

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

|                           |              |
|---------------------------|--------------|
| Complaint no. :           | 7770 of 2022 |
| Date of filing complaint: | 19.12.2022   |
| First date of hearing:    | 16.05.2023   |
| Date of decision :        | 30.05.2023   |

|   |                     |
|---|---------------------|
| 1. Smt. Ruhi Roy W/o Sh. Santosh Kumar Roy<br>2. Sh. Santosh Kumar Roy C/o Sh. Markandey Roy<br><b>Both R/O:</b> Flat No.1102, Tower-3, Orchid Petals,<br>Sector 49, Sohna Road- 122018 | <b>Complainants</b> |
| Versus  |                     |
| M/s Ashiana Dwellings Private Limited<br><b>Regd. office:</b> 3H, Plaza M6, Dist. Center Jasola,<br>New Delhi-110025  | <b>Respondent</b>   |

|   |               |
|---|---------------|
| <b>CORAM:</b>   |               |
| Shri Vijay Kumar Goyal  | <b>Member</b> |
| Shri Ashok Sangwan  | <b>Member</b> |
| <b>APPEARANCE:</b>  |               |
| Complainants No. 2 in person with Ms. Aditi Mishra (Advocate) | Complainants  |
| Sh. Aishwarya Jain (Advocate)                                 | Respondent    |

**ORDER**

- The present complaint has been filed by the complainant/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 provisions of the Act or the

rules and regulations made there under or to the allottees as per the agreement for sale executed inter se.

**A. Unit and project 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 and delay period, if any, have been detailed in the following tabular form:

| S.no. | Particulars                           | Details  |
|-------|---------------------------------------|--|
| 1.    | Name of the project                   | Ashiana Mulberry, Sector-2, Gurgaon  |
| 2.    | Project type                          | Group Housing Project  |
| 3.    | <b>RERA registered/not registered</b> | Registered vide registration no. 44 of 2017 dated 11.08.2017                   |
|       | Validity status                       | 30.06.2020   |
| 4.    | <b>DTPC License no.</b>               | 16 of 2014 dated 10.06.2014  |
|       | Validity status                       | 09.06.2014   |
|       | Licensed area                         | 10.25 acres  |
|       | Name of licensee                      | Ashiana Dwellings Private Limited  |
| 5.    | Provisional allotment dated           | 23.05.2017<br>(As per page no. 27 of complaint)                                |
| 6.    | Unit no.                              | B-309 on 03 <sup>rd</sup> floor, tower T3<br>(As per page no. 27 of complaint) |
| 7.    | Unit area admeasuring                 | 1465 sq. ft. (Super build-area)<br>(As per page no. 27 of complaint)           |
| 8.    | Date of apartment buyer               | 23.05.2017   |



|     | agreement                       | (As per page no. 40 of complaint)   |
|-----|---------------------------------|---|
| 9.  | Possession clause               | <p><b>Clause 11.2 of agreement</b></p> <p><i>The company, based on its present plan and estimated and subject to force measure and all exceptions and conditions beyond control of the company and subject to the allottee making timely payments, endeavor to complete the construction work of the set apartment /building within <u>a period of 39 (thirty-nine) months from the date of this agreement or start of construction after grant of environment clearance by MOEF, whichever is later and grace period of 6 months ("completion date")</u> and shall thereafter apply for grant of occupation certificate and on receipt of the same will offer position of the set apartment to the allottee.</i></p> |
| 10. | Date of start of construction   | Not available on record   |
| 11. | Due date of possession          | <p><b>23.02.2021</b></p> <p>(Calculated from date of agreement i.e. 23.05.2017 as date of start of construction is not available on record + 6 months grace period)</p> <p><b>Grace period of 6 months is allowed</b></p>   |
| 12. | Payment plan                    | Subvention linked payment plan  |
| 13. | Total sale consideration        | <p>Rs. 78,94,625/-</p> <p>(As per page no. 27 of complaint)</p>   |
| 14. | Amount paid by the complainants | <p>Rs 76,92,087/-</p> <p>(As per applicant ledger dated</p>   |

|     |                                  |   |
|-----|----------------------------------|---|
|     |                                  | 21.02.2023 on page 29 of reply)                               |
| 15. | Occupation certificate           | 02.11.2022<br>(As per page no. 123-125 of reply)              |
| 16. | Offer of possession              | 03.11.2022<br>(As per page no. 97 of complaint)               |
| 17. | Tripartite agreement dated       | 07.11.2017<br>(As per page no. 87 of complaint)               |
| 18. | Demand notice and reminder dated | 03.11.2022 & 29.04.2023<br>(As per page no. 42 & 49 of reply) |

**B. Facts of the complaint:**

- That the real estate project "Ashiana Mulberry" at Sector 2, Gurugram, Haryana (hereinafter referred to as "Project") was launched in the year 2014 and came to the knowledge of the complainants, through the authorized representative of the respondent. The respondent in order to lure the complainants offered the allotment under the subvention payment plan wherein it agreed to pay the Pre-EMI amount during specific period of time on the loan raised by them.
- That the complainants vide letter dated 23.05.2017 were provisionally allotted apartment no. B-309 on 3rd floor of tower T3 (2 Bedroom + 2 Toilets + Study) in the said project having super built-up area of 1465 sq. ft. for a total sale price of Rs. 78,94,625/- inclusive of several charges such as the club development charges, power backup installation charges, piped cooking gas installation charges etc.



5. That on 23.05.2017, an apartment buyer agreement was executed between the parties wherein clause 3.1 stated that the allottee has paid a sum of Rs. 8,00,100/- and shall pay the balance amount as per the payment plan. Further, as per clause 11.2, the respondent promised to deliver the possession of the apartment within 39 months from the date of the agreement or the start of construction after grant of environment clearance by MoEF, whichever is later along with a grace period of 6 months, i.e., by 23.08.2020.
6. That on 07.11.2017, a tripartite agreement was executed between HDFC bank, respondent and the complainants. The said agreement was made to jointly raise a loan of Rs. 55,00,000/- by the complainants and the respondent. As per clause 3 of the tripartite agreement, the liability of payment of pre-EMI, i.e. payments from the date of first disbursement till 31.03.2019 ( liability period), was to be borne by the respondent. That on 13.11.2017, the complainants requested for enhancement of the loan amount to 80% of the total value of the property, i.e., Rs. 63,15,700/-.
7. That the respondent initially complied with the terms of the agreement. However, from April 2019, they started defaulting on the pre-EMI from May 2019 and never paid a single pre-EMI shifting the entire burden of the pre-EMI on the complainants jeopardizing the entire subvention scheme as has been agreed between the parties. The following amounts were paid by the complainants between April 2019 and October 2022:

| 01-4-19 to 31-03-20 |                 | 01-4-20 to 31-03-21 |                 |
|---------------------|-----------------|---------------------|-----------------|
| EMI Date            | Amount (in Rs.) | EMI Date            | Amount (in Rs.) |
| 25-May-19           | 48200           | 27-Apr-20           | 46603           |
| 25-Jun-19           | 48200           | 26-May-20           | 46603           |
| 25-Jul-19           | 48200           | 25-Jun-20           | 46603           |
| 25-Aug-19           | 48200           | 27-Jul-20           | 44738           |
| 25-Sep-19           | 48200           | 25-Aug-20           | 44738           |
| 25-Oct-19           | 47668           | 25-Sep-20           | 44738           |
| 25-Nov-19           | 47668           | 26-Oct-20           | 44738           |
| 25-Dec-19           | 47668           | 05-Nov-20           | 5266            |
| 27-Jan-20           | 47135           | 25-Nov-20           | 39472           |
| 25-Feb-20           | 47135           | 28-Dec-20           | 44738           |
| 25-Mar-20           | 47135           | 25-Jan-21           | 44206           |
| Total               | 525409          | 25-Feb-21           | 44206           |
|                     |                 | 25-Mar-21           | 44206           |
|                     |                 | Total               | 540855          |

| 01-4-21 to 31-03-22 |                 | 01-4-22 to 25-10-22 |                 |
|---------------------|-----------------|---------------------|-----------------|
| EMI Date            | Amount (in Rs.) | EMI Date            | Amount (in Rs.) |
| 26-Apr-21           | 36750           | 25-Apr-22           | 36749           |
| 25-May-21           | 36749           | 25-May-22           | 36749           |
| 25-Jun-21           | 36749           | 25-Jun-22           | 36749           |
| 26-Jul-21           | 36749           | 25-Jul-22           | 41542           |
| 25-Aug-21           | 36749           | 25-Aug-22           | 41542           |
| 25-Sep-21           | 36749           | 25-Sep-22           | 41542           |



|           |        |           |        |
|-----------|--------|-----------|--------|
| 25-Oct-21 | 36749  | 25-Oct-22 | 46868  |
| 25-Nov-21 | 36749  |           | 0      |
| 25-Dec-21 | 36749  |           | 0      |
| 25-Jan-22 | 36749  | Total     | 281741 |
| 25-Feb-22 | 36749  |           |        |
| 25-Mar-22 | 36749  |           |        |
| Total     | 440989 |           |        |

8. That having paid huge sum of Rs. 17,88,894/-, the complainants were in hope that the said amount would be adjusted at the time of the offer of possession as the liability for the same was to be assumed by the respondent. They made efforts to contact the respondent about the status of the project and the payment of the pre-EMIs as promised at the time of allotment. However, the respondent did not respond to the queries and kept delaying the date of offer of possession. It sent an email dated 12.07.2019 wherein apprised them that it is at the crucial stage of completion of Phase I and the respondent needs to divert all funds towards construction only and requested the complainants to bear monthly pre-EMI on their own till possession and further assured that they would adjust the same from amount due on possession from their side. The respondent vide said email dated 12.07.2019, further assured that as a goodwill gesture, it would waive off the maintenance charges for first two years.
9. That after a delay of 2 years and 3 months, the respondent vide letter dated 03.11.2022 informed the complainants that it has received the

occupation certificate dated 02.11.2022 from Directorate of Town & Country Planning, Chandigarh. To the utter shock and dismay of the complainant, it did not adjust the pre-EMI amounts and instead raised several illegal demands under the following heads without making any adjustment towards the interest amount for delay and did not waive the maintenance charges as promised in email dated 12.07.2019, :

- (i) Delayed Payment Charges 3,03,489/-
  - (ii) External Development Charges of Rs. 37,739/-
  - (iii) External Electrification Charges of Rs. 73,837/-
  - (iv) Electric Meter Connection Charges of Rs. 16,408/-
  - (v) Power Backup Installation Charges of Rs. 89,600/-
  - (vi) Advance Common Area Maintenance & Management Charges for 24 months of Rs. 1,45,210/-
  - (vii) Advance towards Common Area Electricity [Grid Supply] charges for 24 Months of Rs. 24,000/-
  - (viii) Advance towards Common Area Electricity [Through DG Set] charges for 24 Months of Rs. 14,160/-
  - (ix) Portable Water Supply Charges of Rs. 56,640/-
10. Hence, the above-mentioned offer of possession has not only been made after a delay but in violation of the Act of 2016. It has deliberately and with a mischievous intent tricked the complainants through false promises and representations. The said dishonest intent of the respondent is amply evident from the entire conduct and its omissions is set out hereinafter:-



- (a) Offer of possession subject to illegal demands for additional expenses in violation of the Real Estate (Regulation and Development) Act, 2016;
  - (b) Deliberately committing an absolute breach of the promise to pay the pre-EMIs under the subvention scheme;
  - (c) Complete failure to keep the promised schedule of completion and delay without any valid justification;
  - (d) Misrepresentation by selling the apartment on the basis of the super area.
11. That the respondent has made the offer of possession subject to illegal demands on the heads of certain electricity, electrification, and maintenance charges which are not justified in view of ***Varun Gupta & Ors. v. Emaar MGF Land Ltd., Complaint No. 4031 of 2019.***
12. The complainants have further levied Rs. 3,03,489/- towards delayed payment charges against the installments paid by them which is unjustifiable and arbitrary. The respondent is defaulting party and complainants cannot be compelled to fulfil its contractual obligations when it's has missed the timelines for construction again and again and Authority has held in various judgments that when the promoter has failed in timely delivery of possession, the complainants are not bound to make payments. Hence, levying delay payment charges on complainants are incorrect and non-justifiable.
13. That offer of possession by the respondent on payment of charges which the buyer is not contractually bound to pay and are unreasonable

as per the law laid down, cannot be considered to be a valid offer of possession.

14. That the respondent in its subsequent correspondences through its authorized agents promised that it would bear the liability for the payment of the pre-EMIs to the complainants from the date of the first disbursement till the offer of possession. However, despite several requests and reminders, it has not complied with this promise since May 2019 and the burden of payment of the EMIs has to borne by the complainants and they were forced to make the payment of the EMIs totally amounting to Rs. 17,88,994/- till October 2022.
15. That the complainants were in hope that the amount paid by them would be adjusted by the respondent in the final installment demand. However, to their utter dismay, it did not make any such adjustment in the final offer of possession cum demand letter dated 03.11.2022. Instead, they raised several illegal demands as illustrated above. Thus, the complainants are entitled to an amount of Rs. 17,88,994/- as the respondent breached its contractual obligations and they realized it could have been a method to lure them to invest in the project.
16. That the respondent in the provisional allotment letter as well as the apartment buyer agreement charged the total price of the apartment on the super area basis and mentioned only the same in the agreement. As per the Haryana Real Estate Regulatory Authority, Gurugram (Sale of Apartments/Floors in a Real Estate Project on the basis of Carpet Area)



Regulations, 2021, any agreement for sale on any other basis except on carpet area shall amount to indulgence in unfair trade practice/fraudulent practice by the promoter. Hence, the calculation of the total sale consideration on the basis of the super area is not permissible under law and the carpet area of the apartment has not been specifically mentioned in the agreement.

17. That the said project is delayed by a period of 2 years and 3 months from the due date of possession on 25.08.2020 and hence, the respondent violated Section 11 of Act of 2016. According to Sections 18(1) and 19(3) of the Act read with Rule 15 of Rules, 2017, it is liable to pay the allottees interest for delaying the possession in violation of the terms of the agreement. It has failed to adhere to promises and assurance which were made to them regarding completion of the project and therefore, are liable to pay an interest of MCLR+2% (per annum) till date of actual possession.

**C. Relief sought by the complainants:**

18. The complainants have sought following relief(s):
- i. To set aside the offer of possession dated 03.11.2022 and withdraw demands not covered under the agreement or are illegal as per law and waive off maintenance charges.
  - ii. Direct the respondent to offer a valid offer of possession and handover actual vacant and physical possession of the above said flat.

- iii. Direct the respondent to pay delayed possession charges from due date of possession i.e. December 2020 till handing over of possession.
  - iv. Direct the respondent to pay the pre-EMI amount or adjust the same with effect from May 2019 till valid offer of possession.
  - v. To revise the rate of total sale price as per the carpet area and furnish detailed break-up of the amount to the complainants.
  - vi. Direct the respondent not to take any coercive steps against the complainants such as cancellation of allotment.
  - vii. Direct the respondent to pay litigation cost and expenses.
19. On the date of hearing, the authority explained to the respondent/promoter about the contraventions as alleged to have been committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.

**D. Reply by respondent:**

20. The respondent by way of written reply made the following submissions: -
- a. That the averments made in the complaint under reply may be considered to have been replied to and all the allegations contained therein may be considered to have been specifically denied and controverted, unless specifically admitted hereinafter. The complaint is liable to be dismissed in view of the preliminary objections set out hereinafter. It is only after deciding the



question relating to maintainability of the complaint that the matter is to be proceeded further.

- b. That the complainants, with the ill intentions to enrich themselves wrongfully at the cost of the respondent, have failed to implead HDFC Bank as a respondent and with whom a tripartite agreement dated 07.11.2017 (wrongly dated as 06.09.2017 was executed between them, bank and respondent. In the said agreement, it was decided that the respondent would pay pre-EMI installment from the date of first disbursement of loan installment till 31.03.2019 and the said fact can be corroborated from clause 3 of the tripartite agreement. Hence, the complainants in order to mislead the Authority of the true facts of the case, have not impleaded HDFC Bank as a necessary party. In view thereof, the complaint is bad for misjoinder of necessary parties and is liable to be dismissed at the threshold.
- c. That the complainants, out of their own free will and volition approached the respondent, applied for and booked the unit. An amount of Rs. 6,66,575/- was paid towards the earnest amount as per clause 2.12 of the apartment buyer agreement. The complainants opted for subvention plan - pre-EMI in order to make the payments of all the instalments as mentioned in schedule-b of the apartment buyer agreement.

- d. That thereafter, on 23.05.2017, the unit was allotted to the complainants and the provisional allotment letter of even date was handed over to them. Further, an apartment buyer agreement dated 23.05.2017 was also executed between the parties.
- e. That the said agreement also contained schedule B pertaining to payment plan, and they were under the strict obligation to adhere to the said payment plan. There is no shying away from the fact that as per the terms and conditions laid down in clause 3.2 and 3.4 of the said agreement, the complainants were liable to make timely payment of the outstanding installments of the total sale consideration in order to obtain possession of the said unit. They were fully aware of the fact that timely payment of the installments and outstanding dues is the essence of the contract, duly mentioned in clause 3.2 and 3.4 that delayed and defaulted payments would attract adverse consequences.
- f. That as per Clause 11.2 of the Agreement, the respondent had endeavoured to complete the construction of the project and handover the possession of unit by 22.02.2021 (39 months plus 6 months grace period) from the date of the agreement or start of construction after grant of Environment Clearance by Ministry of Environment, Forest and Climate Change, whichever is later.



- g. The total sale consideration of the said unit was Rs.83,13,619/- (excluding delayed payment charges, legal charges, maintenance charges, deposits and holding charges etc.), out of which it has received a sum of 76,92,087/- (including taxes) towards consideration. Thus, a sum of Rs. 6,21,532/- (excluding delayed payment charges, legal charges, maintenance charges, deposits and holding charges etc.) still remains outstanding which the complainants have failed to pay qua the allotment of the said unit. Additionally, they are also liable to pay an amount of Rs. 3,03,489/- towards delayed payment charges. It is noteworthy to mention that since they opted for subvention plan in lieu of which the loan of Rs. 55,00,000/- was advanced from HDFC Bank. To implement the said subvention scheme, a tripartite agreement was executed between the complainants, bank and respondent on 07.11.2017 wherein several terms and conditions qua the subvention scheme were laid down.
- h. That it is of utmost significance to point out that the complainants have alleged in para 7 of the complaint that the said loan amount was enhanced from Rs. 55,00,000/- to 80% of the total value of the unit i.e. Rs. 63,15,700/-. However, the letter dated 13.11.2017 vide which the enhancement was done has not been filed on record with the complaint. In view of, the said complaint is liable to be dismissed for concealment of facts from the Authority.

- i. That the complainants were under an obligation to adhere to the payment plan opted. Nevertheless, they have repeatedly and wretchedly delayed and defaulted to adhere to the payment plan. It is submitted that in schedule b of the agreement at page 43, it has been clearly mentioned that *"Other Charges such as Registration Expenses, Stamp Duty, Legal Charges, Court Fee, Documentation Charges, any other extra work, External Electrification Charges (EEC), Including Individual sub-meter connection and pre-paid payment system, Sewage and Water Connection etc. along with ancillary expenses shall become payable as and when demanded by the Company"*, therefore, they were liable to pay such balance dues. But despite receiving various reminders, invoices, demand letter(s), intimation letters dated 17.10.2017, 29.11.2017, 03.10.2018, 24.10.2018 through email and otherwise sent by the respondent demanding the outstanding payments, the complainants failed to adhere to the said payment plan opted and hence, they have violated the clauses 3.2 and 3.4 of the agreement. Therefore, they are liable to pay an amount of Rs. 3,03,489/- towards delayed payment charges. There is no iota of doubt that the said act of the complainants is highly deplorable and amounts to breach of terms of the agreement.
- j. That even after sending innumerable final reminders and final demand letters, the complainants, for the reasons best known to them, failed to make timely payments of the outstanding



installments towards total sale consideration. It is necessary to point out that it also sent a final demand notice dated 03.11.2022 along with the customer ledger wherein the respondent persuaded the complainants to take possession of their unit by making full payment of the outstanding dues qua the allotment of unit. The said notice dated 03.11.2022 was followed by a reminder letter dated 29.04.2023. However, they never came forward either to clear the outstanding dues or to take the possession even till date.

- k. That as per clause 3 of the tripartite agreement, the respondent was liable to pay all the pre-EMI for the subvention period as undertaken during the execution of apartment buyer agreement and which was duly and timely paid by it. Hence, it has duly discharged its obligation of payment of pre-EMI interest to the HDFC Bank. Notably, the subvention period commenced from the date of disbursement of first installment of loan till 31.03.2019. Thereafter, it was their obligation to make payment of further pre-EMI interest.
- l. That as per clause 11.2 of buyer agreement, the respondent never promised the complainants to handover the possession of the unit within 39 months plus grace period of 6 months from the date of execution of buyer agreement. The said clause clearly states that the respondent company shall handover the possession subject to application made for grant of occupation certificate and on

receipt of the same shall offer possession of the said unit. Further, clause 11.3 of the agreement enumerates the "force majeure" clause wherein it has been laid down that completion date would automatically be deemed to be extended if the delay in completion of construction of the project occurred due to force majeure or circumstances beyond the control of the respondent-company.

- m. That there were certain factors like non-availability of construction material, electric power slow down, scarcity of water etc., were the substantial reasons which led to the delay in completing the construction of the project. Additionally, the construction of the project was stopped by Hon'ble National Green Tribunal due to poor air quality. It is pertinent to point out here that due to stoppage of construction work, it takes another month's time to remobilize the construction work at project site. Thus, the calculation of period of completion for which the construction work was stopped be treated as zero period. Pursuant thereto, as per the terms of the apartment buyer agreement and the RERA registration, subject to timely payment by the allotteeS as well as subject to force majeure, the construction of the unit was to be completed by 10.03.2019 plus 6 months grace period unless there is delay due to "force majeure", court order etc. It is pertinent to mention herein that the construction of the project was stopped several times during the



year 2017, 2018, 2019 and 2020 by the order of EPCA, HSPCB, NGT and the Hon'ble Supreme Court of India. It is submitted that due to the increase in the level of pollution in the NCR region, the Hon'ble Supreme Court vide its order dated 14.11.2019 passed in the matter of **"MC Mehta Vs Union of India & Others"** bearing **Writ Petition (c) No. 13029/1985** imposed complete ban on construction and excavation work across the National Capital Region from 04.11.2019, which was ultimately lifted on 14.02.2020. The ban on construction caused irreparable damage to the delivery timelines and the real estate developers' finances as it was unable to undertake any construction work during the aforesaid period and the same was beyond its control. Furthermore, the impact of Covid-19 pandemic has been felt throughout the globe and more particularly by real estate industry. The pandemic completely disrupted the supply chain of the respondent. Therefore, the delay if any, is not attributable to the respondent herein.

- n. That in order to curb down the air pollution, the Environment & Pollution (Prevention & Control) Authority, for National Capital Region, reviewed the urgent action that needs to be taken for the implementation of the Graded Response Action Plan (GRAP) vide its notification dated EPCA-R/2020/L-38 dated 08.10.2020 and imposed ban on the use of diesel generator set with effect from

15.10.2020, which has further led to delay in the construction being raised.

- o. That even after the delay caused by the various allottees in making the payments towards their respective units and various orders of the EPCA, HSPCB and the Apex Court, the respondent finished the construction work of Phase-I of the said project and received the occupation certificate on 02.11.2022 from the Director General, Town & Country Planning Department, Chandigarh.
- p. That the respondent has always kept them updated with respect to the development of surrounding area as well as of construction of the project and repetitively apprised them of the factors having visible adverse impact on the real estate industry.
- q. That the instant complaint is an afterthought and has been filed with the ulterior motive to avoid the contractual obligation and earn wrongfully from the respondent.
- r. That the dispute between the parties involves complicated questions of facts and law, which necessarily entail the leading of copious evidence. The issues raised by the complainants cannot be addressed in the complaint before the Authority which follows a summary procedure. In this view of the matter, the complaint is liable to be dismissed on this ground alone.



21. Written submissions filed by respondent to substantiate their averments made in the pleadings as well as in the documents and the same were taken on record and have been perused.
22. Copies of all the relevant documents have been filed and placed on record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submission made by the parties.

**E. Jurisdiction of the authority:**

23. The plea 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**

As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, 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**

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 allottee as per the agreement for sale, or to the association of allottee, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottee, or the common areas to the association of allottee or the competent authority, as the case may be;*

**Section 34-Functions of the Authority:**

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

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

**F. Findings on objections raised by the respondent.**

**F.1 Objection regarding the complainants being investor.**

24. It is pleaded on behalf of respondent that complainants are investors and not consumers. So, they are not entitled to any protection under the Act and the complaint filed by them under Section 31 of the Act, 2016 is not maintainable. It is pleaded that the preamble of the Act, states that the Act is enacted to protect the interest of consumers of the real estate sector. 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 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 buyer and paid 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:

*"Z(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."*

25. In view of above-mentioned definition of allottee as well as the terms and conditions of the apartment buyer's agreement executed between the parties, it is crystal clear that the complainants are allottee 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 allottee being investors are not entitled to protection of this Act also stands rejected.

**F.II Objection regarding delay due to force majeure circumstances**

26. The respondent-promoter has raised a contention that the construction of the project was delayed due to force majeure conditions such as various orders passed by the National Green Tribunal, Environment Pollution (Prevention & Control) Authority and delay in completion of project due to Covid-19 pandemic. Since there were circumstances beyond the control of respondent, so taking into consideration the above-mentioned facts, the respondent be allowed the period during which his construction activities came to stand still, and the said period be excluded while calculating the due date. But the plea taken in this regard is not tenable. The due date for completion of project is calculated as per clause 11.2 of agreement which comes out to be 23.02.2021. Though there have been various orders issued by various competent authorities to curb the environment pollution, but these were for a short period of time and the fact that such type of orders are passed by the various competent Authorities from time to time was already known to the respondent-builder. Further, as far as relaxation on ground of Covid-19 is concerned, grace period of six months as provided under clause 11.2 has been allowed to the respondent being unconditional and thus, no further grace period in this regard can be allowed to the respondent.

**F.III Objection regarding non-payment by the complainants.**



27. The respondent-builder submitted that the complainant-allottees failed to make timely payment towards consideration of allotted unit. Despite issuance of various demand notices & reminders, they never came forward to make payment towards due installments. The Authority observes that the subject unit was booked under subvention payment plan and they have already paid an amount of Rs. 76,92,087/- towards sale consideration of Rs. 78,94,625/- constituting more than 97% of total sale consideration. Thus, the plea of the respondent that the complainants are not coming forward in making payment towards consideration of allotted unit is not tenable.

**G. Findings on the relief sought by the complainants**

**Relief sought by the complainants:**

**G.I To set aside the offer of possession dated 03.11.2022 and withdraw any demands which are not covered under the agreement or are illegal as per law and waive off maintenance charges.**

**G.II Direct the respondent to offer a valid offer of possession and handover actual vacant and physical possession of the above said flat.**

28. The complainants submitted that for a valid offer of possession the same should not be accompanied with illegal demands. However, as per offer of possession it has charged various illegal charges on pretext of electricity, electrification and maintenance charges such as

- a. Delayed Payment Charges 3,03,489/-
- b. External Development Charges of Rs. 37,739/-
- c. External Electrification Charges of Rs. 73,837/-
- d. Electric Meter Connection Charges of Rs. 16,408/-

- e. Power Backup Installation Charges of Rs. 89,600/-
  - f. Advance Common Area Maintenance & Management Charges for 24 months of Rs. 1,45,210/-
  - g. Advance towards Common Area Electricity [Grid Supply] charges for 24 Months of Rs. 24,000/-
  - h. Advance towards Common Area Electricity [Through DG Set] charges for 24 Months of Rs. 14,160/-
  - i. Portable Water Supply Charges of Rs. 56,640/-
29. The Authority observes that as per offer of possession dated 03.11.2022 on page no. 99 of complaint, the respondent raised various demands and the same are dealt by the Authority hereunder: -
- a. Delay payment charges- As per Section 2(za) of Act, the rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 10.70% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delayed possession charges.
  - b. External Development charges & External Electrification charges- External Development charges are charges required to be paid by the company to the relevant authorities and shall be payable by the buyer at such rates as may then be applicable and in such proportion as the sale area of the apartment bears to the total sale area of all the apartments in the project. The respondent is justified in demanding EDC & IDC but since these charges are payable on actual payment



basis the respondent cannot charge a higher rate against EDC/IDC as actually paid to the concerned authority. Therefore, the respondent is directed to provided calculation of EDC & IDC to the complainants-allottee.

As far as external electrification charges are concerned, the same shall not be charged by the respondent-builder as the same are part of external development charges only and thus, are not be burdened twice on the allottee.

c. Electric Meter Connection Charges, Advance towards Common Area Electricity [Grid Supply] charges, Power Backup Installation Charges and Portable Water Supply Charges- The issue w.r.t electricity charges and water connection charges etc. were dealt under ***Complaint No. 4031 of 2019 titled as Varun Gupta & Ors. v. Emaar MGF Land Ltd.*** These connections are applied on behalf of the allottees and they have to make payment to the concerned department on actual basis. In case instead of paying individually for the unit if the builder has paid composite payment in respect of the abovesaid connections including security deposit provided to the units, then the promoters would be entitled to recover the actual charges paid to the concerned department from the allottee on pro-rata basis i.e. depending upon the area of the flat allotted to the complainants viz-à-viz the total area of the particular project. The complainant/allottees will also be entitled to get proof of all such payment to the concerned department along with composite proportionate to their unit before making payment under the relevant head.

It is also clarified that there shall not be any loading or additional charges for such connection in the name of incidental charges and

sometime under the name and style of informal charges which is an illegal charge.

d. Advance Common Area Maintenance & Management Charges- The respondent shall not demand the advance maintenance charges for more than one (1) year from the allottee even in those cases wherein no specific clause has been prescribed in the agreement or where the AMC has been demanded for more than one (1) year. However, in the instant matter, vide email dated 12.07.2019 on page no. 96 of complaint, the respondent stated that in lieu of EMI paid by the complainants, as a gesture, it would waive off the maintenance charges for two years. The email dated 12.07.2019 would be read as part of said agreement and as agreed by the both the parties, the respondent shall bear the cost of maintenance for two years.

e. Legal charges- The issue w.r.t legal charges has been dealt under ***Complaint No. 4031 of 2019 titled as Varun Gupta & Ors. v. Emaar MGF Land Ltd.*** and as per same there has been a cap of Rs. 15,000/- as nominal amount was envisaged which can be charged by the promoter-developer for any such expenses which it may have incurred for facilitating the said transfer as has been fixed by the DTP office in this regard.

Further, it is a settled principle of law that the respondent shall not charge anything which is not part of buyer's agreement.

**G.III Direct the respondent to pay delayed possession charges from due date of possession i.e. December 2020 till handing over of possession.**

30. In the present complaint, the complainants intend to continue with the project and are seeking delay possession charges as provided under



the proviso to section 18(1) of the Act. Sec 18(1) proviso reads as under.

***"Section 18: - Return of amount and compensation***

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

*.....*  
*Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."*

31. Clause 11.2 of the buyer's agreement 23.05.2017 provides for handing over of possession and is reproduced below:

***"Clause 11.2***

*The company, based on its present plan and estimated and subject to force measure and all exceptions and conditions beyond control of the company and subject to the allottee making timely payments, endeavor to complete the construction work of the set apartment /building within a period of 39 (thirty-nine) months from the date of this agreement or start of construction after grant of environment clearance by MOEF, whichever is later and grace period of 6 months ("completion date") and shall thereafter apply for grant of occupation certificate and on receipt of the same will offer position of the set apartment to the allottee..."*

32. The Authority has gone through the possession clause of the agreement and observes that the respondent-developer proposes to handover the possession of the allotted unit within a period of thirty-nine months from the date of execution of agreement or grant of environment clearance by MOEF, whichever is later and grace period of 6 months. In the present case, the date of start of construction is not available on record and therefore, due date of handing over of possession is calculated from date of agreement. The buyer's agreement inter-se parties was executed on 23.05.2017; as such the

due date of handing over of possession without considering grace period comes out to be 23.02.2021.

33. **Admissibility of grace period:** As per clause 11.2 of buyer's agreement dated 23.05.2017, the respondent-promoter proposed to handover the possession of the said unit within a period of thirty-nine months and six months grace period. The Authority is of view that the said grace period of six months shall be allowed to the respondent being unconditional and on account of certain circumstances such as Covid-19 pandemic which were beyond the control of the respondent. Therefore, as per clause 11.2 of the buyer's agreement dated 23.05.2017, the due date of possession comes out to be 23.02.2021.
34. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges however, proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

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

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

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



35. The legislature in its wisdom in the subordinate legislation under the provision of 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.
36. 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., 30.05.2023 is @ 8.70 %. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.70%.
37. 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;"*
38. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 10.70 % by the respondent/promoter which is the same as is being granted to them in case of delayed possession charges.



39. On consideration of the documents available on record and submissions made regarding contravention of provisions of the Act, the Authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 11.2 of buyer's agreement executed between the parties on 23.05.2017, the possession of the subject apartment was to be delivered within a period of thirty-nine months and six months grace period from date of execution of such agreement or start of construction, whichever is later. Since date of start of construction is not available on record, the due date of possession is calculated from the date of execution of buyer's agreement i.e.; 23.05.2017, which comes out to be 23.02.2021. The respondent has offered the possession of the allotted unit on 03.11.2022 after obtaining occupation certificate from competent Authority on 02.11.2022.
40. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate has been obtained from the competent Authority on 02.11.2022 and it has also offered the possession of the allotted unit to the complainants on 03.11.2022. Therefore, in the interest of natural justice, the complainants should be given 2 months' time from the date of offer of possession. This 2 months' of reasonable time is to be given to the complainants keeping in mind that even after intimation of possession practically, one has to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further



clarified that the delay possession charges shall be payable from the due date of possession i.e. 23.02.2021 till the expiry of two months from the date of offer of possession or till actual handing over of possession and whichever is earlier. The respondent-builder has already offered the possession of the allotted unit on 03.11.2022. Thus, delay possession charges shall be payable till offer of possession plus two months i.e. 03.01.2023.

Accordingly, it is the failure of the promoter to fulfil its obligations and responsibilities as per the buyer's agreement dated 23.05.2017 to hand over the possession within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with proviso to section 18(1) of the Act on the part of the respondent is established. As such, the allottees shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 23.02.2021 till offer of possession plus two months i.e. 03.01.2023; at the prescribed rate i.e., 10.70 % p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules.

**G.IV Direct the respondent to pay the pre-EMI amount or adjust the same with effect from May 2019 till valid offer of possession.**

41. As per clause 3 of tri-partite agreement dated 07.11.2017, the builder was under an obligation to make payment of pre-EMI till 31.03.2019. As per email dated 12.07.2019 on page 96 of complainants, the respondent undertook that pre-EMI paid by the complainants shall be adjusted at the time of possession and maintenance charges for first two years shall be waived of.

42. The complainants submitted that initially the respondent paid the pre-EMI but later defaulted in making payment towards pre-EMI from April 2019 and as a result, they have to make payment of Rs. 17,88,894/-. Whereas the respondent on the other hand submitted that it has fully discharged his liability and paid pre-EMI till 31.03.2019.
43. The Authority observes that the respondent sent email dated 12.07.2019 and wherein stating that and acknowledging that payments made by the complainants towards pre-EMI shall be adjusted at the time of offer of possession. The said letter shall be treated as part of tri-partite agreement dated 07.11.2017 wherein acknowledging extension of its obligation towards payment of pre-EMI from 31.09.2019 till offer of possession. Therefore, the respondent is directed to adjust the payment of pre-EMI interest for the time being borne by the complainants; as agreed between the parties as per tri-partite agreement dated 07.11.2017 and email dated 12.07.2019 of respondent.
44. It is further clarified that after due date of possession i.e. 23.02.2021 till offer of possession i.e. 03.11.2022; amount higher among pre-EMI or delay possession charges as described under finding above; shall be borne by the respondent.

**G.V To revise the rate of total sale price as per the carpet area and furnish detailed break-up of the amount to the complainants.**



45. As per allotment letter dated 23.05.2017 on page no. 27 of complaint, details of carpet and super area along with applicable rates thereto are being already given. Hence, no direction to this effect can be issued.

**G.VI Direct the respondent not to take any coercive steps against the complainants such as cancellation of allotment.**

46. Although the respondent has issued various demand letters and reminders but there is nothing on record that it has issued the termination/cancellation of the subject unit. Hence, no direction to this effect can be issued.

**G.VII To initiate the appropriate penal proceedings against the erring respondent as the registration of the project has been lapsed and not renewed.**

47. The aforesaid relief has not been pressed by the complainants during the course of proceeding. Hence, no direction to this effect are required to be issued.

**G. VIII Direct the respondent to pay litigation cost and expenses.**

48. The complainants are seeking relief w.r.t. compensation in the above-mentioned relief. 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., held that an allottee is entitled to claim compensation & litigation charges 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 & litigation expense 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 & legal expenses. Therefore, for claiming compensation under sections 12, 14, 18 and section 19 of the Act, the complainants may file a separate complaint before Adjudicating Officer under section 31 read with section 71 of the Act and rule 29 of the rules.

#### **H. Directions of the authority**

49. 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):
- a. The respondent shall pay interest at the prescribed rate i.e. 10.70 % per annum for every month of delay on the amount paid by the complainants from due date of possession i.e.; 23.02.2021 till the date of offer of possession (03.11.2022) plus two months i.e. 03.01.2023; as per proviso to section 18(1) of the Act read with rule 15 of the rules.
  - b. The respondent is further directed to adjust the payment of pre-EMI interest for the time being borne by the complainants; as agreed between the parties as per tri-partite agreement dated 07.11.2017 and email dated 12.07.2019 of respondent.
  - c. It is further clarified that after due date of possession i.e. 23.02.2021 till offer of possession i.e. 03.11.2022; amount higher



among pre-EMI or delay possession charges as described above;  
shall be borne by the respondent.


- d. The respondent shall not charge anything from the complainants which is not the part of the buyer's agreement.
- e. The rate of interest chargeable from the allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 10.70 % by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.
- f. The respondent/promoter is further directed to issue fresh statement of account after taking into consideration finding of Authority w.r.t charges, delay possession charges and pre-EMI at G.I, G.II, G.III and G.IV respectively within four weeks from date of this order.
- g. The complainants are directed to pay outstanding dues, if any, in next two months and the respondent shall handover the possession of the allotted unit complete in all aspects as per specifications of buyer's agreement within next 15 days and if no dues remains outstanding, the possession shall be handed over within four weeks from date of this order.

h. The respondent is directed to pay arrears of interest accrued, if any, after adjustment in statement of account; within 90 days from the date of this order as per rule 16(2) of the rules.

50. Complaint stands disposed of.

51. File be consigned to registry.

  
(Ashok Sangwan)  
Member

  
(Vijay Kumar Goyal)  
Member

Haryana Real Estate Regulatory Authority, Gurugram

**Dated: 30.05.2023**

**HARERA**  
**GURUGRAM**