

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

Complaint no. : 6410 of 2022
Date of decision : 01.10.2024

Shri Sameer Batra
R/o: TPD H-F09-901, Palm Drive, Sector- 66 Gurugram.

Complainant

Versus

M/s Emaar India Ltd.
(Formerly known as Emaar MGF Land Ltd.)
Address: Emaar MGF Business Park, M.G. Road, 2nd
Floor, Mehrauli Road, Sikandarpur Chowk, Sector-28,
Gurugram-122002, Haryana.
Also at:- ECE House, 28, Kasturba Gandhi Marg, New
Delhi- 122002

Respondent

Coram:

Shri Arun Kumar
Shri Vijay Kumar Goyal

**Chairman
Member**

Appearance:

Shri Gaurav Rawat
Shri Harshit Batra

Advocate for the complainant
Advocate for the respondent

ORDER

1. The present complaint has been filed by the complainant/allottee in Form CRA under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions to the allottee as per the agreement for sale executed inter se them.

A. Project and unit related details

2. The particulars of the project, the details of sale consideration, the amount paid by the complainant, date of proposed handing over the



possession, delay period, if any, have been detailed in the following tabular form:

S. No.	Particulars	Details
1.	Name of the project	Premier Terraces at the Palm Drive, Sector 66, Gurugram, Haryana
2.	Project area	31.62 acres
3.	Nature of the project	Group housing colony
4.	Details of DTCP license no.	I. 228 of 2007 dated 27.09.2007. Valid/renewed up to 26.09.2019. II. 93 of 2008 dated 12.05.2008. Valid/renewed up to 11.05.2020 III. 50 of 2010 dated 24.06.2010. Valid/renewed up to 23.06.2020
5.	Unit no. and size	H-901, 9 th floor, Tower-H measuring 1900 sq. ft. (super area) [page 34 of complaint]
6.	Provisional allotment letter issued in favour of complainant on	19.12.2007 [page 29 of complaint]
7.	Date of execution of buyer's agreement between the complainant and the respondent	12.02.2008 [page 30 of complaint]
8.	Possession clause	14. POSSESSION (a) Time of handing over the Possession <i>Subject to terms of this clause and subject to the Apartment 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 Apartment/Villa/Penthouse by December 2010. The Apartment Allottee agrees and understands that the Company shall be entitled to a grace period of ninety (90) days for applying and obtaining the</i>



		<u>occupation certificate in respect of the Group Housing Complex.</u> (Emphasis supplied) [Page 48 of complaint]
9.	Due date of possession	31.03.2011 [Note: 90 days grace period is included]
10.	Total consideration as per statement of account dated 22.06.2023 at page 171 of reply	Rs.1,10,96,513/-
11.	Total amount paid by the complainant as per statement of account dated 22.06.2023 at page 171 of reply	Rs.1,10,96,512/-
12.	Occupation certificate	25.01.2018 [page 106 of reply]
13.	Offer of possession to the complainant	23.02.2018 [page 108 of reply]
14.	Unit handover letter issued in favor of the complainant on	05.06.2018 [page 120 of reply]
15.	Conveyance deed executed between the respondent and the complainant on	07.09.2018 [page 124 of reply]

B. Facts of the complaint

3. The complainant has made the following submissions in the complaint:
- That the complainant while searching for a flat/accommodation was lured by such advertisements and calls from the brokers of the respondent for buying a house in their project namely palm drive. The respondent company told the complainant about the moonshine reputation of the company and the representative of the respondent company made huge presentations about the project mentioned above and also assured that they have delivered several such projects in the national capital region. The respondent handed over

one brochure to the complainant which showed the project like heaven and in every possible way tried to hold the complainant and incited the complainant for payments.

- ii. That relying on various representations and assurances given by the respondent company and on belief of such assurances, complainant, booked a unit in the project by paying an amount of Rs.10,00,000/-, towards the booking of the said unit and the same was acknowledged by the respondent. The respondent confirm the booking of the unit to the allottee providing the details of the project, confirming the booking of the unit dated 19.12.2007, allotting a unit bearing no. H-901, (9th Floor, tower- H) measuring 1900 sq. ft. in the aforesaid project of the developer for the said colony @ Rs.4600/- per sq. ft. exclusive EDC and IDC, along with two car parking's at the consideration of Rs.98,53,380/- and other Specifications of the allotted unit and providing the time frame within which the next instalment was to be paid.
- iii. That a buyer's agreement was executed between the allottee and respondent on 12.02.2008. As per annexure of the buyer's agreement the sale price of the said apartment shall be Rs.98,53,380/-. That would include the basic sale price, EDC, IDC, preferential location charges and exclusive right to use the dedicated car parking. Further, the complainant having dream of its own residential unit in NCR signed the agreement in the hope that the unit will be delivered on or before December 2010. The complainant were also handed over one detailed payment plan which was construction linked plan. It is unfortunate that the dream of owning a unit of the complainant was shattered due to dishonest, unethical attitude of the respondent.

- iv. That as per clause 14(a) of the buyer's agreement the respondent had to deliver the possession of the unit by December 2010 with a grace period of 90 days for applying and obtaining the occupation certificate. As per the demands raised by the respondent, based on the payment plan, the complainant to buy the captioned unit already paid a total sum of Rs.1,11,03,725/-, towards the said unit against total sale consideration of Rs.98,53,380/-.
- v. That the payment plan was designed in such a way to extract maximum payment from the buyers viz a viz or done/completed. The complainant approached the respondent and asked about the status of construction and also raised objections towards non-completion of the project. It is pertinent to state herein that such arbitrary and illegal practices have been prevalent amongst builders before the advent of RERA, wherein the payment/demands/etc. have not been transparent and demands were being raised without sufficient justifications and maximum payment was extracted just raising structure leaving all amenities/finishing/facilities/common area/road and other things promised in the brochure, which counts to almost 50% of the total project work.
- vi. The complainant have suffered a loss and damage in as much as they had deposited the money in the hope of getting the said Unit for residential purposes. They have not only been deprived of the timely possession of the said unit but the prospective return they could have got if they had invested in fixed deposit in bank. Therefore, the compensation in such cases would necessarily have to be higher than what is agreed in the BBA.
- vii. That the complainant after many request and emails; received the offer of possession on 23.02.2018. It is pertinent to note here that

along with the above said letter of offer of possession respondent raised several illegal demands on account of the following which are actually not payable as per the builder buyer agreement:

- The area of the unit increased from 1900 sq. ft. to 1947.46 sq. ft. without any prior intimation. Money in lieu of extra area was demanded Rs.189,353/-;
 - Advance monthly maintenance for 12 months of Rs.70,109/-.
 - Electric meter charges of Rs.12,626/-.
 - Club membership charges of Rs.2,06,500/-.
 - Gas connection charges of Rs.20,013/-.
 - Sewerage connection charges of Rs.1,723/-.
 - Electrification charges of Rs.81,901/-.
 - HVAT charges of Rs.90,693/-.
 - Additional EDI and IDC of Rs.13,015 and Rs.3,154/- respectively.
- viii. That offering possession by the respondent on payment of charges which the flat buyer is not contractually bound to pay, cannot be considered to be a valid offer of possession. It would be noticed from the details provided above that those charges were never payable by the complainants as per the agreement, by the complainant and hence the offer of possession.
- ix. That the respondent is asking for 12 months of advance maintenance charges amounting to Rs.70,109/- from the complainants which is absolutely illegal and against the laws of the land. The respondent asking for electric meter charges of Rs.12,626/- and electrification charges of Rs.81,901/- from the complainants is absolutely illegal as the cost of the electric meter in the market is not more than Rs.2,500/- hence asking for such a huge amount, when the same is not a part of the builder buyer agreement is unjustified and illegal and therefore needs to be withdrawn immediately. So are the other demands required to be withdrawn, as per details provided above and those which are not a part of the

BBA. The Palm Drive amenities are 24x7 power back up, 24x7 security, badminton court, basketball court, broadband connectivity, club house, covered parking, Creche, Gym, health facilities, intercom facility, kids play area, lawn tennis court, maintenance staff, open parking, recreation facilities, religious place, school, servant quarters, shopping arcade, swimming pool, visitor parking.

- x. That the respondent asked the complainants to sign the indemnity bond as perquisite condition for handing over of the possession. Complainants raised objection to above said pre-requisite condition of the respondent as no delay possession charges was paid to the complainants but respondent instead of paying the delay possession charges clearly refuse to handover to possession if the complainants do not sign the aforesaid indemnity bond. Further, the complainants left with no option instead of signing the same.
- xi. That the complainant after many follow ups and reminders, and after clearing all the dues and fulfilling all one-sided demands and formalities as and when demanded by the respondent issued the physical handover advice letter dated 31.05.2018 of the unit on account of handing over the physical possession of the unit.
- xii. That the complainant after many follow ups and reminders, and after clearing all the dues and fulfilling all one-sided demands and formalities as and when demanded by the respondent got the conveyance deed executed dated 07.09.2018. While this sale deed acknowledges that the complainant have paid the total consideration of Rs.98,53,380/-, towards full and final consideration of the said apartment and applicable taxes etc., it makes no provision for compensating the complainant for the huge delay in handing

over the flat and project. The complainant were not given any opportunity to negotiate the terms of the said sale deed.

- xiii. That as per section 18 of the Act 2016, the promoter is liable to pay delay possession charges to the allottees of a unit, building or project for a delay or failure in handing over of such possession as per the terms and agreement of the sale. The complainant after losing all the hope from the respondent company, having their dreams shattered of owning a flat & having basic necessary facilities in the vicinity of the Premier Terraces at Palm Drive Project and also losing considerable amount, are constrained to approach this Authority for redressal of their grievance. That the complainant has not filed any other complaint before any other forum against the erring respondents and no other case is pending in any other court of law. Hence the present complaint.

C. Relief sought by the complainant

4. The complainant has filed the present compliant for seeking following reliefs:
- i. Direct the respondent to pay the interest on the total amount paid by the complainant at the prescribed rate of interest as per the Act of 2016 from due date of possession till date of actual physical possession.
 - ii. Direct the respondent company to pay the balance amount due to the complainants from the respondent on account of the interest, as per the guidelines laid in the Act, 2016.
 - iii. Direct the respondent company to set aside the one-sided indemnity bond get signed by the respondent.
5. On the date of hearing, the authority explained to the respondent /promoter about the contravention as alleged to have been committed in

relation to section 11(4)(a) of the Act and to plead guilty or not to plead guilty.

D. Reply by the respondent

6. The respondent has raised certain preliminary objections and has contested the present complaint on the following grounds:
 - i. That at the very outset, it is submitted that the instant complaint is untenable both in facts and in law and is liable to be rejected on this ground alone. The complainant is estopped by his acts, conduct, acquiescence, laches, omissions, etc. from filing the present complaint.
 - ii. 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 12.02.2008, as shall be evident from the submissions made in the following paragraphs of the present reply.
 - iii. That the present complaint is not maintainable in law or on facts. The present complaint raises several such issues which cannot be decided in summary proceedings. The said issues require extensive evidence to be led by both the parties and examination and cross-examination of witnesses for proper adjudication. Therefore, the disputes raised in the present complaint are beyond the purview of this Authority and can only be adjudicated by the Adjudicating Officer/Civil Court. Therefore, the present complaint deserves to be dismissed on this ground alone.
 - iv. That the present complaint is not maintainable in law or on facts. The provisions of the Act, 2016 are not applicable to the project in question. The application for issuance of occupation certificate in

respect of the tower in which the apartment in question is located was made on 30.06.2017, i.e., before the notification of the Rules 2017 and the occupation certificate was thereafter issued on 25.01.2018. Thus, in accordance with the definition of rule 2(o) of the rules, the project in question does not come within the meaning and ambit of "ongoing project" and accordingly this court has no jurisdiction to deal with the present matter.

- v. That the complainant has not come before this Authority with clean hands and has suppressed vital and material facts from this Authority. The correct facts are set out in the succeeding paras of the present reply. The true and correct facts and circumstances is subject to the contention of the respondent that the Authority has no jurisdiction to deal with the present matter and that the present complaint is not maintainable for reasons stated in the present reply.
- vi. That the complainant is not an "Allottee" but 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 his residence. Therefore, no equity lies in favour of the complainant.
- vii. That the complainant approached the respondent and expressed interest in booking of an apartment in the residential group housing colony developed by respondent known as "Premier Terraces at Palm Drive" situated in Sector 66, Urban Estate Gurgaon, Haryana. Prior to the booking, the complainant conducted extensive and independent enquiries with regard to the project, only after being fully satisfied on all aspects, that he took an independent and



- informed decision, uninfluenced in any manner by the respondent, to book the unit in question.
- viii. That thereafter the complainant, vide an application form dated 03.12.2007 applied to the respondent for provisional allotment of the unit. Pursuant thereto, unit bearing no TPD H-F09-901, located on the 9th floor, Tower-H admeasuring 1900 sq. ft. was allotted vide provisional allotment letter dated 19.12.2007. The complainant consciously and wilfully opted for a construction linked payment plan for remittance of sale consideration for the unit in question and further represented to the respondent that he shall remit every installment on time as per the payment schedule.
- ix. Thereafter, a buyer's agreement dated 12.02.2008 was executed between the complainant and the respondent. It is pertinent to mention that the buyer's agreement was consciously and voluntarily executed between the parties and the terms and conditions of the same are binding on the parties. That as per clause 14(a) of the agreement, the due date of possession was subject to the complainant having complied with all the terms and conditions of the buyer's agreement. That being a contractual relationship, reciprocal promises are bound to be maintained. That it is respectfully submitted that the rights and obligations of allottee as well as the builder 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.
- x. That the remittance of all amounts due and payable by the complainant under the agreement as per the schedule of payment incorporated in the buyer's agreement was of the essence. It has also been provided therein that the date for delivery of possession of the

unit would stand extended in the event of the occurrence of the facts/reasons beyond the power and control of the respondent. It was categorically provided in clause 14(b)(iv) that in case of any default/delay by the allottees in payment as per the schedule of payment incorporated in the buyer's agreement, the date of handing over of possession shall be extended accordingly, solely on the respondent's discretion till the payment of all outstanding amounts to the satisfaction of the respondent. Since the complainant has defaulted in timely remittance of payments as per the schedule of payment the date of delivery of possession is not liable to be determined in the manner sought to be done by the complainant.

- xi. Despite there being a number of defaulters in the project, the respondent had to infuse funds into the project and have diligently developed the project in question. That it must be noted by the Authority that despite the default caused, the respondent applied for occupation certificate on 30.06.2017 and the same was thereafter issued vide memo bearing no. ZP-308-Vol-I/SD(BS)/2018/3486 dated 25.01.2018. Once an application for grant of occupation certificate is submitted for approval in the office of the concerned statutory authority, respondent ceases to have any control over the same. The grant of sanction of the occupation certificate is the prerogative of the concerned statutory authority over which the respondent cannot exercise any influence. As far as the respondent is concerned, it has diligently and sincerely pursued the matter with the concerned statutory authority for obtaining of the occupation certificate. No fault or lapse can be attributed to the respondent in the facts and circumstances of the case. Therefore, the time period utilized by the statutory authority to grant occupation certificate to

the respondent is necessarily required to be excluded from computation of the time period utilised for implementation and development of the project.

- xii. That thereafter, the complainant was offered possession of the unit in question through letter of offer of possession dated 23.02.2018. The complainant 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 the complainant. It is submitted that reminders dated 27.03.2018 and 17.04.2018 were sent to the complainant requesting to take the physical possession, however, the complainant delayed on his own account. At this instance that a meagre increase of 2.49% was made in the tentative super area, as computed after the receipt of the occupancy certificate. The said increase in area is within the terms and conditions of the buyer's agreement and within the permissible limits as per the Model agreement to sell prescribed in the Rules of 2017, and hence no contention/allegation in regard to the same can be accepted.
- xiii. That in accordance with the facts and circumstances noted above, the present claim is barred by limitation. The Article 113 of Schedule I of the Limitation Act is applicable and the present complaint was filed after over 4 years of passing of limitation, which cannot be condoned under any circumstance whatsoever.
- xiv. Without prejudice to the contentions of the respondent, it is submitted that the allegations of the complainant that possession was to be delivered by December, 2010 are wrong, malafide and result of an afterthought in view of the fact that the complainant had made several payments to respondent even after September, 2017.

In fact, the last payment was received from the complainant on 27.09.2017. If there was in fact a delay in delivery of project as alleged by the complainant, then the complainant would not have remitted instalments after December, 2010.

- xv. That the respondent earnestly requested the complainant to obtain possession of the unit in question and further requested the complainant to execute a conveyance deed in respect of the unit in question after completing all the formalities regarding delivery of possession. However, the complainant did not pay any heed to the legitimate, just and fair requests of the respondent and threatened the respondent with institution of unwarranted litigation. That thereafter, an indemnity cum undertaking for possession dated 12.04.2018 of the said unit was executed by the complainant in favour of the respondent for use and occupation of the said unit whereby the complainant has declared and acknowledged that he has no ownership right, title or interest in any other part of the project except in the unit area of the unit in question. The present frivolous complaint has been filed with the mala fide intention to mount undue pressure upon respondent thereby compelling it to succumb to his unjust and illegitimate demands.
- xvi. That the complainant did not have adequate funds to remit the balance payments requisite for obtaining possession in terms of the buyer's agreement and consequently in order to needlessly linger on the matter, the complainant refrained from obtaining possession of the unit in question. The complainant needlessly avoided the completion of the transaction with the intent of evading the consequences enumerated in the buyer's agreement. Therefore, there is no equity in favour of the complainant. That an offer for

possession marks termination of the period of delay, if any. The complainant is not entitled to contend that the alleged period of delay continued even after receipt of offer for possession. The complainant has consciously and maliciously refrained from obtaining possession of the unit in question. Consequently, the complainant is liable for the consequences including holding charges, as enumerated in the buyer's agreement, for not obtaining possession. The complainant finally took the possession of the unit on 05.06.2018 and consequently, the conveyance deed was executed on 07.09.2018. It was specifically and expressly agreed that the liabilities and obligations of the respondent as enumerated in the allotment letter or the buyer's agreement stand satisfied. The complainant has intentionally distorted the real and true facts in order to generate an impression that the respondent has reneged from its commitments. No cause of action has arisen or subsists in favour of the complainant to institute or prosecute the instant complaint. The complainant has preferred the instant complaint on absolutely false and extraneous grounds in order to needlessly victimise and harass the respondent.

xvii. That in light of the bona fide conduct of the respondent, no delay for the complainant, the peaceful possession having been taken by the complainant, non-existence of cause of action, claim being barred by limitation and the frivolous complaint filed by the complainant, this complaint is bound to be dismissed with costs in favour of the respondent.

E. Jurisdiction of the authority

7. The preliminary objections raised by the respondent regarding jurisdiction of the authority to entertain the present complaint stands

rejected. The authority observed that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I Territorial jurisdiction

8. 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 office 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

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

Section 11

.....

(4) The promoter shall-

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

Section 34-Functions of the Authority:

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

10. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as per provisions of section 11(4)(a) of the Act leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

F. Findings on the objections raised by the respondent

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

11. One of the contentions of the respondent is that the authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the buyer's agreement executed between the parties. The respondent further submitted that the provisions of the Act are not retrospective in nature and the provisions of the Act cannot undo or modify the terms of buyer's agreement duly executed prior to coming into effect of the Act.
12. 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 hon'ble Bombay High Court in **Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 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."

13. Also, in appeal no. 173 of 2019 titled as ***Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya*** 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."

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

F.II Objection regarding non entitlement of any relief under the Act to the complainant being investors.

15. It is pleaded on behalf of respondent that complainant is not "allottee" but investor who has booked the apartment in question as a speculative investment in order to earn rental income/profit from its resale. 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 the preamble is an introduction of a statute and states the main aims and objects of enacting a statute but at the same time, the preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if he 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 complainant is buyer and has paid a considerable amount towards purchase of subject unit. At this stage, it is important to stress upon the definition of the 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."

16. In view of above-mentioned definition of allottee as well as the terms and conditions of the buyer's agreement executed between the parties, it is crystal clear that the complainant is allottee as the subject unit allotted to him by the respondent/promoter. The concept of investor is not defined or referred in the Act of 2016. As per definition under section 2 of the Act, there will be 'promoter' and 'allottee' and there cannot be a party having a status of 'investor'. The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal No.0006000000010557 titled as *M/s Srushti Sangam Developers Pvt Ltd. Vs Sarvapriya Leasing (P) Ltd. and anr.* has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottees being an investor are not entitled to protection of this Act also stands rejected.

F.II Objection regarding the complaint being barred by limitation.

17. The counsel for the respondent submitted that the complainant has filed the present complaint on 27.09.2022 after execution of conveyance deed on 07.09.2018. Therefore, the present complaint is barred by limitation. But the counsel for the complainant submitted that limitation is not applicable qua these proceedings, and submitted a copy of order passed Hon'ble Real Estate Regulatory Authority, Punjab wherein it has been held that the benefits under the Act are not barred by limitation.
18. Though both the parties through their respective counsel advanced submissions with regard to the maintainability of the complaint on the ground of the limitation but in view of settled proposition of law, the case of complainant cannot be thrown away being barred by limitation. As discussed earlier, the subject unit was allotted on 19.12.2007. Though the possession of the unit was to be offered on or before 31.03.2011 after completion of the project but the same was offered only on 23.02.2018 after receipt of occupation certificate on 25.01.2018 and ultimately leading to execution of conveyance deed of the same on 07.09.2018. So, limitation if any, for a cause of action would accrue to the complainant w.e.f. 23.02.2018. The present complaint seeking delay possession charges and other reliefs was filed on 27.09.2022 which is 4 years 7 months and 4 days from the date of cause of action. In the present matter the three year period of delay in filing of the case also after taking into account the exclusion period from 15.03.2020 to 28.02.2022 would fall on 06.02.2023. In view of the above, the Authority is of the view that the present complaint has been filed within a reasonable period of delay and is not barred by limitation.
19. In view of the above, the present complaint is filed within the limitation.

G. Findings on the reliefs sought by the complainant

- G.I Direct the respondent to pay the interest on the total amount paid by the complainant at the prescribed rate of interest as per the Act of 2016 from due date of possession till date of actual physical possession.
- G.II Direct the respondent company to pay the balance amount due to the complainants from the respondent on account of the interest, as per the guidelines laid in the Act, 2016.
20. In the present complaint, the complainant intends to continue with the project and is 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."

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

"14. POSSESSION

(a) Time of handing over the Possession

*Subject to terms of this clause and subject to the Apartment 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 Apartment/Villa/Penthouse by **December 2010**. The Apartment Allottee agrees and understands that the Company shall be entitled to a grace period of ninety (90) days, for applying and obtaining the occupation certificate in respect of the Group Housing Complex."*

22. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement, and the complainant not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such

conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment time period for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject floor and to deprive the allottees of their right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

23. **Due date of possession and admissibility of grace period:** The buyer's agreement was executed between the original allottee and the respondent on 12.02.2008 and as per clause 14(a) of the agreement the respondent was directed to handover the possession of the unit by December 2010 and a grace period of 90 days for applying and obtaining the occupation certificate in respect of the complex. 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:-

"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."*

24. 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 31.03.2011 including grace period of 90 days.
25. **Admissibility of delay possession charges at prescribed rate of interest:** The proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the 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.

26. 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.
27. 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., 01.10.2024 is 9.10%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 11.10%.
28. **Rate of interest to be paid by complainant/allottee for delay in making payments:** The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. 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;"*

29. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 11.10% by the respondent/promoter which is the same as is being granted to the complainant in case of delayed possession charges.

30. On consideration of the documents available on record and submissions made by the parties regarding contravention as per provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 14(a) of the buyer's agreement the possession of the said unit was to be delivered by December 2010 and it is further provided in agreement that promoter shall be entitled to a grace period of 90 days for applying and obtaining completion certificate/occupation certificate in respect of the group housing complex. As far as grace period is concerned, the same is allowed for the reasons quoted above. Therefore, the due date of handing over possession comes out to be 31.03.2011. In the present case, the complainant was offered possession by the respondent on 23.02.2018 after obtaining occupation certificate dated 25.01.2018 from the competent authority. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the complainant as per the terms and conditions of the buyer's agreement.
31. 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 25.01.2018. However, the respondent offered the possession of the unit in question to the complainant only on 23.02.2018, 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, he should be given 2 months' time from the date of offer of possession. These 2 months' of reasonable time is being given to the complainant keeping in

mind that even after intimation of possession practically he has to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e. 31.03.2011 till the expiry of 2 months from the date of offer of possession (23.02.2018) which comes out to be 23.04.2018.

32. 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 delay possession charges at prescribed rate of the interest @ 11.10% p.a. w.e.f. 31.03.2011 till 23.04.2018 as per provisions of section 18(1) of the Act read with rule 15 of the rules.

G.III Direct the respondent company to set aside the one-sided indemnity bond get signed by the respondent.

33. The respondent is further directed not to place any condition or ask the complainants 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.**

H. Directions of the authority

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

- i. The respondent is directed to pay the interest at the prescribed rate i.e. 11.10 % per annum for every month of delay on the amount paid

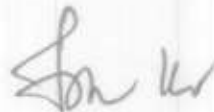
by the complainant from the due date of possession i.e., 31.03.2011 till 23.04.2018 i.e. expiry of 2 months from the date of offer of possession (23.02.2018). The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order as per rule 16(2) of the rules.

- ii. Also, the amount of compensation already paid by the respondent towards compensation for delay in handing over possession shall be adjusted towards the delay possession charges to be paid by the respondent in terms of proviso to section 18(1) of the Act.
- iii. The respondent shall not charge anything from the complainant which is not the part of the buyer's agreement.

35. Complaint as well as applications, if any, stands disposed off accordingly.

36. File be consigned to registry.


(Vijay Kumar Goyal)
Member


(Arun Kumar)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 01.10.2024