

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

Complaint no. : 5040 of 2022
Complaint filed on : 01.08.2022
First date of hearing : 27.10.2022
Date of decision : 16.11.2023

1. Mr. Arun Kumar Singh

2. Mrs. Tripti Singh

Both RR/o: Flat no. 703, Tower 31, Commonwealth
Games, Near Akshardham Temple, Delhi - 110092.

Complainants

Versus

M/s Emaar India Limited Formerly Known as Emaar
MGF Land Ltd.

Registered Office: ECE House, 28, Kasturba Gandhi
Marg, New Delhi - 1100001

Corporate Office: Emaar Business Park, MG Road,
Sikanderpur Chowk, Sector 28, Gurugram, Haryana-
122002.

Respondent

CORAM:

Shri Vijay Kumar Goyal

Member

APPEARANCE:

Shri Arun Kumar Singh and Tripti Singh (Complainants in
person)

Complainants

Shri Ishaan Dang (Advocate)

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	Palm Terrace Select, Sector 66, Gurugram, Haryana
2.	Total area of the project	37.708 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no.	1. 93 of 2008 dated 12.05.2008. Valid/renewed up to 11.05.2020. 2. 50 of 2010 dated 24.06.2010. Valid/renewed up to 23.06.2020.
5.	Occupation certificate granted on	08.03.2019 [pg. 138 of reply]
6.	Unit no.	PTS-10-0002, ground floor, building no. 10. [page 64 of complaint]
7.	Area of the unit	2410 sq. ft.
8.	Provisional allotment letter issued on	20.07.2010 [page 64 of complaint]
9.	Date of execution of buyer's agreement with original allottee	06.10.2010 [page 69 of complaint]
10.	Date of agreement to sell executed between original allottee and complainants	13.11.2016 [pg. 119 of complaint]
11.	Nomination letter in favor of complainants	30.04.2017 [pg. 136 of reply]
12.	Possession clause	14. POSSESSION

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		<p>(a) Time of handing over the possession</p> <p><i>Subject to terms of this clause and subject to allottee(s) having complied with all the terms and conditions of this buyer's agreement, and not being in default under any of the provisions of this buyer's agreement and compliance with all provisions, formalities, documentation etc., as prescribed by the company, the company proposes to hand over the possession of the unit within 36 (thirty six) months from the date of start of construction, subject to timely compliance of the provisions of the buyer's agreement by the allottee. The allottee(s) agrees and understands that the company shall be entitled to a grace period of 3 (three) months, for applying and obtaining the completion certificate/ occupation certificate in respect of the unit and/or the project.</i></p> <p>(Emphasis supplied) [pg. 87 of complaint]</p>	
13.	Date of start of construction as per SOA dated 26.07.2021	31.07.2012 [pg. 218 of complaint]	
14.	Due date of possession	31.07.2015 [Note: Grace period is not included]	
15.	Total consideration	As per statement of account dated 26.07.2021, at page 218 of complaint	As per payment plan annexed with the buyer's agreement
		Rs.2,28,94,295/-	Rs.2,25,42,588/-
16.	Total amount paid by the allottees as per statement of account dated 26.07.2021, at page 219 of complaint	Rs.2,30,04,604/-	
17.	Offer of possession	11.03.2019 [pg. 148 of complaint]	

B. Facts of the complaint

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

- i. That in the year 2010, the respondent issued an advertisement announcing a group housing colony project called 'Palm Terraces Select' in a land parcel admeasuring a total area of approximately 37.708 acres, situated at Sector 66, Gurugram, Haryana and thereby invited applications from prospective buyers for the purchase of units in the said project. Respondent confirmed that the project had got building plan approval from the authority. The respondent painted a rosy picture of the project in its advertisements making tall claims.
- ii. The respondent company told the complainants who bought the unit from its original allottees on 13.11.2016 about the moonshine reputation of the company and the representative of the respondent made huge presentations about the project mentioned above and also assured that they have delivered several such projects in the national capital region.
- iii. That relying on various representations and assurances given by the respondent company the complainants, purchased the said unit in the project by paying an amount of Rs.2,29,68,545/- and also paid huge amount of PLC as the unit was located on the ground floor with front lawn and green area and backside dedicated lawn to the complainants.

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- iv. That, a buyer's agreement was executed between the original allottees and respondent on 06.10.2010. As per clause 14(a) of the buyer's agreement the respondent had to deliver the possession of the unit within period of 33 months from the date of start of construction of the project. Therefore, the due date of possession comes out to be 01.11.2015.
- v. That the original allottees subsequently transferred/endorsed the property in favour of the complainants vide agreement to sell dated 13.11.2016. The original allottee executed an "agreement to sell" in favour of the present complainants for an appropriate consideration. The balance amount for obtaining the property which was still under construction was paid by the complainants according to the demands raised by the respondent.
- vi. That the respondent failed to hand over the actual physical possession of the unit which is in a habitable situation and not only this, the respondent has mischievously and fraudulently charged heavy PLC amount for front side lawn and green area and backside dedicated lawn which are now completely exposed to general public by constructing a ramp right in front of the unit in dispute and a staircase in the back side which opens right in between of the lawn of the complainants for which PLCs was charged.
- vii. That the respondent have completely failed to honour its promises and have not provided the services as promised and agreed through the brochure, BBA and the different advertisements released from

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time to time. Further, such acts of the respondent is also illegal and against the spirit of the Act of 2016 and the Rules of 2017.

- viii. That the respondent has played a fraud upon the complainants and have cheated them fraudulently and dishonestly with a false promise to complete the construction over the project site within stipulated period. The respondent had further mala-fiddly failed to implement the BBA executed with the complainants. Hence, the complainants being aggrieved by the offending misconduct, fraudulent activities, deficiency and failure in service of the respondent is filing the present complaint.
- ix. That the respondent asked the complainants to sign the indemnity bond as perquisite condition for handing over of the possession. They raised objection to above said pre-requisite condition of the respondent as no delay possession charges was paid to the complainants but respondent instead of paying the delay possession charges clearly refuse to handover the possession if the complainants do not sign the aforesaid indemnity bond. Further, the complainants left with no option singed the same.
- x. That the complainants have never delayed in making any payment and have always made the payment rather much before the construction linked plan attached to the BBA.
- xi. That the execution of the undertaking in the format prescribed by the developer was a pre-requisite condition, for the delivery of the possession. The respondent company, in my opinion, could not have

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insisted upon clause 13 of the Indemnity-cum-undertaking. The execution of such an undertaking would defeat the provisions of section 23 and 28 of the Indian Contract Act, 1872 and therefore would be against public policy, besides being unfair trade practice.

- xii. That the present complaint sets out the various deficiencies in services, unfair and/or restrictive trade practices adopted by the respondent in sale of their unit and the provisions allied to it, be it either through not implementing the services/utilities as promised in the brochure or through not delivering the project in time.
- xiii. That the complainants after losing all the hope from the respondent having their dreams shattered of owning a flat & having basic necessary facilities in the vicinity of the project and also losing considerable amount, are constrained to approach this authority for redressal of their grievance.

C. Relief sought by the complainants

4. The complainants are seeking the following relief:
 - i. Direct the respondent to pay the interest on the total amount paid by the complainants at the prescribed rate of interest as per the Act of 2016 from the due date of possession till the date of actual physical possession after adjusting the already paid DPC (paid as per one sided BBA).

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- ii. Direct the respondent to reverse the PLC for central green amounting to Rs.13,49,323/- + PLC for ground floor large lawn amounting to Rs.44,52,765/- as the said PLC'S are charged wrongly.
 - iii. Direct the respondent not to charge holding charges, CAM charges, maintenance charges and any other charges which are not the part of BBA.
 - iv. Direct the respondent not to create any third-party rights upon the unit.
 - v. Direct the respondent to set aside the offer of possession letter dated 11.03.2019.
5. On the date of hearing, the authority explained to the respondent/ promoter about the contraventions as alleged to have been committed in relation to section 11(4)(a) of the Act to plead guilty or not to plead guilty.

D. Reply filed by the respondent

6. The respondent had contested the complaint on the following grounds:
- i. That the complainants have filed the present complaint seeking interest on account of alleged delay in delivering possession of the apartment purchased by the complainants. It is respectfully submitted that complaints pertaining to refund, interest, compensation etc. are to be decided by the adjudicating authority under section 71 of the Act read with rule 29 of the rules and not by

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this hon'ble authority. The present complaint is liable to be dismissed on this ground alone.

- ii. That the complainants have got no locus standi or cause of action to file the present complaint. The present complaint is based on an erroneous interpretation of the provisions of the Act as well as an incorrect understanding of the terms and conditions of the buyer's agreement dated 06.10.2010. The respondent craves leave of this authority to refer to and rely upon the terms and conditions set out in the buyer's agreement, in detail at the time of the hearing of the present complaint, so as to bring out the mutual obligations and the responsibilities of the respondent as well as the complainants thereunder. The provisions of the Act are not retrospective in nature. The provisions of the Act cannot undo or modify the terms of an agreement duly executed prior to coming into effect of the Act. The Act applies to ongoing projects which are registered with the authority, the Act cannot be said to be operating retrospectively. The provisions of the Act relied upon by the complainants for seeking interest cannot be called in to aid in derogation and ignorance of the provisions of the buyer's agreement. The interest for the alleged delay demanded by the complainants is beyond the scope of the buyer's agreement. The complainants cannot demand any interest or compensation beyond the terms and conditions incorporated in the buyer's agreement.

- iii. That the original allottees namely, Dr. Manisha Mishra & Anurag Mishra had approached the respondent in the year 2010 for purchase of an independent unit in its upcoming residential project "Palm Terraces Select" at the Palm Drive, Sector 66, Gurgaon. That prior to approaching the respondent, the original allottees had conducted extensive and independent enquiries regarding the project and it was only after the original allottees were fully satisfied with regard to all aspects of the project, including but not limited to the capacity of respondent to undertake development of the same, that the original allottees took an independent and informed decision to purchase the unit, un-influenced in any manner by respondent.
- iv. That thereafter the original allottees applied for provisional allotment of a unit in the project being developed by the respondent. In pursuance of the aforesaid application form, the original allottees were allotted an independent unit bearing no PTS-10-0002, located on the 00 Floor of Tower 10, in the project vide provisional allotment letter dated 24.07.2010. The original allottees consciously and willfully opted for a subvention payment plan for remittance of the sale consideration for the unit in question and further represented to the respondent that the original allottees shall remit every installment on time as per the payment schedule. The respondent had no reason to suspect bonafide of the original allottees. The original allottees further undertook to be bound by the terms and conditions of the application form. Thereafter, buyer's agreement was executed

between the original allottees and the respondent on 06.10.2010. The original allottees willingly and consciously executed the buyer's agreement without raising any objections to the terms and conditions thereof, which are binding upon the original allottees as well as the complainants, as his successor in interest, with full force and effect.

- v. That the original allottees and the present complainants approached the respondent requesting that the allotment be transferred in the name of the complainants. The complainants executed various transfer documents including the indemnity cum undertaking in terms of which the complainants agreed and undertook to be bound by the buyer's agreement dated 06.10.2010 and also admitted and acknowledged that they shall not be entitled to any compensation in the event of delay in delivering possession. Prior to purchasing the unit in resale from the original allottees, they had conducted their own due diligence and had fully satisfied themselves about all aspects of the project and the complainants took an independent and informed decision to purchase the unit in resale, uninfluenced in any manner by the respondent. Agreement to sell dated 13.11.2016, was executed between the original allottees and the complainants. On the basis of the transfer documents executed by the complainants, nomination letter dated 30.04.2017 was issued by the respondent in their favour.

- vi. That clause 16 of the buyer's agreement provides that compensation for any delay in delivery of possession shall only be given to such



allottees who are not in default of their obligations envisaged under the agreement and who have not defaulted in payment of instalments as per the payment plan incorporated in the agreement. In case of delay caused due to non- receipt of occupation certificate, completion certificate or any other permission/sanction from the competent authorities, no compensation or any other amount shall be payable to the allottees. Clause 14(b)(vi) of the buyer's agreement provides that in the event of any default or delay in payment of instalments as per the schedule of payments incorporated in the buyer's agreement, the time for delivery of possession shall also stand extended. Further, clause 16 of the buyer's agreement further provides that in case of delay caused due to non- receipt of occupation certificate, completion certificate or any other permission/sanction from the competent authorities, no compensation or any other compensation shall be payable to the allottees and the time taken by the statutory authorities in granting the occupation certificate in respect of the project needs to be excluded in determining the time period utilised for implementation of the project.

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- vii. Despite there being a number of defaulters in the project, the respondent itself infused funds into the project and has diligently developed the project in question. The respondent completed construction in July 2017 and had applied for the occupation certificate on 11.01.2018 and the same was obtained on 08.03.2019.

- viii. That without prejudice to the contentions of the respondent, the present complaint is barred by limitation. The complainants had alleged that the possession of the unit was to be given not later than November, 2015 and therefore cause of action, if any, accrued in favour of the complainants in November, 2015 i.e. prior to coming into force of the Act. Thus, the complaint seeking interest as a form of indemnification for the alleged delay is barred by limitation.
- ix. That the complainants were offered possession of the unit in question through letter of offer of possession dated 11.03.2019. Through this letter, the complainants were 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 complainants. However, the complainants did not come forward to obtain possession of the unit in question. They were not entitled to any compensation under the buyer's agreement, being defaulters, the respondent nevertheless credited an amount of Rs.7,11,313/- as compensation in accordance with the buyer's agreement. Rs.36,059/- was also credited to the complainant on account of anti-profiteering.
- x. That in terms of clause 15(b) of the buyer's agreement, stamp duty and registration charges are payable by the complainants. At the joint request of complainants/original allottees, the said unit was transfer /endorsed in the name of the complainants in terms of which, the complainants agreed and undertook to be bound by the buyer's

agreement dated 06.10.2010 and also admitted and acknowledged that they shall not be entitled to any compensation in the event of delay in delivering possession. The transfer documents were voluntarily and consciously executed by the complainants out of their own free will. By getting the unit transferred/endorsed in their name, the complainants had stepped in the shoes of the original allottees and are bound by the terms and condition of the buyer's agreement with same force and effect as the original allottees.

- xī. That the contractual relationship between the complainants and the respondent is governed by the terms and conditions of the buyer's agreement dated 06.10.2010. Clause 12 of the buyer's agreement provides that time shall be the essence of the contract in respect of the allottees obligation to perform/observe all obligations of the allottees including timely payment of the sale consideration as well as other amounts payable by the allottee under the agreement. Clause 13 of the buyer's agreement, *inter alia*, provides for levy of interest on delayed payments by the allottee.
- xii. That several allottees, including the complainants, had defaulted in timely remittance of payment of instalments which was an essential, crucial and an indispensable requirement for conceptualisation and development of the project in question.
- A xiii. That all the demands that have been raised by the respondent are strictly in accordance with the terms and conditions of the buyer's agreement duly executed and agreed to between the parties. There is

no default or lapse on the part of the respondent. The entire sequence of events, that no illegality can be attributed to the respondent. The allegations levelled by the complainants are totally baseless. Thus, it is most respectfully submitted that the present complaint deserves to be dismissed at the very threshold.

7. Copies of all the relevant documents have been filed and placed on record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and written submissions made by the parties.

E. Written submission filed by the parties

E.1 written submission on behalf of the complainant:

8. The complainants have filed the written submission on 22.11.2023, and made the following submissions: -

- a. That the complainants vide agreement to sell dated 13.11.2016, proceeded to purchase the unit in question with all rights and entitlements in terms of buyer's agreement from Mrs. Manisha Mishra & Mr. Anurag Mishra (i.e., original allottee) and paid Rs.22,00,000/-vide cheque nos. 000001 & 000016 as earnest money and Rs.1,35,00,000/- was agreed to be paid through HDFC bank by availing loan. Further, a sum of Rs.54,49,086/- was to be paid at the time of transfer of unit in the name of complainant and Rs.13,16,025/- was agreed to be paid to respondent as and when demanded by the respondent. Thus, a total sum of Rs.2,11,49,087/- was paid by the complainant to the original allottee.



b. That as per the BBA (though one sided) the respondent was under legal obligation to complete the project and hand over the physical possession of the unit within thirty six (36) months with a grace period of three (3) months from the commencement of construction (refer clause 14 [a]). Accordingly, the possession of the unit in case was to be given by 01.11.2015 including grace period of 3 months. It is further established that there was an inordinate delay in completing the project due to some dispute between the respondent and its contractor for that complainant cannot be made to suffer on any count. Because it is an admitted case of respondent that construction start date was 31.07.2012. It is submitted that OC for the ground floor to 3rd floor only was received on 08.03.2019 and construction for at all other floors and also the construction of additional staircase from the unit of complainant on ground floor, the ramp and wall in front of the unit etc. were on going which was finally informed to have ended on 22.10.2019, as per their mail. Therefore, the offer of possession dated 11.03.2019 was not a valid offer of possession. Also, by raising additional staircase in rear lawn and a wall in front of the claimants' unit, resulted into the complete loss of preferential location for which the respondent illegally has charged Rs.58,02,088/- and the complainant is entitled for reversal of PLC charges for central green and back lawn, in addition to the delayed possession compensation. The due date of possession in this case shall be 31.07.2015, as 3 months grace period shall not be

allowable since the project was already inordinately delayed and it is settled law that one cannot be allowed to take advantage of his own wrong. In para 16 of the reply of the respondent, the respondent in its letter dated 11.03.2019 offering possession has categorically admitted giving compensation for delayed possession to the tune of Rs.7,11,313/- (as per one sided BBA), but the same is against the Act of 2016 and the rules of 2017.

- c. Upon receipt of letter of offer of possession, they visit to the apartment not allowed on the ground that the project is under construction, from the available view it was found that a wall is being erected just in front of the unit and thus creating a total blockage of any view of central green lawn for which a PLC of Rs.13,49,323/- (including ST) was charged and being enjoyed by the respondent. Erecting a wall in front of the unit made it least preferential location also in the whole society. Also, the additional staircase construction works were being started along with the unit, at the time of letter of offer of possession, in the back lawns where all the foundation works, man material handling were being done. A huge amount of PLC on account of rear large green lawn was paid by complainants i.e., Rs.44,52,765/- (including ST) and being enjoyed by the respondent. These resulted into complete loss of PLCs on these two accounts to the sum of Rs.58,02,088/- and the complainant is entitled for reversal of PLC charges of Rs.58,02,088/- along with interest.

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d. Therefore, as a law-abiding citizen and consumer, the complainant deposited the balance sale consideration of Rs.6,88,442/-, as per SOA received with offer of possession, under protest. However, the respondent, using his dominant position, did nothing to either issue fresh possession letter, after completion of all the ongoing construction works on the projects, making this ground floor unit habitable did not reverse any PLC and also did not pay the balance DPC, as per the Act of 2016. The complainant, vide mail dated 04.04.2019 to CEO/EMAAR, raised all the concerns and intimated 'under protest' and future actions of registration etc. will be got done when there is clarity on these issues.

E.II written submission on behalf of the respondent:

9. The respondent has filed the written submission on 21.11.2023, and made the following submissions: -
- a. That prior to approaching the respondent, the original allottees had conducted extensive and independent enquiries regarding the project and it was only after the original allottees were fully satisfied with regard to all aspects of the project, took an independent and informed decision to purchase the unit.
 - b. That the original allottees further undertook to be bound by the terms and conditions of the application form. Thereafter, buyer's agreement was executed between the original allottees and the respondent on 06.10.2010.

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- c. That no amount of preferential location charges (PLC) charged by the respondent is liable to be refunded to the complainants. The PLC amount demanded by the respondent have been mentioned in schedule of payment appended on page 49 of respondent's documents. The complainants had voluntarily agreed to make payment of the PLC amount. As per, the relevant clauses in the buyer's agreement pertaining to PLC charge by the respondent clause 1.1(e) on page 56 of respondent's documents. It is evident from a perusal of the aforesaid clauses that the original allottees/complainants are liable to make payment of PLC amount and the same have been demanded legally and in consonance with the terms and conditions of the buyer's agreement.
- d. That furthermore, the complainants have falsely and incorrectly stated in their complaint that the unit in question is not preferentially located anymore. The same is absolutely false and the unit of the complainants continues to be preferentially located.

F. Jurisdiction of the authority

10. The preliminary objection raised by the respondent regarding jurisdiction of the authority to entertain the present complaint stands rejected. The authority observed that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

F.1 Territorial jurisdiction

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

F.II Subject-matter jurisdiction

12. 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.

13. 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.

G. Findings on the objections raised by the respondent

G.I Objection regarding jurisdiction of authority w.r.t. buyer's agreement executed prior to coming into force of the Act and provisions of the Act are not retrospective in nature.

14. One of the contentions of the respondent is that the authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the buyer's agreement executed between the parties and no agreement for sale as referred to under the provisions of the Act or the said rules has been executed inter se parties. The respondent further submitted that the provisions of the Act are not retrospective in nature and the provisions of the Act cannot undo or modify the terms of buyer's agreement duly executed prior to coming into effect of the Act.
15. The authority is of the view that the Act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in appeal no. 173 of 2019 titled as *Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya*,

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in order dated 17.12.2019 the Haryana Real Estate Appellate Tribunal has observed-

"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."

16. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the buyer's agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the buyer's agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of the Act and are not unreasonable or exorbitant in nature.

G.II Whether a subsequent allottee who had executed an indemnity cum undertaking with waiver clause is entitled to claim delay possession charges.

17. The respondent submitted that complainants executed various transfer documents including indemnity cum undertaking in terms of which the complainants agrees and under took to be bound by the buyer's agreement dated 06.10.2010 and also admitted that they shall not be

entitled to any compensation in the event delay in delivering the possession. Therefore, the complainants are not entitled to any compensation.

18. The Authority has comprehensively decided this issue in **CR/4031/2019 titled as Varun Gupta Vs Emaar MGF Land Limited** wherein the authority has observes as under:

"The authority holds that irrespective of the execution of the affidavit/undertaking by the complainants/subsequent allottees at the time of transfer of the unit in their name as allottee in place of the original allottees in the record of the promoter does not disentitle them from claiming the delay possession charges in case there occurs any delay in delivering the possession of the unit beyond the due date of delivery of possession as promised even after execution of an indemnity-cum-undertaking."

19. Thus, in view of the above the objections raised by the respondent stands rejected.

H. Findings on the reliefs sought by the complainants

- H.1 Direct the respondent to pay the interest on the total amount paid by the complainants at the prescribed rate of interest as per the Act of 2016 from the due date of possession till the date of actual physical possession after adjusting the already paid DPC (paid as per one sided BBA).
20. In the present complaint, the complainants intend to continue with the project and are seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under.

"Section 18: - Return of amount and compensation

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

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

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

"11. POSSESSION

(a) Time of handing over the Possession

*Subject to terms of this clause and subject to allottee(s) having complied with all the terms and conditions of this buyer's agreement, and not being in default under any of the provisions of this buyer's agreement and compliance with all provisions, formalities, documentation etc., as prescribed by the company, the company proposes to hand over the possession of the unit **within 36 (thirty six) months from the date of start of construction**, subject to timely compliance of the provisions of the buyer's agreement by the allottee. The allottee(s) agrees and understands that the company shall be entitled to a **grace period of 3 (three) months, for applying and obtaining the completion certificate/ occupation certificate in respect of the unit and/or the project.**"*

22. 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 favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment time period for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject floor and to deprive the allottees of their right accruing after delay in possession.

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23. **Due date of possession and admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within 36 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. The construction commenced on 31.07.2012 as per statement of account dated 26.07.2021. The period of 36 months expired on 31.07.2015. As a matter of fact, the promoter has not applied to the concerned authority for obtaining completion certificate/occupation certificate within the time limit prescribed by the promoter in the buyer's agreement. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of six months cannot be allowed to the promoter at this stage. Therefore, the due date of possession comes out to be 31.07.2015.
24. **Entitlement of delay possession charges to the complainant being subsequent allottee w.e.f. due date of handing over possession or w.e.f. the date of nomination letter/endorsement (i.e. date on which they became allottee)-**
25. The complainants are seeking delay possession charges w.e.f. due date as per the buyer's agreement i.e., 06.10.2010. It has further been stated that the complainants were endorsed as an allottees in the above project (as subsequent allottees) on 30.04.2017. The occupation certificate of the project was received on 08.03.2019 and the same was offered on 11.03.2019.

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26. The counsel for the respondent states that the claim of the complainant arises from the date the complainant was endorsed as an allottee i.e., 30.04.2017. In this regard, he refers to the orders passed by this authority in CR No.804 of 2022 dated 08.09.2022 wherein the DPC has been allowed w.e.f. the date of nomination.
27. The authority observes that the issue w.r.t. the entitlement of delay possession charges to the allottees being subsequent allottees is concerned, the authority has exhaustively decided the said issue in *CR no. 4031 of 2019 titled as Varun Gupta Vs. Emaar MGF Land Ltd.* wherein it has been held that where subsequent allottee had stepped into the shoes of original allottee after the due date of handing over possession but before the coming into force of the Act, the delayed possession charges shall be granted w.e.f. the date of nomination letter issued by the respondent.
28. The authority observes that in the present complaint, the subject unit has been endorsed in favour of the complainant vide nomination letter dated 30.04.2017 i.e., after the due date of handing over possession but before the coming into force of the Act. Therefore, in furtherance of *Varun Gupta Vs. Emaar MGF Land Ltd. (supra)*, the complainant is entitled to delay possession charges w.e.f., the date of nomination letter i.e., 30.04.2017.
29. **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

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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.

30. The legislature in its wisdom in the subordinate legislation under rule 15 of the rules has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.
31. 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., 16.11.2023 is 8.75%. Accordingly, the prescribed rate of interest will be MCLR +2% i.e., 10.75%.
32. **Rate of interest to be paid by the complainants in case of delay in making payments-** The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default.

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33. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 10.75% by the respondent /promoter which is the same as is being granted to the complainants in case of delay possession charges.
34. 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 11(a) of the buyer's agreement executed between the parties on 06.10.2010, the possession of the said unit was to be delivered within a period of 36 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 31.07.2015. The complainant in the present complaint is subsequent allottee and had purchased the unit in question from the subsequent allottees and thereafter, the respondent had acknowledged the same vide nomination letter dated 30.04.2017. In terms of the order passed by the authority in complaint titled as ***Varun Gupta Versus Emaar MGF Land Ltd. (CR/4031/2019)***, the complainant is entitled to delayed possession charges w.e.f. the date of nomination letter dated

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30.04.2017 as he has stepped into the shoes of original allottee after the due date of handing over possession but before the coming into force of the Act. In the present case, the complainant was offered possession by the respondent on 11.03.2019 after obtaining occupation certificate dated 08.03.2019 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 06.10.2010 executed between the parties.

35. Section 19(10) of the Act obligates the allottees 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 08.03.2019. However, the respondent offered the possession of the unit in question to the complainant only on 11.03.2019, so it can be said that the complainants came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, he should be given 2 months' time from the date of offer of possession. 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

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possession charges shall be payable from the date of nomination letter i.e. 30.04.2017 till the expiry of 2 months from the date of offer of possession (11.03.2019) which comes out to be 11.05.2019. Also, the complainant is directed to take possession of the unit in question within 2 months from the date of this order as per section 19(10) of the Act after clearing outstanding dues, if any.

36. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainants are entitled to delay possession charges at prescribed rate of the interest @ 10.75% p.a. w.e.f. 30.04.2017 till 11.05.2019 as per provisions of section 18(1) of the Act read with rule 15 of the rules.
37. Also, the amount of Rs.7,11,313/- (as per statement of account dated 26.07.2021) so paid by the respondent to the complainants towards compensation for delay in handing over possession shall be adjusted towards the delay possession charges to be paid by the respondent in terms of proviso to section 18(1) of the Act.

H.II Direct the respondent to reverse the PLC for central green amounting to Rs.13,49,323/- + PLC for ground floor large lawn amounting to Rs.44,52,765/- as the said PLC'S are charged wrongly.

38. The complainants in their complaint have stated that the respondent has charged heavy PLC amount for front side lawn and green area and backside dedicated lawn which are now completely exposed to general public by constructing a ramp right in front of the unit in dispute and a

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staircase in the back side which opens right in between the lawn of the complainants.

39. On the contrary the respondent replied with respect to the above contention of the complainants, that the additional staircase had to be mandatorily constructed by the respondent due to revision in the fire safety norms which were applied by the fire department with retrospective effect. Assuming without in any manner admitting that the unit has ceased to be preferentially located, it is submitted that the same is not on account of any change in layout plan but due to Government regulations which the respondent is bound to comply with. It is submitted that the complainant's right of use of the lawns is not unconditional but is subject to the terms and conditions of the buyer's agreement.
40. The authority observed that as per clause 1.2(a) and (e) of the buyer's agreement, following provisions have been made regarding PLC:

"1.2 Sale Price for Sale of Unit

(a) Sale Price

- i. The sale price of the Unit ("Total Consideration") payable by the Allottee(s) to the Company includes the basis sale price ("BSP") @ the rate of Rs.5750/- per sq. ft., External Development Charges ("EDC") @ the rate of Rs.368/- per sq. ft., Infrastructure Development Charges ("IDC") @ the rate of Rs.34/- per sq. ft. Preferential Location Charges (PLC) ground floor Large Lawn @ Rs.1650/- sq. ft. green belt @ RS 150/- sq. ft. Central Green @ Rs.500/- sq. ft. and exclusive right to use two (2) reserved car parking(s) space allotted to him/her for his/her exclusive use, which shall be charged separately at the rate of Rs. 350000/-, each for two car park situated at upper basement.*

(d) Preferential Location Charges

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- i. The Developer shall, apart from the basic price of the Unit, charge or fix preferential location charges ("PLC") for certain Unit in the Building and if the Allottee(s) opts for any such Unit then he/she/them/it shall be liable to pay such PLC to the Developer.*
 - ii. The Total Consideration for preferentially located Unit includes the preferential location charges of Rs.55,43,000/- for the Unit located in the Building. The above rate of PLC is applicable to partial green, central green, joggers park, green belt, floor raiser, rear lawn, penthouse, corner Unit etc., and if due to change in layout plan, design /architecture plan etc., the location of any Unit, whether preferentially located or otherwise is changed to any other preferential location where the PLC are higher than the rate as mentioned hereinabove, then in such a case the Allottee shall be liable to pay the PLC as per the revised PLC decided by the Developer within thirty (30) days of any such communication received by the Allottee in this regard. However, if due to the change in the layout plan the Unit ceases to be preferentially located, then in such an event the Developer shall be liable to refund only the amount of preferential location charges paid by the Allottee without any interest and/or compensation and/or damages and/or costs of any nature whatsoever and such refund shall be adjusted in the last payable installment for the Unit."*
41. Also, as per 'Schedule of payments' - P/5 of the buyer's agreement, it is stated that 'PLC-Central Green' an amount of Rs.13,49,323/-, 'PLC-Green Belt' an amount of Rs.4,04,797/- and 'PLC- Ground Floor Large Lawn' is Rs.44,52,765/- and the total amount of PLC is Rs.62,06,885/- [Page no. 104 of the complaint].
42. Needless to say, that the buyer's agreement executed between the parties is binding on them and they are not entitled to avoid any terms or conditions contained therein except for the provisions which have been abrogated by the Act itself or where there are reasons to believe that the same were incorporated in the agreement by the promoter by taking benefit of his being in dominant position and the allottee had no option but to sign on the dotted lines.



43. The competent authority (Director Town & Country Planning) approved the building plans as per the requirements of National Building Code, 2005 as applicable at that time and the promoter developed the project and constructed the building as per approved plans. Later on, before obtaining occupation certificate, the National Building Code (in short, NBC) was amended in the year 2016 and as per amended provisions, all high-rise buildings (i.e. buildings having height of 15 mtrs. and above) irrespective of the area of each floor, are now required to have two staircases. It was notified vide Gazette published on 15.03.2017 that the provisions of NBC 2016 supersede those of NBC 2005. Therefore, the construction of the second staircase is a statutory obligation under the provisions of NBC as amended in the year 2016. In view of the same, the respondent has constructed the second staircase in the rear lawn as per the existing statutory provisions.
44. However, the respondent has constructed a wall and ramp in front of the unit, thus ceasing the preferential location charges towards the front of the unit. In light of the above, the authority is of the view that as the unit is still preferentially located, except to the extent of preferential location of the front lawn and the buyer's agreement clearly provides that the allottee had agreed to pay preferential location charges for preferentially located unit and such preferential location charges are payable by the allottee in the manner and within such time as stated in the schedule of payment. Thus, the respondent is directed to provide the preferential location to the complainants as per buyer's agreement

after removing the wall failing which the proportionate amount of PLC for front lawn which has ceased be refunded to the complainants along with prescribed rate of interest i.e., 10.75% from the date of payment till its realization.

H.III Direct the respondent not to charge holding charges, CAM charges, maintenance charges and any other charges which are not the part of BBA.

- **Holding charges**

45. The authority has decided this in the complaint bearing no. **4031 of 2019** titled as **Varun Gupta V/s Emaar MGF Land Ltd.** wherein the authority has held that the respondent is not entitled to claim holding charges from the complainant/allottee at any point of time even after being part of the buyer's agreement as per law settled by Hon'ble Supreme Court in civil appeal nos. 3864-3889/2020 decided on 14.12.2020.

Therefore, in light of the above, the respondent shall not be entitled to any holding charges though it would be entitled to interest for the period the payment is delayed.

- **CAM Charges & Maintenance Charges**

46. The authority has decided this in the complaint bearing no. **4031 of 2019** titled as **Varun Gupta V/s Emaar MGF Land Ltd.** wherein the authority has held that since maintenance charges are applicable from the time a flat is occupied, its basic motive is to fund operations related to upkeep, maintenance, and upgrade of areas which are not directly under any individual's ownership. RERA's provisions enjoin upon the developer to see that residents don't pay ad hoc charges. Also, there should be a declaration from the developer in the documents that they

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are acting in own self-interest and that they are not receiving any remuneration or kick-back commission.

H.IV. Direct the respondent not to create any third-party rights upon the unit.

47. In view of the findings of the authority at pt. 1 the respondent shall not create any third-party rights upon the unit and shall hand over the possession of the unit to the complainants after payment of the balance amount by the complainants, if any.

H.V Direct the respondent to set aside the offer of possession letter dated 11.03.2019.

48. The said offer of possession is valid as the possession has been offered after receiving occupation certificate from the competent authority.

I. Directions of the authority


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

- i. The respondent is directed to pay the interest to the complainants at the prescribed rate i.e. 10.75% per annum for every month of delay on the amount paid by the complainant from the date of nomination i.e. 30.04.2017 till 11.05.2019 i.e. expiry of 2 months from the date of offer of possession (11.03.2019). 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.
- ii. Also, the amount of Rs.7,11,313/- so paid by the respondent towards compensation for delay in handing over possession shall be adjusted towards the delay possession charges to be paid by the respondent in terms of proviso to section 18(1) of the Act.

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- iii. The rate of interest chargeable from the allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 10.75% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.
 - iv. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period within 30 days and the respondent shall handover the possession in next 30 days to the complainant/allottees and to get the conveyance deed of the allotted unit executed in the favour of complainants in term of section 17(1) of the Act of 2016 on payment of stamp duty and registration charges as applicable.
 - v. **PLC-** Thus, the respondent is directed to provide the preferential location to the complainants as per buyer's agreement after removing the wall failing which the proportionate amount of PLC for front lawn which has ceased be refunded to the complainants along with prescribed rate of interest i.e., 10.75% from the date of payment till its realization.
 - vi. The respondent shall not charge anything from the complainants which is not the part of the buyer's agreement.
50. Complaint stands disposed of.
51. File be consigned to registry.

Dated: 16.11.2023

V.) 
(Vijay Kumar Goyal)
Member
Haryana Real Estate
Regulatory Authority,
Gurugram