

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

Complaint no. : 4381 of 2021
Complaint filed on : 09.11.2021
Date of decision : 23.08.2023

Pradeep Mehra

Address: 504A, DLF Hamilton Court, Phase IV,
Sector 28, Gurugram, Haryana, India-122002.

Also at: 3rd floor, Tower B, Ocus Technopolis Building,
Sector 54, DLF Golf Course Road, Gurugram, Haryana.

Complainant

Versus

1. M/s Emaar India Ltd.
(Formerly known as M/s Emaar MGF Land Ltd.)
Address: Emaar MFG Business Park,
M.G. Road, Sector 28, Sikandarpur Chowk,
Sector 28, Gurugram, Haryana-122002.
2. M/s. Active Promoters Private Limited
Address: 17B, MGF House, Asaf Ali Road, New
Delhi- 110002.
3. M/s. Conscient Infrastructure Private Limited
Address: K-1, Green Park, New Delhi- 110016.
Also at: 10th floor, Tower D, Global business Park,
M.G. Road, Gurugram, Haryana-122002.

Respondents

CORAM:

Shri Ashok Sangwan

Member

APPEARANCE:

Ms. Pragya Sharma

Counsel for the complainant

Mr. Dhruv Rohatgi

Counsel for the respondent

ORDER

1. The present complaint has been filed by the complainant/allottee in Form CRA under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions to the allottee as per the agreement for sale executed inter se them.

A. Project and unit related details

2. The particulars of the project, the details of the sale consideration, the amount paid by the complainant/allottee, the 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 and location of the project	Premier Terraces at the Palm Drive, Sector 66, Gurugram, Haryana
2.	Area of the project	45.4767 acres
3.	DTCP license nos. and validity	i. 228 of 2007 dated 27.09.2007 Valid up to- 26.09.2019 ii. 93 of 2008 dated 12.05.2008 Valid up to- 11.05.2020 iii. 50 of 2010 dated 24.06.2010 Valid up to- 23.06.2020
4.	HRERA registered or not	Registered 1. 19 of 2018 dated 01.02.2018 for 27299.865 sq. mtrs. Valid up to- 30.04.2018



		Extension no.- RC/REP/HARERA/GGM/2018/19 EXT-3 dated 08.10.2018 Valid up to- 30.04.2019 2. 24 of 2020 dated 10.09.2020 for 17.429 acres Valid up to- 08.08.2021
5.	Unit no.	TPD K-PH-04, 16 th floor, tower K measuring 4000 sq. ft. (super area) [annexure P4, page 116 of complaint]
6.	Provisional allotment letter dated	24.11.2007 [annexure R3, page 37 of reply]
7.	Date of execution of buyer's agreement	26.02.2008 [annexure P4, page 112 of complaint]
8.	Possession clause	14. POSSESSION (a) Time of handing over the Possession Subject to terms of this clause and subject to the Apartment Allottee having complied with all the terms and conditions of this Agreement, and not being in default under any of the provisions of this Agreement and compliance with all provisions, formalities, documentation etc., as prescribed by the Company, the Company proposes to hand over the possession of the Apartment/Villa/Penthouse by December 2010. The Apartment Allottee agrees and understands that the Company shall be entitled to a grace period of 90 days, for applying and obtaining the occupation certificate in respect of the Group Housing Complex. (Emphasis supplied) [Page 130 of complaint]
9.	Due date of possession	31.12.2010 [Note: Grace period is not included]



10.	Total consideration as per statement of account dated 07.12.2021 at page 160 of reply	Rs. 2,60,52,821/-
11.	Total amount paid by the complainant as per statement of account dated 07.12.2021 at page 161 of reply	Rs.2,70,52,528/-
12.	Occupation certificate	13.02.2017 [annexure R7, page 164 of reply]
13.	Offer of possession	29.03.2017 [annexure R8, page 166 of reply]

B. Facts of the complaint

3. The complainant has made the following submissions in the complaint:
- That the complainant had invested his life's earning into the subject property i.e., K-PH-04 which is a triplex apartment, having exclusive access to two parking spaces, located on 16th floor situated in tower/block no. K having a super area of 4000 sq. ft. approx. which includes an apartment area of 3904.81 sq. ft. approx., as explained in detail in the present complaint, with the sole intention of spending his old age in a gated and secure dwelling with a nearby hospital. The complainant has approached this Hon'ble Authority in order to seek direction against the respondents for having breached the terms of the buyer's agreement dated 26.02.2008, and for not having offered (on one pretext or another) valid possession in a habitable condition to the complainant till date i.e., with a delay of more than 10 years and 9 months. the complainant has also approached this hon'ble authority as the actions of the respondents is in gross violation



inter-alia of section 11(4)(a) read with section 18(1) of the Act, owing to have failed to comply with the provision of the buyer's agreement and failing to handover possession on a predetermined date.

- ii. That the respondent no.1, *viz.* Emaar India Limited is the first party in the buyer's agreement. Respondent no.1 claim to be one of India's leading real estate developers and is *inter alia* engaged in the business of development of integrated townships, built-up infrastructure, housing and other construction development projects and operations in the residential, commercial retail and hospitality sectors.
- iii. That respondent no.2, *viz.* M/s. Active Promoters Private Limited and respondent no.3, *viz.* Conscient Infrastructure Private Limited are the second and third parties respectively in the buyer's agreement. As per the buyer's agreement the respondent nos. 2 and 3 are the absolute owners of approximately 31.62 acres of contiguous land situated in the revenue estate of Village Badshahpur, Tehsil & District, Gurgaon, Haryana, upon which the subject property is built.
- iv. That the respondents, in the year 2007, came up with a project by the name of Premier Terraces at the Palm Drive situated at Sector 66, Gurgaon, Haryana. By virtue of huge promotions, the respondent no.1 issued a brochure claiming and promising that the project was located in a thriving neighbourhood which was in proximity to few of the most prominent hospitals and was just 20 minutes' drive from Delhi International Airport and that it was easily accessible from the express highway. The respondent also

promoted *vide* its brochure that a dedicated golf driving range and recreational putting green would be one of the amenities provided to the flat buyers. Not just that *vide* the brochure, it was promised that all pent-houses in the project would be entitled to landscaping on the roof, which has not been done at the subject property.

- v. That upon various representations, assurances and warranties on the part of the respondents included *inter-alia* in the brochure, the complainant in the month of November 2007 showed his interest in purchasing the subject property at the project. The total sale consideration for the subject property was agreed to be Rs. 2,32,80,800/- and the same has been reflected in clause 1.2(a)(i) of the buyer's agreement. The complainant opted for construction linked plan.
- vi. That at the time of applying for the subject property, the complainant was required to sign allotment application dated 15.11.2007. Pursuant to the execution of the allotment application, the complainant made payment towards the booking after which, the respondents confirmed the allotment of the subject property *vide* its letter dated 24.11.2007, which was duly signed by the authorized signatory of the respondent no.1.
- vii. That thereafter, the buyer's agreement dated 26.02.2008 was executed by and between the complainant and the respondents. That the buyer's agreement is a standard form contract which has been unilaterally and arbitrarily prepared by the respondents. In order to throw light upon the arbitrariness and unfairness of the terms of the buyer's agreement and its lopsided nature the terms

cater for an event where the respondent no.1 fails to handover vacant and peaceful possession of the subject property after three months of the due date (i.e., December 2010), the respondents shall be liable to compensate the complainant only at the rate of Rs. 5/- per sq. ft. per month of the super area till the date of notice of possession is provided to the complainant. On the other hand, as per the terms of the buyer's agreement in the event of delay of payment by the complainant, the respondents shall be unfairly entitled to charge interest @ 15% per annum compounded at the time of every succeeding instalment from the due date of instalment till the date of payment to the respondents. Such clauses themselves signify inequality of bargaining power between the parties and also the unfair terms of the buyer's agreement.

- viii. That abiding by the terms of the buyer's agreement, the complainant duly made payments in the timely fashion to the respondent no.1 and in accordance with the demand letters / demand notes issued by the respondent no.1. The complainant made payments in a timely manner to the respondents as and when the demands were raised, even though there were several discrepancies with regard to the fact that demands were premature, the complainant made sure to not only pay towards the said demands but also pay delayed payment charges, wherever there was a genuine delay on his part.
- ix. That as per clause 14(a) of the buyer's agreement, the respondents were under obligation to handover the possession of the subject property by December 2010. The respondents further

unfairly entitled itself with a grace period of 90 days, for the purposes of applying for and obtaining occupation certificate for the project. Admittedly, respondents not only failed to obtain the occupancy certificate within the time stipulated in the buyer's agreement, but also failed to offer a valid, vacant and peaceful possession in time to the complainant (which possessions has not been handed over till date). In the event of gross error committed by the respondents, they ought not to be given the said benefit to avail grace period.

- x. That owing to the inordinate delay in offering as well as handing over the possession of the subject property to the complainant, the complainant was forced to arrange alternative accommodation, which ultimately caused unwarranted monetary loss to the complainant. Instance of which can be seen *vide* the fact that in the month of November 2012, the complainant was forced to take up an accommodation on rent for an amount equal to Rs. 70,000/- per month for a period of 2 years. Thereafter, owing to paucity of funds, the complainant was forced to live in his mother's apartment. The respondents ought to compensate the complainant for all the losses suffered.
- xi. That the additional delay in handing over the subject property can be seen by the email communication dated 07.07.2015 which was addressed by the respondent no.1 to the complainant, wherein it informed the complainant that it has applied for the occupancy certificate pertaining to Tower K in the project. However, the email communication dated 07.07.2015 does not narrate true facts, as the occupancy certificate pertaining to Tower K in the



project was obtained only in the month of February 2017 as is admitted by the respondent no.1 *vide inter-alia* the account statement, thereby a delay of 6 years 2 months has been committed by the respondents in obtaining the occupancy certificate.

- xii. That the email dated 07.07.2015 sent by the respondent no.1 was in response to an earlier email dated 06.07.2015 which was sent by the complainant, wherein concerns pertaining to premature demands towards completion of flooring and wall painting were raised, as the project in reality was nowhere close to completion. Upon receiving such an unwarranted demand towards flooring and wall painting, the complainant took it upon himself to visit and inspect the project. Upon such visit and inspection, he was shocked to find out that the said stage was far from being commenced, which was completely contrary to the claims made by the respondent *vide* its communications and oral promises.
- xiii. That the complainant issued a legal notice dated 16.07.2015 through its counsels upon the respondent no.1, demanding (i) possession of the subject property; (ii) interest towards delayed possession; and (iii) completion of the flooring and wall painting of the subject property in accordance with the buyer's agreement.
- xiv. That pursuant to the issuance of legal notice, *vide* email dated 15.09.2015, the respondent no.1 agreed to waive off the delayed payment charges/overdue payment charges and also agreed to withdraw reminder demand notices addressed to the complainant. By virtue of the aforesaid email, the respondent no.1

has itself admitted the wrongful levy of overdue charges and delayed payment charges.

- xv. That the respondent no.1 on 29.03.2017 *vide* its letter titled as "Letter of Offer of Possession at Premier Terraces at Palm Drive" communicated to the complainant that it has obtained the occupancy certificate. As part of the offer of possession, the complainant was directed to pay charges towards (i) club membership; (ii) sewerage plant installation; (iii) Electricity Charges; (iv) Registration; (v) Admin (vi) Gas connection; (vii) HVAT; (viii) Interest Free Maintenance Security; and (ix) 1-year advance maintenance.
- xvi. That the letter dated 29.03.2017 issued by the respondent no.1 to the complainant was contingent to an additional requirements *inter-alia* execution of documents/indemnity bond, whereby the complainant was required to give in writing that he would not initiate any legal proceedings against any of the respondents for claiming damages towards delayed possession. The complainant being aware of his legal rights and remedies refused to give any such undertaking or indemnity in writing, pursuant thereto the possession was never handed over by the respondent. The complainant engaged with respondent no.1 and made sincere efforts to negotiate and resort the matter pertaining to the onerous conditions being unilaterally imposed by respondent no.1, however, respondent no.1 refused to accommodate any reasonable request by the complainant. Till date the complainant has been kept in dark with regards to his rights pertaining to subject property.

- xvii. That despite having accepted its illegality, the respondent no.1 clearly refused to waive the unwarranted demands for additional monies and made sure that the possession would be contingent upon the undertaking and indemnity sought from the complainant. The complainant having no other option but to bow down to the illegal demands of the respondent no.1, in order to secure possession of the subject property, made payment under protest *vide* letter dated 09.06.2017.
- xviii. That the possession offered by the respondents was never a valid offer as signing of the unreasonable and indemnity bond was always made a condition precedent by the respondents, for handing over the possession, therefore making the same a conditional and invalid offer of possession. Respondent no.1 did not allow the complainant to even inspect the subject property prior to signing the indemnity bond. On several occasions, the complainant agreed to sign the indemnity bond under protest and with few changes, modification and tweaks, despite that the respondent no.1 was unmoved and adamantly required the version circulated by it to be signed and acted upon. The same conduct has continued during the period from September/October 2011 till date (including two recent approaches by the respondent in June 2020 and November 2020), when the respondent yet again reiterated its unilateral demand that the possession to the complainant would be handed over subject to the execution of the indemnity bond and other ancillary documents. The respondents are being unreasonable as they currently hold dominant position over the complainant and owing



to which minor changes/accommodations being requested by the complainant is not being entertained by the respondents.

- xix. That upon numerous requests being addressed to the respondent no.1, the complainant finally reluctantly allowed to inspect the subject property on 04.09.2021. The complainant was shocked to see the condition of the subject property, as the same was not in a habitable condition. In this regard, it prayed before this Hon'ble authority that a local commissioner be appointed for the purposes of inspecting the subject property and preparing its status report for ease of reference by this hon'ble authority and for the purposes of fact checking. This hon'ble authority has observed in plethora of judgements wherein the test of habitability has been described as an essential constituent of a valid offer of possession.
- xx. That the subject property is far from being inhabitable, as:
- a. The walls are degrading and decaying owing to water leakage, which makes the structural integrity of the walls highly questionable.
 - b. The flooring on the balcony has rust and rotten marks as well as fungus growth on it, which could have a catastrophic effect on the health of the complainant.
 - c. The insulation on the piping system has disintegrated, owing to which entirely new piping system ought to be installed.
 - d. The roof space of the complainant is filled with stagnant water, which makes it hazardous for not only the residents of the project but also for the residents of the entire city.
 - e. All the air conditioners fitted in the subject property are out of warranty status and therefore needs to be replaced, also the

- working condition of the air conditioners installed could not be checked, as the subject property did not have access to the electricity.
- f. Toilet seats (WC) in several bathrooms were broken as well as non-functional, the entire system ought to be checked and rectified.
- g. The water piping installed in the subject property have gone bad, to such extent that it ought to be replaced in entirety; and
- h. Several windows are broken or have major fitting issues (we submit that this issue alone does make the subject property inhabitable, however, in the larger scheme of things, this clubbed with other deficiencies makes the subject property inhabitable).
- xxi. That the total amount demanded by respondent no.1 till date is equal to Rs. 2,60,17,821 and whereas the complainant has paid as per the payment plan an amount totalling to Rs. 2,70,52,528/-. Despite having paid an amount in excess to the amount demanded by respondents, the respondents have till date not issue a valid, vacant and peaceful possession to the complainant. Moreover, having paid an amount equal to Rs. 10,34,707/- in excess to the demand, instead of working towards handing over of the valid possession in time, the respondents wasted time in adjusting the said amount paid in excess towards delayed payment charges. The respondents from the very beginning have caused inordinate delay in handing over the possession of the subject property and the complainant ought to be compensated for the same.

xxii. That the complainant dutifully and with an intention to seek possession of the subject property engaged with the representatives of respondent no.1. However, respondent no.1 has adamantly stuck with its unreasonable stand that the onerous indemnity bond ought to be executed by the complainant. After a few instances, the respondent no.1 made threats that it would stop communicating with the complainant, until the indemnity bond is executed. The complainant had only two small point for consideration with regards to the language of the clauses (5, 6 and 14) of the indemnity bond. With regards to clauses 5 and 6, that deal with opening a fixed deposit with a recognised Indian Bank for an amount equal to 3.87% of the total amount of Haryana Value Added Tax levied by Haryana Tax Authority, which levy is being challenged by respondent no.1 before the Hon'ble Punjab and Haryana High Court, the complainant agreed to the same, with a caveat that the complainant be shown the exact calculation of the amount so demanded and to provide prior intimation/approval from him at the time of withdrawal. The request for proper intimation of withdrawal was extremely fair and reasonable, however the said request was outrightly rejected by respondent no.1. With regards to clause 14, the complainant informed that any clause limiting a party to exercise its legal remedies is illegal in the eyes of law, despite that respondent no.1 was adamant in the same being included in the indemnity bond.

xxiii. That respondent no.1 sent an unclear notice dated 13.09.2021 (received on September 21, 2021) to the complainant, requiring him to get the conveyance deed to the subject property executed.

In response to the aforesaid notice, the complainant addressed an email dated 22.09.2021 to the representative of the respondent no.1, simply seeking clarity with regards to the final terms and conditions upon which the offer of possession is contingent upon, additional amount that the complainant is required to pay and requested that all the requisite repairs, modification, upgradation and replacement ought to be done prior to handing over of the possession. Thereafter on 27.09.2021, the complainant again addressed an email to the respondent no.1 requiring clarity on the schedule of handing over of the possession and the documents required for the same. The representative of Respondent No.1 vide its email dated 28.09.2021 enlisted the documents that are required to be executed, further, categorically stated that *"Unit will be handed over to your utmost satisfaction and we would like to assure you that all the snags highlighted by you in the past will be completely rectified. Furthermore, at the time of offering possession, the unit is kept in "Semi-furnished stage". As the final deep cleaning, installation of specifications and final coat of paint is done post finalization of the date of possession with the duty manger. Additionally, the final pending work is done after finalizing the date of possession so that on the day of possession you find the apartment in absolute new condition."* It is most humbly submitted that by addressing the email dated 28.09.2021, the respondent no.1 has categorically admitted that it has till date not offered clear and valid possession to the complainant and therefore the subject property has been kept in semi-furnished stage i.e., in an uninhabitable condition. Hence, all offers of possession issued by

the respondent no.1 to the complainant till date are invalid and incomplete.

- xxiv. That during the period 30.09.2021 to 07.10.2021, the complainant being in a desperate state approached the respondents to seek possession of the subject property. Using its dominant position, the respondents yet again reiterated the onerous conditions towards the offer of possession, as per which the complainant was supposed to sign an indemnity bond, settlement agreement as well as was required to wave its right to initiate legal proceedings against the respondents, its servants, employees and agents.
- xxv. The delay of 10 years 9 months in handing over the possession of the subject property is not at all justified and owing to which a noble person is being made to suffer as well as made to inordinately wait for taking possession of the subject property, consideration for which has already been paid by the complainant. It is also abundantly clear that the respondents have time and again failed to give any cogent reason for not following the time schedule mentioned in the buyer's agreement. Owing to which a noble person having high regards in the society, is being made to suffer unnecessarily. Thus, this complaint.

C. Relief sought by the complainant:

4. The complainant has sought following relief(s):
- i. Direct the respondents to hand over peaceful and vacant possession of the subject property in a habitable condition in favour of the complainant and duly convey the subject property in favour of the complainant.
 - ii. Direct the respondents to pay an interest @ 15% p.a. to the

complainant for delay in handing-over the possession of the subject property with effect from 01.12.2010 till the date of actual possession.

- iii. Direct the respondents to make payment towards cost of necessary upgradation, modification and replacement as *inter-alia* set out in the email/communication dated 14.09.2021 addressed by the complainant, required for the purposes of making the subject property habitable.
 - iv. Direct the respondents to make payment towards litigation cost that has been incurred by the complainant in filing the present complaint.
 - v. Direct the respondents to make payment towards mental agony and torture being faced by the complainant for having to wait endlessly to bear fruit of its investment.
5. 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. The respondent no. 1 filed reply on 15.12.2021. However, neither the respondent no.2 and 3 put in appearance nor have filed any reply. In view of the same, the respondent no. 2 and 3 are hereby proceed ex parte.

D. Reply by the respondent no.1

6. The respondent no.1 has contested the complaint on the following grounds:
 - i. That the present complaint is based on an erroneous interpretation of the provisions of the Act as well as an incorrect understanding of the terms and conditions of the buyer's

agreement dated 26.02.2008. The instant complaint is barred by limitation. The complainant has alleged that the respondent was obligated to offer possession of the unit in question by December 2010 and by way of the instant complaint have sought interest for indemnifying him for the alleged delay in delivery of the unit in question. It is submitted that cause of action, if any, for seeking interest accrued in favour of the complainant in 2010 and consequently the instant complaint is barred by limitation. It is also submitted that the present complaint has been filed only to harass the respondent.

- ii. That the present complaint is not maintainable in law or on facts. The provisions of the Real Estate (Regulation and Development) Act, 2016 are not applicable to the project in question. The application for issuance of occupation certificate in respect of the tower in which the apartment in question is located was made on 02.07.2014 i.e., before the notification of the Haryana Real Estate (Regulation and Development) Rules, 2017 and the occupation certificate was thereafter issued on 13.02.2017. Thus, part of the project i.e., the tower in which the unit in question is situated is not an 'ongoing project' within the meaning of Rule 2(1)(o) of the Rules. The same does not require registration and consequently has not been registered under the provisions of the Act. It is reiterated and submitted that the Hon'ble Authority does not have the jurisdiction to entertain and decide the present complaint hence the same is liable to be dismissed on this ground alone.
- iii. That the complainant is not an "allottee" but an investor who has booked the apartment in question as a speculative investment in



order to earn rental income/profit from its resale. The apartment in question has been booked by the complainant as a speculative investment and not for the purpose of self-use as his residence. Therefore, no equity lies in favour of the complainant.

- iv. That the complainant approached the respondent and expressed interest in booking of an apartment in the residential group housing colony developed by respondent known as "Palm Drive" situated in Sector 66, Tehsil & District Gurgaon. Thereafter, the complainant vide an application form applied to the respondent for provisional allotment of the unit. Pursuant thereto, unit bearing no. **TPD K-PH-04**, located on 16th floor, was allotted vide provisional allotment letter. The complainant consciously and willfully opted for a construction linked payment plan for remittance of sale consideration for the unit in question and further represented to the respondent that he shall remit every installment on time as per the payment schedule. Thereafter, a buyer's agreement dated 26.02.2008 was executed between the complainant and the respondent. It is pertinent to mention that the buyer's agreement was consciously and voluntarily executed between the parties. However, the complainant was irregular in payment of instalments which is why the respondent was constrained to issue reminders and letters to the complainant requesting them to make payment of demanded amounts. The complainant consciously and maliciously chose to ignore the payment request letters and reminders issued by the respondent and flouted in making timely payments of the instalments which

was essential, crucial and an indispensable requirement under the buyer's agreement.

- v. That despite there being a number of defaulters in the project, the respondent had to infuse funds into the project and have diligently developed the project in question. The respondent applied for occupation certificate on 02.07.2014 and the same was thereafter issued vide memo bearing no. ZP-308-Vol-I/SD (BS)/2018/3486 dated 13.02.2017. The grant of sanction of the occupation certificate is the prerogative of the concerned statutory authority over which the respondent cannot exercise any influence. As far as the respondent is concerned, it has diligently and sincerely pursued the matter with the concerned statutory authority for obtaining of the occupation certificate. No fault or lapse can be attributed to the respondent in the facts and circumstances of the case. Therefore, the time period utilised by the statutory authority to grant occupation certificate to the respondent is necessarily required to be excluded from computation of the time period utilised for implementation and development of the project.
- vi. That the complainant was offered possession of the unit in question through letter of offer of possession dated 29.03.2017. The complainant was called upon to remit balance payment including delayed payment charges and to complete the necessary formalities/documentation necessary for handover of the unit in question to the complainant. However, the complainant approached the respondent with request for payment of compensation for the alleged delay in utter disregard of the terms

and conditions of the buyer's agreement. The respondent explained to the complainant that he is not entitled to any compensation in terms of the buyer's agreement on account of default in timely remittance of instalments as per schedule of payment incorporated in the buyer's agreement. The respondent earnestly requested the complainant to obtain possession of the unit in question and further requested the complainant to execute a conveyance deed in respect of the unit in question after completing all the formalities regarding delivery of possession. However, the complainant did not pay any heed to the legitimate, just and fair requests of the respondent and threatened the respondent with institution of unwarranted litigation.

- vii. That the respondent has also credited a sum of Rs. 3,34,603/- as concession in Palm Drive Premier. Without prejudice to the rights of the respondent, delayed interest if any has to be calculated only on the amounts deposited by the allottees/complainant towards the basic principle amount of the unit in question and not on any amount credited by the respondent, or any payment made by the allottees/complainant towards delayed payment charges (DPC) or any taxes/statutory payments etc.
- viii. That complainants are not only in breach of the buyer's agreement but also section 19(10) of Act (assuming without in any manner admitting the provisions of the Act to be applicable to the project in question), by failing to take possession of the unit even after two months from the date of receipt of the occupation certificate. The complainants are responsible for all the consequences of breach of the buyer's agreement and violation of the Act.



- ix. That several allottees, including the complainant, have defaulted in timely remittance of payment of installments which was an essential, crucial and an indispensable requirement for conceptualisation and development of the project in question. Furthermore, when the proposed allottees default in their payments as per schedule agreed upon, the failure has a cascading effect on the operations and the cost for proper execution of the project increases exponentially whereas enormous business losses befall upon the respondent. The respondent, despite default of several allottees, has diligently and earnestly pursued the development of the project in question and has constructed the project in question as expeditiously as possible. It is submitted that the construction of the tower in which the unit in question is situated is complete and the respondent has already offered possession of the unit in question to the complainant. Therefore, there is no default or lapse on the part of the respondent and there is no equity in favour of the complainant. It is evident from the entire sequence of events, that no illegality can be attributed to the respondent. The allegations levelled by the complainant are totally baseless.
- x. That the complainant has consciously defaulted in their obligations as enumerated in the buyer's agreement as well as under the Act and it is trite that the complainant cannot be permitted to take advantage of their own wrongs. The instant complaint constitutes a gross misuse of process of law, without admitting or acknowledging in any manner the truth or correctness of the frivolous allegations levelled by the

complainant and without prejudice to the contentions of the respondent.

E. Jurisdiction of the authority

7. 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

8. 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

9. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

Section 11(4)(a)

Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

The provision of assured returns is part of the builder buyer's agreement, as per clause 15 of the BBA dated..... Accordingly, the promoter is responsible for all obligations/responsibilities and functions including payment of assured returns as provided in Builder Buyer's Agreement.

Section 34-Functions of the Authority:

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

10. 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 complainant at a later stage.

F. Findings on the objections raised by the respondent:

F.1 Objection regarding entitlement of DPC on ground of complainant being investor

11. The respondent submitted that the complainant is investor and not consumer/allottee, thus, the complainant is 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 complainant is an allottee/buyer and he has paid a considerable price to the promoter towards purchase of the subject unit in the project of the promoter. At this stage, it is important to stress upon the definition of

term allottee under the Act and the same is reproduced below for ready reference:

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

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 complainant, it is crystal clear that the complainant is an allottee as the subject unit was allotted to him 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. 0006000000010557 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 complainant-allottee being investor is not entitled to protection of this Act stands rejected.

F.II Objections regarding that the respondent has made an application for grant of occupation certificate before coming into force of RERA

14. The respondent-promoter has raised the contention that the said project of the respondent is a pre-RERA project as the respondent has already applied for obtaining occupation certificate from the competent authority on 02.07.2014 and received the same on

13.02.2017 i.e., before the coming into force of the Act and the rules made thereunder.

15. The authority is of the view that as per proviso to section 3 of Act of 2016, ongoing projects on the date of commencement of this Act i.e., 01.05.2017 and for which completion certificate has not been issued, the promoter shall make an application to the authority for registration of the said project within a period of three months from the date of commencement of this Act and the relevant part of the Act is reproduced hereunder: -

Provided that projects that are ongoing on the date of commencement of this Act and for which the completion certificate has not been issued, the promoter shall make an application to the Authority for registration of the said project within a period of three months from the date of commencement of this Act:

16. The legislation is very clear in this aspect that a project shall be regarded as an "ongoing project" until receipt of completion certificate. Since, no completion certificate has yet been obtained by the promoter-builder with regards to the concerned project, the plea advanced by it is hereby rejected.

G. Findings on the relief sought by the complainant:

G. I Possession and delay possession charges

17. Vide interim order dated 31.05.2022, the respondents were directed to hand over possession of the unit as the complainant had paid the full amount of consideration. However, possession has yet to be delivered on account of certain alleged charges raised by the respondent and objections raised by the complainant.
18. The complainant had booked the subject unit vide allotment letter dated 24.11.2007 and the due date for handing over of possession was 31.12.2010 (without grace period). The complainant has paid an

amount of Rs.2,70,52,528/- against a total sale consideration of Rs. 2,60,52,821/-. The offer of possession was made to the complainant on 29.03.2017 but possession was not taken by the complainant on account of objections pertaining to furnishing of indemnity bond.

19. The counsel for the respondent states that the respondent is willing to hand over the unit to the complainant without furnishing of indemnity bond and holding charges. However, the counsel for the complainant states that demands like FD in lieu of possible HVAT charges and maintenance charges are being demanded as a pre-condition to handing over of possession.
20. In the present complaint, the complainant intends 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."

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

14. POSSESSION

(a) Time of handing over the Possession

*Subject to terms of this clause and subject to the Apartment Allottee having complied with all the terms and conditions of this Agreement, and not being in default under any of the provisions of this Agreement and compliance with all provisions, formalities, documentation etc., as prescribed by the Company, the **Company** proposes to hand over the possession of the*

Apartment/Villa/Penthouse by December 2010. The Apartment Allottee agrees and understands that the Company shall be entitled to a grace period of 90 days, for applying and obtaining the occupation certificate in respect of the Group Housing Complex.

22. **Due date of possession and admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within December 2010 and it is further provided in agreement that promoter shall be entitled to a grace period of 90 days for applying and obtaining occupation certificate in respect of said complex. As a matter of fact, the promoter has not applied to the concerned authority for obtaining occupation certificate within the time limit prescribed by the promoter in the buyer's agreement. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 90 days cannot be allowed to the promoter at this stage. Therefore, the due date of possession comes out to be 31.12.2010. The respondent has failed to offer possession of the subject unit within the stipulated time as the occupation certificate was obtained on 13.02.2017 and subsequently, the possession was offered by the respondent on 29.03.2017.
23. Furthermore, at this stage, the authority would express its views regarding the concept of a "valid offer of possession". It is necessary to clarify this concept because, after a valid and lawful offer of possession, the liability of the promoter for the delayed offer of possession comes to an end. On the other hand, if the possession is not valid and lawful, the liability of the promoter continues till a valid offer is made and the allottee remains entitled to receive interest for the delay caused in handing over of possession. The Authority after a detailed

consideration of the matter has concluded that a valid offer of possession must have the following components:

- a. The possession must be offered after obtaining an occupation certificate.**
- b. The subject unit must be in a habitable condition.**
- c. Possession should not be accompanied by unreasonable additional demands**

24. As the occupation certificate has been obtained by the respondent, the offer of possession can be made by the respondent. As per section 19(10) of the Act, the complainant/allottee is duty-bound to take possession within two months of the occupancy certificate issued for the said unit.

25. The respondent has put-forth three pre-conditions vide offer of possession dated 29.03.2017 due to which the complainant could not take possession of the subject unit and they are detailed below:

- **Indemnity-cum-undertaking**

26. The law regarding the signing of indemnity cum undertaking is well settled. An undertaking/ indemnity bond given by a person thereby giving up their valuable rights must be shown to have been executed in a free atmosphere and should not give rise to any suspicion. If the slightest doubt arises in the mind of the adjudicator that such an agreement was not executed in an atmosphere free of doubts and suspicions, the same would be deemed to be against public policy and would also amount to unfair trade practices. No reliance can be placed on any such indemnity-cum-undertaking and the same is liable to be discarded and ignored in its totality. Furthermore, the NCDRC order dated 03.01.2020 in a case titled Capital Greens Flat Buyer Association



and Ors. Vs. DLF Universal Ltd., Consumer case no. 351 of 2015, wherein it was held that the execution of indemnity cum-undertaking would defeat the provisions of sections 23 and 28 of the Indian Contract Act, 1872, and therefore, would be against public policy, besides being an unfair trade practice. The relevant portion of the said judgment is reproduced herein below:

"Indemnity-cum-undertaking

30. The developer, while offering possession of the allotted flats insisted upon execution of the indemnity-cum-undertaking before it would give possession of the allotted flats to the concerned allottee. Clause 13 of the said indemnity-cum-undertaking required the allottee to confirm and acknowledge that by accepting the offer of possession, he would have no further demands/claims against the company of any nature, whatsoever. It is an admitted position that the execution of the undertaking in the format prescribed by the developer was a pre-requisite condition, for the delivery of the possession. The opposite party, in my opinion, could not have insisted upon clause 13 of the Indemnity-cum-undertaking. The obvious purpose behind such an undertaking was to deter the allottee from making any claim against the developer, including the claim on account of the delay in delivery of possession and the claim on account of any latent defect that the allottee may find in the apartment. The execution of such an undertaking would defeat the provisions of Sections 23 and 28 of the Indian Contract Act, 1872, and therefore would be against public policy, besides being an unfair trade practice. Any delay solely on account of the allottee not executing such an undertaking would be attributable to the developer and would entitle the allottee to compensation for the period the possession is delayed solely on account of his having not executed the said undertaking-cum-indemnity." The said judgment of NCDRC was also upheld by the Hon'ble Supreme Court vide its judgment dated 14.12.2020 passed in civil appeal nos. 3864-3889 of 2020 against the order of NCDRC."

27. Also, the counsel for the respondent has admitted during hearing on 03.05.2023 that the respondent is willing to handover the unit to the complainant without furnishing of indemnity bond. Thus in view of the discussion aforesaid and as per the commitment of the respondent, the

authority is of the view that the complainant cannot be made to sign such undertakings.

- **FD regarding HVAT**

28. The authority has decided the issue w.r.t. liability of payment of HVAT in complaint titled as *Varun Gupta. Versus Emaar MGF Land Ltd. (CR/4031/2019)* wherein it has been held that the promoter is entitled to charge VAT from the allottee for the period up to 31.03.2014 @ 1.05% (one percent VAT + 5 percent surcharge on VAT) under the amnesty scheme. However, the promoter shall not charge any VAT from the allottees/prospective buyers during the period 01.04.2014 to 30.06.2017 since the same was to be borne by the promoter-developer only.
29. In the present complaint, the respondent has demanded Rs.2,39,715/- towards HVAT liability post 01.04.2014 vide letter of offer of possession dated 29.03.2017. In light of order stated above, the respondent-promoter is bound to adjust the said amount, if charged from the allottee with the dues payable by him or refund the amount if no dues are payable by him.

- **Holding Charges.**

30. As far as holding charges are concerned, the developer having received the sale consideration has nothing to lose by holding possession of the allotted flat except that it would be required to maintain the apartment. Therefore, the holding charges will not be payable to the developer. Even in a case where the possession has been delayed on account of the allottee having not paid the entire sale consideration, the developer shall not be entitled to any holding charges though it would be entitled to interest for the period the payment is delayed.

31. Moreover, the respondent is not entitled to claim holding charges from the complainant 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.

Given the aforesaid discussion, it is held that the letter dated 29.03.2017 had several illegal demands and pre-conditions, therefore, the said offer cannot be termed as valid offer of possession.

32. All in all, it is evident from the statement of account dated 07.12.2021 that the complainant has paid an amount of Rs.2,70,52,528/- against a total sale consideration of Rs. 2,60,52,821/- by July 2017. Despite paying more than the total sale consideration, the respondent has failed to handover the physical possession of the subject unit to the complainant. The reasons for withholding the possession of the subject unit by the respondent are beyond the imagination of the authority.

33. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges at the prescribed rate. 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.

34. The legislature in its wisdom in the subordinate legislation under rule 15 of the rules has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.
35. 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., 23.08.2023 is 8.75%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.75%.
36. **Rate of interest to be paid by the complainant in case of delay in making payments-** The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:
- "(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.*
- Explanation. —For the purpose of this clause—*
- (i) *the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*
- (ii) *the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"*
37. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 10.75% by the respondent/



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

38. On consideration of the documents available on record and submissions made by the parties regarding contravention as per provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 14(a) of the buyer's agreement executed between the parties on 26.02.2008, the possession of the subject unit was to be hand over by 31.12.2010. The respondent has failed to hand over possession of the subject unit till the date of this order. Accordingly, it is the failure of the respondent/promoter to fulfill its obligations and responsibilities as per the buyer's agreement executed between the parties. The authority is of the considered view that there is delay on the part of the respondent to handover physical possession of the allotted unit to the complainant as per the terms and conditions of the buyer's agreement dated 26.02.2008 executed between the parties.
39. It is pertinent to note that vide order dated 31.05.2022, the respondent was directed to handover the physical possession of the unit to the complainant within a period of two weeks. However, the respondent has failed to handover the physical possession of the subject unit to the complainant and the same has been admitted by the respondent during hearing on 03.05.2023. The respondent has acted in utter disregard to the directions passed by the authority.
40. 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. Considering the aforesaid facts, the



respondent is directed to handover physical possession of the unit to the complainant within a period of one month from the date of this order. Further, the complainant is entitled to delay possession charges at prescribed rate of the interest @ 10.75 % p.a. w.e.f. 31.12.2010 till the date of the valid offer of possession plus 2 months or actual handing over of possession, whichever is earlier as per provisions of section 18(1) of the Act read with rule 15 of the rules. Further, the maintenance charges are to be paid by the complainant after receipt of valid offer of possession plus two months by the respondent.

G.II Compensation

The complainant is seeking the following reliefs:

- i. Direct the respondents to make payment towards cost of necessary upgradation, modification and replacement as *inter-alia* set out in the email/communication dated 14.09.2021 addressed by the complainant, required for the purposes of making the subject property habitable.
 - ii. Direct the respondents to make payment towards litigation cost that has been incurred by the complainant in filing the present complaint.
 - iii. Direct the respondents to make payment towards mental agony and torture being faced by the complainant for having to wait endlessly to bear fruit of its investment.
41. The complainant in above-mentioned reliefs is seeking compensation. Hon'ble Supreme Court of India in civil appeal nos. 6745-6749 of 2021 titled as *M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of Up & Ors. 2021-2022 (1) RCR (c) 357*, has 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. Therefore, the complainant is at liberty to approach the adjudicating officer for seeking the relief of compensation.

H. Directions of the authority

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

- i. The respondent is directed to handover physical possession of the unit to the complainant within a period of one month from the date of this order.
- ii. The respondent is directed to make a valid offer of possession along with an updated statement of accounts after adjusting delay possession charges.
- iii. 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 complainant from due date of possession i.e., 31.12.2010 till the date of the valid offer of possession plus 2 months or actual handing over of possession, whichever is earlier as per provisions of section 18(1) of the Act read with rule 15 of the rules.
- iv. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order and interest for every month of delay shall be paid by the promoter to the allottee before 10th of the subsequent month as per rule 16(2) of the rules as per rule 16(2) of the rules.



- v. The rate of interest chargeable from the allottee by the promoter, in case of default, shall be charged at the prescribed rate i.e., 10.75% 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.
- vi. Also, the amount of compensation, if any, already paid by the respondent to the complainant towards compensation for delay in handing over possession shall be adjusted towards the delay possession charges to be paid by the respondent in terms of proviso to section 18(1) of the Act.
- vii. The maintenance charges are to be paid by the complainant after receipt of valid offer of possession plus two months by the respondent.
- viii. **HVAT:** The respondent-promoter is bound to adjust the amount charged on account of HVAT liability post 01.04.2014 amounting to Rs. 2,39,715/- from the complainant with the dues payable by him or refund the amount if no dues are payable by him.
- ix. The respondent shall not charge anything from the complainant which is not the part of the buyer's agreement.
43. The complaints stand disposed of.
44. File be consigned to registry.

Ashok Sangwan
(Member)

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 23.08.2023