

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

Date of decision : 07.03.2024

NAME OF THE BUILDER		M/S EMAAR MGF LAND LIMITED	
PROJECT NAME		"IMPERIAL GARDEN"	
S. No.	Case No.	Case title	APPEARANCE
1.	CR/6145/2022	Anjana Gosain V/S M/s Emaar MGF Land Limited	Shri Karan Chahar Advocate and Shri Dhruv Rohatgi Advocate
2.	CR/4081/2021	M/s Emaar MGF Land Limited V/S Anjana Gosain	Shri Harshit Batra Advocate and Shri Karan Chahar Advocate

CORAM:

Shri Vijay Kumar Goyal

Member

ORDER

1. This order shall dispose of both the complaints titled as above filed before this authority in form CRA under section 31 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred as "the Act") read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (hereinafter referred as "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 its obligations, responsibilities and functions to the allottees as per the agreement for sale executed inter se between parties.
2. The core issues emanating from them are similar in nature and the complainant(s) in the above referred matters are allottees of the project, namely, "*Imperial Garden*" being developed by the same respondent/promoter i.e., *M/s Emaar India Ltd.*

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3. The aforesaid complaints were counter filed by the parties against each other on account of violation of the buyer's agreement executed between the parties in respect of said unit.
4. The facts of both the complaints filed by the complainants are similar. Out of the above-mentioned case, the particulars of lead case **CR/6145/2022 Anjana Gosain V/S Emaar MGF Land Limited** are being taken into consideration for determining the rights of the parties.

A. Project and unit related details

5. Both the cases relate to one allotted unit. One among these is filed by the allottee and the other one is filed by the builder, so far deciding both the cases, the facts of first case are being taken. But before that 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:

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



			no.3/2019 dated 02.08.2019 which is extended up to 31.12.2019] ii. 14 of 2019 dated 28.03.2019(Phase II) [Valid up to 17.10.2018 for 4.57 acres]
6.	Occupation certificate granted on		17.10.2018 [annexure C4, page 29 of complaint]
7.	Unit no.		IG-09-0204, 2 nd floor, building no. 09 [annexure C6, page 49 of complaint]
8.	Area of the unit		2000 sq. ft.
9.	Provisional allotment letter issued on		28.02.2013 [annexure C5, page 31 of complaint]
10.	Date of execution of tripartite agreement		05.03.2015 (annexure C36, page 82 of complaint)
11.	Date of execution of buyer's agreement		07.06.2013 [annexure C6, page 46 of complaint]
12.	Possession clause		14. POSSESSION (a) Time of handing over the Possession <i>Subject to terms of this clause and barring force majeure conditions, subject to the Allottee having complied with all the terms and conditions of this Agreement, and not being in default under any of the provisions of this Agreement and compliance with all provisions, formalities, documentation etc., as prescribed by the Company, the Company proposes to hand over the possession of the Unit within 42 (Forty Two) months from the date of start of construction, subject to timely compliance of the provisions of the</i>



		<p><i>Agreement by the Allottee. The Allottee agrees and understands that the Company shall be entitled to a grace period of 3 (three) months after the expiry of said period of 42 months, for applying and obtaining the completion certificate/ occupation certificate in respect of the Unit and/or the Project.</i></p> <p>(Emphasis supplied)</p> <p>[annexure C6, page 64 of complaint]</p>
13.	Date of start of construction as per the payment request letter dated 18.10.2013 at page 112 of complaint	11.11.2013
14.	Due date of possession	11.08.2017 [calculated from the date of start of construction i.e., 11.11.2013 + 3 months grace period]
15.	Total consideration as per payment plan annexed with the buyer's agreement at page 80 of complaint	Rs. 1,47,91,387/-
16.	Total amount paid by the respondent-allottee as per calculation sheet (as on 13.09.2021) submitted by the complainant at page 205 of complaint	Rs.1,40,30,373/-
17.	Offer of possession	31.10.2018 [annexure C9, page 178 of complaint]
18.	Legal notice sent by the	09.07.2019

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complainant seeking refund of the amount paid by the respondent/builder on	
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B. Facts of the complaint

6. The complainant/allottee has made the following submissions in the complaint:
- i. That the complainant has booked a flat in the respondent's project named "Imperial Gardens" in sector 102, Village Kherki, Majra Dhankot, Gurugram, Haryana in November 2012 by paying a booking amount of Rs.10,00,000/- vide 2 cheques of Rs.5,00,000/- each bearing cheque no. 085271 and 646141.
 - ii. That the provisional allotment letter was provided by the respondent to the complainant on 28.03.2013. She was allotted a unit bearing no. IG-09-0204 admeasuring 2000 sq. ft. in the said project.
 - iii. That the builder buyer agreement was executed between the parties on 07.06.2013. It is pertinent to mention herein that as per Clause 1.2 (a) of the buyer's agreement the total consideration for the said unit is Rs.1,42,65,000/-. It is further submitted that as per clause 14 (a) of the buyer's agreement the time of handing over of possession by the builder to the complainant is 42 months (3.5 years) i.e. 07.12.2016. The respondent has failed to fulfil its obligations as per the buyer's agreement and thus causing huge financial crisis and mental torture to the complainant.
 - iv. That a tripartite agreement was executed between the complainant, respondent and the State Bank of India on

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05.03.2015 to avail a loan of Rs.40,00,000/- for the said unit in the project. Further, on 10.03.2015, a letter was issued by the respondent giving permission to mortgage for said unit to the complainant. As per the letter issued, it clearly states that the complainant had paid a total sum of Rs.1,09,34,904/- till March 2015 itself.

- v. That the complainant after waiting for 6 years since the buyer's agreement and after making full payment towards the said unit sent a legal notice dated 09.07.2019 to the respondent seeking refund of the amount paid along with compensation towards mental agony and legal fees for failure to fulfill its obligation as per the buyer's agreement and for exploiting the complainant. That the respondent blatantly ignored to reply to the legal notice and filed a false complaint in the Authority to further exploit and harass the complainant.
- vi. That the complainant since 15.11.2012 till 19.12.2015 has paid a total sum of Rs.1,49,34,904/- to the respondent against the said unit. She has fulfilled its obligation of making timely installments as and when demanded by the respondent, but, the respondent has miserably failed to fulfill its obligation as per the buyer's agreement of offering timely possession of the unit i.e. by 07.12.2016.
- vii. That the respondent after receiving full payment for the unit failed to give timely possession to the complainant. Thus, as per Section 18(1) of the Act 2016, the complainant is entitled to get refund of the total amount paid to the respondent along with prescribed interest. From mere perusal of the section, it becomes clear that as

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per section 18(1)(b), if a promoter fails or is unable to give possession as per the buyer's agreement, as is the case in the present complaint, then, he shall on demand by the complainant be liable to refund the amount to the allottees along with interest.

C. Relief sought by the complainant:

7. The complainant in compliant no. **6145/2022** has sought following reliefs:
 - i. Direct the respondent to refund the total amount of Rs.1,49,34,904/- along with prescribed rate of interest as per the Act from the date of payment till date of actual realization.
 - ii. To pay litigation cost of Rs.2,00,000/-.
8. The complainant in compliant no. **4081/2021** has sought following reliefs:
 - i. Direct the respondent-allottee to pay outstanding dues of Rs.30,53,947/- along with interest at the prescribed rate as per the rules and to take possession of the subject unit & execute the conveyance deed.
9. On the date of hearing, the authority explained to the respondents/promoter about the contravention 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

10. The respondent has contested the complaint on the following grounds.
 - i. That the complainant has got no locus standi or cause of action to file the present complaint. The present complaint is based on an erroneous interpretation of the provisions of the Act as well as an incorrect understanding of the terms and conditions of the

buyer's agreement dated 07.06.2013, as shall be evident from the submissions made in the following paras of the present reply. The respondent craves leave of this Authority to refer and rely upon the terms and conditions set out in the buyer's agreement in detail at the time of hearing of the present complaint, so as to bring out mutual obligations and responsibilities of the respondent as well as the complainant.

- ii. That the complainant is estopped by her own acts, conduct, acquiescence, laches, omissions etc. from filing the present complaint. Without admitting or acknowledging in any manner the truth or legality of the false and frivolous complaint preferred by the complainant and without prejudice to the submissions of the respondent that there has been no delay in offering possession in accordance with the buyer's agreement.
- iii. That the instant complaint is barred by limitation. The complainant has alleged that the respondent was obligated to offer possession of the unit in question by June, 2016 and by way of the instant complaint have sought refund with interest for indemnifying them for the alleged delay in delivery of the unit in question. It is submitted that cause of action, if any, for seeking interest accrued in favour of the complainant in 2016 and consequently the instant complaint is barred by limitation.
- iv. That the complainant has not come before this Authority with clean hands and has suppressed vital and material facts from this Authority. It is further relevant to submit that the complainant has concealed the fact of a pending complaint bearing no. **4081 of 2021, titled Emaar India Vs Anjana**

Gosain, pending with the present Authority, which complaint has been filed by the respondent herein, prior in time, seeking the directions against the complainant herein for payment of outstanding dues against the unit allotted to her. The present complaint is nothing but an afterthought to the complaint filed by the respondent herein. The correct facts are set out in the succeeding paras of the present reply.

- v. That the complainant is not an "allottee" but an Investor who has booked the apartment in question as a speculative investment in order to earn rental income/profit from its resale. The apartment in question has been booked by the complainant as a speculative investment and not for the purpose of self-use as her residence. Therefore, no equity lies in favour of the complainant.
- vi. That the complainant had approached the respondent sometime in the year 2013 for purchase of an independent unit in its upcoming residential project "Imperial Gardens" situated in Sector 102, Village Kherki Majra Dhankot, Tehsil & District Gurugram, and Haryana. The complainant prior to approaching the respondent, had conducted extensive and independent enquiries regarding the project and it was only after the complainant was fully satisfied with regard to all aspects of the project, including but not limited to the capacity of the respondent to undertake development of the same, that the complainant took an independent and informed decision to purchase the unit, un-influenced in any manner by the respondent.



- vii. That thereafter the complainant vide an application form applied to the respondent for provisional allotment of a unit in the project and the complainant was duly welcomed by the respondent through the welcome letter dated 28.02.2013. The complainant, in pursuance of the aforesaid application form and welcome letter, was allotted an independent unit bearing no **IG-09-0204**, in the project vide provisional allotment letter dated 28.02.2013. The complainant consciously and willfully undertook to remit the sale consideration for the unit in question in accordance with the payment plan incorporated in the buyer's agreement. The respondent had no reason to suspect bona fide of the complainant. She further undertook to be bound by the terms and conditions of the application form.
- viii. That the rights and obligations of complainant as well as respondent are completely and entirely determined by the covenants incorporated in the buyer's agreement dated 07.06.2013, which continues to be binding upon the parties thereto with full force and effect. The complainant out of her own free will and volition, without any inducement, force, misrepresentation or coercion of the respondent purchased the said unit with open eyes and hence, cannot claim refund from the respondent at this point of time. The said position was duly accepted and acknowledged by her. The complainant is conscious and aware of the fact that she is not entitled to any right or claim against it. She has intentionally distorted the real and true facts and has filed the present complaint in order to harass the respondent and mount undue pressure upon it.

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- ix. That the complainant consciously and maliciously chose to ignore the payment request letters, notices and reminders issued by the respondent and flouted in making timely payments of the instalments which was an essential, crucial and an indispensable requirement under the buyer's agreement. Furthermore, when the proposed allottees default in their payments as per schedule agreed upon, the failure has a cascading effect on the operations and the cost for proper execution of the project increases exponentially and further causes enormous business losses to the respondent. The complainant chose to ignore all these aspects and wilfully defaulted in making timely payments. The respondent despite defaults of several allottees earnestly fulfilled its obligations under the buyer's agreement and completed the project as expeditiously as possible in the facts and circumstances of the case. Therefore, there is no equity in favour of the complainant.
- x. That, without admitting or acknowledging the truth or legality of the allegations advanced by the complainant and without prejudice to the contentions of the respondent, that the provisions of the Act are not retrospective in nature. The provisions of the Act cannot undo or modify the terms of an agreement duly executed prior to coming into effect of the Act. Merely because the Act applies to ongoing projects which are registered with the authority, the Act cannot be said to be operating retrospectively. The provisions of the Act relied upon by the complainant for seeking refund and compensation cannot be called in to aid in derogation and ignorance of the provisions

of the buyer's agreement. The interest is compensatory in nature and cannot be granted in derogation and ignorance of the provisions of the buyer's agreement. That the interest for the alleged delay or compensation demanded by the complainant is beyond the scope of the buyer's agreement and the same cannot be demanded by the complainant being beyond the terms and conditions incorporated in the buyer's agreement.

- xi. That the rights and obligations of the complainant as well as the respondent are completely and entirely determined by the covenants incorporated in the buyer's agreement which continues to be binding upon the parties thereto with full force and effect. As per clause 14 of the buyer's agreement the possession of the unit in question was liable to be delivered within 42 months from the date of start of construction with a grace period of 3 months or such time as may be extended by the competent authority subject to the allottee(s) having strictly complied with all terms and conditions of the buyer's agreement. The grace period of 3 months cannot be excluded and is liable to be included in terms of the Judgment of the Hon'ble Appellate Tribunal in *Fantasy Buildwell Pvt. Ltd. Vs Gaurav Manohar Negi*, bearing *Appeal No. 299 of 2022, decided on 09.12.2022*. It has also been provided therein that the date for delivery of possession of the unit would stand extended in the event of occurrence of the force majeure circumstances. The complainant have completely misconstrued, misinterpreted and miscalculated the time period as determined in the buyer's agreement. It is further provided in the buyer's

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agreement that time period for delivery of possession shall stand extended on the occurrence of delay for reasons beyond the control of the respondent. Furthermore, it is categorically expressed in clause 14(b)(vi) that in the event of any default or delay in payment of instalments as per the schedule of payments incorporated in the buyer's agreement, the time for delivery of possession shall also stand extended. She has defaulted in timely remittance of the instalments and hence the date of delivery option is not liable to determine the matter sought to be done by her.

- xii. That the project of the respondent has been registered under the Act, 2016 and the Rules, 2017. Registration certificate granted by the Haryana Real Estate Regulatory Authority vide memo no. HRERA-140/2017/1083 dated 15.09.2017. The respondent had applied for extension of the registration and the Authority has already extended the validity of registration vide memo bearing no. RC/REP/HARERA/GGM/2017/208 dated 02.08.2019. The registration had been extended till 31.12.2019 and the respondent had already offered possession of the unit in question to the complainant vide letter dated 31.10.2018 but the complainant failed to take the physical possession of the said unit in question. It is noteworthy to mention that many reminders were being sent to the complainant to come up to take the possession of the unit but to no avail, the complainant failed to take possession of the said unit for the reasons best known to her. Therefore, there is no delay in delivery of possession of the unit in question as alleged by the complainant.

The complaint is devoid of any cause of action. The instant complaint is liable to be dismissed at the threshold.

- xiii. That as per clause 16 of the buyer's agreement further provides that no compensation for any delay in delivery of possession caused on account of delay or non-receipt of the occupation certificate, completion certificate or any other permission /sanction from the competent authority shall be provided to the allottees. The respondent had submitted an application dated 21.03.2018 for grant of occupation certificate to the concerned statutory authority. The occupation certificate vide memo bearing no. ZP-845/SD(BS)/2018/29753 was granted on 17.10.2018. It is submitted that once an application for issuance of occupation certificate is submitted before the concerned competent authority the respondent ceases to have any control over the same. The grant of occupation certificate is the prerogative of the concerned statutory authority and the respondent does not exercise any control over the matter. Therefore, the time period utilized by the concerned statutory authority for granting the occupation certificate needs to be necessarily excluded from the computation of the time period utilized in the implementation of the project in terms of the buyer's agreement. As far as respondent is concerned, it has diligently and sincerely pursued the development and completion of the project in question.
- xiv. That the complainant was offered possession of the unit in question through letter of offer of possession dated 31.10.2018. Further, the respondent issued several reminders to the

complainant to take possession of the unit, but to no avail. She was called upon to remit balance payment including delayed payment charges and to complete the necessary formalities /documentation necessary for handover of the unit in question to her. However, the complainant approached the respondent with request for payment of compensation for the alleged delay in utter disregard of the terms and conditions of the buyer's agreement. The respondent explained to the complainant that the validity of registration has already been extended by the statutory authority and therefore she was/is not entitled to any compensation in terms of the buyer's agreement. However, the complainant threatened the respondent with institution of unwarranted litigation. Further, an amount of Rs.12,774/-as benefit of anti-profiting was credited in account of the complainant. The instant complaint has been preferred by the complainant in order to obtain wrongful gain and cause wrongful loss to the respondent.

- xv. That in addition thereto it is submitted that the complainant with malafide intention and to extort money from the respondent, opted to serve the respondent with the legal notice dated 09.07.2019. She was offered the possession on 31.10.2018 and thereafter, in order to harass the respondent and to avoid payment of all outstanding dues, the complainant on 09.07.2019 served a frivolous, baseless legal notice to the respondent, seeking refund of the payments. It is pertinent to note that the complainant sought refund on two grounds, i.e. for the delay so occasioned in completion of the project and further on the

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pretext that the value of the property allegedly had depreciated. It is noteworthy to mention that as per the terms and conditions of the buyer' agreement, on issuance of the letter of offer of possession, the complainant had to come forward to take the physical possession of the unit but in the present case the complainant neither took the physical possession of the unit rather served the respondent with a legal notice which is totally arbitrary, unjustified in the eyes of law. It is submitted that the allottee cannot be allowed to cancel its booking on speculative market conditions, which are always fluctuating. The said submission is without prejudice to the fact that the speculation of the complainant regarding the market price is misconceived and unsubstantiated. That the complainant cannot act as per her whims and fancies. The complainant is conscious and aware of this fact and have preferred the instant complaint in order to obtain wrongful gain and to cause wrongful loss to the respondent. The complainant thereafter issued another legal notice dated 04.12.2019, levelling the same allegations as in the earlier notice to the respondent, which was duly replied by the respondent vide its reply dated 31.12.2019.

- xvi. That the purchasers in the project in question have defaulted in timely remittance of the installments. It is submitted that when the proposed allottees defaulted in their payments as per schedule agreed upon, the failure has a cascading effect on the operations and the cost for proper execution of the project increases exponentially and further causes enormous business losses to the respondent. The respondent despite defaults of

several allottees earnestly fulfilled its obligations under the buyer's agreement and completed the project as expeditiously as possible in the facts and circumstances of the case. The defaults committed by various allottees has delayed the contemplated implementation of the project. The respondent cannot be penalized for indiscipline of the allottees. It is relevant to submit that as on date there is an outstanding of Rs.11,04,541/- against the principal dues, Rs.8,53,527/- as delayed payment charges for default in payment of instalments, Rs.6,74,250/- towards stamp duty, Rs.64,500/- towards registration and administrative charges, VAT Security of Rs.5,00,174/- and CAM Charges of Rs.4,95,913/-.

- xvii. Without prejudice to the aforesaid preliminary objections and the contention of the respondent, it is submitted that in case any relief is granted to the complainant, the same is subject to the necessary deductions towards the earnest monies, delay in payment of installments, credits advanced to the complainant, maintenance dues etc., as may be applicable under the terms of the agreement and as per law.

E. Jurisdiction of the authority

11. 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

12. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram

District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram District. Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

E. II Subject-matter jurisdiction

13. 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;

The provision of assured returns is part of the builder buyer's agreement, as per clause 15 of the BBA dated..... Accordingly, the promoter is responsible for all obligations/responsibilities and functions including payment of assured returns as provided in Builder Buyer's Agreement.

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.

14. 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 entitlement of DPC on ground of complainants being investor.**

15. The respondent submitted that the complainant is investor and not consumer/allottee, thus, the complainant is not entitled to the protection of the Act and thus, the present complaint is not maintainable.
16. The authority observes that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states main aims and objects of enacting a statute but at the same time preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that under section 31 of the Act, any aggrieved person can file a complaint against the promoter if the promoter contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the buyer's agreement, it is revealed that the complainants are an allottees/buyers and they have paid a considerable price to the promoter towards purchase of the subject units in the project of the promoter. At this stage, it is important to stress upon the definition of term allottee under the Act and the same is reproduced below for ready reference:

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

17. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the buyer's agreement executed between respondent and complainants, it is crystal clear that the complainants are allottee as the subject units were allotted to them by the promoter.

The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". Thus, the contention of promoter that the complainants-allottees being investors are not entitled to protection of this Act stands rejected.

G. Findings on the relief sought:

18. The foremost question that arises before the authority is as to whether the allottees are entitled for refund of the amount paid along with interest or they be directed to take the possession of the allotted unit after clearing the outstanding dues along with interest.
19. In the present matter the promoter has proposed to hand over the possession of the apartment according to clause 14(a) of the BBA within a period of 42 months from date of start of construction i.e., 11.11.2013. The due date of possession comes out to be 11.05.2017. Since in the present matter the BBA incorporates conditional grace period/extended period of 3 months in the possession clause for applying and obtaining the completion certificate/occupation certificate in respect of the unit and/or the project. The said grace period is allowed in terms of order dated 08.05.2023 passed by the Hon'ble Appellate Tribunal in *Appeal No. 433 of 2022 tilted as Emaar MGF Lamd Limited Vs Babia Tiwari and Yogesh Tiwari* wherein it has been held that if the allottee wishes to continue with the project, he accepts the term of the agreement regarding grace period of three months for applying and obtaining the occupation certificate. The relevant portion of the order dated 08.05.2023, is reproduced as under:-

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"As per aforesaid clause of the agreement, possession of the unit was to be delivered within 24 months from the date of execution of the agreement i.e. by 07.03.2014. As per the above said clause 11(a) of the agreement, a grace period of 3 months for obtaining Occupation Certificate etc. has been provided. The perusal of the Occupation Certificate dated 11.11.2020 placed at page no. 317 of the paper book reveals that the appellant-promoter has applied for grant of Occupation Certificate on 21.07.2020 which was ultimately granted on 11.11.2020. It is also well known that it takes time to apply and obtain Occupation Certificate from the concerned authority. As per section 18 of the Act, if the project of the promoter is delayed and if the allottee wishes to withdraw then he has the option to withdraw from the project and seek refund of the amount or if the allottee does not intend to withdraw from the project and wishes to continue with the project, the allottee is to be paid interest by the promoter for each month of the delay. In our opinion if the allottee wishes to continue with the project, he accepts the term of the agreement regarding grace period of three months for applying and obtaining the occupation certificate. So, in view of the above said circumstances, the appellant-promoter is entitled to avail the grace period so provided in the agreement for applying and obtaining the Occupation Certificate. Thus, with inclusion of grace period of 3 months as per the provisions in clause 11 (a) of the agreement, the total completion period becomes 27 months. Thus, the due date of delivery of possession comes out to 07.06.2014."

20. Therefore, in view of the above judgement and considering the provisions of the Act, the authority is of the view that, the promoter is entitled to avail the grace period so provided in the agreement for applying and obtaining the occupation certificate. Therefore, the due date of handing over of possession comes out to be 11.08.2017 including grace period of three months.
21. The promoter filed a complaint before the authority bearing no. CR/4081/2021 on 11.10.2021 and thereafter the allottee also filed a complaint bearing no. CR/6145/2022. Both these complaints were clubbed together in order to avoid conflicting orders. Now, the matter before the authority is as to whether the allottee has right to seek refund or not, when the promoter is unable to give possession of unit in accordance with the terms of agreement for sale. The allottee was allotted unit no. IG-09-2004, 2nd floor, building no. 9, on 28.02.2013

having an area of 2000 sq. ft. as per clause 14(a) of the BBA, the subject unit was to be handed on or before 11.08.2017. The respondent started raising demands as per the schedule of payment, but the complainant started defaulting in making payments. The respondent was compelled to issue various payment request letters, demand notices etc. to pay the demanded amount. As per calculation sheet submitted by the promoter in complaint bearing no. 4081/2021 the complainant has not paid the sale consideration as per buyer's agreement. Despite issuance of various reminder letters and after giving reasonable time to the complainant for making payment of outstanding dues of Rs.30,53,947/-.

22. Further, it is pertinent to mention here that the promoter has received the occupation certificate on 17.10.2018 and thereafter, the possession was offered to the allottee on 31.10.2018. The complainant/allottee through send a legal notice with regard to refund the entire paid-up amount on 09.07.2019 and the respondent/promoter has replied the same. The respondent/promoter has failed to return the paid up amount of the complainant/allottee. Thereafter, the complainant /allottee filing of complaint on 09.09.2022 wish to withdraw from the project and seek refund of the paid-up amount along with interest due to failure of respondent/promoter to provide timely possession of the subject unit in accordance with the terms of buyer's agreement.
23. The right under section 18(1) and 19(4) accrues to the allottee on failure of the promoter to complete or unable to give possession of the unit in accordance with the terms of the agreement for sale or duly completed by the date specified therein. If allottee has not exercised the right to withdraw from the project after the due date of possession



is over till the offer of possession was made to him, it impliedly means that the allottee tacitly wished to continue with the project. The promoter has already invested in the project to complete it and offered possession of the allotted unit. Although, for delay in handing over the unit by due date in accordance with the terms of the agreement for sale, the consequences provided in proviso to section 18(1) will come in force as the promoter has to pay interest at the prescribed rate of every month of delay till the handing over of possession and allottees interest for the money they have paid to the promoter is protected accordingly.

24. The legislature in its wisdom in the subordinate legislation under the rule 15 of the rules has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.
25. 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., 07.03.2024 is 8.85%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.85%.
26. However, if it is pertinent to mention here that offer of possession with respect to unit in question has been made by the respondent on 09.07.2019, i.e., after receiving occupation certificate on 17.10.2018. Thereafter, the complainant has been send legal notice to respondent as well as filing the complaint the present complaint on 09.07.2019 and 09.09.2022 respectively for seeking relief of refund. Since the complainant has approached the Authority after occupation certificate has been received and offer of possession has been made by



respondent promoter, therefore, regulation 11(5) of 2018 framed by the Haryana Real Estate Regulatory Authority, Gurugram providing deduction of 10% of total sale consideration as earnest money and sending the remaining amount to the allottee immediately becomes applicable here. The Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, states that:

"5. AMOUNT OF EARNEST MONEY

Scenario prior to the Real Estate (Regulations and Development) Act, 2016 was different. Frauds were carried out without any fear as there was no law for the same but now, in view of the above facts and taking into consideration the judgements of Hon'ble National Consumer Disputes Redressal Commission and the Hon'ble Supreme Court of India, the authority is of the view that the forfeiture amount of the earnest money shall not exceed more than 10% of the consideration amount of the real estate i.e. apartment /plot /building as the case may be in all cases where the cancellation of the flat/unit/plot is made by the builder in a unilateral manner or the buyer intends to withdraw from the project and any agreement containing any clause contrary to the aforesaid regulations shall be void and not binding on the buyer."

27. It is observed by the authority that the allottee invest in the project for obtaining the allotted unit and on delay in completion of the project and when the unit is ready for possession, such withdrawal on considerations other than delay such as reduction in the market value of the property and investment purely on speculative basis will not be in the spirit of the section 18 which protects the right of the allottee in case of failure of promoter to give possession by due date either by way of refund if opted by the allottee or by way of delay possession charges at prescribed rate of interest for every month of delay.
28. This view is supported by the judgement of Hon'ble Supreme Court of India in case of ***Ireo Grace Realtech Pvt. Ltd. v/s Abhishek Khanna and Ors. (Civil appeal no. 5785 of 2019)***, wherein the Hon'ble Apex court took a view that those allottees obligated to take the possession

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of the apartments since the construction was completed and possession was offered after issuance of occupation certificate. It was specifically held that in cases where the respondent/builder is already in receipt of occupancy certificate pursuant to which the respondent/builder has even offered possession of unit to an allottee that too before institution of the case, the allottees in such cases are bound to take possession of their unit with delay possession charges, if any, and no order of refund is warranted in such cases. Relevant para of aforesaid Judgement is as follows:-

"21.1 The issue which now arises is whether the Apartment Buyers are bound to accept the offer of possession made by the Developer where the Occupation Certificate has been issued, along with the payment of Delay Compensation, or are entitled to terminate the Agreement.

21.2 ...

i) Apartment Buyers whose allotment fall in Phase 1 of the Project comprised in Towers A6 to A10, B1 to B4 and C3 to C7, where the Developer has been granted occupation certificate, and offer of possession has been made are enlisted in Chart A;

....

2. Chart A allottees

(i) We are of the view that allottees in Sl. No.1 and 2 in Chart A are obligated to take possession of the apartments, since the construction was completed, and possession offered on 28.06.2019 after the issuance of Occupation Certificate on 31.05.2019. The developer is however obligated to pay Delay Compensation for the period of delay which has occurred from 27.11.2018 till the date of offer of possession was made to the allottees....."

The aforesaid judgement is very well applicable to the facts and circumstances of the instant case. Herein, the respondent has already obtained occupancy certificate for the project on 17.10.2018 itself pursuant to which complainant has also been offered with possession of his unit on 09.07.2019 itself.

29. In the present case, said unit was allotted to complainant on 28.02.2013. There is a delay in handing over the possession as due date of possession was 11.08.2017 whereas, the offer of possession

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was made on 31.10.2018 and thus, becomes a case to grant delay possession charges. The allottee is obligated to take possession of the unit since the construction is completed and possession has been offered after obtaining an occupation certificate from the competent authority. However, the developer is obligated to pay delay charges for the period of delay occurred from the due date till the date of offer of possession was made to the allottees plus two months @ 10.85% p.a. The respondent shall issue a revised account statement within 15 days of this order after adjustment of delayed possession charges at the rate of 10.85% on the paid-up amount by the complainant from due date of handing over possession, i.e., 11.08.2017 till offer of possession plus two months which comes out to be 31.12.2018. The holding charges being demanded at the time of offer of possession are also not leviable and to be excluded from the payable amount while issuing above revised statement of accounts.

30. That as per section 19(6) & 19(7) of the Act every allottee shall be responsible to make necessary payments as per agreement for sale along with prescribed interest on outstanding payments, if any from the allottee and to take physical possession of the apartment as per section 19(10) of the Act. In view of the same, complainant/allottees shall make the requisite payments at the prescribed rate of interest i.e., 10.85% and take possession of the subject unit as per the provisions of sections 19(6), (7), and (10) of the Act of 2016.
31. Thereafter, if the complainant fails to pay outstanding amount as per revised statement of accounts as detailed above within next 30 days along with interest at equitable rate, i.e., 10.85% p.a. on such outstanding amount, the respondent/promoter shall refund the paid-

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up amount of Rs.1,40,30,373/- after deducting the earnest money which shall not exceed the 10% of the sale consideration and amount already paid against credit memo (credit on account of - Anti profiting). Also, the interest at the prescribed rate i.e., 10.85% is allowed on the balance amount from the date of issuing a legal notice, i.e., 09.07.2019 till the actual realization of the amount within the timelines provided in rule 16 of the rules, 2017.

H. Directions of the authority

32. 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 function entrusted to the authority under section 34(f):
- i. The respondents are directed to issue fresh statement of accounts within 15 days of this order after adjustment of delayed possession charges at the rate of 10.75% on the paid-up amount by the complainant from due date of handing over possession, i.e., 13.02.2017 till offer of possession plus two months which comes out to be 23.09.2018. The holding charges being demanded at the time of offer of possession are also not leviable and to be excluded from the payable amount while issuing above revised statement of accounts.
 - ii. The complainant may take the possession within next 30 days on payment of outstanding amount, if any remains, failing which respondent shall refund the paid-up amount of Rs.1,40,30,373/- after deducting the earnest money which shall not exceed the 10% of the sale consideration and amount already paid against credit memo (credit on account of - Anti profiting). Also, the interest at



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and 4081 of 2021

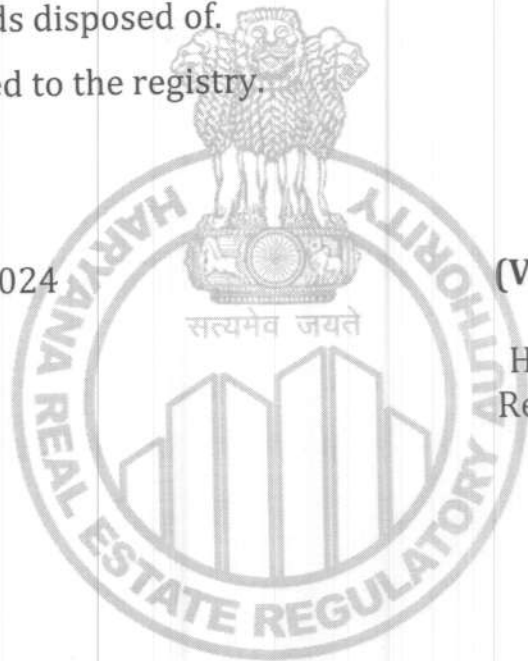
the prescribed rate i.e., 10.85% is allowed on such balance amount from the date of issuing legal notice for seeking refund, i.e., 09.07.2019 till the actual realization of the amount within the timelines provided in rule 16 of the rules, 2017.


iii. A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.

33. Complaint stands disposed of.

34. File be consigned to the registry.

Dated: 07.03.2024



V.1 - 
(Vijay Kumar Goyal)
Member
Haryana Real Estate
Regulatory Authority,
Gurugram

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