

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

Complaint no : 5954 of 2022
Order reserved on : 26.07.2023
Date of pronouncement : 27.09.2023

1. Dr. Ved Prakash Budhraj
2. Savita Budraja

Both Residence of :- Ladywood Road, Sutton Coldfield,
Midland B742QN

Complainants

Versus

M/s Emaar MGF Land Ltd.
Address: Emaar MFG Business Park,
M.G. Road, Sector 28, Sikandarpur Chowk,
Gurugram, Haryana.

Respondent

CORAM:
Shri Ashok Sangwan

Member

APPEARANCE:
Shri Akhil Agarwal
Shri J.K. Dang

Advocate for the complainants
Advocates for the respondent

ORDER

1. The present complaint dated 08.09.2022 has been filed by the complainants/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 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:

Sr. No.	Particulars	Details
1.	Name of the project	Emerald Floors Premier III at Emerald Estate, Sector 65, Gurugram, Haryana
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 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.
6.	HRERA registration valid up to	23.08.2022
7.	Unit no.	EFP-III-36-0001, ground floor, tower 36 measuring 1650 sq. ft. [Page 48 of reply]
8.	Provisional allotment letter dated	26.11.2011 [Page 48 of reply]
9.	Date of execution of buyer's agreement	22.03.2012 [Page 36 of complaint]
10.	Possession clause	11: POSSESSION (a) Time of handing over the possession <i>Subject to terms of this clause and subject to the Allottee(s) having complied with all</i>

2



		<p><i>the terms and conditions of this buyers Agreement, and not being in default under any of the provisions of this buyers 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 this buyers Agreement. The Allottee(s) agrees and understands that the Company shall be entitled to a <u>grace period of 3 months, for applying and obtaining the occupation certificate in respect of the unit and/or the Project</u></i></p> <p>(Emphasis supplied) [page 45 of complaint]</p>
11.	Due date of possession	22.03.2014 [Note: Grace period is not included]
12.	Total consideration as per statement of account dated 19.09.2022 at page 140 of reply	₹ 1,42,57,667/-
13.	Total amount paid by the complainant as per statement of account dated 19.09.2022 at page 140 of reply	₹ 1,45,01,483/-
14.	Occupation certificate	11.11.2020 [Page 149 of reply]
15.	Offer of possession	05.01.2021 [Page 152 of reply]
16.	Delay compensation paid by the respondent to the complainant in terms of the buyer's agreement as per statement of account dated 19.09.2022 at page 140 of reply	₹ 5,73,386/-

B. Facts of the complaint

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

- i. That the present complaint is being filed by Dr. Ved Prakash Budhraja & Ms. Savita Budhraja (hereinafter jointly referred as "Complainants"). That based on the tempting and magnificent claims, assurances and proposals of the respondent, the complainants were lured into buying a unit in the project. In pursuance of the same, the respondent made the complainant book the flat by paying the booking amount of Rs.20,00,000/- on 07.11.2011 by making the complainants sign a booking application on the same date. It is pertinent to note here that the said application dated 07.11.2011 was never provided to the complainants even after repeated requests.
- ii. That after having already paid a huge amount of Rs. 41,49,000/- complainants were left with no choice but to agree to the terms and conditions of the respondent. That the complainants made the payment of Rs.41,49,000/- to the respondent by 24.01.2012. It is of utmost importance to note here that the respondent illegally and with malafide intension took more than 20% of the BSP from the complainants even before signing and executing the floor buyers' agreement. That it was only on 22.03.2012, i.e., after more than 4 months, that the FBA was finally signed and executed between the complainants and the respondent for the total consideration of Rs.1,31,25,650/-. It is of utmost importance to bring in the kind attention of Authority that at this stage when the complainants became aware of the totally one sided and biased BBA, the complainants having already paid more than 20% of the BSP and

were left with no option but to sign on the dotted lines. That some of the one-sided, arbitrary and discriminatory clauses of the ABA, inter alia, have been enlisted which prima facie establish the ill-motives, malafide intentions and fraudulent and illegal practices being adopted by the respondent.

- iii. It is to be noted that the complainants were to make payments to the respondent as per the construction link payment plan which has been annexed with the FBA. That the respondent raised various demands from the complainant from time to time as different stages of construction and the complainants have abide by the construction link payment plan and have made the complete payments as demanded by the respondent and that an excess of payments have been made by the complainants and therefore, by the respondent's own statement of account dated 01.02.2021 entitled for a refund of Rs.66,332/-.
- iv. That as per clause 11 of the FBA, the time for complete construction was stipulated to be two years with a grace period of three months for obtaining occupation certificate. Thus, the due date of possession was 21.03.2014. However, the respondent monumentally failed to complete the construction of the said project and hand over the possession of the flat to the complainants even as stipulated in clause 11 of the FBA and offered possession only on 05.01.2021 that is after a huge delay of 6 years, 10 months & 15 days and the possession offered by the respondent is defective since the respondent has now omitted the entire back-side lawn which was specifically included as per the FBA and has abundantly failed to rectify the same despite numerous request by the complainants.



- v. That it is pertinent to note here that the respondent took around 80% of the total consideration before the due date of possession i.e., 21.03.2014 by falsely claiming to have done the casting of top floor and completion of brickwork in 2014 itself. However, even after almost 7 years from that date, the respondent had not been able to complete the project and give possession to the complainant. This clearly shows that the respondent has played fraud on the complainants and took huge amounts of money from the complainants without even having constructed the project as per the demands made by the respondent as per the construction link plan. This abundantly establishes that all the demands raised by the respondent were fraudulent and false and merely a fraudulent practice of the respondent to misappropriate the hard-earned money of the complainants by not constructing the project as claimed.
- vi. That when the complainants complained about the non-completion of the project as per the demand raised under the construction link plan, the respondent kept assuring the complainant that the construction would accelerate very soon and the project would be completed in time. However, when the respondent failed to give possession to the complainants on the due date of possession, complainants kept pursuing the Respondent but to no avail. This has caused huge amount of mental trauma and harassment to the complainants who has been suffering for years now. That the respondent in his evil designs has misappropriated the hard-earned money of the complainants and has made wrongful gains at his cost.
- vii. That in light of the facts and circumstances laid down above, the complainants are helpless and having already paid the huge amount

of money to Respondent is at their mercy. That the complainants have been subjected to extreme mental agony and harassment by the respondent and is therefore constrained to approach the authority.

C. Relief sought by the complainants/allottees

4. The complainants have filed the present complaint for seeking following relief:

- i. Direct the respondent to give possession of the subject flat as the provisions of the Act and terms of the buyer's agreement.
- ii. Direct the respondent to give delay interest @ 18% on Rs. 1,42,663/- for every month of delay from 21.03.2014 till 05.01.2021.
- iii. Refund of car parking charges and club membership charges being charged illegally.
- iv. Refund excess amount of Rs. 66,332/- collected from the complainants.
- v. Cost of litigation.

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

D. Reply by the respondent/promoter

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

- i. That the present complaint is not maintainable under the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as "the Act"/RERA for short) and the Haryana Real Estate (Regulation and Development) Rules, 2017, (hereinafter referred to as "the



Rules”). This Authority does not have the jurisdiction to hear or decide the present complaint. The present complaint is liable to be dismissed on this ground alone.

- ii. That the complainants have no locus standi or cause of action to file the present complaint. 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 22.03.2012, as shall be evident from the submissions made in the following paras of the present reply.
- iii. That the present complaint is not maintainable in law or on facts. The present complaint raises several such issues which cannot be decided in summary proceedings. The said issues require extensive evidence to be led by both the parties and examination and cross-examination of witnesses for proper adjudication. Therefore, the disputes raised in the present complaint are beyond the purview of this authority and can only be adjudicated by the civil court. The present complaint deserves to be dismissed on this ground as well.
- iv. That the complainants are estopped by their own acts, conduct, acquiescence, laches omissions etc. from filing the present complaint.
- v. That the complainants are not “allottees” but actually investors who have booked the said unit as a speculative investment in order to earn rental income/profit from its resale.
- vi. That the complainants had approached the respondent through their property dealer and expressed an interest in booking an apartment in the residential group housing colony developed by the Respondent known as “Emerald Floors Premier III” at Emerald Estate, situated in Sector 65, Gurugram. Prior to making the booking,



the complainants conducted extensive and independent enquiries with regard to the project and it was only after the complainants was fully satisfied about all aspects of the project, that the complainants took an independent and informed decision, uninfluenced in any manner by the respondent, to book the unit in question.

- vii. That the Complainants had opted for a construction linked payment plan and had agreed and undertaken to make payment in accordance therewith. However, the Complainants failed to make payment in accordance with the schedule of payment and defaulted on numerous occasions. Payment notices and reminders for payment issued by the Respondent to the Complainants are collectively annexed as Annexure R5. HVAT Payment Request letter dated 17.04.2017 is annexed hereto as Annexure R6.
- viii. That it is pertinent to mention that since the complainants were not forthcoming with the outstanding amounts, the Respondent was constrained to issue final notice dated 28.11.2013 to them. The respondent had categorically notified the complainants that they have defaulted in remittance of the amounts due and payable by them. It was further conveyed by the respondent to the complainants that in the event of failure to remit the amounts mentioned in the said notice, the respondent would be constrained to cancel the allotment of the unit in question.
- ix. That the Respondent has duly registered the project under the provisions of the Act. The certificate of registration dated 24.08.2017, which is valid till 23.08.2022. The Respondent completed construction and made an application to the competent authority for issuance of the occupation certificate on 20.07.2020 and the Occupation Certificate has also been issued on 11.11.2020.



Thereafter, the Respondent has duly offered possession of the unit on 05.01.2021, within the period of validity of registration under the Act. The Offer of Possession letter dated 05.01.2021. Although in default of the Buyer's Agreement and not entitled to any compensation under the Buyer's Agreement, nevertheless, the Respondent has credited compensation amounting to Rs 5,73,386/- to the Complainants against the final demand upon offer of possession. The Respondent has also credited Early Payment Rebate (EPR) amounting to Rs 2,21,443/- and an amount of Rs 1,61,919/- on account of Anti-Profiting. Moreover, out of delay payment interest amounting to Rs 1,35,093/-, the Respondent has waived interest amounting to Rs 1,27,985/-. It is submitted that interest, if any, for delay in offering possession is to be calculated on the amounts actually paid by the Allottees excluding taxes and not on any interest, rebate or any other amount paid/credited by the Respondent. This is without prejudice to the submission of the Respondent that no further interest or compensation is payable to the Complainants under RERA.

- x. That it is pertinent to mention herein that the complainants had approached the respondent and duly admitted their defaults and requested the respondent to waive interest in delayed payments. upon the complainants undertaking, inter alia, to make all future payments in a timely manner and not to raise any claim against the respondent for compensation, the respondent proceeded to waive interest amounting to Rs 1,27,985/-. The present complainant has been instituted in violation of the undertaking given by the complainants after availing the benefits thereunder. The Respondent reserves its rights to recover the said amount along with



interest from the Complainants. Indemnity cum undertaking on possession executed by the complainants.

- xi.** That it is most respectfully submitted that the contractual relationship between the parties is governed by the terms and conditions of the buyer's agreement dated 22.03.2012 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 complainants are defaulters and therefore the timelines for delivery of possession are not to be calculated in the manner claimed by the complainants.
- xii.** That without admitting or acknowledging in any manner the truth or legality of the allegations levelled by the complainants and without prejudice to the contentions of the respondent, it is submitted that 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.
- xiii.** That 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:

- xiv. Firstly, The National Building Code (NBC) was revised in the year 2016, and in terms of the same, all high-rise buildings (i.e., buildings having a height of 15 meters and above), irrespective of the area of each floor, are now required to have two staircases. It is expected that the construction of the second staircase will be completed in the first quarter of 2020. Thereafter, upon issuance of the occupation certificate and subject to force majeure conditions, possession of the apartment shall be offered to the complainants. Secondly, the defaults on the part of the contractor.
- xv. That as has been submitted hereinabove, the respondent has duly registered the project under the provisions of the Act, which is valid till 23.08.2022. The respondent has already completed construction and has offered possession within the period of validity of registration under the act and as per the revised timelines agreed between the parties.
- xvi. That, without admitting or acknowledging the truth or legality of the allegations advanced by the complainants and without prejudice to the contentions of the respondent that 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 or in negation of the provisions of the buyer's agreement, as amended by the transfer documents. 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 complainant 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. Furthermore, the complainants being a defaulter, is not entitled to any compensation in terms of clause 13(c) of the buyer's agreement.

xvii. That it is evident from the entire sequence of events, that no illegality or lapse can be attributed to the respondent. Thus, the allegations levelled by the complainants qua the respondent are totally baseless and do not merit any consideration by this authority. The respondent has duly fulfilled its contractual obligations under the buyer's agreement as amended. However, the complainants have failed to fulfil their obligations by refusing to make payment of balance sale consideration and taking possession of the unit. The complainants are not only in violation of the buyer's agreement but also in violation of section 19(10) of the act in terms of which the allottee is bound to take possession of the unit within 2 months from the date of issuance of the occupation certificate by the competent authority. The complainants are thus, liable for the consequences of breach, including but not limited to payment of holding charges for their wilful and deliberate failure to take possession of the property even after valid possession has been offered in accordance with the buyer's agreement. Thus, it is most respectfully submitted that the present complaint deserves to be dismissed at the very threshold.

xviii. That it is evident from the entire sequence of events, that no illegality can be attributed to the respondent. The allegations

levelled by the complainants are totally baseless. There is no merit in the allegations raised by the complainants. Thus, it is most respectfully submitted that the present application 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.

8. Jurisdiction of the authority

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

F. Findings on the objections raised by the respondent



F.I Objection regarding entitlement of DPC on ground of complainants being investors

11. The respondent submitted that the complainants are investor and not consumer/allottee, thus, the complainants are not entitled to the protection of the Act and thus, the present complaint is not maintainable.
12. The authority observes 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 main aims and objects of enacting a statute but at the same time preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that under section 31 of the Act, any aggrieved person can file a complaint against the promoter if the promoter 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 an allottee/buyer and they have paid total price of Rs.1,45,01,483/- to the promoter towards purchase of the said unit in the project of the promoter. At this stage, it is important to stress upon the definition of term allottee under the Act, 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;"

13. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the buyer's agreement executed between respondent and complainants, it is crystal clear that the complainants are allottees as the subject unit was allotted to them by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given 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. 000600000010557 titled as *M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. 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 complainants-allottees being investors are not entitled to protection of this Act stands rejected.

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

14. The counsel for the respondent submitted that the registration of the project is valid till 23.08.2022 and the respondent has already offered possession of the subject unit in question within the period of registration and therefore no cause of action can be construed to have arisen in favour of the complainants to file a complaint for seeking any interest as alleged. 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.

15. 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 of 2017. The new as well as the ongoing project are required to be registered under section 3 and section 4 of the Act.
16. Section 4(2)(I)(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)(I)(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: —

(1): -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...."

17. The authority observes that the time period for handing over the possession is committed by the builder as per the relevant clause of buyer's 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 buyer's agreement. The new timeline as indicated by the promoter in the declaration under section 4(2)(I)(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..."

G. Findings on the reliefs sought by the complainant

G.I Direct the respondent to give possession of the subject flat as the provisions of the Act and terms of the buyer's agreement.

G.II Direct the respondent to give delay interest @ 18% on Rs. 1,42,663/- for every month of delay from 21.03.2014 till 05.01.2021.

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

"Section 18: - Return of amount and compensation

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

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

19. Clause 11(a) of the buyer's agreement provides for time period for handing over of possession and is reproduced below:

"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 3 months, for applying and obtaining the completion certificate/occupation certificate in respect of the Unit and/or the Project.*

20. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement, and the complainants not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment time period for handing



over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

21. Admissibility of grace period: The promoter has proposed to hand over the possession of the said unit within 24 from the date of execution of this Agreement and further provided in agreement that promoter shall be entitled to a grace period of 3 for applying and obtaining the occupation certificate in respect of the unit and/or the Project. The date of execution of buyer's agreement is 22.03.2012. The period of 24 months expired on 22.03.2014. As a matter of fact, the promoter has not applied to the concerned authority for obtaining completion certificate/occupation certificate within the grace period prescribed by the promoter in the buyer's agreement. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 3 months cannot be allowed to the promoter at this stage.

22. Admissibility of delay possession charges at prescribed rate of interest: Section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

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

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

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

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

24. 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., 27.09.2023 is 8.75%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.75%.

25. The definition of term 'interest' as defined under section 2(z) 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;"*

26. Considering the above-mentioned facts, the authority calculated due date of possession according to clause 11(a) of the buyer's agreement dated



22.03.2012 i.e., 24 months from the date of execution and disallows the grace period of 3 months as the promoter has not applied to the concerned authority for obtaining completion certificate/occupation certificate within the time limit prescribed by the promoter in the buyer's agreement. As per the settled law one cannot be allowed to take advantage of his own wrong. Therefore, the authority allows DPC w.e.f. 22.03.2014 till 05.03.2021 i.e., expiry of 2 months from the date of offer of possession (05.01.2021).

The amount of compensation already paid to the complainants by the respondent as delay compensation as per the buyer's agreement shall be adjusted towards delay possession charges payable by the promoter at the prescribed rate of interest (DPC) to be paid by the respondent as per the proviso to section 18(1) of the Act.

27. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 11.11.2020. However, the respondent offered the possession of the unit in question to the complainants only on 05.01.2021. So, it can be said that the complainants came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the complainants should be given 2 months' time from the date of offer of possession. These 2 months of reasonable time is being given to the complainants keeping in mind that even after intimation of possession practically he 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.

28. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainants are entitled to delay possession charges at prescribed rate of the interest @ 10.75 % p.a. w.e.f. 22.03.2014 till 05.03.2021 i.e., expiry of 2 months from the date of offer of possession (05.01.2021).

G.III Refund of car parking charges and club membership charges being charged illegally.

• Car parking charges-

29. As far as issue regarding parking is concerned, the authority is of the opinion that open parking spaces cannot be sold/charged by the promoter both before and after coming into force of the Act. However as far as issue regarding covered car parking is concerned where the said agreements have been entered into before coming into force the Act, the matter is to be dealt with as per the provisions of the builder buyer's agreement subject to that the allotted parking area is not included in super area.

30. In the present complaint, the respondent has charged Rs. 2,50,000/- towards covered car park as per clause 1.2(a) and 1.3 and the same are reproduced below:

"1.2 Sale Price for Sale of Unit

(a) Sale Price

(i) The sale price of the Unit ("Total Consideration") payable by the Allottee(s) to the Company includes the basic sale price ("Basic Sale Price/BSP"), cost towards exclusive usage of covered car park, External Development Charges ("EDC").....

1.3 Parking Space

a) The Allottee(s) agrees and understands that the exclusively reserved car parking space assigned to the Allottee(s) shall be understood to be together with the Unit and the same shall not

have any independent legal entity detached or independent from the said Unit. The Allottee(s) undertakes not to sell/transfer/deal with such exclusive reserved car parking space independent of the said Unit. In case the Allottee(s) has/have applied for and has been allotted an additional parking space, subject to availability, the same shall also be subject to this condition. However, such additional parking space can only be transferred to any other allottee in the Building/Project."

In the instant matter, the subject unit was allotted to the complainants vide allotment letter dated 26.11.2011 and as per the said allotment letter, the respondent had charged a sum of Rs. 2,50,000/- on account of car parking charges. As per clause 1.2(a)(i) and Annexure 3 of the buyer's agreement 22.03.2012, the allottee had agreed to pay the cost of covered car parking charges over and above the basic sale price. The cost of parking of Rs.2,50,000/- has been charged exclusive to the basic price of the unit as per the terms of the agreement. The cost of parking of Rs.2,50,000/- has already been included in the total sale consideration and the same is charged as per the buyer's agreement. Accordingly, the promoter is justified in charging the same.

- **Club membership charges-**

31. The complainants are also seeking refund of the club membership charges on account of non-completion of the club facility. Counsel for the respondent states that the club building stands completed and the OC for the same shall be submitted within a week with an advance copy to the complainants.

The authority observes that the complainants had agreed to pay club membership registration charges amounting to Rs.75,000/- in terms of clause 3 of the buyer's agreement. While deciding the issue of club membership charges in CR/3203/2020 titled as Vijay Kumar Jadhav

Vs. M/s BPTP Limited and anr. decided on 26.04.2022, the authority has observed as under:

"79. The authority concurs with the recommendation made by the committee and holds that the club membership charges (CMC) shall be optional. The respondent shall refund the CMC if any request is received from the allottee. Provided that if an allottee opts out to avail this facility and later approaches the respondent for membership of the club, then he shall pay the club membership charges as may be decided by the respondent and shall not invoke the terms of flat buyer's agreement that limits CMC to Rs.1,00,000/-"

In view of the above, the authority holds that the club membership charges shall be optional. The respondent shall refund the club membership charges if any request is received from the complainants-allottee. Provided that if they opt out to avail this facility and later approaches the respondent for membership of the club, then they shall pay the club membership charges as may be decided by the respondent and shall not invoke the terms of buyer's agreement that limits club membership charges to Rs.75,000/-.

G.IV Refund excess amount of Rs.66,332/- collected from the complainants.

32. The complainants submitted that as per respondent's own statement of account dated 01.02.2021, the complainant has made excess amount to the tune of Rs. 66,332/-. Therefore, in the present complaint, the occupation certificate was granted by the competent authority on 11.11.2020. However, the respondent offered the possession of the unit in question to the complainants only on 05.01.2021. In view of the authority that the respondent is liable to refund the said amount to the complainants.

G.V Cost of litigation.

33. Hon'ble Supreme Court of India, in case titled as **M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP & Ors.** (civil appeal nos. 6745-



6749 of 2021, decided on 11.11.2021), has held that an allottee is entitled for claiming compensation under sections 12, 14, 18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. Therefore, the complainant is at liberty to approach the adjudicating officer for seeking compensation, if any.

H. Directions of the authority

34. 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):

- i. The respondent is directed to pay the interest at the prescribed rate i.e., 10.75 % per annum for every month of delay on the amount paid by the complainants from 22.03.2014 till 05.03.2021 i.e., expiry of 2 months from the date of offer of possession (05.01.2021). The arrears of interest accrued so far shall be paid to the complainants within 90 days from the date of this order as per rule 16(2) of the rules.
- ii. The complainants are directed to pay outstanding dues, if any, after adjustment of delay possession charges/interest for the period the possession is delayed. The rate of interest chargeable from the complainants/allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 10.75% by the respondents/promoters which is the same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delay possession charges as per section 2(za) of the Act. The

Complaint no. 5954 of 2022

amount of compensation already paid to the complainants by the respondent as delay compensation as per the buyer's agreement shall be adjusted towards delay possession charges payable by the promoter at the prescribed rate of interest (DPC) to be paid by the respondent as per the proviso to section 18(1) of the Act.

iii. The respondent shall not charge anything from the complainants which is not the part of the buyer's agreement. The respondent is also not entitled to claim holding charges from the complainants/allottees at any point of time even after being part of the buyer's agreement as per law settled by hon'ble Supreme Court in civil appeal nos. 3864-3889/2020 decided on 14.12.2020.

35. Complaint stands disposed of.

36. File be consigned to registry.


Ashok Sangwan
(Member)

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 27.09.2023