

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

Complaint no. : 5728 of 2019
First date of hearing : 23.12.2020
Date of Decision : 31.03.2021

1.Mr. Gaurav Manohar Negi
2.Ms. Ritushka Negi
Both RR/o:-1138, Sector C,
Pocket-1, Vasant Kunj,
New Delhi-110070

Complainants

Versus

Fantasy Buildwell Private Limited
Regd. office: -Room No. 205,
Welcome Plaza S-551, School Block-II,
Shakarapur Delhi-1 10092

Respondent

CORAM

Shri Samir Kumar
Shri Vijay Kumar Goyal

Member

Member

APPEARANCE

Sh. Abhay Jain & Rishab Jain Advocate for the complainants
Sh. Akshay Sharma Advocate for the respondent

ORDER

1. The present complaint dated 29.11.2019 has been filed by the complainants/allottees 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 related details

2. The particulars of project, unit, 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.	Project name and location	Paras Quartier, Sector-2 Gawal Pahari, Gurgaon- 12201
2.	Project area	10.09 acres
3.	Nature of the project	Group housing project
4.	DTCP license no.	74 of 2012 dated 31.07.2012
	License valid up to	30.07.2020
	Licensee	Fantasy Buildwell Private Limited
5.	RERA registered/not registered	Registered
	HARERA registration no.	164 of 2017 dated 29.08.2017



	Validity of registration	28.08.2022
6.	Unit no.	02, 29 th Floor, Tower-Iconic (Page no. 32 of complaint)
7.	Unit measuring	6000 sq. ft. (Page no. 32 of the complaint)
8.	Allotment letter	14.01.2013 (Page 26 of the complaint)
9.	Payment plan	Construction linked payment plan. (Page 62 of complaint)
10.	Total consideration	Rs.6,51,20,000/- (As per payment plan on page no. 62 of the complaint)
11.	Total amount paid by the complainant	Rs.6,31,55,224/- (As per customer statement on page no. 67 of complaint)
12.	Date of execution of apartment buyer's agreement	03.07.2013 (Page no. 29 of the complaint)
13.	Due date of delivery of possession as per of the apartment buyer agreement (As per clause 3.1, 42 months from the date of execution of agreement or date of obtaining all licenses or approvals for commencement of construction whichever is later plus 6 months' grace period)	16.04.2017 Note: - The due date of possession has been calculated from the date of environment clearance (Issue of Consent of establish i.e., 16.10.2013) Note: - Grace period not allowed.
14.	Offer of possession	19.11.2020 (Page no. 4 of the application of occupation



		certificate)
15.	Occupation certificate	22.06.2020
16.	Delay in handing over possession till the offer of possession i.e., 19.11.2020	3 years 7 months 3 days

B. Facts of the complaint

3. That the respondent had purchased the land measuring approximately 10 acres situated at village Gawal Pahari and has obtained license bearing no. 74 of 2012 dated 31st July 2012 from the director general, town and country planning department, government of Haryana for development of a residential group housing colony on the land. The complainants are not informed by the developer about the present state of license whether the licence has been renewed or not.
4. That the complainants paid a total sum of Rs. 6,31,55,224/- (six crore thirty-one lakh fifty-five thousand two hundred and twenty-four) for the apartment which is more than 96% (ninety-six per centum) of the total consideration.
5. That even after a delay of more than two years and ten months, the respondent has failed to offer legal and rightful possession of the apartment.

C. Relief sought by the complainants:

6. The complainants have sought following reliefs:

- (i) A sum of Rs.5,34,188/- (five lakh thirty-four thousand one hundred and eighty-eight) should be paid by the respondent per month for delay of possession, at the rate of 10.15 per centum as per the prevailing MCLR plus 2 per centum, till the rightful legal possession is handed over to the complainants. Further, the respondent is liable to pay a sum of Rs.1,36,61,409/- (one crore thirty-six lakh sixty-one thousand four hundred and nine) towards the delay caused, which has been calculated from 03.07.2017 to 18.11.2019.
 - (ii) Direct the respondent to complete the construction and handover the possession of the apartment to the complainants immediately.
 - (iii) Direct the respondent to complete the construction of common areas infrastructural facilities and amenities like club, park, etc. for the complainants and other buyers of the project.
7. Notice of the complaint was issued to the respondent. The reply has been filed by the respondent on 21.10.2020. 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



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

- i. The complainants are not genuine flat purchasers or consumers as they are investors who purchased the apartment for purpose of selling it in future. When they could not be successful in selling the apartment in question, they have filed the present complaint, though the provisions of the Act are not made to protect the interest of the investors.
- ii. That the complainants did not adhere to payment schedule and most of the payments were made by them after the expiry of due dates of payment which is a violation of clause no. 3.1 of apartment buyer agreement.
- iii. That the present complaint is not maintainable since the possession had to be handed over to the complainants in terms of clause 3.1 and 3.2 of the builder buyer agreement which clearly provides that subject to the complainants complying with all the terms of the apartment buyer agreement and making timely payments of the instalments as and when they fall due the respondent proposes to offer the possession of the apartment within a period of 51 months of the date of execution of the apartment buyer agreement or the date of obtaining all licences or approvals



for commencement of construction, whichever is later, subject to force majeure. Moreover, all the approvals for commencement of the construction work were received towards around the end of the year 2013 and the construction work began only in November 2013. Thus, it is clear that the complaint has been filed in contravention of the provisions of the apartment buyer agreement dealing with the offer of possession and the complaint merits outright dismissal in view of the same.

- iv. That section 19 of RERA Act, 2016 lays down the rights and duties of the allottees and sub-clause (6) of section 19 provides that the allottee shall be responsible to make payments in the manner and as per the time specified in the agreement between the parties. In the recent case it has been admitted by the complainants that they have failed to make the complete payment therefore the complainants are in breach of the Real Estate Regulatory Authority Act, 2016 and the Haryana Real Estate (Regulation and Development) Rules, 2017.
- v. That the Hon'ble Supreme Court of India in the case of *Saradmani Kandappan and Ors. Vs. S. Rajalakshmi and Ors*, decided on 04.07.2011 having citation (2011) 12 SCC 18 in para 33 and 34, while interpreting similar contracts



involving performance of reciprocal promises in respect of immovable properties has interpreted sections 52, 53 and 54 of the Indian Contract Act, 1872, to hold that in case of a contract wherein payments are to be paid by the purchaser in a time bound manner as per the agreed payment plan and he fails to do so then the seller shall not be obligated to perform its reciprocal obligations and the contract shall be voidable at the option of the seller alone and not the purchaser. The said dictum is applicable in the present case as well since not only does the order of performance of reciprocal performances as per the agreement mandate timely payments by the complainants but also since the complainants admitted in the complaint to not having paid the due and payable instalments.

- vi. That the Hon'ble National Consumer Disputes Redressal Commission in the case of *Manas Developers vs. Madhur Arjun Bhabal*, bearing Revision Petition No. 1563 of 2011 decided on 09.03.2015, has held that in cases where the complainants have failed to pay the amounts in accordance with the agreement and are defaulters then the builder cannot be held liable for delayed possession since the builder is not obligated to give possession without getting



the entire payment with interest. It is further held that defaulters should not be rewarded for their wrongs.

- vii. That further, the Hon'ble Supreme Court of India in the case of *Supertech vs. Rajni Goyal*, decided on 23.10.2018, reported as 2018 (14) SCALE 187, has held that consumers cannot be allowed to reap the benefits of their own wrong by not taking possession when the same has been offered by the Builder and the computation of interest also closes on the said date.

"Furthermore, the period of Interest should close on April 2016 when the Full Occupancy Certificate was obtained as per the admission of the Respondent-Purchaser herself in para 40) of the Consumer Complaint, wherein she has admitted that the Appellant-Builder had obtained the Completion Certificate as late as April 2016. The Respondent - Purchaser could not have any further grievance after April 2016 with respect to delay in handing over possession. The Respondent-Purchaser ought not to be allowed to reap the benefits of her own delay in taking possession."(Sic)

- viii. It is further submitted that the complainant does not have any valid or subsisting cause of action to file the present complaint.
9. That the respondent has prayed for the dismissal of the complaint.
10. 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.



11. Delayed payment interest: The respondent has emphasized that there had been delay in payment of the instalment by the complainants and most of the times the complainants made the payments after the expiry of due date of payments. The complainants have categorically stated that they paid Rs. 6,31,224/- i.e., more than 96% of the total sale consideration to the respondent till 30.06.2018. However, the respondent has not denied this fact in the reply. Thus, the onus to prove that the payments were made by complainants after the lapse of due date of payment was on the respondent. The respondent could have easily proved this fact by filing a copy of statement of account of the apartment in question. Moreover, if there was any delay on the part of complainants to make the timely payment of the instalment but the respondent accepted the deposits without claiming any delayed payment interest. The respondent is now estopped from raising this belated stage of filing the reply to the complaint. Above all, the respondent has not filed any iota of material on the record to show that the complainants have in fact made delayed payments. Accordingly, the authority holds that the said contention raised on the behalf of the respondent being against the record is devoid of any merits. The same is accordingly rejected.



E. Jurisdiction of the authority

The application of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observed subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I: Subject matter jurisdiction

12. 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. The complainants have nowhere sought the relief of refund. The complainants have 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.*
13. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the apartment by 16.04.2017



and further provided in agreement that promoter shall be entitled to a grace period of 6 months and 90 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's agreement. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 6 months and 90 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.

F. Findings on the objections raised by the respondent



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

14. The respondent has taken a stand that the complainants are the investors and not consumers and 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 read with rule 28 of the rules. 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 but at the same time preamble cannot be used to defeat the enabling 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. 6,31,55,224 /- to the promoter towards purchase of the 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. 0006000000010557 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 Whether the respondent has violated the provisions of section 19(6) read with section 19(7) of the Act?

15. As per the observations of authority, the total consideration of the apartment is Rs. 6,51,20,000/- (without tax but including IFMSD). The complainants/allottees have paid only Rs. 6,31,55,224/- and sum of Rs. 19,64,776/- is still outstanding which in spite of the respondent's demand letters has not been paid by the complainants/allottees. As per clause 12.1 of apartment buyer's agreement, it is the obligation of allottee to make timely payments for the total sale consideration. Clause 12.1 of apartment buyer's agreement is reproduced as under:

"12. TIMELY PAYMENT IS THE ESSENCE OF THIS AGREEMENT, TERMINATION AND FOREFEITURE

12.1 Timely payments of all amounts as per this agreement, payable by the purchaser(s) neglects, omits, ignore, or fails, for any reason whatsoever, to pay to the seller any of the instalments or other amounts and the charges due and payable by the purchaser(s) under the terms and conditions of this agreement or by respective due dates thereof or if the purchaser(s) in any other fails to perform, comply or observe any of the terms and conditions herein contained within the time stipulated or agreed to, the seller shall be entitled to cancel/terminate this agreement forthwith and forfeited the booking amounts or amounts paid up to the earnest money, along with other dues of non-refundable nature and interest. The Seller is not under any obligation to send reminders for the payments to be made by the Purchaser(s), as per schedule of payments and for the payments to be made as per demands by the seller."



16. Therefore, authority is satisfied that the complainants are in contravention of section 19(6) and (7) of the Act. The relevant provision of the Act has been reproduced below:

19. Rights and duties of allottees:

(6) Every allottee, who has entered into an agreement or sale to take an apartment, plot or building as the case may be, under Section 13, shall be responsible to make necessary payments in the manner and within the time as specified in the said agreement for sale and shall pay at the proper time and place, the share of the registration charges, municipal taxes, water and electricity charges, maintenance charges, ground, rent, and other charges, if any.

(7) The allottee shall be liable to pay interest, at such rate as may be prescribed, for any delay in payment towards any amount or charges to be paid under sub-section (6).

That the Hon'ble High Court of Bombay in the matter titled ***Neelkamal Realtors Suburban Pvt. Ltd. And Anr vs. Union of India*** has already held that RERA strikes the balance between the promoter and allottees, the relevant para of judgement is reproduced herein below:

"In the case of Cellular Operations Association of India and ors. Vs. Telecom Regulatory Authority of India and ors. (Supra), the Supreme Court held that there cannot be any dispute in respect of settled principles governing provisions of Articles 14, 19(1)(g) read with Article 19(6). But a proper balance between the freedom guaranteed and the social control permitted by Article 19(6) must be struck in all cases. We find that RERA strikes balance between rights and obligations of promoter and allottees. It is a beneficial legislation in the larger public interest occupying the field of regulatory nature which was absent in this country so far."



F.III What should be the rate of interest to be paid by the complainants/allottees?

17. It has been contended by the respondent that as per standard apartment buyer's agreement, the complainants/allottees are under statutory obligations to pay the instalments within the time agreed therein and also to bear 18% simple interest on dues. The relevant clause 2.21 of apartment buyer's agreement is reproduced below:



"2.21 the seller and the purchaser(s) hereby agree that 10% (ten percent) of the Basic Sale Price on the Super Area of the Apartment shall constitute the "Earnest Money"

In case the payment of the any instalment as may be specified is delayed, then the Purchaser(s) shall pay interest on the amount due at the rate of 18% (Eighteen percent) per annum compounded at the time of every succeeding instalment or 3 (three) months, whichever is earlier."

18. However, section 19(6) and (7) of the Act states that the allottee shall make necessary payments in the manner and within time as specified in the agreement for sale and to pay interest, at such rate as may be prescribed, for any delay in payments 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.

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 homer 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."

G. Findings on the relief sought by the complainants

It is contented on the behalf of the complainants that:-

"A sum of Rs.5,34,188/- (Five lakh thirty-four thousand one hundred and eighty-eight) should be paid by the respondent per month for delay of possession, at the rate of 10.15 per centum as per the prevailing MCLR plus 2 per centum, till the rightful legal possession is handed over to the complainants. Further, the respondent is liable to pay a sum of Rs.1,36,61,409/- (one crore thirty-six lakh sixty-one thousand four hundred and nine) towards the delay caused, which has been calculated from 3rd July 2017 to 18th November 2019."

19. In the present complaint, the complainants intend to continue with the project and are 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, —

- (a) *In accordance with the terms of the agreement for the sale or, as the case may be, duly completed by the date specified therein; or*

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. Clause 3.1 of the apartment buyer agreement (in short, agreement) provides for handing over of possession and is reproduced below:

"3. POSSESSION

3.1 Time of handing over the possession

"Subject to Clause 10 herein or any other circumstances not anticipated and beyond the reasonable control of the Seller and any restraints/ restrictions from any courts/authorities and subject to the Purchaser(s) 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 having complied with all provisions, formalities, documentation, etc. as prescribed by the Seller, whether under this Agreement or otherwise, from time to time, the Seller proposes to offer to hand over the possession of the Apartment to the Purchaser(s) within a period of 42 (Forty Two) months with an additional grace period of 6 (six) Months from the date of execution of this Agreement or date of obtaining all licenses or approvals for commencement of construction, whichever is later, subject to Force Majeure. The Purchaser(s) agrees and understands that the Seller shall be entitled to a grace period of 90 (ninety) business days, after the expiry of grace period, for offer hand over the possession of the Apartment to the Purchaser. Any application for the occupation certificate in respect of the Project shall be filed in the due course. The Seller shall give Notice of Offer of Possession in writing to the Purchaser(s) with regard to the handing over of possession, where after, within 30 (thirty) days, the purchaser(s) shall clear his outstanding dues and complete documentary formalities and take physical possession of the Apartment. In case, the Purchaser(s) raises any issue with respect to any demand, the same would not entitle the Purchaser(s) for an extension of the time for taking over possession of the Apartment. In the event the Purchaser(s) fails to make all payments and accept and take the possession of the Apartment within 30 (thirty) days of the Notice of Offer of Possession, the Purchaser(s) shall be deemed to be custodian of the Apartment from such due date indicated in the Notice of Offer of Possession and the Apartment shall be held by the Seller solely at the risks, and costs of the Purchaser(s), including but not limited to applicability of the appropriate Holding Charges as defined in Clause 3.3 below



and interest. The obligation of the Seller to offer possession to the Purchaser under this Clause shall be subject to Force Majeure."

21. At the outset it is relevant to comment on the possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions. The complainants have not made any default under any of the provisions of this agreements and complied 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 as it is stated in the clause that the allottee must comply with all the terms and conditions of the agreement and not being in default under any provisions of the agreement and also fulfilment of all 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 delay possession charges at prescribed rate of interest: The complainants are seeking delay possession charges at the rate of 10.15% p.a. plus 2%. However, proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

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

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

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

23. 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 homer 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."

24. 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., 31.03.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

25. 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;"*

26. 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.

27. 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 respondent is in contravention of the section 11(4)(a) of the Act. By virtue of clause 3.1 of the agreement executed between the parties on 03.07.2013, the possession of the subject apartment was to be delivered within 42 months from the date of execution of agreement or date of obtaining all licenses or approvals for commencement



of construction whichever is later plus 6 months' grace period. The due date of possession has been calculated from the date of environment clearance which comes out to be 16.04.2017. 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 of the apartment 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., 16.04.2017 till the handing over of the possession, 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.

H. Directions of the authority

28. 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., 16.04.2017 till the date of offer of possession i.e. 19.11.2020.

- ii. The arrears of delayed possession charges be adjusted in the ledger account of the complainants.
- iii. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
- iv. It is directed to the respondent that he shall not charge any extra amount which is not mentioned in builder buyer agreement.
- v. It is directed that no holding charges shall be payable to the respondent.

29. Complaint stands disposed of.

30. File be consigned to registry.


(Samir Kumar)
Member


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 31.03.2021