

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

Complaint no. : 609 of 2023
Date of first hearing: 11.08.2023
Date of decision : 16.02.2024

Satya Vrat Asha Dhankar R/o: Flat no. C805, Paras Dews, Sector-106, Dwarka Expressway, Gurugram.	Complainants
Versus	
M/S Ashiana Dwellings Pvt. Ltd. Office: - 3H, Plaza M6, District Centre, Jasola, New Delhi-110025.	Respondent

CORAM:	
Shri Sanjeev Kumar Arora	Member
APPEARANCE:	
Shri Garvit Gupta	Complainants
Shri Deeptanshu Jain	Respondent

ORDER

1. The present complaint dated 14.02.2023 has been filed by the complainants/allottee 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 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.N.	Particulars	Details
1.	Name and location of the project	"Ashiana Mulberry" at sector 2, Gurgaon, Haryana
2.	Nature of the project	Residential Group housing
3.	Project area	10.25 acres
4.	DTCP license no.	16 of 2014 dated 10.06.2014
5.	RERA Registered/ not registered	Registered vide no. 22 of 2018 dated 23.10.2018 valid upto 30.06.2023
6.	Allotment Letter	27.10.2015 (Page no. 31 of complaint)
7.	Unit no.	506, 5 th floor, Tower-T2 (page 38 of complaint)
8.	Unit area admeasuring	1210 sq. ft. (page 38 of complaint)
9.	Date of builder buyer agreement	27.10.2015 (Page 36 of complaint)
10.	Possession Clause	<i>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</i>

		<p><i>endeavour 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 months 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.</i></p>
11.	Due date of possession	27.07.2019 (calculated from the date of agreement as date of construction is not on records) Note: Grace period is included as it is unqualified.
12.	Total sale consideration	Rs. 69,33,250/- (as per payment plan on page no. 24 of complaint) Rs. 77,68,724/- (as per SOA on page no. 116 of reply)
13.	Amount paid by the complainants	Rs. 75,41,170/- (as per SOA on page no. 116 of reply)
14.	Occupation certificate	02.11.2022 (Page no. 111 of reply)
15.	Offer of possession	03.11.2022 (Page no. 120 of complaint)

B. Facts of the complaint

3. That the complainants received a marketing call from the office of respondent in the month of May, 2015 for booking in the above mentioned residential project of the respondent. The complainants, induced by the assurances and representations made by the respondent, decided to book a residential unit in the project of the respondent as the complainants required the same in a time bound manner for their own use and occupation and of their family members.
4. That the complainants made the payment of Rs. 2,00,000/-, Rs. 3,00,000/- and 1,74,675/- at the time of booking. Accordingly, the respondent issued a provisional allotment letter dated 27.10.2015 vide which the respondent allotted flat no. C-506, Fifth Floor, Tower T2 admeasuring 1210 sq.ft. in the above-mentioned project of the respondent.
5. That a copy of the buyer's agreement was sent to the complainants which was a wholly one-sided document containing totally unilateral, arbitrary, one-sided, and legally untenable terms favoring the respondent and was totally against the interest of the purchaser, including the complainants herein.
6. That in the case of the complainants making the delay in the payment of instalments, the respondent company is shown to be entitled to charge interest @ 12% per annum, the complainants are shown to be only entitled to a meagre amount of Rs. 5/- per sq. ft. per month of the super area of the apartment for the period of delay in offering the possession of the apartment beyond the period stated by the respondent.
7. That the complainants had made payment of approximately of Rs. 6,74,645/- before the execution of the agreement and hence the complainants were left with no other option but to accept the one-

sided terms of the buyer's agreement. Hence the buyer agreement dated 27.10.2015 was executed.

8. That the respondent in violation of the mutually agreed payment plan, sent demand notices dated 17.10.2017 and 10.11.2017 seeking the payment towards the 'Completion of the Internal Plaster' which constituted 40% of the total cost of the unit. As per the payment plan, the respondent should have raised the payment demand first towards the completion of the super structure which constituted for 20% of the total cost of the unit. Since, the said demand required the complainants to make payment towards 40% of the total cost of the unit instead of the agreed 20% of the total cost of the unit, the complainants raised their objections vide their email dated 19.09.2017 and 20.10.2017. The respondent tried to justify its illegal demands under the garb of unilateral terms of the agreement. As the complainants were throughout willing and ready to take the possession of the unit, the complainants agreed to make the payment towards the demanded amount, however, under the condition that no interest would be levied by the respondent. The respondent vide its email dated 15.11.2017 acknowledged the same and demanded an undertaking that the payment would be made. The complainants vide their email dated 15.11.2017 decided to make the payment and specifically intimated to the respondent that the acceptance to make the payment was subject to the respondent not levying any interest.
9. That the complainants have till date made the payment of Rs. 76,15,707/- out of the total sale consideration amount of Rs. 69,33,250/- strictly as per the terms of the allotment and the construction linked payment plan and no default in making timely

payment towards the instalment demands has been committed by the complainants.

10. That the respondent failed to handover the possession of the flat within the promised time frame, which in the present case was delayed for an extremely long period of time. As per clause 11.2 of the agreement, the possession of the unit was to be handed over by the respondent within a period of 39 months from the date of execution of the agreement along with a grace period of 6 months.
11. That since the agreement was executed between the parties on 27.10.2015, hence, as per the terms of the agreement, the due date of delivery of possession as per the agreed terms of the apartment buyer's agreement elapsed way back on 27.07.2019.
12. That since the time period to handover the possession stated by the respondent in the apartment buyer's agreement had lapsed, the complainants requested the respondent telephonically, and by visiting the office of the respondent to update them about the date of handing over of the possession. The complainants even visited the construction sites 10-12 times during the whole dealing with the respondent.
13. That vide letter dated 03.11.2022, the respondent intimated to the complainants that the unit allotted to them was ready for possession as the respondent had obtained the occupation certificate. On-going through the terms of the offer of possession, the complainants realized that respondent had unilaterally increased the sale consideration of the unit by demanding illegal charges which were not attributable to the complainants.
14. That the offer of possession contained several illegalities which are as follows:-

A. Delayed payment charges demanded from the complainants

- That the respondent vide the letter dated 03.11.2022 demanded Rs. 1,53,017/- from the complainants. There was no delay at all on the part of the complainants in making the payment towards the total sale consideration amount.

B. Maintenance Charges including Advance Common Area Maintenance and Management Charges for 24 months, Advance Towards Common Area Electricity (Grid Supply) charges for 24 months, Advance towards the Common Area Electricity (through DG Set) charges for 24 months and Potable Water Supply Charges and External Electrification Charges

- That respondent has demanded Rs.1,19,936/- towards the Advance Common Area Maintenance and Management Charges for 24 months; Rs. 24,000/- towards Advance Towards Common Area Electricity (Grid Supply) charges for 24 months; Rs. 14,160/- towards Advance towards the Common Area Electricity (through DG Set) charges for 24 months and Rs. 56,640/- towards Potable Water Supply Charges.
- The respondent has demanded AMC for a period of two years. The said act of the respondent itself is illegal and unethical.
- The respondent has also demanded and the respondent had made payment of Rs. 60,984/- towards the external electrification charges. The said demand is completely illegal as the said charges are to be demanded at the appropriate stage from the complainants on a pro-rata basis after the completion of the project in question and the said amount is liable to be refunded back to the complainants.

C. Registration charges

- That respondent has demanded Rs. 35,010/- from the complainants as registration charges. As already observed in Para 214 of the judgment titled 'Varun Gupta vs Emaar MGF Land Ltd', the maximum nominal amount which the builder can collect from the allottee under the guise of facilitating the transfer of the property in his name is Rs. 15,000/-. Thus, the respondent is bound to revoke the demand towards the excess registration charges.

D. Club Development Charges

- The respondent had demanded and the complainants had already made payment of Rs. 1,65,469/- to the respondent. The said amount was charged from the complainants under the guise to develop the club facility as promised by the respondent at the time of booking. However, despite the lapse of 8 years from the date of booking, no such club exists on the project site and it is now clear that the said charges demanded by the builder under the ambit of club development have been mis-utilized by it at the cost of the complainants.
- E. That the respondent has charged GST at the rate of 12% from the complainants against the applicable rate of 5%. However, the respondent has failed to provide the credit for difference 7% GST to the complainants. The complainants are entitled to the said amount as well from the respondent.
15. That the respondent has been acting not only in contrary to the terms of the agreement which were drafted by the respondent itself but also on account of its own acts and has reduced the complainants at its mercy wherein and the complainants' questions have been left unanswered and the respondent/promoter is continuing with its illegal acts acting strictly in violation of the provisions of the RERA Act, 2016.

16. That the respondent in utter disregard of its responsibilities has left the complainants in the lurch and the complainants have been forced to chase the respondent for seeking relief. Thus, the complainants have no other option but to seek justice from this Hon'ble Authority.

C. Relief sought by the complainants:

17. The complainants have sought following relief(s):

1. Direct the respondent to handover possession of the allotted unit along with interest as prescribed under real Estate (Regulation and Development) Act, 2016 from the due date to handover the possession till actual realization of the amount.
2. Direct the respondent to execute conveyance deed favoring the complainants as per section 17 of the Real Estate Regulation and Development Act, 2016.
3. Direct the respondent to refund Rs. 1,65,469/- paid towards club development charges along with prescribed rate of interest.
4. Direct the respondent to refund Rs. 60,984/- paid towards the external electrification charges along with prescribed rate of interest.
5. Direct the respondent to revoke the demand of Rs. 1,53,017/- payable towards delayed interest from the complainants.
6. Direct the respondent to revoke demand towards maintenance charges including advance common area maintenance and management charges for 24 months, advance towards common area electricity charges for 24 months, portable water supply charges and external and electrification charges and excess registration charges.
7. Direct the respondent to provide the credit for difference 7% GST to the complainants along with prescribed rate of interest.

8. Direct the respondent to not to demand holding charges from the complainants.

D. Reply by the respondent

18. That the complainants out of their own free will and volition approached the respondent, and booked a unit bearing number C-506, "Type C" on the 5th floor, tower-T2 having super built up area of 1210 sq. ft. in the respondent's project "Ashiana Mulberry phase-I" situated at sector-02, Sohna, Gurgaon, Haryana. The complainants opted for performance linked payment plan as per schedule B in order to make the payments of all the instalments by making payment of Rs. 6,74,645/-.
19. Thereafter, an apartment buyer's agreement dated 27.10.2015 was executed between the complainants and the respondent. Additionally, a provisional allotment letter of even date was also issued to the complainants.
20. That the said agreement also contained the schedule B pertaining to payment plan linked to performance and the complainants were under an obligation to adhere to the said payment plan.
21. The total sale consideration of the said unit was Rs. 76,15,707/- (including taxes) which the respondent has duly received towards consideration. However, a sum of Rs. 3,80,570/- still remains outstanding towards expenses under other heads and Rs. 2,27,553/- including unit charges, and delay penalty charges of Rs. 1,53,017 which the complainants have failed to pay. Additionally, the complainants are also required to make payment of Rs. 2,69,390/- towards pending maintenance charges, deposits and other charges as per possession intimation letter dated 03.11.2022.

22. That the complainants were under an obligation to adhere to the payment plan opted for. Nevertheless, the complainants have defaulted in adhering to the payment plan. Despite receiving various reminders and demand letter(s) through email and otherwise sent by the respondent demanding the outstanding payments, 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 said agreement wherein they were liable to make timely payment of the outstanding installments of the total sale consideration in order to obtain possession of the said unit. There is no iota of doubt that the said act of the complainants is highly deplorable and amounts to breach of terms of the said agreement. The complainants were fully aware of the fact that timely payment of the installments and outstanding dues is the essence of the contract, which duly finds mention in clause 3.4 and 3.5 that delayed and defaulted payments shall attract adverse consequences.
23. That all the emails of the complainants were duly responded to by the respondent and the complainants were duly informed that interest shall be levied on delayed payments. However, despite that, the complainants kept on delaying payments of installments.
24. That the complainants were under an obligation to adhere to the payment plan opted as laid down in Schedule - B at Page nos. 43 and 44 of the agreement, which enlists the charges apart from the total sale consideration. Therefore, the complainants were liable to pay such balance dues.
25. That the alleged unilateral increase in the sale consideration and demand of illegal charges in form of charges indicated by the complainants in Para 23 and 25 of the complaint under response which were allegedly

demanded illegally vide possession intimation letter-cum-notice dated 03.11.2022, were very much legal and an essential part of the agreement and were chargeable under following clauses:

- External electrification charges - Clause 15.10 of Agreement
- Electric meter connection charges - Page 43 of the Agreement
- Advance common area maintenance and management charges - Clauses 15.1 and 15.6 of the Agreement
- Advance towards common area electricity through grid supply - Clause 15.11 of the Agreement
- Advance towards common area electricity through DG set - Clause 15.11 of the Agreement
- Portable water supply charges - Page 43 of the Agreement

26. That as per clause 11.2 of the said agreement, the respondent never promised to hand over the possession till July 2019. In actuality, clause 11.2 of the said agreement states that the respondent shall endeavor to complete the construction work of the unit within period of 39 months from date of the said agreement (plus grace period of 6 months), subject to application made for grant of occupation certificate and on receipt of the same shall offer possession of the said unit, which was in turn conditional upon the "force majeure".

27. Therefore, clause 11.3 of the said agreement enumerates the "force majeure" clause which states 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.

28. The factors like non-availability of construction materials, electric power slowdown, scarcity of water etc., are the substantial reasons which led to

the delay in completing the construction of the project. Additionally, the construction of the project was stopped by Hon'ble National Green Tribunal pertaining to the factors of poor air quality. 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.

29. Further, clause 11.4 of the said agreement mentions the "Delay Penalty" clause wherein it has been laid down that if completion could be not completed within the time period stated in clause 11.1, 11.2 and & 11.3 subject to the timely payments made by the complainants as per the schedule of payment then the Respondent will pay delay penalty @ of Rs. 5/- (Rupees Five Only) per month per sq. ft. of the super built area provided that the Allottee has not been in default of the payment.
30. The terms of the agreement and the RERA registration, subject to timely payment by the Allottees as well as subject to force majeure, the construction of the unit was to be completed by 26.01.2019 plus 6 months grace period i.e. by 26.07.2019 unless there is delay due to "force majeure", court order etc. The construction of the project was stopped several times during the years 2017, 2018, 2019 and 2020 by the order of EPCA, HSPCB, NGT and the Hon'ble Supreme Court of India. It is most respectfully submitted that due to the increase in the level of pollution in the NCR region, the Hon'ble Supreme Court vide its order dated 14.11.2019 passed in the matter of "MC Mehta Vs Union of India & Others" bearing Writ Petition (c) No. 13029/1985 imposed complete ban on construction and excavation work across the National Capital Region from 04.11.2019, which was ultimately lifted on 14.02.2020. Ban on

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

31. 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.
32. It is submitted that the respondent had already submitted the application dated 05.04.2021 to the DTCP and even after the delay caused by the various allottees including the complainants herein, in making the payment towards their respective units and various orders of the EPCA, HSPCB and the Apex Court, has finished the construction work of Phase-I of the said Project and even after delay by the DTCP, has received the occupation certificate on 02.11.2022 from the Director General, Town & Country Planning Department, Chandigarh bearing Memo No. ZP-1062/JD(RA)/2022/32955 (hereinafter referred to as the "Occupation Certificate"). the respondent is ready and willing to give the possession of the units to other allottees in respect of which the respondent has also sent

a letter dated 03.11.2022 calling upon the complainants to make payment of outstanding dues and take possession of the unit.

33. 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.
34. That the money received from the complainants/allottees has been utilized towards the construction of the project/unit. During the last three years, Real Estate Sector has seen several events which severely impacted the Real Estate Sector. That due to the current pandemic COVID-19 situation the construction at the site was slowed down.
35. That the complainants are seeking delay penalty charges along with interest and compensation without placing on record any substantial evidentiary proof. The Hon'ble Supreme Court in a number of judgments has held that compensation for delay is to be the loss incurred by the customer and in the instant case the complainants have failed to provide proof for the same. On the contrary it is the respondent who has incurred loss due to the omissions on part of the complainants for which the complainants are liable to pay an amount of Rs. 1,53,017/- towards delay penalty charges to the respondent.
36. Copies of all the relevant documents have been duly 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 submissions made by the parties.

E. Jurisdiction of the authority

37. 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

38. 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

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

Section 11(4)(a)

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

Section 34-Functions of the Authority:

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

40. 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 complainants at a later stage.

F. Findings on the objections raised by the respondent

F.1 Objections regarding force majeure

41. 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, supreme court of India, EPCA, HSPCB to stop the construction during 2017, 2018, 2019 and 2020, non-payment of instalment by allottees and Covid-19. The plea of the respondent regarding various orders of the NGT and other forums advanced in this regard are devoid of merit. The orders passed by NGT banning construction in the NCR region was for a very short period of time and thus, cannot be said to impact the respondent-builder leading to such a delay in the completion. Also, there may be cases where allottees has not paid instalments regularly but all the allottees cannot be expected to suffer because of few allottees. The respondent further raised a plea regarding covid-19 but that came in the year 2020. Hence, events alleged by the respondent do not have any impact on the project being developed by the respondent. Thus, the promoter respondent cannot be given any leniency on based of aforesaid reasons and it is well settled principle that a person cannot take benefit of his own wrong. However, in the possession clause of the agreement 6 months grace period is unqualified and therefore, it has been allowed.

G. Findings on the relief sought by the complainants.

G. 1 Direct the respondent to handover possession of the allotted unit along with interest as prescribed under real Estate (Regulation and Development) Act, 2016 from the due date to handover the possession till actual realization of the amount.

42. 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.”

43. Clause 11.2 of the apartment buyer's agreement provides the time period of handing over possession and the same is reproduced below:

“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 endeavour 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 months 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. .

44. 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 complainants 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.

45. 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 residentials, 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.

46. **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, they 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.

47. 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.
48. 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., 16.02.2024 is 8.85%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.85%.
49. 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;"*

50. 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 handed over within 39 months from the date of agreement or start of construction whichever is later including grace period of 6 months. The date of start of construction is not available on records so the due is calculated from the date of agreement i.e., 27.10.2015 and which comes out to be 27.01.2019. Further the respondent is entitled for a grace period of 6 months as it is unqualified so, the due date for handing over of possession hereby comes out as 27.07.2019.
51. 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.
52. As per contentions made by the complainants, the occupation certificate for the subject unit has been received on 02.11.2022 and on 03.11.2022 a

letter for offer of possession along with outstanding demands has been sent to them. The demand letter included various demands that were without any calculation or justification. They sent various mail raising their queries but all went in vain. Subsequently respondent demanded holding charges from them for not occupying the unit. Lastly it has been contended that respondent outrightly refused to accord their demands. On the contrary the respondent contended that complainants consciously choose to ignore the demand letters/reminders.

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

Validity of offer of possession

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

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

55. In the present matter, the respondent has offered the possession of the allotted unit on 03.11.2022 i.e., after obtaining occupation certificate from the concerned department along with alleged additional demand. Therefore, no doubt that the offer of possession has been sent to the

complainants but the same is accompanied with unreasonable additional demands. Thus, the offer of possession is not a valid offer of possession as it triggers (iii) component of the above-mentioned definition.

56. 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., 27.07.2019 till the date of the actual handover of possession at the prescribed rate i.e., 10.85 % p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules.

G.II Direct the respondent to refund Rs. 1,65,469/- paid towards club development charges along with prescribed rate of interest.

57. It is held that occupation certificate for the unit of the allottee has been received in which the details of the club are not mentioned. The authority is of the view that if the club has come into existence and the same is operational or is likely to become operational soon i.e. within reasonable period of around 6 months, the demand raised by the respondent for the said amenity shall be discharged by the complainants as per the terms and conditions stipulated in the builder buyer's agreement. However, if the club building is yet to be constructed, the respondent should prepare a plan for completion of the club and demand money regarding club charges and its membership from the allottees only after completion of the club.

G.III Direct the respondent to refund Rs. 60,984/- paid towards the external electrification charges along with prescribed rate of interest.

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

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

G.IV Direct the respondent to revoke demand towards maintenance charges including advance common area maintenance and management charges for 24 months, advance towards common area electricity charges for 24 months, portable water supply charges and excess registration charges.

- **Maintenance Charges including advance maintenance charges**

60. 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.

- **Advance electricity charges and Portable water supply**

61. The issue w.r.t electricity charges and water connection charge etc. were dealt under Complaint no. **4031 of 2019 titled as Varun Gupta & Ors. Vs. Emaar MGF Land Ltd.** These connections are applied on behalf of the allottees and they have to make payment to the concerned department on actual basis. In case instead of paying individually for the unit if the builder has paid composite payment in respect of the above said connections including security deposit provided to the units, then the promoters would be entitled to recover the actual charges paid to the concerned department from the allottee on pro-rata basis i.e. depending upon the area of the flat allotted to the complainants viz-a-viz the total area of the particular project. The complainants/allottees will also be entitled to get proof of all such payment to the concerned department along with composite proportionate to their unit before making payment under the relevant head.
62. 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.
- **Registration charges**
63. The registration of property at the registration office is mandatory for execution of the conveyance (sale) deed between the developers (seller) and the homebuyer (purchaser). Besides the stamp duty, homebuyers also pay for execution of the conveyance/sale deed. This amount, which is given to the developers in the name of registration charges, is significant. The authority considering the pleas of the developer-promoter directs that a nominal amount of up to Rs.15000/- 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. For any other charges like incidental/miscellaneous and of like nature, since the same are not defined and no quantum is specified in the builder buyer's agreement, therefore, the same cannot be charged.

G.V Direct the respondent to revoke the demand of Rs. 1,53,017/- payable towards delayed interest from the complainants.

64. As per section 2(za) of the Act, 2016 the rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 10.85% 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.

G.VI Direct the respondent to provide the credit for difference 7% GST to the complainants along with prescribed rate of interest.

65. The authority has decided this issue in the complaint bearing no. 4031 of 2019 titled as Varun Gupta V/s Emaar MGF Land Ltd. wherein the authority has held that for the projects where the due date of possession was after 01.07.2017 i.e., date of coming into force of GST, the builder is entitled for charging GST but builder has to pass the benefit of input tax credit to the buyer. That in the event the respondent-promoter has not passed the benefit of ITC to the buyers of the unit which is in contravention to the provisions of section 171(1) of the HGST Act, 2017 and has thus committed an offence as per the provisions of section 171 (3A) of the above Act. The allottee shall be at liberty to approach the State Screening Committee Haryana for initiating proceedings under section 171 of the HGST Act against the respondent-promoter. The concerned SGST Commissioner is advised to take necessary action to ensure that the benefit of ITC is passed on to the allottee in future.

66. The final tax liability is to be re-fixed after considering the benefit u/s 171 of the SGST/CGST Act. However, the respondent-promoter shall not recover the amount charged towards GST from the allottee till the final calculation by the profiteering committee is provided and shall be payable only till the due date of possession subject to the decision and calculation of the profiteering committee.

G.VII Direct the respondent to not to demand holding charges from the complainants.

67. The respondent is debarred from claiming holding charges from the complainants /allottees at any point of time even after being part of apartment buyer's agreement as per law settled by hon'ble Supreme Court in civil appeal no. 3864-3899/2020 decided on 14.12.2020.

G.VIII Direct the respondent to execute conveyance deed favoring the complainants as per section 17 of the Real Estate Regulation and Development Act, 2016.

68. Section 17 (1) of the Act deals with duty of promoter to get the conveyance deed executed and the same is reproduced below:

"17. Transfer of title-

(1). The promoter shall execute a registered conveyance deed in favour of the allottee along with the undivided proportionate title in the common areas to the association of the allottees or the competent authority, as the case may be, and hand over the physical possession of the plot, apartment of building, as the case may be, to the allottees and the common areas to the association of the allottees or the competent authority, as the case may be, in a real estate project, and the other title documents pertaining thereto within specified period as per sanctioned plans as provided under the local laws:

Provided that, in the absence of any local law, conveyance deed in favour of the allottee or the association of the allottees or the competent authority, as the case may be,

under this section shall be carried out by the promoter within three months from date of issue of occupancy certificate."

69. As OC of the unit has been obtained by the competent authority on 02.11.2022, therefore, conveyance deed can be executed with respect to the unit. Accordingly, the authority directs the respondent to execute the conveyance deed in favour of the complainants after settling the dues, if any within 90 days from the date of this order.

H. Directions of the authority


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

- i. The respondent is directed to handover physical possession of the subject unit within 30 days from the date of this order as occupation certificate of the project has already been obtained by it from the competent authority.
- ii. The respondent is directed to pay delayed possession charges at the prescribed rate of interest i.e., 10.85% p.a. for every month of delay on the amount paid by the complainants to the respondent from the due date of possession 27.07.2019 till the date of actual handover of possession at the prescribed rate 10.85% p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules.
- iii. 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.

- iv. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
- 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 complainants 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.

71. Complaint stands disposed of.

72. File be consigned to registry.



(Sanjeev Kumar Arora)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 16.02.2024