

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

Complaint no. : 1981 of 2018  
First date of hearing : 12.03.2019  
Order reserved on : 17.12.2020  
Date of decision : 03.03.2021

Gurpreet Singh Walia  
R/o H.No.C-1/46, Sector-36,  
Noida, UP-201303.

**Complainant**

Versus

M/s Emaar MGF Land Ltd.  
Regd. office: 306-308, Square One,  
C-2, District Centre, Saket,  
New Delhi-110017.  
Marketing address: Emaar Business Park,  
M.G. Road, Sikanderpur Chowk, Sector 28,  
Gurugram-122002, Haryana.

**Respondent**

**CORAM:**

Dr. K.K. Khandelwal  
Shri Samir Kumar

**Chairman  
Member**

**APPEARANCE:**

Shri Sukhbir Yadav  
Shri Ishaan Dang

Advocate for the complainant  
Advocate for the respondent

**ORDER**

1. The present complaint dated 03.12.2018 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. Unit and project 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.	Heads	Information
1.	Project name and location	Marbella, Sector 65 and 66, Gurugram.
2.	Project area	109.063 acres
3.	Nature of the project	Residential plotted colony
4.	DTCP license no. and validity status	1. 97 of 2010 dated 18.11.2010 for 106.856 acres Valid/renewed up to 18.11.2020 2. 41 of 2011 dated 03.05.2011 for 1.06 acres Valid/renewed up to 03.05.2024
5.	HRERA registered/ not registered	<b>Registered vide no. 307 of 2017 dated 17.10.2017 for 41.86 acres</b>
	HRERA registration valid up to	<b>16.10.2022</b>
6.	Occupation certificate	<b>18.11.2017</b> [Page 149 of complaint and page 77 of reply]

7.	Provisional allotment letter	19.11.2010 [Page 34 of complaint and page 34 of reply]
8.	Villa/unit no. as per the buyer's agreement dated 07.04.2011	MAR-BL-023 [Page 74 of complaint]
9.	Villa/unit measuring	8120 sq. ft. (super built up area) on 500 sq. yd. plot [Page 42 of complaint]
10.	Date of execution of buyer's agreement	07.04.2011 [Page 40 of complaint]
11.	Payment plan	Instalment payment plan [Page 74 of complaint]
12.	Total consideration as per statement of account dated 13.10.2018 (Page 96 of complaint) and 10.12.2018 (Page 39 of reply)	Rs.7,93,74,683/-
13.	Total amount paid by the complainant as per statement of account dated 13.10.2018 (Page 98 of complaint) and 10.12.2018 (Page 41 of reply)	Rs.7,97,97,498/-
14.	Demand on account of 'On start of site infrastructure development' was due on	27.04.2012 [As per statement of account dated 13.10.2018, page 96 of complaint]
15.	Due date of delivery of possession as per clause 10(a) of the said agreement i.e. 30 months from commencement of development work (i.e. 27.04.2012) [Page 52 of complaint]	27.10.2014

16.	<b>Date of offer of possession to the complainant</b>	<b>08.01.2018</b> [Page 92 of complaint]
17.	Delay in handing over possession till date of issuance of lift certificate i.e. 15.05.2019	4 years 6 months 18 days

**B. Facts of the complaint**

3. The complainant submitted that on 19.11.2010, respondent issued provisional allotment letter for the villa no. MAR-BL-023 in the said project in favour of the complainant under the construction linked plan. On 07.04.2011, a pre-printed and unilateral buyer's agreement was executed between the respondent and the complainant. As per clause 10(a) of the buyer's agreement, respondent has to give the possession of villa within 30 months from commencement of development work. The development work started on site on 27.04.2012 as per statement of account dated 13.10.2018. Therefore, the due date of possession was 27.10.2014. That on 02.12.2010, respondent issued a letter to the complainant informing the scheme of "on time payment rebate" @ 5% of sale price (waiver of last instalment of 5% of sale price) and as per the scheme of timely payment rebate, last demand of 5% need to be waived off.
4. On 12.01.2018, respondent issued a letter of offer of possession to the complainant and informed that the

occupation certificate for the unit has been received and the unit is ready for possession. That during site visit on 18.10.2018, the complainant found that his unit is not fit for occupation/habitation. Construction activity was carried on adjoining and nearby plots. Entry gate, internal roads, streetlight, club house, playgrounds etc. was not constructed. Parks and other amenities were not yet developed. Construction material and waste were spread all around the project. Elevator uses certificate of unit was not obtained. That at the time of booking, respondent claimed luxury living in Marbella Villas and also lured with rosy pictures, but the current possession of project is uninhabitable and unsafe.

5. The respondent has given compensation on delay period from 30.06.2016 to 08.01.2018 @ Rs.10 per sq. ft. As on date villa is not in habitable possession and respondent have to compensate the complainant from 27.10.2014 to till the date of actual possession of villa @ prescribed rate of interest.
6. The main grievance of the complainant in the present complaint is that in spite of paying more than 100% of the actual amount of villa, the respondent has failed to deliver the possession of fully constructed and developed villa. Complainant did not purchase four walls and roof, but also purchased all allied amenities and facilities as promised at the

time of receiving the payment. Complainant has paid Rs.7,97,97,498/- and after paying huge amount, basic infrastructure in project is not yet completed. Complainant has paid Rs.20,00,000/- club charges on 28.02.2014, thereafter club is not yet constructed.

**C. Reliefs sought by the complainant**

7. The complainant has sought the following reliefs:
  - i. Direct the respondent to provide valid occupation certificate (without any pre-condition).
  - ii. Direct the respondent to pay interest @ prescribed rate on amount paid by the complainant to the respondent as instalments towards purchase of villa from due date of possession till lawful offer of possession under section 18 of the Act.
  - iii. Direct the respondent to provide electricity connection to villa of respondent.
  - iv. Direct the respondent to refund the GST levied on payment of complainant.
  - v. Direct the respondent to complete the construction of other villas in complex and other promised amenities.
8. 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 to plead guilty or not to plead guilty.

**D. Reply by the respondent**

9. The respondent has contested the complaint on the following grounds:

- i. The respondent submitted that the complaints pertaining to sections 12, 14, 18 and 19 of the Act are to be decided by the adjudicating officer under section 71 of the Act read with rule 29 of the rules and not by this hon'ble regulatory authority.
- ii. The respondent submitted in pursuance of application form dated 24.08.2010, the complainant was allotted independent villa bearing MAR-BL-023 vide provisional allotment letter dated 19.11.2010. Thereafter, the buyer's agreement was executed between the parties on 07.07.2011. The complainant consciously and wilfully opted for construction linked plan for remittance of the sale consideration for the unit in question and further represented to the respondent that the complainant shall remit every instalment on time as per the payment schedule.
- iii. That the complainant has defaulted in adhering to the schedule of payment incorporated with the buyer's

agreement. The respondent issued payment request letter dated 10.09.2013 calling upon the complainant to make payment of instalment no. 5 under the payment plan/instalment plan opted by the complainant. There was default in remittance of amount pertaining to completion of brickwork which is evident from perusal of the statement of account dated 10.12.2018. Therefore, it is comprehensively established that the complainant has defaulted in due observance of the terms and conditions of the buyer's agreement.

- iv. That it is absolutely wrong and denied that as per the scheme of timely repayment rebate large amount of 5% needs to be waived off. It is submitted that benefit of the scheme is applicable only to the allottees who have not defaulted in remittance of instalments as per the schedule of payments incorporated in the buyer's agreement. The complainant having defaulted in remittance of instalments as per the schedule of payment is thus not entitled to the benefit provided in the scheme.
- v. That as per clause 12(c) of the buyer's agreement dated 07.04.2011 provides that only such allottees, who have complied with all the terms and conditions of the buyer's agreement including making timely payment of



instalments are entitled to receive any compensation under the buyer's agreement dated 07.04.2011. In the present case, the complainant had delayed payment of instalments and is consequently not eligible to receive any compensation from the respondent.

- vi. The respondent submitted that the complainant was offered possession of the said villa through letter of offer of possession dated 08.01.2018. 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. However, the complainant did not take any step to complete the necessary formalities or to pay the balance amount liable to be paid by him. The respondent was granted the occupation certificate in respect of the said villa on 18.11.2017.
- vii. The respondent submitted that despite default of several allottees, the respondent has diligently and earnestly pursued the development of the project in question and has constructed the project in question as expeditiously as possible. It is submitted that the construction of the villa is complete in all respects and the respondent

already offered the possession of the villa in question to the complainant upon receipt of occupation certificate from the competent authority. therefore, there is no default or lapse on the part of the respondent and there is no equity in favour of the complainant.

- viii. That as per clause 3(a) of the buyer's agreement, the club in question shall be constructed either simultaneously or after the construction of the villa in question and it has been agreed by the complainant that all charges including but not limited to Club Membership Registration Charges shall be paid as and when demanded by the respondent or maintenance agency appointed in accordance with the terms and conditions incorporated in the buyer's agreement. Furthermore, it is submitted that the respondent is in the process of collaborating with the potential contractors for construction of the proposed club. It is further submitted that the respondent has provided club facilities in an alternate building which shall be fully functional within a month's time.
- ix. That the respondent has installed CCTV cameras at entry and exit points and near parks (in zone I) and services area (WTP) of the project. in addition to the above, 16 security guards have been employed in the phase/area in

which the unit in question is situated by the community facility management team of the respondent. Furthermore, 32 security guards have been employed by the project team of the respondent for other areas. Therefore, there is no lapse or shortfall in the security of the project in question.

- x. The respondent submitted that electricity is provided to the unit. Permanent power connection from DHBVN has already been installed and the same is operating without any snag. Furthermore, DG set has been installed for providing power backup. Therefore, there is continuous 24 hour power supply for the project.
- xi. Hence, this complaint is liable to be dismissed.

**E. Written arguments by the respondent**

- 10. The respondent submitted the written arguments on 23.11.2020 wherein it is stated that respondent had submitted an application dated 27.04.2017 for issuance of occupation certificate in respect of the project before the concerned statutory authority. The occupation certificate was, thereafter, granted on 18.11.2017. It is respectfully submitted that once an application is submitted before the statutory authority, respondent ceases to have any control over the same. Therefore, the time taken by the concerned statutory authority

to issue an occupation certificate in respect of the project has to be excluded from the computation of the time for implementation and development of the project.

11. The respondent submitted that the complainant and the respondent are bound by terms and conditions of the buyer's agreement and the respondent put reliance in this regard upon various citations: *2000(1) Apex Court Journal 388, AIR 1996 SC 2508, AIR 1990 SC 699*. The respondent submitted that this hon'ble authority does not have jurisdiction and authority to legally direct levying of interest and in this regard, the respondent has put reliance on order dated *02.05.2019 passed by Justice Darshan Singh (Retd.) Chairman, Haryana Real estate Appellate Tribunal, Chandigarh.*
12. The respondent further submitted that the liability to pay interest imposed on the developer is in the nature of compensation. It has further been held that any determination of dispute pertaining to payment of interest under sections 12, 14, 18 and 19 is to be adjudicated by the adjudicating officer as per section 71 of the Act. While supporting this contention, the respondent has place reliance on *Neelkamal Realtors Suburban Pvt. Ltd. and anr. Versus Union of India and ors. [2018(1) RCR (Civil) 298]*.

13. The complainant has submitted certain citations in support of arguments on 17.12.2020. The complainant submitted that the Hon'ble Supreme Court has held in series of judgment that builder buyer's agreements are one-sided, ex-facie and arbitrary. The complainant has cited para 181 of *Neelkamal Realtors Suburban Pvt. Ltd. V. UOI and Ors. (W.P. 2737 of 2017)*, wherein the Bombay HC ha salso held that the agreements entered into with the individual purchasers were invariably one-sided, standard-format agreements prepared by the builders and which were overwhelmingly in their favor with unjust clauses.

**F. Written arguments by the complainant**

14. That the complainant has referred the case titled as *Wing. Cdr. Arifur Rahman Khan and Aleya Sultana and Ors. Versus DLF Southern Homes Pvt. Ltd. and Ors.* (Civil Appeal no. 6239 of 2019) raising issue pertaining to admitted delay in handing over of possession and quantum of compensation. Further in case titled as *R V Prasannakumaar v. Mantri Castles Pvt Ltd.*, the court observed that there was a delay of two years and hence the award of interest at the rate of 6 percent was reasonable and justified. In *Pioneer Urban Land and Infrastructure Limited v. Govindan Raghavan*, the Court observed that in these circumstances, the flat purchasers could

not be compelled to obtain possession which was offered almost two years after the grace period under the agreement had expired. Hence, the NCDRC was held to have correctly awarded interest at the rate of 10 percent per annum.

15. 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.

#### **G. Jurisdiction of the authority**

16. The preliminary objection raised by the respondent regarding jurisdiction of the authority to entertain the present complaint also 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.

##### **G.I Territorial Jurisdiction**

17. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram District, therefore this authority has complete territorial jurisdiction to deal with the present complaint.

### **G.II Subject-matter jurisdiction**

18. The respondent has contended that the complaints pertaining to section 12,14,18 and 19 of the Act are to be decided by the adjudicating officer under section 71 of the said Act read with rule 29 of the rules and not by this hon'ble regulatory authority. 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.* leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant 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.*

### **H. Findings on the reliefs sought by the complainant**

19. In the present complaint, the complainant intended to continue with the project and sought 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."*

20. The clause 10(a) of the buyer's agreement provides for time period of handing over of possession of the villa in question and is reproduced below:

**"10. POSSESSION**

**(a) Time of handing over the Possession**

*Subject to terms of this clause and subject to the Allottee(s) having complied with all the terms and conditions of this Buyer's Agreement, and not being in default under any of the provisions of this Buyer's Agreement and compliance with all provisions, formalities, documentation etc. as prescribed by the Company, the Company proposes to hand over the possession of the Villa within 30 (thirty) months from commencement of development work. The Allottee(s) agrees and understands that the Company shall be entitled to a grace period of 3 (three) months, for applying and obtaining the occupation certificate in respect of the Villa."*

21. 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 date 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 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.

22. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the said villa within 30 (thirty) months from commencement of development work and further provided in agreement that promoter shall be entitled to a grace period of 3 months for applying and obtaining occupation certificate in respect of villa. As a matter of fact, the promoter has not applied for occupation certificate within the time limit prescribed by the promoter in the buyer's agreement. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 3 months 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.*

- 23. Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges at the 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.

24. 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."*

25. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., 17.12.2020 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.
26. 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;"*

27. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 9.30% by the respondents/promoters which is the same as is being

granted to the complainant in case of delayed possession charges.

28. By virtue of clause 10(a) of the buyer's agreement executed between the parties on 07.04.2011, possession of the booked unit was to be delivered within a period of 30 months plus 3 months grace period from commencement of development work. The respondent raised demand on account of 'On start of Site Infrastructure Development' on 27.04.2012, therefore, the due date is calculated from this date. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over possession comes out to be 27.10.2014.
29. In the present case, the complainant was offered possession of the subject villa by the respondent on 08.01.2018 after receipt of occupation certificate dated 18.11.2017. 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 dated 07.04.2011 executed between the parties. The counsel for the complainant submitted that the occupation certificate dated 18.11.2017 was granted with a condition that the respondent will obtain the clearance from the competent authority after installing the lift and the lift

certificate was issued by the competent authority on 15.05.2019. It was further contended by the counsel for the complainant that the said offer of possession was invalid as the lift was not operational and therefore the complainant is entitled to delay possession charges till the date of issuance of lift certificate. The complainant sought relief regarding validity of occupation certificate, the complainant should approach the appropriate forum i.e. DTCP, Haryana if he has any grievance w.r.t occupation certificate.

30. **Validity of offer of possession:** At this stage, the authority would express its views regarding the concept of 'valid offer of possession'. It is necessary to clarify this concept because after valid and lawful offer of possession liability of promoter for delayed offer of possession comes to an end. On the other hand, if the possession is not valid and lawful, liability of promoter continues till a valid offer is made and allottee remains entitled to receive interest for the delay caused in handing over valid possession. The authority after detailed consideration of the matter has arrived at the conclusion that a valid offer of possession must have following components:
- i. **Possession must be offered after obtaining occupation certificate-** The subject unit after its completion should have received occupation certificate

from the department concerned certifying that all basic infrastructural facilities have been laid and are operational. Such infrastructural facilities include water supply, sewerage system, storm water drainage, electricity supply, roads and street lighting.

- ii. **The subject unit should be in habitable condition-** The test of habitability is that the allottee should be able to live in the subject unit within 30 days of the offer of possession after carrying out basic cleaning works and getting electricity, water and sewer connections etc from the relevant authorities. In a habitable unit all the common facilities like lifts, stairs, lobbies, etc should be functional or capable of being made functional within 30 days after completing prescribed formalities. The authority is further of the view that minor defects like little gaps in the windows or minor cracks in some of the tiles, or chipping plaster or chipping paint at some places or improper functioning of drawers of kitchen or cupboards etc. are minor defects which do not render unit uninhabitable. Such minor defects can be rectified later at the cost of the developers. The allottees should accept possession of the subject unit with such minor defects under protest. This authority will award suitable relief for

rectification of minor defects after taking over of possession under protest.

However, if the subject unit is not habitable at all because the plastering work is yet to be done, flooring works is yet to be done, common services like lift etc. are non-operational, infrastructural facilities are non-operational then the subject unit shall be deemed as uninhabitable and offer of possession of an uninhabitable unit will not be considered a legally valid offer of possession.

- iii. **Possession should not be accompanied by unreasonable additional demands-** In several cases additional demands are made and sent along with the offer of possession. Such additional demands could be unreasonable which puts heavy burden upon the allottees. An offer accompanied with unreasonable demands beyond the scope of provisions of agreement should be termed an invalid offer of possession. Unreasonable demands itself would make an offer unsustainable in the eyes of law. The authority is of the view that if respondent has raised additional demands, the allottees should accept possession under protest

31. The counsel for the complainant stated that till date he has not taken the possession of the villa as it is incomplete. The



authority appointed a local commission to visit the project site and submit its report w.r.t the status of the villa as well as the project. The local commission submitted its report on 01.02.2021 with the findings as under:

*"All the four villas are physically inspected, and it is submitted that the works in three villas are completed except some cleaning works which are to be completed at the time of handing over the possession. There three villas are in habitable condition. But the fourth villa no. MAR-BL-065 is not complete till date as there are seepage issue and some pending works. The promoter has deployed the labour force in villa no. MAR-BL-065 and trying to complete the balance works like paint, plaster etc. and removing the seepage issues or dampness from the walls of basement and ground floor. Therefore, the villa no. MAR-BL-065 is not in habitable condition due to seepage issues and pending works."*

32. It is interesting to note that the occupation certificate dated 18.11.2017 was granted with a condition that the respondent will obtain the clearance from the competent authority after installing the lift. However, the lift certificate was issued by the competent authority on 15.05.2019. Therefore, in light of the said report and applying above principle on facts of this case, the said villa can be said to habitable when the lift certificate was granted by the competent authority i.e. on 15.05.2019. Therefore, in the interest of natural justice, the delay possession charges shall be granted till 15.05.2019 i.e. the date on which the lift certificate was obtained by the respondent and the villa was made habitable. It is further clarified that the

delay possession charges shall be payable by the promoter to the allottee from the due date of possession i.e. 27.10.2014 till 15.05.2019.

33. 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 i.e. 9.30 % p.a. w.e.f. 27.10.2014 till 15.05.2019 as per proviso of section 18(1) of the Act read with rule 15 of the rules.
34. It has been observed by the authority that as per statement of account dated 10.12.2018 (Annexure R5 of reply filed by the respondent), the respondent has already given compensation amounting to Rs.14,86,961/- to the complainant on account of delay in handing over possession as per clause 12 of the buyer's agreement. Therefore, the amount so paid by the respondent towards compensation for delay shall be adjusted towards the delay possession charges to be paid by the respondent in terms of section 18 of the Act.
35. The counsel for the respondent stressed upon that as the complainant is not coming forward to take possession, the complainant is liable to pay holding charges. With respect to relief regarding holding charges, the hon'ble NCDRC in its

order dated 03.01.2020 in case titled as **Capital Greens Flat Buyer Association and Ors. V. DLF Universal Ltd., Consumer case no. 351 of 2015 held as under:**

*"36. It transpired during the course of arguments that the OP has demanded holding charges and maintenance charges from the allottees. As far as maintenance charges are concerned, the same should be paid by the allottee from the date the possession is offered to him unless he was prevented from taking possession solely on account of the OP insisting upon execution of the Indemnity-cum-Undertaking in the format prescribed by it for the purpose. If maintenance charges for a particular period have been waived by the developer, the allottee shall also be entitled to such a waiver. As far as holding charges are concerned, the developer having received the sale consideration has nothing to lose by holding possession of the allotted flat except that it would be required to maintain the apartment. Therefore, the holding charges will not be payable to the developer. Even in a case where the possession has been delayed on account of the allottee having not paid the entire sale consideration, the developer shall not be entitled to any holding charges though it would be entitled to interest for the period the payment is delayed."*

The said judgment of NCDRC was also upheld by the hon'ble Supreme Court vide its judgement dated 14.12.2020 passed in the civil appeal nos. 3864-3889 of 2020 against the order of NCDRC (supra). Thus, the respondent shall not charge holding charges from the complainant.

36. With respect to the relief of refund of GST amount, the complainant argued that the respondent cannot charge GST reason being the tax which has come into existence after due date of delivery should not be levied being unjustified since the same would not have fallen on the complainant had the same

been delivered within the time stipulated in the buyer's agreement. The relevant para w.r.t taxes and levies of the buyer's agreement is as follows:

***"9(f) Taxes and levies***

*(i) In addition to the Total Consideration, the Allottee(s) shall be responsible for payment of all taxes, levies, assessments, demands or charges including but not limited to service tax, sales tax, VAT levied or leviable in future on the Villa or any part of the Project in proportion to his/her/their/its Super Built-up Area of the Villa..."*

In the present complaint as per clause 9(f) of the buyer's agreement, the complainant/allottee has agreed to pay all applicable taxes, levies, assessments, demands or charges including but not limited to sale tax, VAT, service tax if applicable, levied or leviable now or in future by Government. But this liability shall be confined only up to the deemed date of possession. The delay in delivery of possession is the default on the part of the respondent/promoter and the possession was offered on 08.01.2018 and by that time the GST had become applicable. But it is settled principle of law that a person cannot take the benefit of his own wrong/default. So, the authority is of the opinion that the respondent/promoter was not entitled to charge GST from the complainant/allottee as the liability of GST had not become due up to the deemed date of possession as per the agreements.

37. Hence, the authority hereby passes the following 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. 9.30 % per annum for every month of delay on the amount paid by the complainant from due date of possession i.e. 27.10.2014 till 15.05.2019. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order.
  - ii. However, the respondent has already paid a sum of Rs.14,86,961/- towards delay in handing over possession at the time of offer of possession, therefore, the said amount shall be adjusted towards the amount to be paid by the respondent/promoter as delayed possession charges under section 18 read with rule 15 of the rules.
  - iii. The respondent shall not to charge holding charges from the complainant.
  - iv. The respondent shall not charge GST from the complainant.
  - v. The respondent shall not charge anything from the complainant which is not part of the buyer's agreement.

vi. Interest on the delay payments from the complainant shall be charged at the prescribed rate @ 9.30 % by the promoter which is the same as is being granted to the complainant in case of delay possession charges.

38. Complaint stands disposed of.

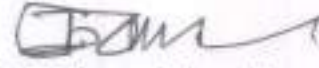
39. File be consigned to registry.

  
(Samir Kumar)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 03.03.2021

  
(Dr. K.K. Khandelwal)

Chairman

Judgement uploaded on 08.06.2021.