

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

Complaint no.:	479 of 2023
Date of decision:	31.01.2024

1. Kanhiya Lal Tanwar
2. Lalit Tanwar

Both R/O:- Flat.107, Plot-1054, Near Garima Dental
Clinic, Opp. Huda Market

Complainants

Versus

Ashiana Dwellings Pvt. Ltd.
Address:- 3H, Plaza M6, Dist. Center Jasola,
New Delhi-110025

Respondent

CORAM:

Shri Ashok Sangwan

Member

APPEARANCE:

Ms. Aditi Mishra

Advocate for the Complainants

Shri Deeptanshu Jain

Advocate for the Respondent

ORDER

1. The present complaint dated 03.02.2023 has been filed by the complainants/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is *inter alia* prescribed that the promoter shall be responsible for all obligations, responsibilities and functions as provided under the provision of the Act or the Rules and regulations made there under or to the allottee as per the agreement for sale executed *inter se*.

A. Unit and project related details

2. The particulars of unit details, 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:

S.no.	Particulars	Details
1.	Name of the project	Ashiana Mulberry, Sector-2, Gurgaon
2.	Project type	Group Housing Project
3.	RERA registered/not registered	Registered vide registration no. 44 of 2017 dated 11.08.2017
	Validity status	30.06.2020
4.	DTPC License no.	16 of 2014 dated 10.06.2014 valid upto 09.06.2026
	Licensed area	10.25 acres
	Name of licensee	Ashiana Dwellings Private Limited
5.	Provisional allotment dated	23.10.2015 (As per page no. 29 of complaint)
6.	Unit no.	C-810 on 08 th floor, tower T3 (As per page no. 29 of complaint)
7.	Unit area admeasuring	1210 sq. ft. (As per page no. 29 of complaint)
8.	Date of apartment buyer agreement	03.11.2015 (As per page no. 34 of complaint)
9.	Possession clause	Clause 11.2 of agreement <i>The company, based on its present plan and estimated and subject to force measure and all exceptions and conditions beyond control of the company and subject to the allottee making timely payments, endeavor to complete the construction work of the set</i>

		<i>apartment /building within a period of 39 (thirty-nine) months from the date of this agreement or start of construction after grant of environment clearance by MOEF, whichever is later and grace period of 6 months ("completion date") and shall thereafter apply for grant of occupation certificate and on receipt of the same will offer position of the set apartment to the allottee.</i>
10.	Date of start of construction	Not available on record
11.	Due date of possession	03.08.2019 (Calculated from date of agreement i.e. 03.11.2015; as date of start of construction is not available on record + 6 months grace period) Grace period of 6 months is allowed
12.	Payment plan	Subvention linked payment plan
13.	Total sale consideration	Rs. 68,72,750/- (As per schedule of payment on page no. 72 of complaint)
14.	Total amount paid by the complainants	Rs 67,63,487/- (As per SOA dated 03.11.2022 on page 118 of complaint) Amount paid by the bank to the respondent i.e., Rs. 56,98,845/-
15.	Tri-partite agreement dated	23.03.2016 (As alleged by the complainant on page no. 02 of rejoinder)
16.	Pre-EMI clause	As per Schedule I till 36 months or offer of possession, whichever is earlier

17.	Occupation certificate	02.11.2022 (As per page no. 146 of reply)
18.	Offer of possession	03.11.2022 (As per page no. 116 of complaint)
19.	Legal notice dated	13.01.2023 (As per page no. 128 of complaint)

B. Facts of the complaint

3. The complainants pleaded the complaint on the following facts:

- i. That the complainants applied for allotment of a unit in the project vide application form dated 23.09.2015 and vide provisional allotment letter dated 23.10.2015, they were allotted Apartment No. C-810 on 8th Floor, Tower T-2 (2 BHK +2 Toilets) having super built-up area of 1210 sq. ft. for a total sale price of Rs.62,72,750/- inclusive of several charges such as the club development charges, power backup installation charges, piped cooking gas installation charges, electrical substation charges, fire-fighting charges, External Development Charges, Infrastructure Development Charges, Interest Free Maintenance Security Charges, Advance Maintenance Charges.
- ii. That on 03.11.2015, the Apartment Buyer Agreement was executed between the parties. As per clause 11.2 the respondent promised to deliver the possession of the apartment within 39 months from the date of the Agreement, i.e., by 03.02.2019.

Clause 11.2 of the Agreement is stipulated below:

" The Company based on its present plans and estimates and subject to force majeure and all just exceptions and conditions beyond control of the company and subject to allottee making timely

payments shall endeavor to complete the construction work of the said Apartment/ Building thereof within a period of 39 months from the date of this Agreement or start of construction after grant of Environment Clearance by MOEF whichever is later and a grace period of 6 (six) months ("Completion Date") and shall thereafter apply for grant of the Occupancy Certificate and on receipt of the same will offer possession of the said Apartment to the Allottee."

- iii. That to finance the purchase of the unit, complainants availed home loan services from PNB Housing Finance Limited (hereinafter referred as PNBHFL) in 2016 and raised a loan of Rs 54,00,000/- which was subsequently raised to Rs.58,37,000/- in 2018.
- iv. That subsequently considering the payment plan opted by the complainants, a tripartite agreement dated 23.03.2016 was executed between the complainants, respondent, and the PNBHFL wherein, the respondent had taken the liability to pay the PRE EMI from the date of first disbursement till offer of possession or 36 months whichever is earlier.
- v. That upon perusal of the loan account statement of complainants with PNBHFL, it is clear that the date of first disbursement is 29.06.2016. Thus, the subvention period as specified in schedule I of the Tripartite Agreement will be from 29.06.2016-29.06.2019. But the respondent erred in calculating the subvention period and stopped paying PRE EMI after November 2018. Due to this error, complainants had to bear the additional burden of PRE EMI for six more months, which the respondent was liable to pay to PNBHFL and had defaulted in payment of same. Thus, the respondent is liable to refund the PRE EMI amount paid to PNBHFL from December 2018- June 2019 to the complainants.

- vi. That the complainants in pursuance of the issuance of the loan amount have, accordingly met the demands raised by the respondent and made timely payments to the respondent. The said payments were acknowledged by the respondent vide receipts issued on the given dates and also in the possession cum demand letter dated 03.11.2022.
- vii. That the complainants hoping that he would get the possession of the apartment in time waited till February 2019. However, near to the date of possession, not only did the respondent delay the delivery of possession but also stopped paying the Pre-EMI amount. Despite several calls and other correspondences, the respondent failed to give a satisfactory response to the queries and concerns of the complainants.
- viii. That the complainants being disappointed by the conduct of the respondent, but hopeful that the final offer of possession would contain the necessary adjustments continued to make the Pre-EMI payments. That on 30.03.2021, the complainants got loan transferred from PNB Housing Finance Ltd. to State Bank of India.
- ix. That the complainants have paid a sum of Rs.3,44,925.00 against the PRE EMI for the period of December 2018-June 2019. The complainants have several made efforts to contact the respondent regarding the status of the project and the payment of the pre-EMIs as promised at the time of allotment. However, the respondent did not respond to the queries and kept delaying the date of offer of possession.
- x. That after long delay of more than 3 years and 5 months, the respondent vide letter dated 03.11.2022 informed the

complainants that it had received the Occupation Certificate dated 02.11.2022. To the utter shock and dismay of the complainants, the respondent did not adjust the pre-EMI amounts from December 2018 till June 2019 against the last installment. Instead the respondent raised several additional unreasonable demands which were not part of Apartment Buyer Agreement and also against the law, under the following heads:

- i) External Electrification Charges of Rs. 60,984/-
- ii) Electric Meter Connection Charges of Rs. 13,552/-
- iii) Advance Common Area Maintenance & Management Charges for 24 months of Rs. 1,19,936/- (it was agreed only for one year as per Apartment Buyer Agreement)
- iv) Advance towards Common Area Electricity [Grid Supply] charges for 24 Months of Rs. 24,000/-
- v) Advance towards Common Area Electricity [Through DG Set] charges for 24 Months of Rs. 14,160/-
- vi) Portable Water Supply Charges of Rs. 56,640/-
- vii) Delayed Payment Charges-1,14,739/-
- viii) Legal Charges of Rs. 23,600/-
- xi. That the respondent has made the offer of possession in complete breach of its prior assurances and the provisional allotment letter, and the Agreement. Further the respondent has made the offer of possession subject to unreasonable additional demands on the heads of certain external electrification and maintenance charges which are not justified. This Authority in ***Varun Gupta & Ors. v. Emaar MGF Land Ltd., Complaint No. 4031 of 2019*** has

held:

“Advance Maintenance Charges (AMC): The respondent is right in demanding advance maintenance charges at the rates’ prescribed in the builder buyer’s agreement at the time of offer of possession. However, the respondent shall not demand the advance maintenance charges for more than one year from the allottee even in those cases wherein no specific clause has been prescribed in the agreement or where the AMC has been demanded for more than a year.”

- xii. That offering possession by the respondent on payment of charges which the buyer is not contractually bound to pay and are unreasonable as per the law laid down, cannot be considered to be a valid offer of possession. That the said project is delayed by a period of 3 years and 11 months from the due date of possession on 03.02.2019, and hence, the respondent is liable to pay the allottee interest for delaying the possession in violation of the terms of the Agreement. That the complainants in order to have an amicable solution of grievances tried to approach the respondent again and again and even sent email for the same but the respondent failed to address the grievances of complainants. Thus, the complainants were constrained to issue legal notice to the respondent to which respondent chose not to reply.
- xiii. That in view of the above, the mental agony and torture caused to the complainants is beyond limit as the entire illegal acts of the respondent are deliberate and with the sole intention to harass the complainants and to gain illegal monetary benefits.

C. Relief sought by the complainants:

4. The complainants have sought following reliefs:

- i. Direct the respondent to set aside the invalid offer of possession dated 03.11.2022 and withdraw any demands which are not

- covered under the agreement.
- ii. Direct the respondent to offer a valid offer of possession and handover actual vacant and physical possession of the unit.
 - iii. Direct the respondent to pay delayed possession charges at the prescribed rate of interest.
 - iv. Direct the respondent to pay pre-EMI amount or adjust the same in the last instalment with effect from December 2018.
 - v. Direct the respondent not to take any coercive steps against the complainants such as cancellation of allotment.
 - vi. To initiate the appropriate penal proceedings against the erring respondent as the registration of the project has been lapsed and not renewed.
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, on 20.09.2015, out of their own free will and volition approached the respondent and booked a unit bearing number C-810, "Type C" on the 8th Floor, Tower-T3 having a super built up area of 1210 sq. ft. in the respondent's Project "Ashiana Mulberry Phase-I" situated at Sector-02, Sohna, Gurgaon, Haryana
 - ii. That the complainants opted for Subvention plan – Pre-EMI in order to make the payments of all the instalments. Thereafter, on 23.10.2015, the unit was allotted to the complainants and the provisional allotment letter of even date was provided to the

complainants. Thereafter, an Apartment Buyer Agreement dated 03.11.2015 (was executed between the complainants and the respondent.

- iii. It is submitted that the said agreement also contained the Schedule B pertaining to payment plan, and the complainants were under an obligation to adhere to the said payment plan. Further, as per Clause 11.2 of the said Agreement, the date of possession of unit was 03.08.2019. The total sale consideration of the said unit was Rs.73,37,673/- (including taxes) out of which the respondent has received a sum of 67,63,487/- (including taxes) towards consideration. It is noteworthy to mention that since the complainants had opted for Subvention Plan in lieu of which the loan was advanced from PNB Housing Finance Limited, to implement the said Subvention Scheme, a Tripartite Agreement was executed between the complainants, the bank and the respondent on 23.03.2016.
- iv. It is significant to mention herein that the complainants were under an obligation to adhere to the payment plan opted. Nevertheless, the complainants have defaulted to adhere to the payment plan. Despite, receiving various reminders and demand letters through email dated 06.01.2016, 15.02.2016, 23.07.2016, 10.10.2016, 27.10.2016, 11.01.2017, 25.05.2017, 29.11.2017, 10.01.2018, 25.01.2018 and 03.10.2018, the complainants have failed to adhere to the said payment plan opted and hence, the complainants have violated the Clauses 3.4 and 3.5 of the Apartment Buyer Agreement. There is no doubt that the said act of

the complainants is highly deplorable and amounts to breach of terms of the Apartment Buyer Agreement.

- v. That, the complainants have deliberately concealed the fact that Cheque bearing no. 459244 dated 01.02.2018 amounting to Rs.3,58,581/- issued by complainants got dishonored, which magnifies the conduct of the complainants towards making timely payment and adhering to the Payment Plan. The complainants were well aware that timely payment of the installments and outstanding dues is the essence of the contract.
- vi. It is apposite to mention that as per Clause-E of the Tripartite Agreement, the respondent was liable to pay all the Pre-EMI for the Subvention Period as undertaken during the execution of Apartment Buyer Agreement and Tripartite Agreement. Notably, the Subvention Period commenced from the date of disbursement of first installment of loan till offer of possession or 36 months from the date of disbursement of first installment of loan, whichever is earlier. Thereafter, it was the obligation of the complainants to make payment of further Pre-EMI interest. Furthermore, as per Clause 3 of the Tripartite Agreement, the respondent was only responsible for making the payment of Pre-EMI till the end of 36 months from the date of first disbursement or date of offer of possession, whichever is earlier.
- vii. It is most respectfully submitted that the Bank has recorded the Subvention start date of the sanctioned loan amount as 05.12.2015 in its statement. Hence, as per the bank record, the subvention period ended on 04.12.2018. The respondent has duly complied with its obligation and paid the Pre-EMI due till 04.12.2018.

Thereafter, the complainants sent an email dated 12.12.2018 and 13.12.2018 seeking clarification with respect to payment of Pre-EMI during and after the Subvention Period. In response thereto, the respondent wrote an email dated 13.12.2018. Nevertheless, the complainants again sent an email dated 15.12.2018 wherein it was alleged that the date of subvention end was not communicated at the time of allotment of unit. Reverting to the email, the respondent vide email dated 15.12.2018 clarified that as per the schedule received from the Bank, the subvention commenced on 05.12.2015, the complainants were also advised to contact the Bank in case of further queries. Thereafter, paying no heed to the assistance provided by the respondent, the complainants sought same clarification from the Bank. It is submitted that the Bank has not even been made a party in the captioned complaint which signifies that the complaint is bad for mis-joinder of necessary parties.

- viii. It is abundantly clear that as per Clause 11.2 of Apartment Buyer Agreement, the respondent never promised the complainants to handover the possession of the unit within 39 months plus grace period of 6 months from the date of execution of Apartment Buyer Agreement. The said clause clearly states that the respondent company shall handover the possession subject to application made for grant of Occupation Certificate and on receipt of the same shall offer possession of the said Unit.

Clause 11.2 of the Agreement has been reproduced herein:

"Clause 11.2 The Company, based on its present plans and estimates and subject to Force Majeure and all just exceptions and conditions beyond control of the Company and subject to the

Allottee making timely payments, shall endeavor to complete the construction work of the said Apartment/Building thereof within a period of 39 (THIRTY NINE) months from the date of this Agreement or start of construction after grant of environment Clearance by MoEF whichever is later and a grace of 6 (six) months ("Completion Date") and shall thereafter apply for grant of the Occupancy Certificate and on receipt of the same will offer possession of the said Apartment to the Allottee."

- ix. Further, Clause 11.3 of the Agreement enumerates the "force majeure" clause wherein it has been laid down that completion date shall automatically be deemed to be extended if the delay in completion of construction of the project has occurred due to force majeure or circumstances beyond the control of the respondent company. The factors like non-availability of construction materials, electric power slow down, scarcity of water etc., are the substantial reasons which led to the delay in completing the construction of the project. Additionally, the construction of the project was stopped by the Hon'ble National Green Tribunal pertaining to the factors of poor air quality. It is pertinent to point out here that due to stoppage of construction work, it may take another month's time to remobilize the construction work at project site. Thus, the calculation of period of completion for which the construction work was stopped shall be treated as Zero Period.
- x. That, as per the terms of the Apartment Buyer Agreement and the RERA registration subject to timely payment by the allottees as well as subject to force majeure, the construction of the unit was to be completed by 10.03.2019 plus 6 months grace period unless there is delay due to "force majeure", court order etc. It is pertinent to mention herein that the construction of the project was stopped

several times during the year 2017, 2018, 2019 and 2020 by the order of EPCA, HSPCB, NGT and the Hon'ble Supreme Court of India. It is most respectfully submitted that due to the increase in the level of pollution in the NCR region, the Hon'ble Supreme Court vide its order dated 14.11.2019 passed in the matter of "**MC Mehta Vs Union of India & Others**" bearing Writ Petition No. **13029/1985** imposed complete ban on construction and excavation work across the National Capital Region from 04.11.2019, which was ultimately lifted on 14.02.2020. Ban on construction caused irreparable damage to the delivery timelines and the real estate developers' finances as the respondent was not able to undertake any construction work during the aforesaid period and the same was beyond the control of the respondent. Furthermore, the impact of Covid-19 pandemic has been felt throughout the globe and more particularly by Real Estate industry. The pandemic completely disrupted the supply chain of the respondent therefore the delay if any, is not attributable to the respondent herein.

- xi. That in order to curb down the air pollution the Environment & Pollution (Prevention & Control) Authority, for National Capital Region, has reviewed the urgent action that needs to be taken for the implementation of the Graded Response Action Plan (GRAP) vide it's notification dated EPCA-R/2020/L-38 dated 08.10.2020 and has imposed ban on the use of diesel generator set with effect from 15.10.2020, which has further led to delay in the construction being raised. It is submitted that even after the delay caused by the various complainants including the complainants herein, in

making the payment towards their respective units and various orders of the EPCA, HSPCB and the Apex Court, the respondent has completed the construction work of Phase-I of the said project and has received the Occupation Certificate on 02.11.2022 .

- xii. That the respondent has always kept the complainants updated with respect to the development of surrounding area as well as of construction of the project. The respondent further repetitively apprised the complainants of the factors which have a visible adverse impact on the Real Estate Industry. The money received from the complainants/allottees has been utilized towards the construction of the project. It is further pertinent to mention here that during the last three years, real estate sector has seen several events which severely impacted the real estate sector. It is relevant to mention here that due to the COVID-19 situation the construction at the site was slowed down. It is further most respectfully submitted that the instant Complaint is an afterthought and has been filed with the ulterior motive to avoid the contractual obligation and earn wrongfully from the respondent.

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

E. Jurisdiction of the authority

8. 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

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

E.II Subject matter jurisdiction

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

Section 11

.....

(4) The promoter shall-

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

Section 34-Functions of the Authority:

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

11. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-

compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

F. Findings on the objections raised by the respondents:

F.I Objections regarding force majeure

12. The respondents-promoter has raised the contention that the construction of the tower in which the unit of the complainants is situated, has been delayed due to force majeure circumstances such as orders passed by National Green Tribunal to stop construction during 2015-2016-2017-2018, non-availability of construction materials, electric power slow down, scarcity of water etc., are the substantial reasons which led to the delay in completing the construction of the project. Since there were circumstances beyond the control of respondent, so taking into consideration the above-mentioned facts, the respondent be allowed the period during which his construction activities came to stand still, and the said period be excluded while calculating the due date. But the plea taken in this regard is not tenable. The due date for completion of project is calculated as per clause 11.2 of BBA which comes out to be 03.08.2019. Though there have been various orders issued to curb the environment pollution, but these were for a short period of time. So, the circumstances/conditions after that period can't be taken into consideration for delay in completion of the project. advanced in this regard are devoid of merit. Thus, the promoter-respondent cannot be given any leniency on based of

aforesaid reasons and it is well settled principle that a person cannot take benefit of his own wrong.

13. As far as delay in construction due to outbreak of Covid-19 is concerned, Hon'ble Delhi High Court in case titled as ***M/s Halliburton Offshore Services Inc. V/S Vedanta Ltd. & Anr. bearing no. O.M.P (I) (Comm.) no. 88/ 2020 and IAs 3696-3697/2020*** dated 29.05.2020 has observed that-

"69. The past non-performance of the Contractor cannot be condoned due to the COVID-19 lockdown in March 2020 in India. The Contractor was in breach since September 2019. Opportunities were given to the Contractor to cure the same repeatedly. Despite the same, the Contractor could not complete the Project. The outbreak of a pandemic cannot be used as an excuse for non- performance of a contract for which the deadlines were much before the outbreak itself." मम जयते

The respondent was liable to complete the construction of the project and handover the possession of the said unit was to be handed over within a period of 39 (thirty-nine) months from the date of this agreement or start of construction after grant of environment clearance by MOEF, whichever is later and grace period of 6 months which comes out to be 03.08.2019 and is claiming benefit of lockdown which came into effect on 23.03.2020 whereas the due date of handing over of possession was much prior to the event of outbreak of Covid-19 pandemic. Therefore, the authority is of the view that outbreak of a pandemic cannot be used as an excuse for non- performance of a contract for which the deadlines were much before the outbreak itself



and for the said reason, the said time period is not excluded while calculating the delay in handing over possession.

G. Findings on the relief sought by the complainants

- i. Direct the respondent to set aside the invalid offer of possession dated 03.11.2022 and withdraw any demands which are not covered under the agreement.
- ii. Direct the respondent to offer a valid offer of possession and handover actual vacant and physical possession of the unit.
- iii. Direct the respondent to pay delayed possession charges at the prescribed rate of interest.
- iv. Direct the respondent to pay pre-EMI amount or adjust the same in the last instalment with effect from December 2018.
- v. Direct the respondent not to take any coercive steps against the complainants such as cancellation of allotment.
- vi. To initiate the appropriate penal proceedings against the erring respondent as the registration of the project has been lapsed and not renewed.

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

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

Sr. no.	Description	Amount
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1.	Electric Meter Connection Charges	Rs. 13,552/-
2.	External Electrification Charges	Rs. 60,984/-
3.	Legal Charges (This charge is towards cost incurred towards lawyer fees, documentation charges and other incidental expenses for execution of your apartment conveyance deed)	Rs. 23,600/-
4.	Advance Common area Maintenance & Management (CMM) Charges for 24 months (based on prevailing costing)	Rs. 1,19,936/-
5.	Portable water supply charges (This is an Adhoc figure it shall be reconciled every quarter and the differential amount if any shall be adjusted from advance amount)	Rs. 56,640/-

- **External Electrification Charges**

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

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

16. The issue w.r.t electricity charges and water connection charge etc. were dealt under Complaint no. **4031 of 2019** titled as **Varun Gupta & Ors. Vs. Emaar MGF Land Ltd.** These connections are applied on behalf of

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

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

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

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

- **Legal Charges**

19. The issue w.r.t legal charges has been dealt under Complaint no. 4031 of 2019 titled as **Varun Gupta & Ors. Emaar MGF Land Ltd.** and as per same there has been a cap of Rs. 15000/- as nominal amount was envisaged which can be charged by the promoter developer for any



such expenses which it may have incurred for facilitating the said transfer as has been fixed by the DTP office in this regard.

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

G.II Direct the respondent to offer a valid offer of possession and handover actual vacant and physical possession of the unit.

G.III Direct the respondent to pay delayed possession charges at the prescribed rate of interest.

21. 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."

22. Clause 11.2 of the agreement to sell provides the time period of handing over possession and the same is reproduced below:

"11.2 The company, based on its present plan and estimated and subject to force measure and all exceptions and conditions beyond control of the company and subject to the allottee making timely payments, endeavour to complete the construction work of the set apartment /building within a period of 39 (thirty-nine) months from the date of this agreement or start of construction after grant of environment clearance by MOEF, whichever is later and grace period of 6 months ("completion date") and shall thereafter apply for grant of occupation certificate and on receipt of the same will offer position of the set apartment to the allottee.



23. The authority has gone through the possession clause of the agreement. At the outset, it is relevant to comment on the pre-set possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and the complainant not being in default under any provision of this agreement and in compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions is not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning.
24. The buyer's agreement is a pivotal legal document which should ensure that the rights and liabilities of both builder/promoter and buyer/allottee are protected candidly. The apartment buyer's agreement lays down the terms that govern the sale of different kinds of properties like residential, commercials etc. between the buyer and builder. It is in the interest of both the parties to have a well-drafted apartment buyer's agreement which would thereby protect the rights of both the builders and buyers in the unfortunate event of a dispute that may arise. It should be drafted in the simple and unambiguous language which may be understood by a common man with an ordinary educational background. It should contain a provision with regard to stipulated time of delivery of possession of the apartment,



plot or building, as the case may be and the rights of the buyer/allottees in case of delay in possession of the unit.

25. Admissibility of grace period: The promoter has proposed to hand over the possession of the subject unit within a period of 39 (thirty-nine) months from the date of this agreement or start of construction after grant of environment clearance by MOEF, whichever is later and grace period of 6 months ("completion date"). As no date of start of construction has been placed on record by the respondent therefore, the due date of possession has been calculated from date of execution of builder buyer agreement i.e., 03.11.2015. The period of 39 months expires on 03.02.2019. Since in the present matter the BBA incorporates unqualified reason for grace period/extended period in the possession clause. Accordingly, the authority allows this grace period of 6 months to the promoter at this stage, accordingly the due date of possession comes out to be 03.08.2019.

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

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

(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate

prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.

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

27. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.
28. 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., 31.01.2024 is 8.85%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.85%.
29. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default.

The relevant section is reproduced below:

"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.

*Explanation. —For the purpose of this clause—
the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*

the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"



30. On consideration of the documents available on record and submissions made regarding contravention of provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 11.2 of the buyer's agreement executed between the parties, the possession of the subject unit was to be handover by 03.08.2019. The respondent failed to hand over possession of the subject unit by the due date. Accordingly, it is the failure of the respondent/promoter to fulfil its obligations and responsibilities as per the agreement to hand over the possession within the stipulated period. The authority is of the considered view that there is a delay on the part of the respondent to offer possession of the allotted unit to the complainants as per the terms and conditions of the buyer's agreement executed between the parties. The respondent has offered the possession of the allotted unit to the complainants on 03.11.2022 after obtaining Occupation certificate from the competent Authority on 02.11.2022.
31. Accordingly, it is the failure of the promoter to fulfil its obligations and responsibilities as per the agreement to hand over the possession within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4) (a) read with proviso to section 18(1) of the Act on the part of the respondent is established. As such, the allottees shall be paid, by the promoter, interest for every month of a delay from the due date of possession i.e., 03.08.2019 till 03.01.2023 i.e., expiry of 2 months from the date of offer of possession (03.11.2022) at the prescribed rate i.e., 10.85 % p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules.

G.IV Direct the respondent to pay the Pre-EMI amount or adjust the same in the last instalment with effect from December 2018.

32. A tripartite agreement ("TPA") was executed between the allottee, builder and financial institution in March 2016. The allottees have alleged that builder shall pay all the Pre-EMIs/EMI's to the financial institution 36 months or offer of possession, whichever is earlier.
33. The relevant clause of the tripartite agreement is clause E and SCHEDULE I is reproduced hereunder for ready reference:

The builder hereby offers interest subvention for the loan extended by PNBHFL to the Borrower to purchase the property which the borrower accepts. The builder liability for payment of interest on the loan amount disbursed/to be disbursed by PNBHFL will be for initial period as mentioned in Schedule I from the date of loan disbursement in respect of the above said property, (hereinafter referred to as Subvention Period).

SCHEDULE I

9. Subvention period 36 months or till offer of possession whichever is earlier.

34. However, a bare perusal of clause E and Schedule I of the TPA makes is apparent that the liability of the builder for paying the Pre EMI is from the date of loan disbursement in respect of the above said property, till 36 months or offer of possession, whichever is earlier. As the date of loan disbursement in respect of the said unit i.e., 29.06.2016 as per the SOA of PNB Housing dated 25.02.2021 on page 91 of the complaint. The Pre- EMI period was started from the date of loan disbursement i.e., 29.06.2016 till 29.06.2019. Therefore, the builder is obliged to pay Pre-EMI amount to the bank for the period of 36 months that is earlier from the date of offer of possession.

35. Therefore, the authority cannot read the terms of the TPA outside its express meaning until and unless there is any ambiguity in the agreement. In view of such circumstances the authority observes that the respondent/builder is obligated to pay Pre EMI's/EMI's till the 36 months is earlier as per schedule I of the tripartite agreement. Therefore, the respondent is directed to pay the Pre EMI's to the complainants as per schedule I of the tripartite agreement dated 23.03.2016, if any.

H. Directions of the authority

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

- i. The respondent is directed to pay the interest at the prescribed rate i.e., 10.85 % per annum for every month of delay on the amount paid by the complainants from the due date of possession i.e., 03.08.2019 till 03.01.2023 i.e., expiry of 2 months from the date of offer of possession (03.11.2022) at the prescribed rate i.e., 10.85 % p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules.
- ii. Also, the respondent directed to pay the balance pre-EMI's to the complainants as per schedule I of the tripartite agreement dated 23.03.2016, if any.
- iii. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
- iv. The rate of interest chargeable from the allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 10.85%

by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottees, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

- v. The respondent is directed to pay arrears of interest accrued within 90 days from the date of order of this order as per rule 16(2) of the rules.
 - vi. The respondent shall not charge anything from the complainant which is not the part of the flat buyer's agreement. However, holding charges shall not be charged by promoter at any point of time even after being a part of the agreement as per Law settled by Hon'ble Supreme Court in Civil Appeal no. 3864-3889/2020 dated 14.12.2020.
37. Complaint stands disposed of.
38. File be consigned to registry.

Ashok Sangwan
(Member)

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 31.01.2024