

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

Date of decision: 22.12.2023

NAME OF THE BUILDER		M/S ASHIANA DWELLINGS PVT. LTD.	
PROJECT NAME		ASHIANA MULBERRY PHASE I	
S. No.	Case No.	Case title	Appearance
1	CR/49/2023	Sushma Tiwary and Anurag Tiwary V/s M/S Ashiana Dwellings Pvt. Ltd.	Ms. Aditi Sharma Shri R.K Sharma
2	CR/92/2023	Prashanth KP V/S M/S Ashiana Dwellings Pvt. Ltd.	Ms. Aditi Sharma Shri R.K Sharma

**CORAM:**

Shri Sanjeev Kumar Arora

**Member****ORDER**

1. This order shall dispose of the two complaints titled above filed before this authority under section 31 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred as "the Act") read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (hereinafter referred as "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 its obligations, responsibilities and functions to the allottees as per the agreement for sale executed inter se between parties.
2. The core issues emanating from them are similar in nature and the complainant(s) in the above referred matters are allottees of the project, namely, Ashiana Mulberry Phase I situated at Sector-2, Gurugram being developed by the same respondent/promoter i.e., M/S Ashiana Dwellings

Pvt. Ltd. The terms and conditions of the buyer's agreements fulcrum of the issue involved in all these cases pertains to failure on the part of the promoter to deliver timely possession of the units in question, seeking possession of the unit along with delayed possession charges.

3. The details of the complaints, reply status, unit no., date of agreement, possession clause, due date of possession, total sale consideration, total paid amount, and relief sought are given in the table below:

<b>Project Name and Location</b>	<b>"Ashiana Mulberry Phase I" at sector 2, Gurgaon, Haryana.</b>
<b>Project area DTCP License No.</b>	10.25 acres 16 of 2014 dated 10.06.2014 valid upto 09.06.2026
<b>Rera Registered</b>	Registered 44 of 2017 dated 11.08.2017 valid upto 30.06.2020
<b>Possession Clause: -7</b>	
<b>7.1. Schedule for possession of the said Apartment</b>	
Subject to receipt of Occupancy Certificate within 60 days from the date of Application, the Promoter assures to hand over possession of the Apartment along with parking by <b>30<sup>th</sup> June 2019</b> plus a grace period of 6 months as per agreed terms and conditions unless there is delay due to force majeure, Court orders, Government policy./guidelines, decisions affecting the regular development of the real estate project. If, the completion of the Project is delayed due to the above conditions, then the Allottee agrees that the Promoter shall be entitled to the extension of time for delivery of possession of the Apartment. The Promoter shall be deemed to have completed the construction as per agreed scheduled if application for grant of Occupancy Certificate is filed within the schedule given below.	
<b>Due date of possession: 30.06.2019</b>	
<b>Occupation certificate: 02.11.2022</b>	
<b>Offer of possession: 03.11.2022</b>	

Sr. No	Complaint No., Case Title, and Date of filing of complaint	Unit No.	Unit admeasuring	Date of apartment buyer agreement	Due date of possession	Total Sale Consideration / Total Amount paid by the	Relief Sought
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						complainant	
1.	CR/49/ 2023  Sushma Tiwary and Anurag Tiwary V/s M/S Ashiana Dwellings Pvt. Ltd.  <b>DOF:</b> 10.01.202 3  <b>Reply status:</b> 21.07.202 3	C-1210, 12 <sup>th</sup> Floor, Tower T3	697.83 sq. ft. (carpet area)	07.03.2 018  <b>Tripar tite agree ment:</b> 28.03.2 018	30.06.201 9	TSC: - Rs.61,88 ,558/-  AP: - Rs 63,41,39 9/-	1. DPC
2.	CR/92/ 2023  Prashanth KP V/S M/S Ashiana Dwellings Pvt. Ltd.  <b>DOF:</b> 10.01.202 3  <b>Reply status:</b> 21.07.202 3	C-806, 8 <sup>th</sup> floor, tower T2	697.83 sq. ft. (carpet area)	21.02.2 018  <b>Tripar tite agree ment:</b> April 2018	30.06.201 9	TSC: - Rs.62,49 ,058/-  AP: - 64,05,77 6/-	1. DPC

<p><b>Note: In the table referred above certain abbreviations have been used. They are elaborated as follows:</b></p> <p><b>Abbreviation Full form</b>  TSC Total Sale consideration  AP Amount paid by the allottee(s)</p>
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4. The aforesaid complaints were filed by the complainants against the promoter on account of violation of the builder buyer's agreement executed between the parties in respect of said units for not handing over the possession by the due date, seeking the physical possession of the unit along with delayed possession charges.
5. It has been decided to treat the said complaints as an application for non-compliance of statutory obligations on the part of the promoter /respondent in terms of section 34(f) of the Act which mandates the authority to ensure compliance of the obligations cast upon the promoters, the allottee(s) and the real estate agents under the Act, the rules and the regulations made thereunder.
6. The facts of all the complaints filed by the complainant(s)/allottee(s) are similar. Out of the above-mentioned case, the particulars of lead case **CR/92/2023 Prashanth KP V/S M/S Ashiana Dwellings Pvt. Ltd.** are being taken into consideration for determining the rights of the allottee(s) qua delay possession charges.

**A. Project and unit related details**

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

***CR/92/2023 Prashanth KP V/S M/S Ashiana Dwellings Pvt. Ltd.***

S. N.	Particulars	Details
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1.	Name of the project	"Ashiana Mulberry Phase I" at sector - 2, Gurugram
2.	Nature of the project	Residential Group Housing Colony
3.	Project area	10.25 acres
4.	DTCP license no. and validity status	16 of 2014 dated 10.06.2014 valid upto 09.06.2026
5.	RERA Registered/ not registered	<b>Registered</b> 44 of 2017 dated 11.08.2017 valid upto 30.06.2020
6.	Unit no.	C-806, 8th floor, tower T2 [page no. 31 of complaint]
7.	Unit area admeasuring	697.83 sq. ft (carpet area) [page no. 31 of complaint]
8.	Agreement for sale	21.02.2018 [page no. 24 of complaint]
9.	Tripartite Agreement	April 2018 [page no. 73 of complaint]
10.	Possession clause	<b>7.1. Schedule for possession of the said Apartment</b> Subject to receipt of Occupancy Certificate within 60 days from the date of Application, the Promoter assures to hand over possession of the Apartment along with parking by <b>30th June 2019</b> plus a grace period of 6 months as per agreed terms and conditions unless there is delay due to force majeure, Court orders, Government policy,/guidelines, decisions affecting the

		regular development of the real estate project. If, the completion of the Project is delayed due to the above conditions, then the Allottee agrees that the Promoter shall be entitled to the extension of time for delivery of possession of the Apartment. The Promoter shall be deemed to have completed the construction as per agreed scheduled if application for grant of Occupancy Certificate is filed within the schedule given below.
11.	Due date of delivery of possession	30.06.2019 Note: Grace period is not included.
12.	Total sale consideration	Rs.62,49,058/- [as per payment plan on page no. 60 of complaint]
13.	Amount paid by the complainant	Rs. 64,05,776/- [as per SOA annexed with offer of possession on page no. 25 of reply]
14.	Occupation certificate	02.11.2022 [page no. 122 of reply]
15.	Offer of possession	03.11.2022 [page no. 23 of reply]

### B. Facts of the complaint

The complainant has made the following submissions in the complaint: -

- That the complainant vide agreement for sale dated 21.02.2018 was allotted apartment no. C-806, tower T-2 (2 Bedroom +2 Toilets) in the said project having carpet area of 697.83 sq. ft. for a total sale price of Rs. 61,10,450/- inclusive of several charges such as the club development

charges, power backup installation charges, piped cooking gas installation charges, electrical substation charges, etc. In the said agreement, the respondent had clearly specified that the possession would be offered by 30.06.2019.

9. That clause 1.10 of agreement for sale stated that the allottee has paid a sum of Rs. 6,72,000/- and shall pay the balance amount as per the payment plan. As per clause 7.1(ii) the respondent promised to deliver the possession of the apartment by 30.06.2019.
10. That the complainant availed home loan services from Housing Development Finance Corporation Limited to finance the purchase of above said apartment. Further in April 2018, a tripartite agreement was executed between HDFC bank, the respondent and the complainant. The said agreement was made jointly by the complainant and the respondent to raise a loan of Rs. 50,00,000/-. As per clause 3 of the tripartite agreement the liability of payment of pre-EMI, i.e. payments from the date of first disbursement till 31.03.2019, was to be borne by the respondent.
11. That the parties had agreed on the subvention till offer of possession payment plan. In pursuance to this, and the issuance of the loan, the complainant made the following payments at the time of the booking as well as on subsequent dates complying with all the demands raised by the respondent from time to time. The said payments were acknowledged by the respondent vide receipts issued on the given dates.
12. That the complainant hoping that they would get the possession of the apartment in time waited till June 2019. However, near to the date of possession, not only did the respondent delay the delivery of possession but also stopped the Pre-EMI amount from May 2019. Despite several calls and other correspondences, the respondent failed to give a satisfactory

response to the queries and concerns of the complainant. As late as October 2019, the respondent vide letter dated 11.10.2019 informed the complainant that their subvention period had expired on March 2019, and even though they were able to refund the payment of Pre-EMI interest for the month of April 2019, they would no longer be able to bear the said burden and asked the Complainant to pay the same. Further, the letter stated that the amount of Pre-EMI interest paid by the complainant till the offer of possession would be adjusted against the last installment amount demanded. The letter also mentioned that the expected month of possession would be March 2020.

13. That the complainant being disappointed by the conduct of the respondent, but hopeful that the final offer of possession would contain the promised adjustments continued to make the Pre-EMI payments. However, even in March 2020, the respondent company failed to offer possession, thereby increasing the burden of the Pre-EMI on the complainant. Hence, the complainant paid a huge sum of Rs.13,49,489/- till October 2022 towards the Pre-EMI from May 2019 till October 2022.
14. The complainant made efforts to contact the respondent about the status of the project and the payment of the pre-EMIs as promised at the time of allotment, however, the respondent did not respond to the queries and kept delaying the date of offer of possession.
15. That after long delay of more than 3 years and 5 months, the respondent vide letter dated 03.11.2022 informed the complainant that it had received the occupation certificated dated 02.11.2022 from Directorate of Town & Country Planning, Chandigarh. To the utter shock and dismay of the complainant, the respondent did not adjust the pre-EMI amounts till



October 2022. Instead the respondent raised several illegal demands under the following heads:

- (i) External Electrification Charges of Rs. 60,984/-
- (ii) Electric Meter Connection Charges of Rs. 13,552/-
- (iii) Advance Common Area Maintenance & Management Charges for 24 months of Rs. 1,19,936/-
- (iv) Portable Water Supply Charges of Rs. 56,640/-
- (v) Legal Charges of Rs. 23,600/-

16. Hence, the above-mentioned offer of possession has not only been made after a huge delay but in violation of the Real Estate (Regulation and Development) Act 2016. The complainant even raised his grievances in detail via email dated 27.11.2022 regarding the additional charges in possession intimation cum demand letter and made request to make necessary adjustments as was promised at the time of signing of agreements executed between the parties and also through letter dated 11.10.2019 sent by respondent.
17. That the complainant was offered possession vide possession intimation letter dated 03.11.2020 but same accompanied with additional demands, hence amounts to invalid offer of possession
18. That the respondent in its advertisement for the sale of the flat, and through subsequent correspondences through its authorized agents promised that it would bear the liability for the payment of the pre-EMIs to the complainant from the date of the first disbursement till the offer of possession. However, despite several requests and reminders, the respondent did not comply with this promise since May 2019 and the burden of payment of the EMIs fell on the complainant and they were

forced to make the payment of the EMIs totally amounting to Rs. 13,49,489/- till October 2022.

19. That the complainant were hoping that the amount of the payments made by them would be adjusted by the respondent in the final installment demand. However, to the complainant's utter dismay, the respondent did not make any such adjustments in the final offer of possession cum demand letter dated 03.11.2022, instead they raised several illegal demands as illustrated above. The complainant are entitled to an amount of Rs. 13,49,489/- till October 2022 as the respondent breached its contractual obligation and the complainant realized it could have been a method to lure the complainant to invest in the project.

**C. Relief sought by the complainant: -**

20. The complainant has sought following relief(s):

- I. Direct the respondent to pay delayed possession charges from the due date of possession i.e., 30.06.2019 till handing over of possession.
- II. Direct the respondent to offer valid offer of possession and handover actual vacant and physical possession of the flat.
- III. Direct the respondent to set aside the offer of possession dated 03.11.2022 and direct the respondent to withdraw any demands which are not covered under the agreement or are illegal as per law.
- IV. Direct the respondent to pay the pre EMI amount or adjust the same in the last instalment with effect from May 2019 till valid offer of possession.

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

**D. Reply by the respondent**

The respondent has contested the complaint on the following grounds.

22. That the complainant out of their own free will and volition approached the respondent, and booked a unit bearing number C-1210, "Type C" on the 12th floor, tower-T3 having super built up area of 1210 sq. ft. in the respondent's project "Ashiana Mulberry phase-I" situated at sector-02, Sohna, Gurgaon, Haryana. The complainant opted for Pre-EMI subvention payment plan in order to make the payments of all the instalments.
23. Thereafter, an agreement for sale dated 07.08.2018 was executed between the complainant and the respondent.
24. That the said agreement also contained the schedule C pertaining to payment plan, and the complainant were under an obligation to adhere to the said payment plan. Further, as per clause 7.1 (ii) of the said agreement, the date of possession of unit was 30.06.2019.
25. The total sale consideration of the said unit was Rs. 68,50,492/- (including taxes) out of which the respondent has received a sum of 63,41,399/- towards consideration. Ergo, a sum of Rs. 5,09,093/- and Rs. 14,386/- (towards delayed payment charges) still remains outstanding which the complainant have failed to pay qua the allotment of the said unit.
26. That since the complainant had opted for subvention payment plan in lieu of which the loan was advanced from HDFC Bank for a sum of Rs. 55,00,000/- to implement the said subvention scheme, a tripartite agreement was executed between the complainant, bank and respondent on 28.03.2018 (hereinafter referred to as "Tripartite Agreement")

wherein several terms and conditions qua the Subvention Scheme were laid down.

27. That the complainant were under an obligation to adhere to the payment plan opted. Nevertheless, the complainant have defaulted to adhere to the payment plan. It is most respectfully submitted before this Hon'ble Authority that despite receiving various reminders and demand letter(s) through email and otherwise dated 03.10.2018, 24.10.2018, 09.11.2018, 04.12.2018, 19.11.2018, 07.01.2019 and 21.02.2019 sent by the respondent demanding the outstanding payments, the complainant have failed to adhere to the said payment plan opted and hence, the complainant have violated the clauses 1.4 and 5.2 of the agreement for sale wherein they were liable to make timely payment of the outstanding installments of the total sale consideration in order to obtain possession of the said unit. There is no iota of doubt that the said act of the complainant is highly deplorable and amounts to breach of terms of the said agreement. The complainant were fully aware of the fact that timely payment of the installments and outstanding dues is the essence of the contract, which duly finds mention in clause 1.4 and 5.2 that delayed and defaulted payments shall attract adverse consequences.
28. Additionally, as per clause 7.1 of the agreement, the respondent never promised to handover the possession by 30th June 2019 (plus grace period of 6 months). In actuality, clause 7.1 (ii) of the agreement states that the promoter shall handover the possession of the unit by 30th June 2019 (plus grace period of 6 months), subject to receipt of occupancy certificate within 60 days from date of application which was in turn conditional upon the "force majeure".

29. That the complainant were under an obligation to adhere to the payment plan opted as laid down in schedule – C and pages 7-9 of the agreement, which enlists the charges apart from the total sale consideration, therefore, the complainant were liable to pay such balance dues. it would not be amiss to state that the complainant, for the reasons best known to them, failed to make timely payments of the outstanding installments towards total sale consideration.
30. That as per clause 4 of the tripartite agreement, the respondent was liable to pay all the Pre-EMI for the subvention period as undertaken during the execution of agreement for sale and tripartite agreement. Notably, as per the undertaking-cum-indemnity executed by both the complainant, timely payment of installments was the essence of the said agreement and the respondent had promised to pay Pre-EMI only upon the representation of complainant that timely payments shall be made by them as per the said agreement. However, there were various defaults in payment of installments. In this regard, the respondent had also written an email dated 13.03.2019 to the complainant stating that the Subvention period shall not be extended.
31. That as per clause 7.1 (ii) of agreement the respondent never promised the complainant to handover the possession of the unit till 30th June 2019 plus grace period of 6 months from the date of execution of agreement. The said clause clearly states that the respondent company shall handover the possession subject to application made for grant of occupation certificate and on receipt of the same shall offer possession of the said unit.
32. Further, clause 7.1 (iii) of the agreement enumerates the "force majeure" clause wherein it has been laid down that completion date shall

automatically be deemed to be extended if the delay in completion of construction of the project has occurred due to force majeure or circumstances beyond the control of the respondent company.

33. The factors like non-availability of construction materials, electric power slow down, scarcity of water etc., are the substantial reasons which led to the delay in completing the construction of the Project. Additionally, the construction of the project was stopped by Hon'ble National Green Tribunal pertaining to the factors of poor air quality. It is pertinent to point out here that due to stoppage of construction work, it may take another month's time to remobilize the construction work at project site. Thus, the calculation of period of completion for which the construction work was stopped shall be treated as zero period.
34. Pursuant thereto, as per the terms of the agreement and the RERA registration, subject to timely payment by the allottees as well as subject to force majeure, the construction of the unit was to be completed by 30.06.2019 plus 6 months grace period unless there is delay due to "force majeure", court order etc. The construction of the project was stopped several times during the year 2017, 2018, 2019 and 2020 by the order of EPCA, HSPCB, NGT and the Hon'ble Supreme Court of India. It is most respectfully submitted that due to the increase in the level of pollution in the NCR region, the Hon'ble Supreme Court vide its order dated 14.11.2019 passed in the matter of "MC Mehta Vs Union of India & Others" bearing Writ Petition (c) No. 13029/1985 imposed complete ban on construction and excavation work across the National Capital Region from 04.11.2019, which was ultimately lifted on 14.02.2020. Ban on construction caused irreparable damage to the delivery timelines and the

real estate developers' finances as the respondent was not able to undertake any construction work during the aforesaid period and the same was beyond the control of the respondent. Furthermore, the impact of Covid-19 pandemic has been felt throughout the globe and more particularly by Real Estate industry. The pandemic completely disrupted the supply chain of the respondent therefore the delay if any, is not attributable to the respondent herein.

35. That in order to curb down the air pollution the Environment & Pollution (Prevention & Control) Authority, for National Capital Region, has reviewed the urgent action that needs to be taken for the implementation of the Graded Response Action Plan (GRAP) vide it's notification dated EPCA-R/2020/L-38 dated 08.10.2020 and has imposed ban on the use of Diesel Generator set with effect from 15.10.2020, which has further led to delay in the construction being raised.
36. That the respondent had already submitted the application dated 05.04.2021 to the DTCP and even after the delay caused by the various complainant including the complainant herein, in making the payment towards their respective units and various orders of the EPCA, HSPCB and the Apex Court, has finished the construction work of phase-I of the said project and even after delay by the DTCP, has received the occupation certificate on 02.11.2022 from the Director General, Town & Country Planning Department, Chandigarh bearing Memo No. ZP-1062/JD(RA)/2022/32955 (hereinafter referred to as the "Occupation Certificate"). the respondent is ready and willing to give the possession of the units to other allottees in respect of which the respondent has also sent a letter dated 03.11.2022 calling upon the complainant to make payment

of outstanding dues and take possession of the unit. However, same was returned back as unserved for the reasons "Recipient not found" upon the complainant. Therefore, the possession of the unit could not be handed over to the Complainant.

37. That the respondent has always kept the complainant updated with respect to the development of surrounding area as well as of construction of the project. The Respondent further repetitively apprised the complainant of the factors which have a visible adverse impact on the Real Estate Industry.
38. That the money received from the complainant/allottees has been utilized towards the construction of the project/unit. That during the last three years, Real Estate Sector has seen several events which severely impacted the Real Estate Sector. That due to the current Pandemic COVID-19 situation the construction at the site was slowed down.
39. That the instant complaint is an afterthought and has been filed with the ulterior motive to avoid the contractual obligation and earn wrongfully from the respondent.
40. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submission made by the parties.

#### **E. Jurisdiction of the authority**

41. The plea of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that it has territorial



as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

**E.I Territorial jurisdiction**

42. As per notification no. **1/92/2017-1TCP dated 14.12.2017** issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram District. Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

**E.II Subject matter jurisdiction**

43. 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) *The promoter shall-*

*(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;*

**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.*

44. 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.

45. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in *Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. 2021-2022 (1) RCR (Civil), 357* and reiterated in case of *M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020* decided on **12.05.2022** wherein it has been laid down as under:

*"86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is that although the Act indicates the distinct expressions like 'refund', 'interest', 'penalty' and 'compensation', a conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest thereon, it is the regulatory authority which has the power to examine and determine the outcome of a complaint. At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of Section 71 read with Section 72 of the Act. If the adjudication under Sections 12, 14, 18 and 19 other than compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating officer under Section 71 and that would be against the mandate of the Act 2016."*

46. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the case mentioned above, the authority has the jurisdiction to entertain a complaint seeking refund of the amount and interest on the refund amount.

**F. Findings on the objections raised by the respondents:**

**F.I Objections regarding force majeure**

47. The respondents-promoter has raised the contention that the construction of the tower in which the unit of the complainants is situated, has been delayed due to force majeure circumstances such as orders passed by National Green Tribunal to stop construction during 2015-2016-2017-2018, dispute with contractor, non-payment of instalment by allottees and demonetization. The plea of the respondent regarding various orders of the NGT and demonetisation but all the pleas advanced in this regard are devoid of merit. The orders passed by NGT banning construction in the NCR region was for a very short period of time and thus, cannot be said to impact the respondent-builder leading to such a delay in the completion. The plea regarding demonetisation is also devoid of merit. Further, any contract and dispute between contractor and the builder cannot be considered as a ground for delayed completion of project as the allottee was not a party to any such contract. Also, there may be cases where allottees has not paid instalments regularly but all the allottees cannot be expected to suffer because of few allottees. Hence, events alleged by the respondent do not have any impact on the project being developed by the respondent Thus, the promoter respondent cannot be given any leniency on based of aforesaid reasons and it is well settled principle that a person cannot take benefit of his own wrong.

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

- I. Direct the respondent to pay delayed possession charges from the due date of possession i.e., 30.06.2019 till handing over of possession.
- II. Direct the respondent to offer valid offer of possession and handover actual vacant and physical possession of the flat.

48. In all the complaints, the complainant 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."*

49. Clause 7 of the agreement to sell provides the time period of handing over possession and the same is reproduced below:

*"7.1. Schedule for possession of the said Apartment*

*Subject to receipt of Occupancy Certificate within 60 days from the date of Application, the Promoter assures to hand over possession of the Apartment along with parking by 30th June 2019 plus a grace period of 6 months as per agreed terms and conditions unless there is delay due to force majeure, Court orders, Government policy,/guidelines, decisions affecting the regular development of the real estate project. If, the completion of the Project is delayed due to the above conditions, then the Allottee agrees that the Promoter shall be entitled to the extension of time for delivery of possession of the Apartment. The Promoter shall be deemed to have completed the construction as per agreed scheduled if application for grant of Occupancy Certificate is filed within the schedule given below.*

50. The authority has gone through the possession clause of the agreement. At the outset, it is relevant to comment on the pre-set possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and the complainant not being in default under any provision of this agreement and in compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions is 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 date for handing over possession loses its meaning.

51. The buyer's agreement is a pivotal legal document which should ensure that the rights and liabilities of both builder/promoter and buyer/allottee are protected candidly. The apartment buyer's agreement lays down the terms that govern the sale of different kinds of properties like residential, commercials etc. between the buyer and builder. It is in the interest of both the parties to have a well-drafted apartment buyer's agreement which would thereby protect the rights of both the builders and buyers in the unfortunate event of a dispute that may arise. It should be drafted in the simple and unambiguous language which may be understood by a common man with an ordinary educational background. It should contain a provision with regard to stipulated time of delivery of possession of the apartment, plot or building, as the case may be and the rights of the buyer/allottees in case of delay in possession of the unit.

52. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant(s) is seeking delay possession charges. However, proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

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

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

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

53. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.
54. 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., 22.12.2023 is 8.85%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.85%.
55. 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—*

*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 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;"*

56. On consideration of the documents available on record and submissions made regarding contravention of provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 7.1 of the buyer's agreement executed between the parties, the possession of the subject unit was to be handover by 30<sup>th</sup> June 2019.
57. The respondent failed to hand over possession of the subject unit by the due date. Accordingly, it is the failure of the respondent/promoter to fulfil its obligations and responsibilities as per the agreement to hand over the possession within the stipulated period. The authority is of the considered view that there is a delay on the part of the respondent to offer possession of the allotted unit to the complainants as per the terms and conditions of the buyer's agreement executed between the parties.
58. As per contentions made by the complainants, the occupation certificate for the subject unit has been received on 02.11.2022 and on 03.11.2022 a letter for offer of possession along with outstanding demands has been sent to them. The demand letter included various demands that were without any calculation or justification. They sent various mail raising their queries but all went in vain. Subsequently respondent demanded holding charges from them for not occupying the unit. Lastly it has been contended that respondent outrightly refused to accord their demands. On the contrary the respondent contended that complainants consciously choose to ignore the demand letters/reminders.

59. The concept of valid offer of possession is to be understood first.

***Validity of offer of possession***

60. It is necessary to clarify this concept because after valid and lawful offer of possession, the liability of promoter for delayed offer of possession comes to an end. On the other hand, if the possession is not valid and lawful, the liability of promoter continues till valid offer is made and allottee remains entitled to receive interest for the delay caused in handing over valid possession. The authority is of considered view that a valid offer of possession must have following components:

- i. Possession must be offered after obtaining occupation certificate;*
- ii. The subject unit should be in a habitable condition;*
- iii. The possession should not be accompanied by unreasonable additional demands.*

61. In the present matter, the respondent has offered the possession of the allotted unit on 03.11.2022 i.e., after obtaining occupation certificate from the concerned department along with alleged additional demand. Therefore, no doubt that the offer of possession has been sent to the complainants but the same is accompanied with unreasonable additional demands. Thus, the offer of possession is not a valid offer of possession as it triggers (iii) component of the above-mentioned definition.

62. So, demand w.r.t. heads that are unfair and illegal, thus, cannot be charged and also demand w.r.t. holding charges is also held to be set aside as holding charges shall not be charged by the promoter at any point of time even after being part of agreement as per law settled by the *Hon'ble Supreme Court in civil appeal no. 3864-3889/2020 dated 14.12.2020.*



63. Accordingly, it is the failure of the promoter to fulfil its obligations and responsibilities as per the agreement to hand over the possession within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4) (a) read with proviso to section 18(1) of the Act on the part of the respondent is established. As such, the allottees shall be paid, by the promoter, interest for every month of a delay from the due date of possession i.e., 30.06.2019 till the date of the actual handover of possession at the prescribed rate i.e., 10.85 % p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules.

**III. Direct the respondent to set aside the offer of possession dated 03.11.2022 and direct the respondent to withdraw any demands which are not covered under the agreement or are illegal as per law.**

64. The complainant has contended about various illegal charges raised by the respondent-promoter vide letter of offer of possession dated 03.11.2022. The said charges are detailed as under:

Sr. no.	Description	Amount
1.	Electric Meter Connection Charges	Rs. 13,552/-
2.	External Development charges	Rs. 31,170/-
3.	External Electrification Charges	Rs. 60,984/-
4.	Legal Charges (This charge is towards cost incurred towards lawyer fees, documentation charges and other incidental expenses for execution of your apartment conveyance deed)	Rs. 23,600/-

5.	Advance Common area Maintenance & Management (CMM) Charges for 24 months (based on prevailing costing)	Rs. 1,19,936/-
6.	Portable water supply charges (This is an Adhoc figure it shall be reconciled every quarter and the differential amount if any shall be adjusted from advance amount)	Rs. 56,640/-

- **External Development charges and External Electrification Charges**

65. External Development charges are charges required to be paid by the company to the relevant authorities and shall be payable by the buyer at such rates as may then be applicable and in such proportion as the sale area of the apartment bears to the total sale area of all the apartments in the project. The respondent is justified in demanding EDC& IDC but since these charges are payable on actual payment basis the respondent cannot charge a higher rate against EDC/IDC as actually paid to the concerned authority. Therefore, the respondent is directed to provide calculation of EDC& IDC to the complainants-allottee.

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

- **Electric Meter Connection Charges and Portable Water supply Charges**

67. The issue w.r.t electricity charges and water connection charge etc. were dealt under Complaint no. 4031 of 2019 titled as **Varun Gupta & Ors. Vs.**

**Emaar MGF Land Ltd.** These connections are applied on behalf of the allottees and they have to make payment to the concerned department on actual basis. In case instead of paying individually for the unit if the builder has paid composite payment in respect of the above said connections including security deposit provided to the units, then the promoters would be entitled to recover the actual charges paid to the concerned department from the allottee on pro-rata basis i.e. depending upon the area of the flat allotted to the complainants viz-a-viz the total area of the particular project. The complainant/allottees will also be entitled to get proof of all such payment to the concerned department along with composite proportionate to their unit before making payment under the relevant head.

68. It is also clarified that there shall not be any loading or additional charges for such connection in the name of incidental charges and sometime under the name and style of informal charges which is an illegal charge.

- **Advance Common Area Maintenance & Management Charges**

69. The respondent shall not demand the advance maintenance charges for more than one (1) year from the allottee even in those cases wherein no specific clause has been prescribed in the agreement or where the AMC has been demanded for more than one year.

- **Legal Charges**

70. The issue w.r.t legal charges has been dealt under Complaint no. 4031 of 2019 titled as Varun Gupta & Ors. Emaar MGF Land Ltd. and as per same there has been a cap of Rs. 15000/- as nominal amount was envisaged which can be charged by the promoter developer for any such expenses which it may have incurred for facilitating the said transfer as has been fixed by the DTP office in this regard.

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

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

72. A tripartite agreement ("TPA") was executed between the allottee, builder and financial institution in April 2018. The allottees have alleged that builder shall pay all the Pre-EMIs/EMI's to the financial institution till offer of possession.

73. The relevant clause of the tripartite agreement is clause 3 and is reproduced hereunder for ready reference:

*The housing loan advanced to the borrower by HDFC shall be repayable by the borrower by way of Equated Monthly instalments (EMI). The date of commencement of EMI shall be the first day of month following the month in which the disbursement of the loan will have been completed and consequently the due date of payment of first EMI shall in such a case be the last day of the following month. Till the commencement of EMI the borrower shall pay pre Pre-EMI, which is the simple interest on the loan amount disbursed calculated at the rate of interest as mentioned in the respective loan agreement of the Borrower.*

*The Borrower has informed the HDFC of the scheme of arrangement between the Borrower and the Builder in terms whereof the Builder hereby assumes the liability of payments under the loan agreement as payable by the Borrower to HDFC from the date of first disbursement till 31<sup>st</sup> March 2019 (the period be referred to as the "Liability Period" and the Liability be referred to as "Assumed Liability") it is however agreed that during the liability period the repayment liability is joint and several by and between the Borrower and the Builder. The assumption of liability by the Builder in no manner whatsoever releases, relinquishes and/or reduces the liability of the Borrower and that same shall not be affected in any manner on account of any difference and/or dispute between the Borrower and the Builder under the arrangement between them.*

74. However, a bare perusal of clause 3 of the TPA makes it apparent that the liability of the builder for paying the pre EMI is from the date of disbursement till 31.03.2019.

75. Therefore, the authority cannot read the terms of the TPA outside its express meaning until and unless there is any ambiguity in the agreement. In view of the same, complainant is not entitled for the said relief.


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

76. 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 handover physical possession of the subject unit within 60 days from the date of this order as occupation certificate of the project has already been obtained by it from the competent authority.
- ii. The respondent is directed to pay delayed possession charges at the prescribed rate of interest i.e., 10.85% p.a. for every month of delay on the amount paid by the complainant to the respondent from the due date of possession 30.06.2019 till the date of actual handover of possession at the prescribed rate 10.85% p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules.
- iii. Also, the amount so paid by the respondent towards pre-EMI 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.
- iv. The rate of interest chargeable from the allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 10.85% by

- the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottees, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.
- v. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
- vi. The respondent is directed to pay arrears of interest accrued within 90 days from the date of order of this order as per rule 16(2) of the rules.
- vii. The respondent shall not charge anything from the complainant which is not the part of the flat buyer's agreement. However, holding charges shall not be charged by promoter at any point of time even after being a part of the agreement as per Law settled by Hon'ble Supreme Court in Civil Appeal no. 3864-3889/2020 dated 14.12.2020.
- I. This decision shall mutatis mutandis apply to cases mentioned in para 3 of this order.
- J. The complaints stand disposed of.
- K. Files be consigned to registry.

**HARERA**  
GURUGRAM

  
(Sanjeev Kumar Arora)  
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 22.12.2023