BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	:	**2020 of 2023**
Date of complaint	:	**01.05.2023**
Date of order	:	**22.05.2024**

Sohan Lal Swamy,
R/o: H. No. D-1301, Celebrity Homes,
Palam Vihar, Gurugram. **Complainant**

Versus

Rajdarbar Assets Limited
Office at: - 303, 3rd Floor, Global Foyer,
Golf Course Road, Sector-43, Gurugram-122002. **Respondent**

CORAM:
Ashok Sangwan **Member**

APPEARANCE:

Aarti Bhalla (Advocate)	Complainant
Sandeep Yadav (Advocate)	Respondent

ORDER

1. The present complaint has been filed by the complainant/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 thereunder 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 complainant, 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 of the project	"Global Foyer", Palam Vihar, Gurugram.
2.	Project area	1.980 acres
3.	Nature of the project	Commercial Complex
4.	DTCP license no. and validity status	**Not provided**
5.	Name of licensee	M/s Natural Product Bio-Tech Ltd.
6.	RERA Registered/ not registered	Not Registered
7.	Unit no.	417, Fourth Floor (Page no. 28 of the complaint)
8.	Area admeasuring (super area)	847.09 sq. ft. (originally 707 sq. ft.) (page 61 of reply)
9.	Date of execution of agreement for sale	18.07.2014 (Page no. 26 of the complaint)
10.	Possession clause	***17.*** *"That the Seller shall complete the construction of the Said Complex and apply for completion certificate within a period of 36 months from the date of execution of this Agreement (with grace/cure period of further six months) except when such delay in construction has been caused due to any of the reasons mentioned in Clause 25. In such event i.e., where the Seller completes the construction in accordance with the terms herein and applies for completion certificate, it shall be absolved of its obligations under this Agreement including the obligation to pay interest to the Allottee(s) for delay on any account".*
11.	Due date of possession	18.01.2018 [as per possession clause] (Grace period of 6 months is allowed being unqualified)

12.	Total sale consideration	Rs.63,13,510/- (excluding parking charges, PLC, Applicable taxes) (As per BBA at page no. 28 of the complaint)
13.	Amount paid by the complainant	Rs.61,71,805/- (As per payment receipts annexed with the complaint)
14.	Occupation certificate /Completion certificate	05.04.2018 (Page no. 140 of the reply)
15.	Offer of possession	22.01.2019 (Page no. 10 of written submissions dated 12.04.2024)

B. Facts of the complaint

3. The complainant has made the following submission: -

I. That the complainant through its application of allotment dated 14.11.2013 has applied for allotment of a unit bearing no. 417, 4th Floor, having super area of 707 sq. ft. (approx) in the upcoming commercial complex of the respondent named "Global Foyer" by paying an amount of Rs.5,00,000/- being the registration/booking amount.

II. That on 18.07.2014, the respondent has issued provisional allotment letter thereby duly acknowledging the receipt of Rs.19,64,284/-including service tax and has executed an apartment buyer's agreement dated 18.07.2014 regarding the said allotment for a total sale consideration of Rs.66,63,510/-.

III. That the complainant kept on making payments of due demands made by the respondent as per the construction linked payment plan schedule attached with the buyer's agreement and has paid a sum of Rs.61,71,805/- in all against the total sale consideration of Rs.66,63,510/- upto 04.11.2016.

IV. That as per clause 17 of the buyer's agreement, the respondent was required to offer possession of the apartment to the complainant within

36 months from the date of signing of the buyer's agreement. However, the respondent has miserably failed to offer possession of the service apartment to the complainant within the deadline stipulated under clause 17 of the buyer's agreement.

V. That the respondent, after a lapse of almost 3 years sent letter dated 15.01.2020 to the complainant thereby raising illegal and unlawful demands in the name of holding charges, maintenance charges and has further threatened to charge interest @18% p.a. as "overdue charges".

VI. That the complainant having no other means has raised protest through email dated 22.03.2021, thereby demanding an immediate and urgent meeting with its director to discuss the issue relating to increase in more than 10% super area of the apartment, without taking complainant's consent, which is against the terms and conditions of clause 12 of the buyer's agreement dated 18.07.2014. Further, the complainant has further expressed its displeasure and anguish for not responding to the complainant's repeated request.

VII. That the respondent has even till date failed to provide any explanation as to how the super area of the project increased exorbitantly, especially when as per the respondent there has been no change in the approved plans, without seeking prior consent of our client.

VIII. That the respondent wrote an email dated 11.10.2021 to the complainant thereby intimating him about the searching being made by the respondent for tie up of the complainant's service apartment with on management contract despite having the specific knowledge that neither respondent offered the possession of the apartment to the complainant nor have executed the sale deed/conveyance deed in favour of the complainant.

IX. That the complainant again on 24.05.2022 and 30.05.2022, wrote an email to the respondent inquiring about the status of the complainant service

apartment regarding possession/construction/occupancy. However, till date respondent has not replied to the said emails of the complainant and has further failed to disclose the current status of the project.

C. Relief sought by the complainant:

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

   i. Direct the respondent to pay interest on the amount deposited.

   ii. Direct the respondent to recall demand letter dated 01.11.2022.

   iii. Direct the respondent to register sale deed of the unit in question.

   iv. Direct the respondent to provide a copy of occupation certificate to the complainant.

   v. Direct the respondent to pay compensation towards mental agony, breach of trust, damages and litigation cost.

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 by the respondent.

6. The respondent has contested the complaint on the following grounds: -

   i. That the complaint is neither maintainable nor tenable and is liable to be out-rightly dismissed as the buyer's agreement was executed between the complainant and the respondent prior to the enactment of the Act, 2016 and the provisions laid down in the said act cannot be applied retrospectively.

   ii. That the present complaint is not maintainable before the Authority as the buyer's agreement contains an arbitration clause which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute i.e. clause 59 of the buyer's agreement.

   iii. That the complainant after checking the veracity of the project namely Global Foyer, Block-H, Palam Vihar, Gurugram had applied for allotment of

a unit vide it booking application form dated 14.11.2013 and deposited part amount towards the total sale consideration.

iv. That based on the said application, the respondent vide its provisional allotment offer letter dated 14.07.2014 allotted the allottee unit no.-417, 4th Floor, having tentative super area 707 sq. ft. in the said commercial complex for a sale consideration amount of Rs.8930/- per sq. ft. i.e. Rs.63,13,510/- inclusive of EDC/IDC and the said saleable price excluding other charges payable by the allottee towards one car parking, PLC, tax, levies i.e. VAT, surcharge, service charges etc.

v. That the buyer's agreement dated 15.07.2014 was executed between the allottee and the respondent and the parties are bound by the terms and conditions of the said agreement.

vi. That the possession of the unit was supposed to be offered to the complainant in accordance with the agreed terms and conditions of the buyer's agreement. However, the complainant has failed to adhere to his contractual obligations as per the buyer's agreement.

vii. That the respondent intimated and offered the possession to the complainant on 22.01.2019 and net payable amount of Rs.25,20,467/- + Rs.87,409/- with the bifurcation amount of all heads was sent by the respondent. However, till date the due amount has not been paid by the complainant.

viii. That the implementation of the said project was hampered due to non-payment of instalments by allottees including the complainant on time and also due to the events and conditions which were beyond the control of the respondent. Some of the force majeure events/conditions due to which the implementation of the project was affected were Orders passed by National Green Tribunal, inclement weather conditions viz. Gurugram, Demonetization etc.

ix. That upon receipt of the occupation certificate, the respondent vide letter dated 22.01.2019 duly intimated the complainant to take/offer the possession of his unit as per the agreed terms and conditions of the apartment buyer's agreement so that the unit of the complainants may be ready for occupation. It is also submitted that the size of the booked unit of the complaint has been increased from 707 sq. ft. to 874.09 sq. ft. and the said intimation has been given by the respondent to the complainant and also asked to pay the amount of the increased area as per the buyer's agreement, but the complainant did not adhere/accept the offer of possession.

x. That the respondent again sent a reminder letter dated 15.01.2020 to the complainant for taking the possession of the booked unit and also informed that the said commercial complex is in running condition since 01.03.2019 and the maintenance of the said complex has been started since 01.03.2019 and also requested to take the possession of the booked unit and pay the pending dues.

xi. That the respondent has sent a payment due reminder dated 01.11.2022 to the complainant and also intimated that the said delay charges shall be applicable at the time of unit transfer/cancellation/possession etc. It is also stated that the complainant is the person who has not paid the demanded installment on time and being as a valued customer the respondent did not cancel the unit of the complainant, but the complainant is the person who have file the present complaint before this Hon'ble Authority instead of paying the due amount upon him. Hence the present complaint is not maintainable in its present form.

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 respondent has raised a preliminary submission/objection the authority has no jurisdiction to entertain the present complaint. The objection of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below:

E. I Territorial jurisdiction

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)(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 respondent.

F. I Objection regarding complainant is in breach of agreement for non-invocation of arbitration.

12. The respondent submitted that the complaint is not maintainable for the reason that the agreement contains an arbitration clause which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute.

13. The authority is of the opinion that the jurisdiction of the authority cannot be fettered by the existence of an arbitration clause in the buyer's agreement as it may be noted that section 79 of the Act bars the jurisdiction of civil courts about any matter which falls within the purview of this authority, or the Real Estate Appellate Tribunal. Thus, the intention to render such disputes as non-arbitrable seems to be clear. Also, section 88 of the Act says that the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. Further, the authority puts reliance on catena of judgments of the Hon'ble Supreme Court, particularly in ***National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506***, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, consequently the authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause. Therefore, by applying same analogy the presence of arbitration clause could not be construed to take away the jurisdiction of the authority.

14. Further, in **Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017**, the National Consumer Disputes Redressal Commission, New Delhi (NCDRC) has held that

the arbitration clause in agreements between the complainants and builders could not circumscribe the jurisdiction of a consumer. The relevant paras are reproduced below:

> *"49. Support to the above view is also lent by Section 79 of the recently enacted Real Estate (Regulation and Development) Act, 2016 (for short "the Real Estate Act"). Section 79 of the said Act reads as follows: -*
>
> *"79. Bar of jurisdiction - No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."*
>
> *It can thus, be seen that the said provision expressly ousts the jurisdiction of the Civil Court in respect of any matter which the Real Estate Regulatory Authority, established under Sub-section (1) of Section 20 or the Adjudicating Officer, appointed under Sub-section (1) of Section 71 or the Real Estate Appellant Tribunal established under Section 43 of the Real Estate Act, is empowered to determine. Hence, in view of the binding dictum of the Hon'ble Supreme Court in A. Ayyaswamy (supra), the matters/disputes, which the Authorities under the Real Estate Act are empowered to decide, are non-arbitrable, notwithstanding an Arbitration Agreement between the parties to such matters, which, to a large extent, are similar to the disputes falling for resolution under the Consumer Act.*
>
> *...*
>
> *56. Consequently, we unhesitatingly reject the arguments on behalf of the Builder and hold that an Arbitration Clause in the afore-stated kind of Agreements between the Complainants and the Builder cannot circumscribe the jurisdiction of a Consumer Fora, notwithstanding the amendments made to Section 8 of the Arbitration Act."*

15. While considering the issue of maintainability of a complaint before a consumer forum/commission in the fact of an existing arbitration clause in the builder buyer agreement, the hon'ble Supreme Court **in *case titled as M/s Emaar MGF Land Ltd. V. Aftab Singh in revision petition no. 2629-30/2018 in civil appeal no. 23512-23513 of 2017 decided on 10.12.2018*** has upheld the aforesaid judgement of NCDRC and as provided in Article 141 of the Constitution of India, the law declared by the Supreme Court shall be binding on all courts within the territory of India and accordingly, the

authority is bound by the aforesaid view. The relevant paras are of the judgement passed by the Supreme Court is reproduced below:

> *"25. This Court in the series of judgments as noticed above considered the provisions of Consumer Protection Act, 1986 as well as Arbitration Act, 1996 and laid down that complaint under Consumer Protection Act being a special remedy, despite there being an arbitration agreement the proceedings before Consumer Forum have to go on and no error committed by Consumer Forum on rejecting the application. There is reason for not interjecting proceedings under Consumer Protection Act on the strength an arbitration agreement by Act, 1996. The remedy under Consumer Protection Act is a remedy provided to a consumer when there is a defect in any goods or services. The complaint means any allegation in writing made by a complainant has also been explained in Section 2(c) of the Act. The remedy under the Consumer Protection Act is confined to complaint by consumer as defined under the Act for defect or deficiencies caused by a service provider, the cheap and a quick remedy has been provided to the consumer which is the object and purpose of the Act as noticed above."*

16. Therefore, in view of the above judgements and considering the provision of the Act, the authority is of the view that complainant is well within his rights to seek a special remedy available in a beneficial Act such as the Consumer Protection Act and RERA Act, 2016 instead of going in for an arbitration. Hence, we have no hesitation in holding that this authority has the requisite jurisdiction to entertain the complaint and that the dispute does not require to be referred to arbitration necessarily.

F.II Objections regarding force majeure.

17. The respondent-promoter has raised the contention that the construction of the project has been delayed due to force majeure circumstances such as orders/restrictions of the NGT, demonetization, inclement weather conditions in Gurugram etc. However, all the pleas advanced in this regard are devoid of merit. First of all, the possession of the unit in question was to be offered by 18.07.2017. Hence, events alleged by the respondent do not have any impact on the project being developed by the respondent. The plea of the respondent regarding various orders of the NGT and demonetisation and all the pleas advanced in this regard are devoid of merit. The orders

passed by NGT banning construction in the NCR region was for a very short period of time and thus, cannot be said to impact the respondent-builder leading to such a delay in the completion. The plea regarding demonetisation is also devoid of merit. 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.

F. III Objection regarding jurisdiction of authority w.r.t. apartment buyer's agreement executed prior to coming into force of the Act.

18. Another contention of the respondent is that authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the buyer's agreement executed between the parties prior to the enactment of the Act and the provision of the said Act cannot be applied retrospectively. The authority is of the view that the Act nowhere provides nor can be so construed, that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of ***Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)*** decided on 06.12.2017 which provides as under:

> *"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter....*

122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."

19. Also, in appeal no. 173 of 2019 titled as ***Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya***, in order dated 17.12.2019 the Haryana Real Estate Appellate Tribunal has observed-

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

20. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of any other Act, rules, statutes, instructions, directions issued thereunder and are not unreasonable or exorbitant in nature. Hence, in the light of above-mentioned reasons, the contention of the respondent w.r.t. jurisdiction stands rejected.

G. Findings regarding relief sought by the complainant.

G. I Direct the respondent to recall demand letter dated 01.11.2022.
G.II Direct the respondent to pay the interest on the amount deposited.
G.III Direct the respondent to register sale deed of the unit in question in favour of the complainant.

21. The complainant was allotted a service apartment bearing no. 4F-417, 4th floor, admeasuring 707 sq. ft. super area in the project of the respondent named as 'Global Foyer' situated at Palam Vihar, Sector-1, Gurugram vide apartment buyer agreement dated 18.07.2014 for a total sale consideration of Rs.63,13,510/- (excluding parking charges, PLC, Applicable taxes) out of which the complainant has made a payment of Rs.61,71,805/- to the respondent as evident from the payment receipts annexed with the complaint. The occupation certificate of the building in which the unit of complainant is situated was obtained by the respondent on 05.04.2018 and thereafter, possession of the unit was offered to the complainant vide offer of possession letter dated 22.01.2019. The respondent vide offer of possession letter dated 22.01.2019 intimated the complainant that as per the physical measurement of his unit, the super area of the unit has slightly increased by 167.09 sq.ft. i.e. more than 23% and now the final area of his unit stands at 874.09 sq.ft.

22. The respondent contended that it had issued several reminders to the complainant to come forward to take possession of the unit in question after clearing the outstanding dues including the amount on account of increase in super area, but the same were not paid by the complainant till date.

23. The complainant has submitted that the respondent has illegally increased more than 10% super area of the apartment, without taking complainant's consent, which is against the terms and conditions of clause 12 of the buyer's agreement dated 18.07.2014. Clause 12 of the apartment buyer's agreement dated 18.07.2014 is reproduced as under for ready reference:

"That the Allottee(s) has seen and accepted the plans, designs, specifications which are tentative and the Allottee(s) authorizes the Seller to effect suitable and necessary alterations/modifications in the layout plan/building plans, designs and specifications as the Seller may deem fit or as directed by any competent authority (ies). However, in case of any major alteration/modification resulting in more than 10% change in the Super Area of the Said Premises or material change in the specifications of the Said Premises any time prior to and upon the grant of occupation/completion certificate, the Seller shall intimate to the Allottee(s) in writing the changes thereof and the resultant change, if any, in the price of the Said Premises to be paid by him/her and the Allottee(s) agrees to inform the Seller in writing his/its consent or objections to the changes within thirty (30) days from the date of such notice failing which the Allottee(s) shall be deemed to have given his/its full consent to all the alterations/modifications. If the Allottee(s) writes to the Seller within thirty (30) days of intimation by the Seller indicating his non consent/objections to such alterations/modifications resulting in more than 10% change in the Super Area, then the allotment shall be deemed to be cancelled and the Seller shall refund the entire money received from the Allottee(s) with prevailing bank interest rate. The Allottee(s) agrees that any increase or reduction in the Super Area of the Said Premises shall be payable or refundable in accordance with Clause 6(a) above."

24. Considering the above-mentioned facts, the authority observes that the respondent has increased the super area of the unit from 707 sq. ft. to 874.09 sq. ft. i.e. more than 23% without any prior intimation and justification to the complainant in terms of the buyer's agreement dated 18.07.2014. 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 holds that the demand for extra payment on account of increase in the super area by the respondent-promoter from the allottee(s) is legal but subject to condition that before raising such demand, details have to be given to the allottee(s) and without justification of increase in super area, any demand raised in this regard is liable to be quashed. However, this remains subject to the condition that the flats and other components of the super area on the project have been constructed in accordance with the plans approved by the competent authorities. In view of the above, the demand w.r.t increase in super area without any prior intimation and justification to the

complainant is bad in the eyes of law and the same is hereby quashed as it is a well settled principle that no one can take benefit of his own wrong.

25. The complainant intends to continue with the project and is seeking delay possession charges at prescribed rate of interest on amount already paid by him as provided under the proviso to section 18(1) of the Act which 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."*

26. Clause 17 of the apartment buyer's agreement (in short, the agreement) dated 18.07.2014, provides for handing over possession and the same is reproduced below:

> *17. "That the Seller shall complete the construction of the Said Complex and apply for completion certificate within a period of 36 months from the date of execution of this Agreement (with grace/cure period of further six months) except when such delay in construction has been caused due to any of the reasons mentioned in Clause 25. In such event i.e., where the Seller completes the construction in accordance with the terms herein and applies for completion certificate, it shall be absolved of its obligations under this Agreement including the obligation to pay interest to the Allottee(s) for delay on any account."*

27. **Due date of handing over possession:** The respondent-promoter has proposed to handover the possession of the subject service apartment within a period of 36 months plus grace period of 6 months from the date of execution of the apartment buyer's agreement. Therefore, the due date has been calculated as 36 months from the date of execution of the apartment buyer's agreement i.e. 18.07.2014. Further a grace period of 6 months is allowed to the respondent being unqualified (inadvertently grace period of 6 month was left to be added on proceedings dated 20.03.2024). Thus, the due date of possession come out to be 18.01.2018.

28. **Admissibility of delay possession charges:** The complainant is seeking delay possession charges @18% interest on the amount deposited from the

date of deposit till its realization. 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.*

29. 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.

30. 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 22.05.2024 is 8.85%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.85% per annum.

31. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

> *"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.*
> *Explanation. —For the purpose of this clause—*
> *(i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*

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

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

33. On consideration of the documents available on record and submissions made by both the parties, the authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of apartment buyer's agreement executed between the parties on 18.07.2014, the possession of the booked unit was to be delivered by 18.01.2018. The occupation certificate was granted by the concerned authority on 05.04.2018 and thereafter, the possession of the subject flat was offered to the complainant vide letter dated 22.01.2019. Copies of the same have been placed on record. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the subject flat and it is failure on part of the promoter to fulfil its obligations and responsibilities as per the buyer's agreement dated 18.07.2014 to hand over the possession within the stipulated period.

34. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 05.04.2018. The respondent offered the possession of the unit in question to the complainant only on 22.01.2019, so it can be said that the complainant came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the complainant should be given 2 months time from the

date of offer of possession. These 2 months of reasonable time is being given to the complainant keeping in mind that even after intimation of possession practically he has to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession till the expiry of 2 months from the date of offer of possession (22.01.2019) which comes out to be 22.03.2019.

35. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainant is entitled to delayed possession at prescribed rate of interest i.e., 10.85 % p.a. w.e.f. 18.01.2018 till the expiry of 2 months from the date of offer of possession (22.01.2019) which comes out to be 22.03.2019 as per provisions of section 18(1) of the Act read with rule 15 of the rules and section 19(10) of the Act.

36. Further the complainant is seeking relief w.r.t execution of conveyance deed of the unit in question in his favour. The Authority observes that as per section 11(4)(f) and section 17(1) of the Act of 2016, the promoter is under an obligation to get the conveyance deed executed in favour of the complainant. Whereas, as per section 19(11) of the Act of 2016, the allottee is also obligated to participate towards registration of the conveyance deed of the unit in question.

37. The possession of the subject unit has already been offered to the complainant after obtaining completion certificate on 22.01.2019. Therefore, the respondent/builder is directed to handover the possession of the unit on payment of outstanding dues if any, within 30 days to the complainant/allottee and to get the conveyance deed of the allotted unit

executed in his favour in terms of section 17(1) of the Act of 2016 on payment of stamp duty and registration charges as applicable within three months from the date of this order. Further, only administrative charges of upto 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 vide circular dated 02.04.2018.

38. The respondent is further directed not to place any condition or ask the complainant to sign an indemnity of any nature whatsoever, which is prejudicial to their rights as has been decided by the authority in complaint bearing no. ***4031 of 2019*** titled as ***Varun Gupta V. Emaar MGF Land Ltd.***

G.IV Direct the respondent to provide a copy of occupation certificate.

39. The complainant is seeking a copy of occupation certificate of the building in which his unit is situated. However, the same has been annexed by the respondent in its reply as Annexure R-15. Therefore, no direction to the same.

G.IV Direct the respondent to pay compensation on account of mental agony, breach of trust, damages and litigation charges.

40. The complainant is seeking relief w.r.t. compensation in the above-mentioned relief. Hon'ble Supreme Court of India in ***civil appeal nos. 6745-6749 of 2021 titled as M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of Up & Ors.,*** has held that an allottee is entitled to claim compensation & litigation charges under sections 12,14,18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation & litigation expense shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation & legal expenses. Therefore, for claiming compensation under sections 12, 14, 18 and section 19 of the Act, the

complainant may file a separate complaint before Adjudicating Officer under section 31 read with section 71 of the Act and rule 29 of the rules.

H. Directions of the authority: -

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

i. The demand w.r.t increase in super area is quashed.

ii. The respondent is directed to pay interest to the complainant against the paid-up amount at the prescribed rate i.e., 10.85% per annum for every month of delay from due date of possession i.e., 18.01.2018 till the expiry of 2 months from the date of offer of possession (22.01.2019) i.e., upto 22.03.2019 only.

iii. The respondent is directed to supply a copy of the updated statement of account after adjusting the delayed possession charges within a period of 15 days to the complainant.

iv. The complainant is directed to pay outstanding dues, if any, after adjustment of delay possession charges within a period of 30 days from the date of receipt of updated statement of account.

v. The respondent is directed to handover the possession of the unit on payment of outstanding dues if any, within 30 days to the complainant/allottee and to get the conveyance deed of the allotted unit executed in his favour in terms of section 17(1) of the Act of 2016 on payment of stamp duty and registration charges as applicable, if not already paid, within a period of three months.

vi. The respondent shall not charge anything from the complainant which is not the part of the apartment buyer's agreement.

vii. The respondent-promoter is not entitled to charge holding charges from the complainant-allottee at any point of time even after being part of the apartment buyer's agreement as per law settled by Hon'ble Supreme Court in civil appeal nos. 3864-3889/2020 on 14.12.2020.

viii. 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 as per section 2(za) of the Act.

42. Complaint stands disposed of.

43. File be consigned to the registry.

Dated: 22.05.2024

(Ashok Sangwan)
Member
Haryana Real Estate
Regulatory Authority,
Gurugram