


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

Complaint no. : 440 of 2023
Complaint filed on : 09.02.2023
Date of decision : 03.01.2024

Alankar Baunthiyal

R/o: House no. 3/11, Ground Floor, Opposite
Brain International School, Vikar Puri, Tilak
Nagar, Tilak Nagar, S.O. West Delhi, Delhi-
110018.

Complainant


Versus

Emaar India Ltd.

(formerly known as "Emaar MGF Land Ltd.")
Regd. office at: ECE House, 28 Kasturba Gandhi
Marg, New Delhi-110001.

Respondent

CORAM:

Sh. Ashok Sangwan

Member

APPEARANCE:

Rishabh Jain Advocate

Harshit Batra Advocate

Complainant

Respondent

ORDER

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

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

A. Project and unit related details

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

Sr. No.	Particulars	Details
1.	Name of the project	Imperial Garden, Sector 102, Gurugram, Haryana
2.	Total area of the project	12 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no.	107 of 2012 dated 10.10.2012
	Validity of license	09.10.2020
	Licensee	Kamdhenu Projects Pvt. Ltd.
	Area for which license was granted	12 acres
5.	Registered/not registered	Registered in two phases i. 208 of 2017 dated 15.09.2017 [Valid up to 31.12.2018 for 49637 sq. mtrs. and extension granted vide no.3/2019 dated 02.08.2019 which is extended up to 31.12.2019]

		ii. 14 of 2019 dated 28.03.2019 (Phase II) [Valid up to 17.10.2018 for 4.57 acres]
6.	Occupation certificate granted on	17.10.2019 [page 160-163 of reply]
7.	Provisional allotment letter	27.02.2013 [page 35-43 of reply]
8.	Unit no.	IG-06-1603, 16 th floor, building no.06
9.	Area of the unit (super area)	2000 sq. ft.
10.	Date of execution of buyer's agreement	23.05.2013 [page 44-97 of reply]
11.	Possession clause	<p>14. POSSESSION</p> <p>(a) Time of handing over the Possession</p> <p><i>Subject to terms of this clause and barring force majeure conditions, and subject to the Allottee(s) 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 Unit within 42 (Forty Two) months from the date of start of construction; subject to timely</i></p>

		<p><i>compliance of the provisions of the Agreement by the Allottee. The Allottee agrees and understands that the Company shall be entitled to a grace period of 3 (three) months after the expiry of said period of 42 months, for applying and obtaining the completion certificate/occupation certificate in respect of the Unit and/or the Project.</i></p> <p>(Emphasis supplied)</p> <p>[page 114 of reply]</p>
12.	Date of start of construction as per the statement of account dated 19.06.2023	11.11.2013
13.	Due date of possession	11.05.2017 [Note: Grace period is not included]
14.	Total consideration as per SOA dated 19.06.2023 at 217 of reply	Rs.1,49,91,160/-
15.	The total amount paid by the complainant as per SOA dated 19.06.2023 at 217 of reply	Rs.1,59,29,667/-
16.	Offer of possession	23.10.2019 [page 164-168 of reply]
17.	Unit handover letter dated	01.09.2020
18.	CD executed dated	02.05.2023

B. Facts of the complaint

3. The complainant made the following submissions in the complaint:
- I. The respondent published very attractive brochure, highlighting about the group housing colony called 'Imperial Gardens' at Sector - 102, Village kherki majra Dhankot, District Gurugram, Haryana. The respondent claimed to be one of the best and finest in construction and one of the leading real estate developers of the country, in order to lure prospective customers to buy apartments in the project. The complainant was approached by the sale representatives of the respondent and they made tall claims about the project 'Imperial Gardens' as the world class project. The complainant was invited to the sales office and was lavishly entertained and promises were made to him that the possession of his unit would be handed over in time including that of parking, parks, club and other common areas. The complainant was impressed by representations made by the respondent and he paid Rs.10,00,000/- via three cheques dated 18.01.2013 as booking amount to the respondent.
 - II. The respondent took more than ten per cent of total cost of the unit from the complainant before the execution of the builder buyer agreement. The total cost of the unit is Rs.1,54,63,256/- including the EDC and IDC, preferential location charges (PLC), car parking, club membership, service tax etc., while the respondent had collected a total sum of Rs.31,04,257/- till 15.05.2013, which is around 20% (twenty percent) of the total cost of the unit.
 - III. The builder buyer's agreement was executed between the respondent, the complainant and the complainant's sister-in-law (co-applicant).

Mrs Neetu Khantwal on 23.05.2013 for purchasing unit no. IG-06-1603 at 16th Floor in building no. 06, having a super area of 2000 square feet with the exclusive right to use the car parking space. A request letter dated 28.05.2014 along with all necessary documents was submitted to the respondent for the deletion of the co-applicant's name Mrs Neetu Khantwal from the said unit. The respondent vide letter dated 03.06.2014, confirmed the deletion of name of the co-applicant, Mrs Neetu Khantwal wife of Mr Rakesh Khantwal from the property with no further claims on the said unit and hence, the complainant is the sole owner of the unit. The total sale consideration of the unit is Rs.1,54,63,256/- inclusive of EDC and IDC amounting Rs.6,06,000/-, Interest Free Maintenance Security (IFMS) amounting Rs.1,00,000/-, Club Membership amounting Rs.75,000/-, Taxes as applicable amounting Rs.5,62,256/-, Exclusive Rights for Car Park amounting Rs.3,50,000/- and Preferential Location Charges for culture courts amounting Rs.3,40,000/-.

- IV. The date of handing over the possession of the unit as per the builder buyer's agreement is forty two months plus three months from the date of execution of the builder buyer agreement i.e., 23.02.2017.
- V. The complainant has also paid a sum of Rs.2,47,746/- towards maintenance charges for the unit to the respondent. The respondent called the complainant for inspection of the unit before taking physical handover of the unit. The complainant visited the project site for observation and inspection of the unit and noticed some deficiencies. The complainant submitted a home orientation form dated 14.01.2020

- to the respondent to rectify the deficiencies at the earliest and to make the unit good for handover to the complainant.
- VI. The respondent issued a unit handover letter to the complainant on 01.10.2020 and handed over the physical possession of the unit. The respondent also allocated an exclusive right to use car parking space 02-080 to the complainant in the project. The complainant have made all the payments timely as and when demanded by the respondent and in total, paid a sum of Rs.1,63,17,365/- till 22.12.2022 i.e. more than 100% of the payable amount.
- VII. As per the statement of accounts dated 26.12.2023, the respondent had credited a sum of Rs.3,96,493/- on 14.11.2019 on account of delay in handing over the possession of the unit to the complainant. But it is pertinent to mention here that the possession of the unit was delayed for more than three years and six months and the respondent credited an amount of Rs.3,96,493/- for delay possession charges which is not justified and complete.
- VIII. The complainant had approached the respondent and pleaded for delivery of possession of his unit as per the builder buyer's agreement on various occasions. The respondent did not reply to the letters, emails, personal visits, telephone calls, of the complainant seeking information about the status of the project and delivery of possession of the unit. The respondent have not paid the delayed possession charges to the complainant for the period from 23.02.2017 till 01.09.2020 i.e, the date of handing over the physical possession of the unit.

- IX. The respondent has in an unfair manner siphoned of funds meant for the project and utilised same for its own benefit for no cost. The respondent being builder, promoter, colonizer and developer whenever in need of funds from bankers or investors ordinarily has to pay a heavy interest per annum. However in the present scenario, the respondent utilised the funds collected from the complainant and other buyers for its own good and utilised it in other projects, being developed by the respondent.
- X. The complainant has lost confidence and in fact has got no trust left in the respondent, as the respondent has deliberately and wilfully indulged in undue enrichment, by cheating the complainant beside being guilty of indulging in unfair trade practices and deficiency in services in not delivering the legitimate and rightful possession of the unit on time as committed in the builder buyer's agreement and then remaining non-responsive to the requisitions of the complainant.

C. Relief sought by the complainant

4. The complainant is seeking the following relief:
- Direct the respondent to pay delayed possession charges as per the provisions of Act.
 - Direct the respondent to refund the excess amount of Rs.7,06,000/- paid by the complainant at the prescribed rate of interest from the date of its payment till its realisation.

D. Reply filed by the Respondent

5. The respondent had contested the complaint on the following grounds:
- That the complainant along with co-applicant namely, Neetu Khantwal approached the respondent and expressed interest in booking of a unit

in the residential group housing colony developed by respondent known as "Imperial Garden" situated in Sector 102, Gurgaon, Haryana. Prior to the booking, the complainant along with co-applicant conducted extensive and independent enquiries with regard to the project, only after being fully satisfied on all aspects, they took an independent and informed decision, uninfluenced in any manner by the respondent to book the unit in question.

- II. That thereafter, the complainant along with the co-applicant, vide an application form applied to the respondent for provisional allotment of the unit. Pursuant thereto, unit bearing no **IG-06-1603**, located on the 16th Floor, Tower-06 admeasuring 2000 sq. ft. (tentative area) was allotted vide provisional allotment letter dated 27.02.2013. The complainant along with co-applicant consciously and wilfully opted for a construction linked payment plan for remittance of sale consideration for the unit and further represented to the respondent that they shall remit every instalment on time, as per the payment schedule. The respondent had no reason to suspect the bonafide of the complainant and the co-applicant and proceeded to allot the unit in question in their favor.
- III. Thereafter, builder buyer's agreement was executed on 23.05.2013 between the complainant, co-applicant and the respondent. It is pertinent to mention that the buyer's agreement was consciously and voluntarily executed between the parties and the terms and conditions of the same are binding on the parties.
- IV. It is pertinent to mention here that after execution of the builder buyer's agreement, the complainant requested for the deletion of the co-applicant's name, namely Neetu Khantwal and thereby sent a request letter for name deletion on 28.05.2014, requesting the respondent to delete the name of the

- co-applicant and execute an indemnity cum undertaking. Consequently, the name of the co-applicant was deleted which was confirmed by the respondent vide letter dated 03.06.2014.
- V. That as per the builder buyer's agreement, the due date of possession was, subject to the allottees having complied with all the terms and conditions of the agreement. That being a contractual relationship, reciprocal promises are bound to be maintained. The rights and obligations of allottee as well as the builder are completely and entirely determined by the covenants incorporated in the agreement which continue to be binding upon the parties thereto with full force and effect.
- VI. It is submitted that the remittance of all amounts due and payable by the complainant under the agreement as per the schedule of payment incorporated in the agreement was of the essence. It has also been provided therein that the date for delivery of possession of the unit would stand extended in the event of the occurrence of the facts/reasons beyond the power and control of the respondent. It is pertinent to mention that it was categorically provided in clause 14(b)(v) that in case of any default/delay by the allottees in payment as per the schedule of payment incorporated in the agreement, the date of handing over of possession shall be extended accordingly, solely on the respondent's discretion till the payment of all outstanding amounts to the satisfaction of the respondent.
- VII. That it is submitted that the complainant had defaulted/delayed in making the due payments, upon which, reminders were also served to the complainant and had paid delayed payment interest at multiple occasions. That the *bonafide* of the respondent is also essential to be highlighted at this instance, who had served a number of request letters and demand notes to the complainant to ensure that the payments are made in a timely

fashion. Furthermore, the delivery of possession was also subject to the *force majeure* circumstances as under Clause 14(b)(i) and Clause 31 of the Agreement which are reiterated hereunder:

Clause 14(b)(i) of the Agreement:

If, the completion of the Building including the Unit is delayed due to force majeure conditions then the Allottee agrees that the Company shall be entitled to the extension of time for handing over of the possession of the said Unit. The Company as a result of such a contingency arising reserves the right to alter or vary the terms and conditions of this Agreement or if the circumstances beyond the control of the Company so warrant, the Company may suspend the construction of the Building/Project and this Agreement for such period as it may consider expedient. The Allottee agrees not to claim compensation of any nature whatsoever of this Agreement for the period of suspension of the construction of the Building/Project and this Agreement.

Clause 31 of the Agreement:

The handover of the Unit shall be subject to force majeure clause which, inter alia, includes delay on account of non-availability of steel and/or cement and/or other Building materials, water supply or electric power or slow down strike or due to a dispute with the construction agency employed by the Company, civil commotion or by reasons of war, enemy action, earthquake or any act of God. If there is any delay in the delivery of possession of the Unit or the Company is unable to deliver possession of the Unit due to a force majeure event or due to any notice, order, rule or notification of the Central or State Government and/or any other public or competent authority or for any other reason beyond the control of the Company, shall be entitled to a reasonable extension of the time for delivery of possession of the Unit. The Allottee understands and acknowledges that if due to any force majeure conditions, the whole or part of the Project is abandoned or abnormally delayed, the Allottee shall not be entitled to prefer any claim whatsoever except that the Company shall on demand refund the Allottees' money without any interest.

- VIII. At this stage, in the year 2012 on the directions of the Hon'ble Supreme Court of India, the mining activities of minor minerals (which includes sand) was regulated. The Hon'ble Supreme Court directed framing of modern mineral concession rules. Reference in this regard may be had to the judgment of **Deepak Kumar v. State of Haryana, (2012) 4 SCC 629**. The competent authorities took substantial time in framing the rules and in

the process the availability of building materials including sand which was an important raw material for development of the said Project became scarce. Further, the respondent faced certain other force majeure events including but not limited to non-availability of raw material due to various orders of Hon'ble Punjab & Haryana High Court and National Green Tribunal thereby regulating the mining activities, brick kilns, regulation of the construction and development activities by the judicial authorities in NCR on account of the environmental conditions, restrictions on usage of water, etc. It is pertinent to state that the National Green Tribunal in several cases related to Punjab and Haryana had stayed mining operations including in O.A No. 171/2013, wherein vide order dated 2.11.2015 mining activities by the newly allotted mining contracts by the state of Haryana was stayed on the Yamuna river bed. These orders in fact *inter-alia* continued till the year 2018. Similar orders staying the mining operations were also passed by the Hon'ble High Court and the National Green Tribunal in Punjab and Uttar Pradesh. The stopping of mining activity not only made procurement of material difficult but also raised the prices of sand/gravel exponentially. It was almost 2 years that the scarcity continued, despite which all efforts were made and materials were procured at 3-4 times the rate and the construction continued without shifting any extra burden to the customer. The time taken by the respondent to develop the project is the usual time taken to develop a project of such a large scale and despite all the *force majeure* circumstances, the respondent completed the construction of the project diligently and timely, without imposing any cost implications on the complainant and demanding the prices only as and when the construction was being done.

- IX. It is to be noted that the development and implementation of the project have been hindered on account of several orders/directions passed by various authorities/forums/courts, before passing of the subjective due date of offer of possession.
- X. That from the facts indicated above and documents appended, it is comprehensively established that a period of 287 days was consumed on account of circumstances beyond the power and control of the respondent, owing to the passing of orders by the statutory authorities. All the circumstances stated hereinabove come within the meaning of *force majeure*, as stated above. Thus, the respondent has been prevented by circumstances beyond its power and control from undertaking the implementation of the project during the time period indicated above and therefore the same is not to be taken into reckoning while computing the due date. In a similar case where such orders were brought before the Hon'ble Authority in the **Complaint No. 3890 of 2021** titled "**Shuchi Sur and Anr vs. M/S Venetian LDF Projects LLP**" decided on 17.05.2022, the Hon'ble Authority was pleased to allow the grace period and hence, the benefit of the above affected 582 days need to be rightly given to the respondent.
- XI. That furthermore, without admitting or acknowledging in any manner the truth or legality of the allegations levelled by the complainant and without prejudice to the contentions of the respondent, it is submitted that the project has got delayed on account of the following reason which was/is beyond the power and control of the respondent and hence the respondent cannot be held responsible for the same:

A. Defaults of Contractor: In light of bringing all the material facts before the authority, the defaults caused by the contractor need to be categorically highlighted:

- i. That a contract was executed between the respondent and Capacite Infraprojects (Contractor) in terms of which the contractor was to construct residential projects being developed by the respondent in the name and style of "Imperial Garden", including civil, structure, finishing, M-F, external development, infrastructure, horticulture, EWS, clubhouses, swimming pools, convenience shopping etc.
 - ii. That the contractor was not able to meet the agreed timelines for construction of the project. The progress of work at the project site was extremely slow on account of various defaults, such as failure to deploy adequate manpower, shortage of materials etc. in this regard, the respondent made several requests to the contractor to expedite progress of the work at the project site. However, the contractor did not adhere to the said requests and the work at the site came to a standstill.
- XII. That all these circumstances come within the purview of the force majeure clause and hence allow a reasonable time to the respondent. The respondent had the right to suspend the construction of the project upon happening of circumstances beyond the control of the respondent. However, the respondent did not suspend the construction and managed to keep the project afloat through all the adversities.
- XIII. It is further submitted 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. That it must be noted by the authority that despite the default caused, the respondent applied for Occupation Certificate in respect of the said unit on 28.01.2019 and the same was thereafter issued vide memo bearing no. ZP-845/AD(RA)2019/25815 dated 17.10.2019. It is pertinent to note that once an application for grant of Occupation Certificate is submitted for approval in the office of the concerned statutory authority, the respondent ceases to have any control over the same. 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 utilized by the statutory authority to grant occupation certificate to the respondent is necessarily required to be excluded from computation of the time period utilized for implementation and development of the project.

- XIV. That thereafter, the complainant was offered possession of the unit in question through letter of offer of possession on 23.10.2019. 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. It is submitted that the complainant delayed the procedure of taking the possession of the said unit on her own account.
- XV. 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 the delivery of possession. However, the complainant did not pay any heed to the legitimate, just, and fair request of the respondent and threatened the respondent with the institution of unwarranted litigation. The instant complaint is preferred in complete contravention of their earlier representations and documents executed. The present frivolous complaint has been filed with the *mala fide* intention to mount undue pressure upon respondent thereby compelling it to succumb to their unjust and illegitimate demands.

- XVI. That the complainant finally took possession of the Unit on 01.09.2020 and consequently, the conveyance deed was executed on 02.05.2023. It was specifically and expressly agreed that the liabilities and obligations of the respondent as enumerated in the allotment letter or the builder buyer's agreement stand satisfied. The complainant has intentionally distorted the real and true facts in order to generate an impression that the respondent has reneged from his commitments. No cause of action has arisen or subsists in favor of the complainant to institute or prosecute the instant complaint.
- XVII. That moreover, after the execution of the conveyance deed, the contractual relationship between the parties stands fully satisfied and comes to an end. That there remains no claim/ grievance of the complainant with respect to the builder buyer's agreement or any obligation of the parties thereunder. That after the execution of the conveyance deed, the parties are estopped from making any claims at this instance.
- XVIII. That moreover, without accepting the contents of the complaint in any manner whatsoever, and without prejudice to the rights of the respondent, delayed interest if any has to be calculated only on the amounts deposited by the allottees/complainants towards the basic principal amount of the unit

- and not on any amount credited by the respondent, or any payment made by the complainants towards delayed payment charges. It is submitted that the respondent has credited an amount of Rs.3,96,493/- as compensation and an amount of Rs.38,099/- towards anti-profiting.
- XIX. That in light of the *bona fide* conduct of the respondent, no delay for the complainant, the peaceful possession having been taken by the complainant, non-existence of cause of action, and the frivolous complaint filed by the complainant, this complaint is bound to be dismissed with costs in favor of the respondent.
- XX. The present complaint is not maintainable in law or on facts. The present complaint raises several such issues which cannot be decided in summary proceedings. The said issues require extensive evidence to be led by both the parties and examination and cross-examination of witnesses for proper adjudication. Therefore, the disputes raised in the present complaint are beyond the purview of this authority and can only be adjudicated by the civil court. Therefore, the present complaint deserves to be dismissed on this ground alone.
- XXI. That the complainant has not come before the authority with clean hands and has suppressed vital and material facts. That the complainant is vehemently and most humbly stated that bring out the true and correct facts and circumstances is subject to the contention of the respondent that the authority has no jurisdiction to deal with the present matter and that the present complaint is not maintainable for reasons stated in the present reply.
- XXII. 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 unit in question has been booked by the



complainant as a speculative investment and not for the purpose of self-use as her residence. Therefore, no equity lies in favor of the complainant.

E. Jurisdiction of the authority

6. 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

7. As per notification no. 1/92/2017-ITCP 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

8. Section 11(4)(a) of the Act 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.

9. So, in view of the provisions of the Act quoted above, the Authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as per provisions of section 11(4)(a) of the Act leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

F. Findings on the objections raised by the respondent

F.I. Whether signing of unit hand over letter or indemnity-cum-undertaking at the time of possession extinguishes the right of the allottee to claim delay possession charges is valid?

10. The respondent contended that at the time of taking possession of the subject unit vide unit hand over letter dated 01.09.2020, the complainant had certified himself to be fully satisfied with regard to the measurements, location, direction, developments et cetera of the unit and also admitted and acknowledge that he does not have any claim of any nature whatsoever against the respondent and that upon acceptance of possession, the liabilities and obligations of the respondent as enumerated in the allotment letter/buyer's agreement, stand fully satisfied. The relevant para of the unit handover letter relied upon reads as under:

"The Allottee, hereby, certifies that he / she has taken over the peaceful and vacant physical possession of the aforesaid Unit after fully satisfying himself / herself with regard to its measurements, location, dimension and development etc. and hereafter the Allottee has no claim of any nature whatsoever against the Company with regard to the size, dimension, area, location and legal status of the aforesaid Home.

Upon acceptance of possession, the liabilities and obligations of the Company as enumerated in the allotment letter/Agreement executed in favour of the Allottee stand satisfied."

11. In the complaint bearing no. 4031 of 2019 titled as Varun Gupta V/s Emaar MGF Land Ltd., the Authority has comprehensively dealt with

this issue and has held that the unit handover letter and indemnity cum undertaking executed at the time of taking possession, does not preclude the allottees from exercising their right to claim delay possession charges as per the provisions of the Act.

12. In light of the aforesaid order, the complainant is entitled to delay possession charges as per provisions of the Act despite signing of indemnity at the time of possession or unit handover letter.

F.II. Whether the execution of the conveyance deed extinguishes the right of the allottee to claim delay possession charges?

13. In the complaint bearing no. 4031 of 2019 titled as *Varun Gupta V/s Emaar MGF Land Ltd.*, the authority has comprehensively dealt with this issue and has held that taking over the possession and thereafter execution of the conveyance deed can best be termed as respondent having discharged its liabilities as per the buyer's agreement and upon taking possession, and/or executing conveyance deed, the complainant never gave up their statutory right to seek delayed possession charges as per the provisions of the said Act. Also, the same view has been upheld by the Hon'ble Supreme Court in case titled as *Wg. Cdr. Arifur Rahman Khan and Aleya Sultana and Ors. Vs. DLF Southern Homes Pvt. Ltd. (now Known as BEGUR OMR Homes Pvt. Ltd.) and Ors. (Civil appeal no. 6239 of 2019) dated 24.08.2020*, the relevant paras are reproduced herein below:

"34 The developer has not disputed these communications. Though these are four communications issued by the developer, the appellants submitted that they are not isolated aberrations but fit into a pattern. The developer does not state that it was willing to offer the flat purchasers possession of their flats and the right to execute conveyance of the flats while reserving their claim for compensation for delay. On the contrary, the tenor of the communications indicates that while executing the Deeds of Conveyance, the flat buyers were informed that no form of protest or reservation would be acceptable.

The flat buyers were essentially presented with an unfair choice of either retaining their right to pursue their claims (in which event they would not get possession or title in the meantime) or to forsake the claims in order to perfect their title to the flats for which they had paid valuable consideration. In this backdrop, the simple question which we need to address is whether a flat buyer who seeks to espouse a claim against the developer for delayed possession can as a consequence of doing so be compelled to defer the right to obtain a conveyance to perfect their title. It would, in our view, be manifestly unreasonable to expect that in order to pursue a claim for compensation for delayed handing over of possession, the purchaser must indefinitely defer obtaining a conveyance of the premises purchased or, if they seek to obtain a Deed of Conveyance to forsake the right to claim compensation. This basically is a position which the NCDRC has espoused. We cannot countenance that view.

35. *The flat purchasers invested hard earned money. It is only reasonable to presume that the next logical step is for the purchaser to perfect the title to the premises which have been allotted under the terms of the ABA. But the submission of the developer is that the purchaser forsakes the remedy before the consumer forum by seeking a Deed of Conveyance. To accept such a construction would lead to an absurd consequence of requiring the purchaser either to abandon a just claim as a condition for obtaining the conveyance or to indefinitely delay the execution of the Deed of Conveyance pending protracted consumer litigation."*

14. Therefore, in furtherance of *Varun Gupta V/s Emaar MGF Land Ltd. (supra)* and the law laid down by the hon'ble Apex Court in the *Wg. Cdr. Arifur Rahman (supra)*, this authority holds that even after execution of the conveyance deed, the complainant cannot be precluded from his right to seek delay possession charges from the respondent-promoter.

F.III. Objection regarding complainant is Investor not consumer.

14. The respondent has taken a stand that the complainant is an investor and not consumer, therefore, he is not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumer of the real estate sector. The authority observed that the respondent is correct in

stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states main aims & 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 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 apartment buyer's agreement, it is revealed that the complainant is buyer and he has paid total price of Rs. 1,59,29,667 /- to the promoter towards purchase of an unit in the project of the promoter. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

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

15. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the buyer's agreement cum provisional allotment letter executed between promoter and complainants, it is crystal clear that they are allottee(s) as the subject unit allotted to them by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". The Maharashtra Real Estate Appellate Tribunal in its

order dated 29.01.2019 in appeal no. 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 promoters that the allottees being investors are not entitled to the protection of this Act also stands rejected.

G. Findings on the reliefs sought by the complainant

G.I. Direct the respondent to pay interest at prescribed rate, towards delay in handing over the possession of the property in question as per provisions of The Real Estate (Regulation and Development) Act, 2016 and Haryana Real Estate (Regulation and Development) Rules, 2017.

16. In the present complaint, the complainant 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."

17. 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 barring force majeure conditions, and subject to the Allottee(s) 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 Unit **within 42 (Forty Two) months from the date of start of construction**; subject to timely compliance of the provisions of the Agreement by the Allottee. The Allottee agrees and understands that the Company shall be entitled to a*

grace period of 3 (three) months after the expiry of said period of 42 months, for applying and obtaining the completion certificate/occupation certificate in respect of the Unit and/or the Project.

18. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement, and the complainant not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favor of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment time period for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject floor and to deprive the allottees of their right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.
19. Due date of possession and admissibility of grace period: As per Clause 14(a) of the builder buyer agreement dated 25.03.2013, the promoter has proposed to hand over the possession of the said unit within 42 months from the date of commencement of construction and promoter shall be further entitled to a grace period of three months for applying and obtaining occupation certificate in respect of said floor. The

construction commenced on 11.11.2013 as per statement of account dated 19.06.2023. The period of 42 months expired on 11.05.2017. 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 three months cannot be allowed to the promoter at this stage. Therefore, the due date of possession comes out to be 11.05.2017.

20. Admissibility of delay possession charges at prescribed rate of interest: The 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.

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

22. 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., 03.01.2024 is 8.85%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.85%.

23. **Rate of interest to be paid by complainant/allottee for 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."

24. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 10.85% by the respondent/promoter which is the same as is being granted to the complainant in case of delayed possession charges.

25. 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 23.05.2013, the possession of the said unit was to be delivered within a period of 42 months from the date of commencement of construction and it is further provided in agreement that promoter shall be entitled to a grace period of three months for applying and obtaining completion certificate/occupation certificate in respect of said floor. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over possession comes out to be 11.05.2017. In the present case, the complainant was offered possession by the respondent on 23.10.2019 after obtaining occupation certificate dated 17.10.2019 from the competent authority. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the complainant as per the terms and conditions of the buyer's agreement dated 23.05.2013 executed between the parties.

26. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 17.10.2019 and the respondent offered the possession of the unit in question to the complainant on 23.10.2019. These 2 months of reasonable time is being given to the complainant keeping in mind that even after intimation of possession practically he has to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay

possession charges shall be payable from the due date of possession, i.e., 11.05.2017 till the expiry of 2 months from the date of offer of possession (23.10.2019) which comes out to be 23.12.2019.

27. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainant is entitled to delay possession charges at prescribed rate of the interest @10.85% p.a. w.e.f., 11.05.2017 till 23.12.2019 as per provisions of section 18(1) of the Act read with rule 15 of the rules.

28. Also, the amount of compensation already paid by the respondent to the complainant towards delay in handing over of 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.

G.II. Direct the respondent to refund the excess amount of Rs.7,06,000/- paid by the complainant at the prescribed rate of interest from the date of its payment till its realisation.

29. The complainant has sought the above mentioned relief w.r.t. refund the excess amount of Rs.7,06,000/- paid by the complainant to the respondent, in the absence of any specific document and particulars made in his facts of the complaint thus, no directions can be issued.

H. Directions of the Authority

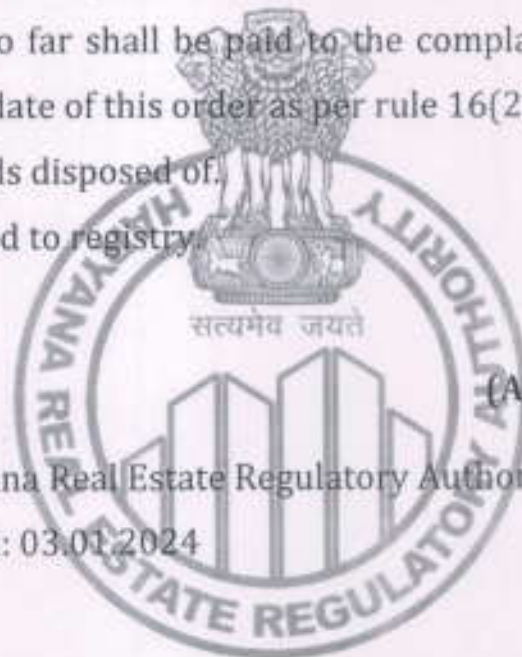
30. Hence, the Authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

- i. The respondent is directed to issue an updated, fresh and detailed statement of account as per the terms and conditions agreed at the time of execution of the BBA to the complainant within 30

days after adjusting the amount already paid by the respondent to the allottee. Further, the respondent is directed to pay the interest at the prescribed rate, i.e., 10.85 % per annum for every month of delay on the amount paid by the complainant from the due date of handing over the possession of the unit, i.e., 11.05.2017 till 23.12.2019, i.e., after expiry of 2 months from the date of offer of possession (23.10.2019). The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order as per rule 16(2) of the rules.

29. Complaint stands disposed of.

30. File be consigned to registry.



(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 03.01.2024

HARERA
GURUGRAM