

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

Complaint no. : 6702 of 2019
First date of hearing : 11.02.2020
Date of decision : 25.03.2021

Akanksha Priya
D/o late Amrendra Priya
R/o: - E-204, BPTP Freedom Park
Life apartment, Sector-57, Near Artemis
Hospital, Gurugram- 122003

Complainant

Versus

M/s Ramprashtha Promoters and
Developers Private Limited.
Regd. office: - Plot No.114,
Sector-44, Gurugram-122002.

Respondent

CORAM:

Shri Samir Kumar
Shri Vijay Kumar Goyal

**Member
Member**

INDEX

SR. NO.	PARTICULARS	PAGE NO.
1.	A. Unit and project related details	2-6
2.	B. Facts of the complaint	6-10
3.	C. Relief sought by complainant(s)	10-11
4.	D. Reply by respondent	11-21
5.	E. Jurisdiction of the authority	21-23
6.	F. Findings of authority on the objections raised by respondent	23-27
7.	G. Findings on the relief sought by the complainant	27-34
8.	H. Directions of the authority	34-36

APPEARANCE:

Sh. Tanuj Agarwal
Sh. Dheeraj Kapoor

Advocate for the complainant
Advocate for the respondent

ORDER

1. The present complaint dated 27.12.2019 has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is *inter alia* prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the act or the rules and regulations made there under or to the allottee as per the agreement for sale executed *inter se*.

A. Unit and project details

2. The particulars of unit details, sale consideration, the amount paid by the complainants, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S.No.	Heads	Information
1.	Unit no.	1304, 13 th floor, Tower J [Page 38 of complaint]
2.	Unit measuring	1310 sq. ft.
3.	Date of allotment letter	10.01.2011

		[Page 23 of complaint]
4.	Date of execution of apartment buyer's agreement	25.11.2010 [Page 33 of complaint]
5.	Payment plan	Possession linked payment plan. [Page 63 of complaint]
6.	Total consideration	Rs.44,25,860/- [as per schedule of payment page no 63 of complainant]
7.	Total amount paid by the complainant	Rs.49,09,775 /- [as per receipt information dated 10.02.2020 page 138 of reply]
8.	Due date of delivery of possession as per clause 15(a) of the apartment buyer agreement: 31.08.2012 [Page 48 of complaint]	31.08.2012
9.	Delay in handing over of possession till offer of possession i.e. 03.03.2018	5 years 6 months and 3 days
10.	Details of Occupation Certificate if any	Date of OC granted, if any, by the competent Authority: Dated 13.02.2018 Area/Tower for which OC obtained- J. [as per annexure R-1, page 47 of reply]

3. The particulars of the project namely, "The EDGE Tower" as provided by the registration branch of the authority are as under:

Project related details		
1.	Name of the promoter	Ramprastha Promoters & Developers Pvt. Ltd.

2.	Name of the project	The Edge Towers	
3.	Location of the project	Sector 37C, Village Gadauli Kalan, Gurugram	
4.	Nature of the project	Group Housing	
5.	Whether project is new or ongoing	Ongoing	
6.	Registered whole/phase as	Phase	
7.	If developed in phase, then phase no.	1	
8.	Total no. of phases in which it is proposed to be developed, if any	5	
9.	HARERA registration no.	279 of 2017	
10.	Registration certificate	Date	Validity
		09.10.2017	31.12.2018
11.	Area registered	108894 sq. mt.	
12.	Extension applied on	17.12.2018	
13.	Extension certificate no.	Date	Validity
		In principal approval on 12.06.2019	31.12.2019
Licence related details of the project			
1.	DTCP license no.	33 of 2008 dated 19.02.2008	
2.	License validity/ renewal period	18.02.2025	
3.	Licensed area	60.511 Acres	
4.	Name of the license holder	Ramprastha Builders Pvt Ltd and 11 others	

5.	Name of the collaborator	NA	
6.	Name of the developer/s in case of development agreement and/or marketing agreement entered into after obtaining license.	NA	
7.	Whether BIP permission has been obtained from DTCP	NA	
Date of commencement of the project			
1.	Date of commencement of the project	20.08.2009	
Details of statutory approvals obtained			
S.N.	Particulars	Approval no and date	Validity
1.	Approved building plan	12.04.2012	11.04.2017
2.	Environment clearance	21.01.2010	20.01.2015
3. (a)	Occupation certificate date	13.12.2017	
	Tower No.	Floors	
	Tower U, V, W, X, Y, Z	G+13 th	
(b)	Occupation certificate date	13.02.2018	
	Tower No.	Floors	
	Tower I, J, K, L, M	G+19 th	
(c)	Occupation certificate date	13.02.2020	
	Tower No.	Floors	
	Tower H, N, O	G+19 th	
	Convenient shopping	GF	

4.	Completion date	certificate	NA
----	-----------------	-------------	----

B. Fact of the complaint

4. That the respondent company made several representations of their project to the complainant alluring her to book a flat in their project "THE EDGE TOWERS" situated Southern Court, Ramprastha City, Sector 37D, Gurgaon, Haryana. The respondent had made several claims pertaining to the architecture and the landscape of the project. That some of the facilities mentioned by the respondent Company have been provided as follows: a) lifts; b) car parking; c) gymnasium d) club house; e) children play areas f) gated community g) landscape garden.
5. That relying on the assurances made by the respondent company and lured by the rosy picture painted by the respondent the complainant applied for booking in the project of the respondent company vide their application dated 18.10.2010. It is important to mention here that the first allottee in the below described apartment is the grandfather of the allottee no. 2 (complainant herein). The present apartment was purchased by the grandfather of the complainant (Sh. Shiva Priya) as gift for her after investing his life savings.

6. That after the application being made by the complainant the respondent company had made the allotment in favour of the complainant for unit no. J-1304, in 13th floor, admeasuring 1310 sq. ft. with one car parking in the said project for total sale consideration 44,25,86/-. It is submitted that prior to and as on the date of entering into apartment buyer's agreement the complainant had made the payment of Rs.11,61,400/- in favour of the respondent company as per the payment plan in relation to the apartment which was being booked by the complainant in the project of the respondent company.
7. That an apartment buyer's agreement was executed between the parties on 25.11.2010 under which the complainant was constrained to accept various arbitrary and unilateral clauses made in favour of the respondent company. That there was no scope of attaining any mutuality at that time as the complainant had already paid a considerable amount to the tune of Rs.17,70,344/- towards the booking of the apartment and could not risk the allotment.
8. The complainant has submitted that the utter disregard of the possession clause the respondent company had miserably failed in completing the project even till date that is after a delay of almost 7 years from its scheduled date of delivery. That aggrieved with the inordinate delay in delivering the

possession the complainants have been constrained to file the present complaint for possession along with delay penalty charges. It is important to mention here that the complainant has been offered possession in the month of Dec 2018 but the same does not constitute legal possession as firstly, there was pre-condition of taking meagre sum of Rs 1,25,000/- as compensation and secondly the same was in the name of the complainant's grandfather and therefore causing legal hurdle in taking possession. Moreover, the project till date is incomplete and devoid of any amenities. The complainant has come to know her personal visit to the site that the construction on the site is still undergoing. It is further submitted that the complainant made the following payments to the respondent as and when demanded by the respondent company; the complainant till date has made payments of Rs. 42,04,567/- to the respondent company.

9. That the term was introduced and explained by the legislators, in order to avoid the exploitation of one party by the other, by providing a level playing field where similar interests have to be paid by the parties for any default on their part. That the said section has been miserably defeated and contravened by the unilateral clauses of the respondent's agreement. Thus, the authority is requested to take a note of the same and grant

appropriate relief to the complainant herein as she has been subjected to financial and emotional distress because of the said unilateral and illegal clauses.

10. The complainant has submitted that the delay in the delivery of the flat is solely due to the negligence of the respondent company. The respondent company have never informed the complainant any force majeure circumstances which has evidently led to the halt in the construction. That there is enough information in the public domain which suggest that the respondent have deliberately not completed the present project and have hoodwinked the complainant into making the payments towards the sham project with no hopes of completion. Due to the failure of the respondent in completing the project and delivering the possession of the apartment which was due in Aug 2012 the original allottee no.1 (Mr. Shiva Priya), also grandfather of the complainant could not see her granddaughter taking the possession of the unit and residing in the same happily. The delay in the present matter is inordinate as it is clear from the averments of the present case.
11. The complainant has further submitted that this is a case when the respondent company had misused its dominant position resulting in the mental and financial harassment to the complainant herein. The instances of misuse include: -

- Not updating the complainant about the stage of development in spite of receiving several requests of the complainant.
- No possession of apartment granted despite of receiving huge amount of money from the complainant within the prescribed time period.

12. That the complainant needs to be compensated least at the prescribed rate of interest for huge delay since she has been deprived of the possession for the past 7 years while at the same time the respondent company has enjoyed the luxury and fruits of the payments made by the complainant.
13. The illegal conduct of the respondent company does not end here as she is in receipt of the demand for maintenance without even delivery of completed apartment and its possession. The respondent company's conduct is within the definition of the unfair practices as without delivery of the apartment demand for maintenance cannot be raised by the respondent company.

C. Relief sought by the complainants:

14. The complainants have sought following relief(s):
- I. To direct the respondent to deliver immediate possession of the apartment J-1304 in the project, The Edge Tower located at Sector 37D, Gurgaon, Haryana

along with all the promised amenities and facilities and to the satisfaction of the complainant;

- II. To direct the respondent to make the payment of delay penalty interest at the prescribed rate of interest on the amount already paid by the complainant to the respondent, from the promised date of delivery of the flat till the actual delivery of the flat to the complainant.

D. Reply by the respondent

15. The respondent has filed an application for rejection of complaint on the ground of jurisdiction along with reply. The respondent has contested the complaint on the following grounds.

- I. The complaint filed by the complainants is not maintainable and the Haryana Real Estate Regulatory Authority, Gurugram, Haryana has no jurisdiction whatsoever to entertain the present complaint. According to the respondent, the jurisdiction to entertain the complaints pertaining to refund, possession, compensation, and interest i.e., prescribed under sections 12, 14, 18 and section 19 of the Act lies with the adjudicating officer under sections 31 and 71 read with rule 29 of the rules.
- II. In the present case, the complaint pertains to the alleged delay in delivery of possession for which the

complainants have filed the present complaint and is seeking the relief of possession, interest, and compensation u/s 18 of the said Act. Therefore, even if the project of the respondent had been covered under the definition of "ongoing project and registered with this authority, the complaint, if any, is still required to be filed before the adjudicating officer under rule 29 of the said rules and not before this authority under rule 28 as this authority has no jurisdiction whatsoever to entertain such complaint and such complaint is liable to be rejected.

- III. That now, in terms of the Haryana Real Estate (Regulation and Development) Amendment Rules, 2019 (hereinafter referred to as the "said amendment rules"), the complainants have filed the present complaint under the amended rule-28 in the amended "form CRA" and is seeking the relief of possession, interest and compensation u/s 18 of the said Act.
- IV. That statement of objects and reasons as well as the preamble of the said Act clearly state that the RERA is enacted for effective consumer protection and to protect the interest of consumers in the real estate sector. RERA is not enacted to protect the interest of investors. As the said Act has not defined the term consumer, therefore the definition of "Consumer" as provided under the Consumer Protection Act, 1986 has to be referred for

adjudication of the present complaint. The complainants are investors and not consumers as explained herein below: -

- a) That this authority has no jurisdiction to entertain the present complaint as the complainant has not come to this authority with clean hands and has concealed the material fact that apart from the unit no. J-1304, "EDGE" Ramprastha City, Sector-37D, Gurgaon, for which the complainant has filed the present complaint, the complainant, through her family (Father's brother Mr. Arvind Priya), has also invested in one more apartment i.e. E-1604 in the same project of the respondent. The complainant has invested in two residential units in the same project of the respondent for earning profits and the transaction therefore is relatable to commercial purpose and the complainant not being a 'consumer' within the meaning of Section 2(1)(d) of the Consumer Protection Act, 1986, the complaint itself is not maintainable under the said Act. This has been the consistent view of the Hon'ble National Consumer Disputes Redressal Commission in a number of cases wherein it has been held that even when a consumer has booked more than one unit of residential premises; it

amounts to booking of such premises for investment/commercial purpose.

- b) The complainants are investors and not consumers and nowhere in the present complaint have the complainants pleaded as to how the complainants are consumers as defined in the Consumer Protection Act, 1986 qua the respondent. The complainants have deliberately not pleaded the purpose for which the complainants entered into an agreement with the respondent to purchase the apartment in question. The complainants, who are already the owners of House E-2098, Ansal Esencia, Sector-67, Gurgaon (address mentioned in the booking application form) and E-204, BPTP Freedom Park Life apartment Sector-57, Near Artemis Hospital, Gurgaon-122003 (address mentioned in the present complaint) are investors, having invested in two units in the same project of the respondent and who never had any intention to buy the apartment for their own personal use and have now filed the present complaint on false and frivolous grounds.

- V. The respondent has submitted that this authority has no jurisdiction to entertain the present complaint as the complainants have not come to this authority with clean hands and have concealed the material fact that: -

- the respondent had already applied the occupation certificate vide application dated 27.04.2016 and it was deemed to be granted on 26.06.2016 and actually granted on 13.02.2018. It is also pertinent to mention here that after obtaining the occupation certificate, the respondent, has already issued the letter of offer of possession dated 03.03.2018, addressed to both the allottees i.e. the complainant and her grandfather Mr. Shiva Priya, for the said apartment along with the statement of account with the details of all the charges, etc. as mentioned therein as well as in the notice of possession. However, even after receiving the notice of possession dated 03.03.2018 and various reminders, thereafter, including reminder dated 20.06.2018, 20.07.2018 and 20.08.2018, the complainants neither made the payment nor came forward for the possession of the apartment. It is also pertinent to mention here that vide letter dated 17.05.2018, the complainants were duly informed that with effect from 05.06.2018, the respondent will start levying holding and other charges, in accordance with the apartment buyer agreement. The complainant, vide letter dated 13.07.2018, were also informed that with effect

from 04.09.2018, maintenance charges as applicable will be levied.

- That the complainant thereafter informed the respondent that the second allottee i.e. her grandfather Mr. Shiva Priya has expired and requested that his name be deleted from the allotment/apartment buyer's agreement and the complainant be made the sole allottee and handed over the possession. The complainant was duly informed by the respondent that in order to delete the name of her grandfather and make the complainant the sole allottee and handover the possession to her, she will have to complete certain legal formalities, including but not limited to getting an affidavit and NOC from all the other legal heirs in her favour and also make the payment of dues. It is pertinent to mention that the complainant completed the said formalities on 01.03.2019, after which the requisite changes were made in the apartment buyer agreement on 01.03.2019 (page-64 of the complaint) and she was made as the sole allottee and thereafter the complainant made the payment of dues on 05.06.2019. However, despite that, the complainant has not come forward till date to take the possession of the said unit and has instead

filed the present complaint on false and frivolous grounds.

- That the complainant is defaulters, having deliberately failed to make the payment of installments within the time prescribed, which resulted in delay payment charges/interest, as reflected in the statement of account. The complainant is also liable to pay the maintenance charges of Rs. 1,05,471/- and holding charges of Rs. 6,14,585/-. That in addition to the maintenance and holding charges, the complainant is also liable to pay the stamp duty, registration and other miscellaneous and ancillary charges.

VI. Despite several adversities, the respondents have completed the construction of the said apartment and have already obtained the occupation certificate dated 13.02.2018 for the said apartment and vide notice of possession dated 03.03.2018, have already offered the possession to the complainants. However, as the complainants were only short term and speculative investors, therefore they were not interested in taking over the possession of the said apartment. It is apparent that the complainants had the motive and intention to make quick profit from sale of the said apartment through the process of allotment. Having failed to resell

the said apartment due to general recession and because of slump in the real estate market, the complainants have developed an intention to raise false and frivolous issues to engage the Respondents in unnecessary, protracted, and frivolous litigation. The alleged grievance of the complainants has origin and motive in sluggish real estate market.

- VII. That this authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the apartment buyer's agreement signed by the complainants/allotment offered to him. It is a matter of record and rather a conceded position that no such agreement, as referred to under the provisions of said Act or said Rules, has been executed between the complainants and the respondent. Rather, the agreement that has been referred to, for the purpose of getting the adjudication of the complaint, is the apartment buyer agreement dated 25.11.2010, executed much prior to coming into force of said Act or said rules. The adjudication of the complaint for interest and compensation, as provided under sections 12, 14, 18 and 19 of said Act, has to be in reference to the agreement for sale executed in terms of said Act and said Rules and no other agreement. This submission of the respondents *inter alia*, finds support from reading of the provisions of the said Act and the said Rules. Thus, in view of the

submissions made above, no relief can be granted to the complainants.

VIII. The respondent has submitted that the proposed estimated time of handing over the possession of the said apartment i.e., 31.08.2012 + 120 days, which comes to 31.12.2012, is applicable only subject to force majeure and the complainants having complied with all the terms and conditions and not being in default of any terms and conditions of the apartment buyer's agreement, including but not limited to the payment of instalments. In case of any default/delay in payment, the date of handing over of possession shall be extended accordingly solely at the respondent's discretion, till the payment of all outstanding amounts and at the same time in case of any default, the complainants will not be entitled to any compensation whatsoever in terms of clause 15 and clause 17 of the apartment buyer agreement.

IX. That there was no intentional delay in the construction on the part of the respondent. The respondent had started the construction of the above said project immediately after the approval of the building plan i.e., 13.08.2009 with the intention to complete the project within the stipulated time, but due to the following situations beyond the control of the respondent, the construction of the project could not be completed

upto 31.08.2012: - (a) Default on part of the contractor i.e., Supreme Infrastructure India Ltd.; (b) That the hon'ble Punjab and Haryana High Court on 31.07.2012 in **CWP No. 20032 of 2008 titled as Sunil Singh vs. MOEF & others** had directed that ground water shall not be used for the construction purposes and further ordered to stop the construction immediately till the time company produce a confirmation from administrator, HUDA, Gurgaon to the effect that company is no more using ground water; (c) due to the heavy shortage of supply of construction material i.e., river sand and bricks etc throughout Haryana, due to the order of hon'ble Supreme Court of India in the case titled as **Deepak Kumar Vs. State of Haryana dated 27.02.2012**, construction work was stopped at site for considerable long time; (d) shortage of labour, etc.

- X. The projects in respect of which the respondent has obtained the occupation certificate are described as hereunder: -

S. No	Project Name	No. of Apartments	Status
1.	Atrium	336	OC received
2.	View	280	OC received

3.	Edge Tower I, J, K, L, M Tower H, N Tower-O (Nomenclature-P) (Tower A, B, C, D, E, F, G)	400 160 80 640	OC received OC received OC received OC to be applied
4.	EWS	534	OC received
5.	Skyz	684	OC to be applied
6.	Rise	322	OC to be applied

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

E. Jurisdiction of the authority

The application of the respondent regarding rejection of complaint on ground of jurisdiction 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

17. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices



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

E.II Subject matter jurisdiction

18. The respondent has contended that the relief regarding refund and compensation are within the jurisdiction of the adjudicating officer and jurisdiction w.r.t the same does not lie with the authority. It seems that the reply given by the respondent is without going through the facts of the complaint as the same is totally out of context. The complainant has nowhere sought the relief of refund and regarding compensation part the complainant has stated that he is reserving the right for compensation and at present he is seeking only delay possession charges. The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as held in *Simmi Sikka v/s M/s EMAAR MGF Land Ltd. (complaint no. 7 of 2018)* leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage. The said decision of the authority has been upheld by the Haryana Real Estate Appellate Tribunal in its judgement

dated 03.11.2020, in appeal nos. 52 & 64 of 2018 titled as ***Emaar MGF Land Ltd. V. Simmi Sikka and anr.***

F. Findings on the objections raised by the respondent

F.I Objection regarding entitlement of DPC on ground of complainant being investor

19. The respondent has taken a stand that the complainants are the investors and not consumers, therefore, they are not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority observed that the respondent is correct in stating 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 & 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 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 apartment buyer's agreement, it is revealed that the complainants are buyer and they have paid total price of



Rs.49,09,775/- to the promoter towards purchase of an apartment in the project of the promoter. At this stage, it is important to stress upon the definition of term allottee under the Act, 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;"

In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment buyer's agreement executed between promoter and complainants, it is crystal clear that the complainants are allottee(s) as the subject unit was 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". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 000600000010557 titled as *M/s Srushti Sangam*



Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. 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 allottee being an investor is not entitled to protection of this Act also stands rejected.

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

20. Another contention of the respondent is that authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the apartment buyer's agreement executed between the parties and no agreement for sale as referred to under the provisions of the Act or the said rules has been executed inter se parties. The authority is of the view that the Act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements

made between the buyers and sellers. The said contention has been upheld in the landmark judgment of ***Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)*** 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."

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

"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed

possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."

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

G. Findings on the relief sought by the complainant

Relief sought by the complainant: The respondent company to immediately deliver the possession of impugned unit no. J-1304, "EDGE", Ramprastha City Gurugram along with prescribed rate of interest on the amount already paid by the complainant to the respondent from the promised date of delivery of the flat till the actual delivery of the flat to the complainant.

23. In the present complaint, the complainants intend 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."

24. Clause 15(a) of the apartment buyer's agreement provides for handing over of possession and is reproduced below:

"15. POSSESSION

(a) Time of handing over the Possession

Subject to terms of this clause and subject to the Allottee having complied with all the terms and condition of this Agreement and the Application, and not being in default under any of the provisions of this Agreement and compliance with all provisions, formalities, documentation etc., as prescribed by RAMPRASTHA. RAMPRASTHA proposed to hand over the possession of the Apartment by 31/08/2012 the Allottee agrees and understands that RAMPRASTHA shall be entitled to a grace period of hundred and twenty days (120) days, for applying and obtaining the occupation certificate in respect of the Group Housing Complex."

25. The authority has gone through the possession clause of the agreement and observed that this is a matter very rare in nature where builder has specifically mentioned the date of handing over possession rather than specifying period from



some specific happening of an event such as signing of apartment buyer's agreement, commencement of construction, approval of building plan etc. This is a welcome step, and the authority appreciates such firm commitment by the promoter regarding handing over of possession but subject to observations of the authority given below.

26. 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 application, and the complainants not being in default under any provisions of these agreements 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 date for handing over possession loses its meaning. The incorporation of such clause in the buyer agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his 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.

27. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the apartment by 31.08.2012 and further provided in agreement that promoter shall be entitled to a grace period of 120 days for applying and obtaining occupation certificate in respect of group housing complex. As a matter of fact, the promoter has not applied for occupation certificate within the time limit prescribed by the promoter in the apartment buyer agreement. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 120 days cannot be allowed to the promoter at this stage. The same view has been upheld by the hon'ble Haryana Real Estate Appellate Tribunal in appeal nos. 52 & 64 of 2018 case titled as **Emaar MGF Land Ltd. VS Simmi Sikka** case and observed as under: -

68. As per the above provisions in the Buyer's Agreement, the possession of Retail Spaces was proposed to be handed over to the allottees within 30 months of the execution of the agreement. Clause 16(a)(ii) of the agreement further provides that there was a grace period of 120 days over and above the aforesaid period for applying and obtaining the necessary approvals in regard to the commercial projects. The Buyer's Agreement has been executed on 09.05.2014. The period of 30 months expired on 09.11.2016. But there is no material on record that during this period, the promoter had applied to any authority for obtaining the necessary

approvals with respect to this project. The promoter had moved the application for issuance of occupancy certificate only on 22.05.2017 when the period of 30 months had already expired. So, the promoter cannot claim the benefit of grace period of 120 days. Consequently, the learned Authority has rightly determined the due date of possession.

- 28. Payment of delay possession charges at prescribed rate of interest:** Proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

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

(1) For the purpose of proviso to section 12, section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.

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

- 29. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases. The Haryana Real Estate Appellate Tribunal in **Emaar MGF Land Ltd. vs. Simmi Sikka (Supra)** observed as under: -**

"64. Taking the case from another angle, the allottee was only entitled to the delayed possession charges/interest only at the rate of Rs.15/- per sq. ft. per month as per clause 18 of the Buyer's Agreement for the period of such delay; whereas, the promoter was entitled to interest @ 24% per annum compounded at the time of every succeeding instalment for the delayed payments. The functions of the Authority/Tribunal are to safeguard the interest of the aggrieved person, may be the allottee or the promoter. The rights of the parties are to be balanced and must be equitable. The promoter cannot be allowed to take undue advantage of his dominate position and to exploit the needs of the home buyers. This Tribunal is duty bound to take into consideration the legislative intent i.e., to protect the interest of the consumers/allottees in the real estate sector. The clauses of the Buyer's Agreement entered into between the parties are one-sided, unfair and unreasonable with respect to the grant of interest for delayed possession. There are various other clauses in the Buyer's Agreement which give sweeping powers to the promoter to cancel the allotment and forfeit the amount paid. Thus, the terms and conditions of the Buyer's Agreement dated 09.05.2014 are ex-facie one-sided, unfair and unreasonable, and the same shall constitute the unfair trade practice on the part of the promoter. These types of discriminatory terms and conditions of the Buyer's Agreement will not be final and binding."

30. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., 25.03.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.
31. The definition of term 'interest' as defined under section 2(z a) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

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

Explanation. —For the purpose of this clause—

- (i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*
- (ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;”*

32. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same as is being granted to the complainants in case of delayed possession charges.

33. On consideration of the documents available on record and submissions made by both the parties regarding contravention of provisions of the Act, the authority is satisfied that the respondents are in contravention of the provisions of the Act. By virtue of clause 15(a) of the agreement executed between the parties on 25.11.2010, possession of the subject apartment was to be delivered within stipulated time i.e. by 31.08.2012. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over possession is 31.08.2012. The respondent has failed to handover possession of the subject

apartment till date of this order. Accordingly, it is the failure of the respondent/promoter to fulfil its obligations and responsibilities as per the agreement to hand over the possession within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with proviso to section 18(1) of the Act on the part of the respondent is established. As such the allottee shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 31.08.2012 till the actual offer of possession 03.03.2018, at prescribed rate i.e., 9.30 % p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules.

34. The allottee requested for fresh statement of account of the unit based on the above determinations of the authority.

H. Directions of the authority

35. 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 interest at the prescribed rate of 9.30% p.a. for every month of delay from the due date of possession i.e., 31.08.2012 till the actual offer of possession i.e. 03.03.2018.

- ii. The promoter may credit delay possession charges in the account ledger/statement of account of the unit of the allottee, if the amount outstanding against the allottee is more than the DPC this will be treated as sufficient compliance of this order.
- iii. If there is no amount outstanding against the allottee or less amount outstanding against the allottee then the balance delay possession charges shall be paid after adjustment of the outstanding against the allottee.
- iv. The arrears of such interest accrued from 31.08.2012 till the date of order by the authority shall be paid by the promoter to the allottee within a period of 90 days from date of this order and interest for every month of delay shall be paid by the promoter to the allottee before 10th of the subsequent month as per rule 16(2) of the rules.
- v. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
- vi. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

- vii. The respondent shall not charge anything from the complainants which is not the part of the agreement, however, holding charges shall not be charged by the promoter at any point of time even after being part of agreement as per law settled by hon'ble Supreme Court in civil appeal no. 3864-3899/2020.
- viii. The promoter is directed to furnish to the allottee statement of account within one month of issue of this order. If there is any objection by the allottee on statement of account, the same be filed with promoter after fifteen days thereafter. In case the grievance of the allottee relating to statement of account is not settled by the promoter within 15 days thereafter then the allottee may approach the authority by filing separate application.
36. Complaint stands disposed of.
37. File be consigned to registry.


(Samir Kumar)
Member


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 25.03.2021
Judgement uploaded on 01.06.2021