered to the complainants vide letter dated 28.07.2021. The complainants have been called upon to make payment of outstanding dues and complete the requisite formalities and documentation so as to enable the respondent to hand over possession of the unit to the complainants. However, the complainants have refrained from taking possession of the unit on false and frivolous pretexts. It is submitted that the respondent has duly fulfilled its obligations under the buyer's agreement, by completing construction of the unit/tower, obtaining the occupation certificate in respect thereof from the competent authority within the period of registration under the Act.

xii. That several allottees, including the complainants, have defaulted in timely remittance of payment of installments which was an essential, crucial and an indispensable requirement for

conceptualisation and development of the project in question. Furthermore, when the proposed allottees default in their payments as per schedule agreed upon, the failure has a cascading effect on the operations and the cost for proper execution of the project increases exponentially whereas enormous business losses befall upon respondent. Respondent, despite default of several allottees, has diligently and earnestly pursued the development of the project in question and has constructed the project in question as expeditiously as possible. Therefore, there is no default or lapse on the part of respondent and there in no equity in favour of the complainants. Thus, the present complaint deserves to be dismissed at the very threshold.

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

E. Jurisdiction of the authority

8. The preliminary objections raised by the respondent regarding jurisdiction of the authority to entertain the present complaint stands rejected. The authority 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, 2016 provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

> ***Section 11(4)(a)***
>
> *Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;*
>
> *The provision of assured returns is part of the builder buyer's agreement, as per clause 15 of the BBA dated..... Accordingly, the promoter is responsible for all obligations/responsibilities and functions including payment of assured returns as provided in Builder Buyer's Agreement.*
>
> ***Section 34-Functions of the Authority:***
>
> *34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.*

11. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter 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

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

12. One of the contentions of the respondent is that the authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the buyer's agreement executed between the parties and no agreement for sale as referred to under the provisions of the Act or the said rules has been executed inter se parties. The respondent further submitted that the provisions of the Act are not retrospective in nature and the provisions of the Act cannot undo or modify the terms of buyer's agreement duly executed prior to coming into effect of the Act.

13. The authority is of the view that the Act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific

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

> *"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter.....*
>
> *122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."*

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

> *"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the*

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

15. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the buyer's agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the buyer's agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of the Act and are not unreasonable or exorbitant in nature.

F.II Objection regarding handing over possession as per declaration given under section 4(2)(l)(C) of the Act

16. The counsel for the respondent has stated that respondent has duly fulfilled its obligations under the buyer's agreement, by completing construction of the unit/tower, obtaining the occupation certificate in respect thereof from the competent authority within the period of registration under the Act. Hence, no illegality can be attributed to the respondent.

17. Therefore, next question of determination is whether the respondent is entitled to avail the time given to him by the authority at the time of registering the project under section 3 & 4 of the Act. It is now settled law that the provisions of the Act and the rules are also applicable to ongoing project and the term ongoing project has been defined in rule 2(1)(o) of the rules. The new as well as the ongoing project are required to be registered under section 3 and section 4 of the Act.

18. Section 4(2)(l)(C) of the Act requires that while applying for registration of the real estate project, the promoter has to file a declaration under section 4(2)(l)(C) of the Act and the same is reproduced as under: -

> *Section 4: - Application for registration of real estate projects*
>
> *(2)The promoter shall enclose the following documents along with the application referred to in sub-section (1), namely: —.....*
>
> *(l): -a declaration, supported by an affidavit, which shall be signed by the promoter or any person authorised by the promoter, stating: — .....*
>
> *(C) the time period within which he undertakes to complete the project or phase thereof, as the case may be...."*

19. The time period for handing over the possession is committed by the builder as per the relevant clause of apartment buyer agreement and the commitment of the promoter regarding handing over of possession of the unit is taken accordingly. The new timeline indicated in respect of ongoing project by the promoter while making an application for registration of the project does not change the commitment of the

promoter to hand over the possession by the due date as per the apartment buyer agreement. The new timeline as indicated by the promoter in the declaration under section 4(2)(l)(C) is now the new timeline as indicated by him for the completion of the project. Although, penal proceedings shall not be initiated against the builder for not meeting the committed due date of possession but now, if the promoter fails to complete the project in declared timeline, then he is liable for penal proceedings. The due date of possession as per the agreement remains unchanged and promoter is liable for the consequences and obligations arising out of failure in handing over possession by the due date as committed by him in the apartment buyer agreement and he is liable for the delayed possession charges as provided in proviso to section 18(1) of the Act. The same issue has been dealt by hon'ble Bombay High Court in case titled as ***Neelkamal Realtors Suburban Pvt. Ltd. and anr. vs Union of India and ors***. and has observed as under:

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

F.III Objection regarding non entitlement of any relief under the Act to the complainants being investors

20. It is pleaded on behalf of respondent that complainants are not "allottees" but investors who have booked the apartment in question as

a speculative investment in order to earn rental income/profit from its resale. The authority observes that the respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that the preamble is an introduction of a statute and states the main aims and objects of enacting a statute but at the same time, the preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if he contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the buyer's agreement, it is revealed that the complainants are buyers and have paid a considerable amount towards purchase of subject unit. At this stage, it is important to stress upon the definition of the term allottee under the Act, and the same is reproduced below for ready reference:

> *"2(d) 'allottee' in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold(whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent."*

21. In view of above-mentioned definition of allottee as well as the terms and conditions of the buyer's agreement executed between the parties, it is crystal clear that the complainants are allottees as the subject unit

allotted to them by the respondent/promoter. The concept of investor is not defined or referred in the Act of 2016. As per definition under section 2 of the Act, there will be 'promoter' and 'allottee' and there cannot be a party having a status of 'investor'. The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal No.0006000000010557 titled as **M/s Srushti Sangam Developers Pvt Ltd. Vs Sarvapriya Leasing (P) Ltd. and anr.** has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottees being an investor are not entitled to protection of this Act also stands rejected.

G. Findings of the authority

G.I Refund of PLC amounting to Rs.19,75,000/- along with interest

22. **Relief sought by the complainants:** Direct the respondent to refund the entire deposited amount of Rs.19,75,000/- towards PLC of the said unit along with interest at the prescribed rate.

23. The complainants have sought the relief of refund of PLC charges against the respondent as the attributes of PLC have been altered by the respondent and the attributes mentioned in the BBA at clause 1.2 (e) no longer exist. He further points out to an email dated 29.03.2020 wherein the respondent has stated that the concern of the complainants related to PLC shall be confirmed at the time of offer of possession and the team of the respondent shall be doing the necessary

reconciliation before initiating the final possession of the unit. However, no relief has been forth coming in this regard. The counsel for the complainants further relies upon judgment passed by this authority on 12.08.2021 in CR No.4031/2019.

24. The counsel for the respondent states that the settlement agreement was signed between the respondent and the complainants on 26.09.2020 where all issues between the respondent and the complainants were finally settled and the pending complaint vide CR No.2795 of 2020 preferred by the complainants against the respondent with regard to the same unit was finally settled. He specifically points out para-Nos.4 and 5 of the said agreement wherein the first party (complainants) shall completely release and forever discharged the company and all its officers, employees etc. from all claims, demands, obligations, actions, causes of action etc. etc. if any, claim under the said complaint and further states that all concerns and claims and grievances related to complaint no. 2795 of 2020 stand redressed to the entire satisfaction of first party. Therefore, the said complaint does not stand since an agreement has already been signed and issues finally settled.

25. With regard to the PLC attributes, the counsel for the respondent states that the PLC attributes are mentioned at Annexure-3 appended to the BBA at page 77 of the reply wherein only the amount of Rs.19,75,000/-

is mentioned against PLC charges and no such attributes of exclusive access have been promised. Further, the counsel for the respondent relies upon orders of this authority passed in CR No.4403 of 2021 titled "Yogendra Singh and another versus Emaar MGF Land Ltd." in which finding regarding PLC has been recorded. The counsel for the complainants objects and states that in this matter, the issue of exclusive access rights does not exist.

26. The authority observes that as far as status of CR/2795/2020 is concerned, the status of the same is "Online complaint not yet received at office", thus, the said complaint has not been decided on merits by the authority. Also, it is matter of record that the complainants had raised several issues including the issue of PLC vide email dated 28.03.2020 and the respondent has reverted to the said email on 29.03.2020 addressing the concern of the complainants stating that "*3. Further, your concern related to PLC shall be confirmed at the time of offer of possession as our team shall be doing the necessary reconciliation before initiating the final possession of the unit.*" In the present case, the possession of the subject unit was offered to the complainants on 28.07.2021 after receipt of occupation certificate dated 11.11.2020. It is pertinent to mention here that the possession of the subject unit was offered to the complainants subsequent to the settlement agreement dated 26.09.2020. Thus, the complainants have approached the authority by

way of present complaint. As the concern of PLC was not addressed by respondent neither at the time of settlement nor at the time of offer of possession, the authority has decided to proceed with the complaint as such.

27. As far as contention of the counsel for the complainants regarding alteration of attributes of PLC due to objection raised by the fire department is concerned, the authority is of the view that the competent authority (Director Town & Country Planning) approved the building plans as per the requirements of National Building Code, 2005 as applicable at that time and the promoter developed the project and constructed the building as per approved plans. Later on, before obtaining occupation certificate, the National Building Code (in short, NBC) was amended in the year 2016 and as per amended provisions, all high-rise buildings (i.e. buildings having height of 15 mtrs. and above) irrespective of the area of each floor, are now required to have two staircases. It was notified vide Gazette published on 15.03.2017 that the provisions of NBC 2016 supersede those of NBC 2005. Therefore, the construction of the second staircase is a statutory obligation under the provisions of NBC as amended in the year 2016. In view of the same, the respondent has constructed the second staircase in the rear lawn as per the existing statutory provisions.

28. The counsel for the respondent has relied on the orders passed by the authority in CR/4403/2021 titled as Yogendra Singh Emaar and Anr. Versus Emaar India Ltd. wherein the authority has held that the allottee is liable to pay charges on account of PLC and the relevant para of that order is reproduced as under:

> *"The authority observes that as per clause 1.2 (e) of the buyer's agreement, following provisions have been made regarding PLC:*
>
> ***"1.2(e) Preferential Location Charges***
>
> *(i) The proportionate amount of the preferential location charges ('**PLC**') for certain Units in the Project which inter alia would be for Open Space at the rate of 5% of BSP, Corner Plot at the rate of 5% of BSP, **Ground Floor at the rate of Rs.600/- sq. ft.,** 1st Floor at the rate of Rs.150/- sq. ft., 2nd Floor at the rate of Rs.75/- sq. ft. and if the Allottee(s) opts for any such Unit, the PLC for the same shall be included in the Total Consideration payable by the Allottee(s) as set out in clause 1.2 (a)(i) above for the said Unit.*
>
> *(ii) The Allottee(s) understands that if due to change in layout plan, the location of any Unit, whether preferentially located or otherwise is changed to any other preferential location, where the PLC are higher than the rate as mentioned hereinabove, then in such a case the Allottee(s) shall be liable to pay the PLC as per the revised PLC decided by the Company within thirty (30) days of any such communication received by the Allottee(s) in this regard. However, if due to the change in the layout plan the Unit ceases to be preferentially located, then in such an event the Company shall be liable to refund only the amount of PLC paid by the Allottee(s) without any interest and/or compensation and/or damages and/or costs of any nature whatsoever and such refund shall be adjusted in the following installment for the Unit."*
>
> *In the present complaint, it is matter of fact that the unit is located on the ground floor and as per clause 1.2(e)(i) of the buyer's agreement, the promoter has demanded PLC of Rs. 9,90,000/- for the unit being preferentially located at ground floor. **Neither the allotment letter nor the buyer's agreement anywhere states that the said amount has been charged for exclusive right to front or rear lawn. Therefore, the contention of the complainants is devoid of merits. In light of the above, the authority observes that the respondent has demanded PLC as per the terms of the buyer's agreement and the complainants are liable to pay the same."*** (Emphasis supplied)

29. The authority is of the view that the nature and extent of relief of PLC is fact dependent. The aforesaid order passed by the authority in

CR/4403/2021 and relied by the counsel for the respondent is not applicable to the facts of the present matter as the clause of PLC of both the buyer's agreement is not identical. Thus, the ratio of decision in CR/4403/2020 is not applicable to the present matter.

30. In the present complaint, the authority observes that as per clause 1.2 (e) of the buyer's agreement dated 08.02.2012, following provisions have been made regarding PLC:

> *"1.2(e) Preferential Location Charges*
>
> *(i) There are certain units in the project on which the preferential location charges (PLC) are applicable and if the Allotee(s) opts for any such Unit, the PLC for the same shall, in addition to the basic sale price, be included in the Total Consideration payable by the Allottee(s) as set out in the clause 1.2(a)(i) above for the said Unit.*
>
> *(ii) The Allottee(s) understands that* ***exclusive access rights for the front and rear lawns that form part of preferentially located ground floor units is charged @ Rs. 1000/- per sq. ft****. and exclusive access rights for top floor terrace area that form part of preferentially located top floor units is charged @ Rs. 4,00,000 / - for 1650 sq. ft units and Rs. 5,00,000/- for 1600 sq. ft. and 1975 sq. ft. units and in case the Allottee(s) opts for such preferentially located ground floor / top floor then the aforesaid PLC shall be added to the Total Consideration for such preferentially located unit.*
>
> *(iii) The Allottee(s) understands that if due to change in layout plan, the location of any Unit, whether preferentially located or otherwise is changed to any other preferential location, where the PLC are higher than the rate as mentioned hereinabove, then in such a case the Allottee(s) shall be liable to pay the PLC as per the revised PLC decided by the Company within thirty (30) days of any such communication received by the Allottee(s) in this regard. However, if due to the change in the layout plan the Unit ceases to be preferentially located, then in such an event the Company shall be liable to refund only the amount of PLC paid by the Allottee(s) without any interest and/or compensation and/or damages and/or costs of any nature whatsoever and such refund shall be adjusted in the following installment for the Unit."* *(Emphasis supplied)*

31. In the present complaint, it is matter of fact that the unit is located on the ground floor and as per clause 1.2(e)(i) of the buyer's agreement, the promoter has demanded PLC for exclusive access rights for the front and rear lawns that form part of preferentially located ground floor units and has charged the same @ Rs. 1000/- per sq. ft. Thus, an amount of Rs.19,75,000/- has been charged by the respondent on account of said PLC. As stated above, second staircase has been constructed in the rear lawn and exclusive access right to front and rear lawn does not exist, thus, unit has ceased to be preferentially located.

32. In light of the above, the authority is of the view that as the unit has ceased to preferentially located, the respondent is directed to refund the amount charged for preferential location i.e., Rs. 19,75,000/- along with interest at the prescribed rate w.e.f. the date of payment made by the complainants till the realisation of the amount.

H. Direction of the authority

33. 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 is directed to refund the amount of Rs.19,75,000/- charged for preferential location along with interest at the prescribed rate @ 10.70% p.a. w.e.f. the date of

payment made by the complainants till the realisation of the amount.

34. Complaint stands disposed of.

35. File be consigned to registry.

(Sanjeev Kumar Arora)
Member

(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 28.03.2023