BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 3596 of 2020
First date of hearing : 09.12.2020
Date of decision : 22.07.2021

Sunita Verma
R/o: K 7/69, DLF City Phase 2,
Gurugram-122002, Haryana. **Complainant**

Versus

M/s Emaar MGF Land Ltd.
Address: 306-308, 3rd floor, Square One,
C2, District Centre, Saket,
New Delhi -110017. **Respondent**

CORAM:
Dr. K.K. Khandelwal **Chairman**
Shri Vijay Kumar Goyal **Member**

APPEARANCE:
Shri Jagdeep Kumar Advocate for the complainant
Shri J.K. Dang Advocate for the respondent

ORDER

1. The present complaint dated 22.10.2020 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

	HRERA registration valid up to	**31.12.2018**
7.	HRERA extension of registration vide	**01 of 2019 dated 02.08.2019**
	Extension valid up to	**31.12.2019**
8.	Occupation certificate granted on	05.12.2018 [Page 142 of reply]
9.	Provisional allotment letter dated	28.01.2013 [Page 38 of complaint]
10.	Unit no.	GGN-15-0502, 5th floor, tower 15 [Page 53 of complaint]
11.	Unit measuring	1650 sq. ft.
12.	Date of execution of buyer's agreement	08.05.2013 [Page 50 of complaint]
13.	Payment plan	Construction linked payment plan [Page 81 of complaint]
14.	Total consideration as per statement of account dated 18.11.2020 at page 136 of the reply	Rs.1,19,45,706/-
15.	Total amount paid by the complainant as per statement of account dated 18.11.2020 at page 137 of reply	Rs.1,20,44,203/-
16.	Date of start of construction as per statement of account dated 18.11.2020 at page 136 of the reply	14.06.2013
17.	Due date of delivery of possession as per clause 14(a) of the said agreement i.e. 36 months from the date of start of construction (14.06.2013) + grace period of 5 months, for applying and	14.06.2016 **[Note:** Grace period is not included**]**

	obtaining completion certificate/ occupation certificate in respect of the unit and/or the project. [Page 66 of complaint]	
18.	**Date of offer of possession to the complainant**	**12.12.2018** [Page 106 of complaint]
19.	Delay in handing over possession till 12.02.2019 i.e. date of offer of possession (12.12.2018) + 2 months	2 year 7 months 29 days
20.	Unit handover letter	22.02.2019 [Page 190 of reply]
21.	Conveyance deed executed on	01.03.2019 [Page 195 of reply]

B. Facts of the complaint

4. The complainant has made following submissions in the complaint:

   i. That somewhere in the starting of 2012, the respondent through its representatives approached the complainant with an offer to invest and buy a flat in the proposed project of respondent. On 12.08.2012, the complainant had a meeting with respondent where the respondent explained the project details and highlighted the amenities of the project like Joggers Park, Joggers Track, rose garden, 2 swimming pool, amphitheater and many more. Relying on these details, the complainant enquired about the availability of flat on 5th floor in tower 15 which

was a unit consisting area of 1650 sq. ft. It was represented to the complainant that the respondent has already processed the file for all the necessary sanctions and approvals from the appropriate and concerned authorities for the development and completion of said project on time with the promised quality and specification. The respondent had also shown the brochures and advertisement material of the said project to him and assured that the allotment letter and builder buyer agreement for the said project would be issued to him within one week of booking. The complainant, relying upon those assurances and believing them to be true, booked a residential flat bearing no. 0502 on 5th floor in tower – 15 in the said project measuring approximately super area of 1650 sq. ft. Accordingly, he paid Rs. 7,50,000/- as booking amount on 12.08.2012.

ii. That on 28.01.2013, approximately after one year, the respondent issued a provisional allotment letter containing very stringent and biased contractual terms which are illegal, arbitrary, unilateral and discriminatory in nature because every clause was drafted in a one-sided way and a single breach of unilateral terms of provisional allotment letter by complainant, will cost him forfeiture

of 15% of total consideration value of unit. Respondent exceptionally increased the net consideration value of flat by adding EDC, IDC and PLC and when complainant opposed the unfair trade practices of respondent, he was informed that EDC, IDC and PLC are just the government levies, and they are as per the standard rules of government. Further, the delay payment charges will be imposed @ 24% which is standard rule of company and company will also compensate at the rate of Rs. 7.50/- per sq. ft. per month in case of delay in possession of flat by company. Complainant opposed these illegal, arbitrary, unilateral and discriminatory terms of provisional allotment letter but there was no other option left with him because if he stops the further payment of installments then in that case, respondent may forfeit 15% of total consideration value from the total amount paid by them. Thereafter, on 08.05.2013 the buyer's agreement was executed on similar illegal, arbitrary, unilateral and discriminatory terms narrated by respondent in provisional allotment letter.

iii. That as per the clause 14 of the said buyer's agreement dated 08.05.2013, the respondent had agreed and promised to complete the construction of the said flat and

deliver its possession within a period of 36 months with a five (5) months grace period thereon from the date of start of construction. However, the respondent has breached the terms of said buyer's agreement and failed to fulfill its obligations and has not delivered possession of said flat within the agreed time frame of the buyer's agreement. The proposed possession date as per buyer's agreement was due on 14.11.2016.

iv. That from the date of booking 12.08.2012 and till 11.01.2019, the respondent had raised various demands for payment of installments towards sale consideration of the said flat and the complainant had duly paid and satisfied all those demands without any default or delay on his part and had also otherwise fulfilled his part of obligations as agreed in the flat buyer's agreement. The complainant was and had always been ready and willing to fulfill his part of agreement, if any pending.

v. That as per the statement dated 07.10.2020, issued by the respondent, the complainant had already paid Rs.1,16,92,505/- towards total sale consideration as demanded by the respondent from time to time and now nothing is pending to be paid on the part of complainant.

vi. That the possession was offered by respondent through letter "Intimation of Possession" dated 12.12.2018 which was not a valid offer of possession because respondent had offered the possession with stringent condition to pay certain amounts which were never part of agreement. At the time of offer of possession, builder did not adjust the penalty for delay possession. Respondent demanded Rs.1,44,540/- towards two-year advance maintenance charges from complainant which was never agreed under the buyer's agreement and respondent also demanded a lien marked FD of Rs. 3,52,996/- on pretext of future liability against HVAT which are also unfair trade practice. The respondent demanded Rs.3,14,880/- towards e-stamp duty and Rs.50,000/- towards registration charges of above said unit in addition to final demand raised by respondent along with offer of possession. That the respondent had charged IFMS twice and had increased the sale consideration. Respondent gave physical handover of aforesaid property on 22.02.2019.

vii. That after taking possession of flat on 22.02.2019, the complainant also identified some major structural changes which were done by respondent in project in

comparison to features of project narrated to him on 12.08.2012 at the office of respondent. The area of the central park was told 8 acres but in reality, it is very small as compared to 8 acres; respondent-built car parking underneath 'Central Park' and joggers park does not exist whereas the respondent had charged huge amount of PLC for that.

viii. That the respondent has acted in a very deficient, unfair, wrongful, fraudulent manner by not delivering the said flat within the agreed timelines as agreed in the buyer's agreement and otherwise. The cause of action accrued in the favour of the complainant and against the respondent on 12.08.2012 when the said flat was booked by the complainant, and it further arose when respondent failed/neglected to deliver the said flat on proposed delivery date.

C. Relief sought by the complainant

5. The complainant has filed the present compliant for seeking following reliefs (as amended by the complainant vide application dated 29.06.2021):

i. Direct the respondent to pay 18% interest on account of delay in offering possession on amount paid by the

complainant from the date of payment till the date of delivery of possession.

ii. Any other relief/order or direction which this authority deems fit and proper considering the facts and circumstances of the present complaint.

6. On the date of hearing, the authority explained to the respondent/promoter about the contravention as alleged to have been committed in relation to section 11(4)(a) of the Act and to plead guilty or not to plead guilty.

D. Reply by the respondent

7. The respondent has raised certain preliminary objections and has contested the present complaint on the following grounds:

i. That the complainant has filed the present complaint seeking refund of several amounts and interest for alleged delay in delivering possession of the apartment booked by the complainant. It is respectfully submitted that such complaints 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 authority. The present complaint is liable to be dismissed on this ground alone.

ii. That the present complaint is based on an erroneous interpretation of the provisions of the Act as well as an incorrect understanding of the terms and conditions of

the buyer's agreement dated 08.05.2013. That the provisions of the Act are not retrospective in nature. The provisions of the Act cannot undo or modify the terms of an agreement duly executed prior to coming into effect of the Act. The provisions of the Act relied upon by the complainant for seeking interest cannot be called in to aid in derogation and in negation of the provisions of the buyer's agreement. The complainant cannot claim any relief which is not contemplated under the provisions of the buyer's agreement. Assuming, without in manner admitting any delay on the part of the respondent in delivering possession, it is submitted that the interest for the alleged delay demanded by the complainant is beyond the scope of the buyer's agreement. The complainant cannot demand any interest or compensation beyond or contrary to the agreed terms and conditions between the parties.

iii. That the complainant was provisionally allotted apartment no. GGN-15-0502 vide provisional allotment letter dated 28.01.2013. The complainant had opted for a construction linked payment plan. The buyer's agreement was sent to the complainant for execution under cover of letter dated 20.03.2013. Since the complainant failed to

execute the buyer's agreement, reminder dated 22.04.2013 was sent by the respondent. Eventually, the buyer's agreement was executed between the complainant and the respondent on 08.05.2013.

iv. That right from the very beginning, the complainant had opted for a construction linked payment plan in which the first three instalments were time bound. The respondent issued notices for payment and reminders as per the payment plan. The statement of account dated 18.11.2020 reflects the payments made by the complainant as well as the delayed payment interest.

v. That as per the terms and conditions of the buyer's agreement, the complainant was under a contractual obligation to make timely payment of all amounts payable under the buyer's agreement, on or before the due dates of payment failing which the respondent is entitled to levy delayed payment charges in accordance with clause 1.2(c) read with clauses 12 and 13 of the buyer's agreement.

vi. That the respondent registered the project under the provisions of the Act. The project had been initially registered till 31.12.2018. The respondent completed construction of the tower in which the apartment in

question is situated and applied for the occupation certificate in respect thereon on 13.04.2018. The occupation certificate was issued by the competent authority on 05.12.2018.

vii. That upon receipt of the occupation certificate, the respondent offered the letter of offer of possession of the apartment in question to the complainant vide letter dated 12.12.2018. The complainant was called upon to remit balance amount as per the attached statement and also to complete the necessary formalities and documentation so as to enable the respondent to hand over possession of the apartment to the complainant. It is pertinent to mention herein that compensation amounting to Rs.3,08,799/- was also credited to the complainant although in accordance with clause 16(c) of the buyer's agreement, the complainant, being in default of the buyer's agreement is not entitled to any compensation from the respondent. However, instead of clearing their outstanding dues and taking possession of the apartment, the complainant addressed frivolous correspondence to the respondent.

viii. That eventually, the complainant took possession of the apartment in question on 22.02.2019. Thereafter

conveyance deed has also been registered in favour of the complainant on 01.03.2019. At the time of taking possession of the apartment, the complainant has certified herself to be fully satisfied with regard to the measurements, location, direction, developments et cetera of the unit and also admitted and acknowledged that the complainant does not have any claim of any nature whatsoever against the respondent and that upon acceptance of possession, the liabilities and obligations of the respondent as enumerated in the allotment letter/ buyer's agreement, stand fully satisfied. Thus, the complainant is estopped from filing the present complaint. The complaint is not maintainable after execution and registration of the conveyance deed in favour of the complainant.

ix. That clause 14 of the buyer's agreement provides that subject to force majeure conditions and delay caused on account of reasons beyond the control of the respondent, and subject to the allottee not being in default of any of the terms and conditions of the same, the respondent expects to deliver possession of the apartment within a period of 36 months plus five months grace period, from the date of start of construction of the project. In the case

of delay by the allottee in making payment or delay on account of reasons beyond the control of the respondent, the time for delivery of possession stands extended automatically. In the present case, the complainant is defaulters who have failed to make timely payment of sale consideration as per the payment plan and is thus in breach of the buyer's agreement. The time period for delivery of possession automatically stands extended in the case of the complainant. On account of delay and defaults by the complainant, the due date for delivery of possession stands extended in accordance with clause 14(b)(iv) of the buyer's agreement, till payment of all outstanding amounts to the satisfaction of the respondent.

x. That in so far as payment of compensation/interest to the complainant is concerned, it is submitted that the complainant, being in default, is not entitled to any compensation in terms of clause 16(c) of the buyer's agreement. furthermore, in terms of clause 16(d) of the buyer's agreement, no compensation is payable due to delay or non-receipt of the occupation certificate, completion certificate and/or any other permission/ sanction from the competent authority.

xi. That the respondent had completed construction of the apartment/tower by April 2018 and had applied for issuance of the occupation certificate on 13.04.2018. The occupation certificate was issued by the competent authority on 05.12.2018. It is respectfully submitted that after submission of the application for issuance of the occupation certificate, the respondent cannot be held liable in any manner for the time taken by the competent authority to process the application and issue the occupation certificate. Thus, the said period taken by the competent authority in issuing the occupation certificate as well as time taken by Government/statutory authorities in according approvals, permissions etc., necessarily have to be excluded while computing the time period for delivery of possession.

xii. That the respondent denied that IFMS amount has been charged twice from the complainant. It is wrong and denied that the sale consideration has been increased. The sale consideration amount does not include applicable taxes, stamp duty, registration charges and interest on delayed payments. In accordance with clause 21 of the buyer's agreement, the complainant is bound to pay maintenance charges, including advance

maintenance charges for a period of one year or as may be decided by the respondent/the maintenance agency at its discretion. Insofar as HVAT is concerned, it is wrong and denied that any direction is liable to be given to the respondent is not entitled to demand the lien marked over the fixed deposit furnished by the complainant towards VAT liability which is payable by the complainant under the buyer's agreement. Once the VAT liability it is finally determined, after payment towards the VAT liability, any excess amount shall be duly refunded to the complainant and any shortfall shall be accordingly demanded from the complainant, as the case may be. That the complainant is liable to pay all taxes, levies, fees that are applicable upon the apartment booked by the complainant as per clause 3 of the buyer's agreement. It is absolutely wrong and emphatically denied that the respondent has adopted any illegal, arbitrary, unilateral or unfair trade practice. On the contrary, all the demands raised by the respondent are strictly in accordance with the buyer's agreement.

xiii. That several allottees, including the complainant has defaulted in timely remittance of payment of installments which was an essential, crucial and an indispensable

requirement for conceptualization and development of the said project. Furthermore, when the proposed allottees default in their payments as per schedule agreed upon, the failure has a cascading effect on the operations and the cost for proper execution of the project increases exponentially whereas enormous business losses befall upon the respondent. The respondent, despite default of several allottees, has diligently and earnestly pursued the development of the project in question and has constructed the project in question as expeditiously as possible. Therefore, there is no default or lapse on the part of the respondent and there in no equity in favour of the complainant. It is evident from the entire sequence of events, that no illegality can be attributed to the respondent.

xiv. Based on the above submissions, the respondent asserted that the present complaint deserves to be dismissed at the very threshold.

8. 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.

E. Jurisdiction of the authority

9. The preliminary objections raised by the respondent regarding jurisdiction of the authority to entertain the present complaint stands rejected. The authority observed that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I Territorial jurisdiction

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

E.II Subject-matter jurisdiction

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

F. Findings on the objections raised by the respondent

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

12. The respondent contended that authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the buyer's agreement executed between the parties 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 respondent further submitted that the provisions of the Act are not retrospective in nature and the provisions of the Act cannot undo or modify the terms of buyer's agreement duly executed prior to coming into effect of the Act.

13. 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."*

14. 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 <u>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</u>. 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."

15. 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 buyer's agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of the Act and are not unreasonable or exorbitant in nature.

F.II Objection regarding exclusion of time taken by the competent authority in processing the application and issuance of occupation certificate

16. As far as contention of the respondent with respect to the exclusion of time taken by the competent authority in processing the application and issuance of occupation certificate is concerned, the authority observed that the respondent had applied for grant of occupation certificate on 13.04.2018 and thereafter vide memo no. ZP-835-

AD(RA)/2018/33193 dated 05.12.2018, the occupation certificate has been granted by the competent authority under the prevailing law. The authority cannot be a silent spectator to the deficiency in the application submitted by the promoter for issuance of occupancy certificate. It is evident from the occupation certificate dated 05.12.2018 that an incomplete application for grant of OC was applied on 13.04.2018 as fire NOC from the competent authority was granted only on 21.11.2018 which is subsequent to the filing of application for occupation certificate. Also, the Chief Engineer-I, HSVP, Panchkula has submitted his requisite report in respect of the said project on 11.10.2018. The District Town Planner, Gurugram and Senior Town Planner, Gurugram has submitted requisite report about this project on 31.10.2018 and 02.11.2018 respectively. As such, the application submitted on 13.04.2018 was incomplete and an incomplete application is no application in the eyes of law.

17. The application for issuance of occupancy certificate shall be moved in the prescribed forms and accompanied by the documents mentioned in sub-code 4.10.1 of the Haryana Building Code, 2017. As per sub-code 4.10.4 of the said Code, after receipt of application for grant of occupation certificate, the competent authority shall communicate in writing within

60 days, its decision for grant/ refusal of such permission for occupation of the building in Form BR-VII. In the present case, the respondent has completed its application for occupation certificate only on 21.11.2018 and consequently the concerned authority has granted occupation certificate on 05.12.2018. Therefore, in view of the deficiency in the said application dated 13.04.2018 and aforesaid reasons, no delay in granting occupation certificate can be attributed to the concerned statutory authority.

F.III Whether signing of unit hand over letter or indemnity-cum-undertaking at the time of possession extinguishes the right of the allottee to claim delay possession charges.

18. The respondent is contending that at the time of taking possession of the apartment vide unit hand over letter dated 22.02.2019, the complainant had certified himself to be fully satisfied with regard to the measurements, location, direction, developments et cetera of the unit and also admitted and acknowledge that he does not have any claim of any nature whatsoever against the respondent and that upon acceptance of possession, the liabilities and obligations of the respondent as enumerated in the allotment letter/buyer's agreement, stand fully satisfied. The relevant para of the unit handover letter relied upon reads as under:

> *"The Allottee, hereby, certifies that he / she has taken over the peaceful and vacant physical possession of the aforesaid Unit*

after fully satisfying himself / herself with regard to its measurements, location, dimension and development etc. and hereafter the Allottee has no claim of any nature whatsoever against the Company with regard to the size, dimension, area, location and legal status of the aforesaid Home.

Upon acceptance of possession, the liabilities and obligations of the Company as enumerated in the allotment letter/Agreement executed in favour of the Allottee stand satisfied."

19. At times, the allottee is asked to give the indemnity-cum-undertaking before taking possession. The allottee has waited for long for his cherished dream home and now when it is ready for possession, he either has to sign the indemnity-cum-undertaking and take possession or to keep struggling with the promoter if indemnity-cum-undertaking is not signed by him. Such an undertaking/ indemnity bond given by a person thereby giving up his valuable rights must be shown to have been executed in a free atmosphere and should not give rise to any suspicion. If a slightest of doubt arises in the mind of the adjudicator that such an agreement was not executed in an atmosphere free of doubts and suspicions, the same would be deemed to be against public policy and would also amount to unfair trade practices. No reliance can be placed on any such indemnity-cum-undertaking and the same is liable to be discarded and ignored in its totality. Therefore, this authority does not place reliance on such indemnity-cum-undertaking. To fortify this view, the authority place reliance on the NCDRC

order dated 03.01.2020 in case titled as **Capital Greens Flat Buyer Association and Ors. Vs. DLF Universal Ltd., Consumer case no. 351 of 2015**, wherein it was held that the execution of indemnity-cum-undertaking would defeat the provisions of sections 23 and 28 of the Indian Contract Act, 1872 and therefore would be against public policy, besides being an unfair trade practice. The relevant portion of the said judgment is reproduced herein below.

> *"Indemnity-cum-undertaking*
>
> *30. The developer, while offering possession of the allotted flats insisted upon execution of the indemnity-cum-undertaking before it would give possession of the allotted flats to the concerned allottee.*
>
> *Clause 13 of the said indemnity-cum-undertaking required the allottee to confirm and acknowledge that by accepting the offer of possession, he would have no further demands/claims against the company of any nature, whatsoever. It is an admitted position that the execution of the undertaking in the format prescribed by the developer was a pre- requisite condition, for the delivery of the possession. The opposite party, in my opinion, could not have insisted upon clause 13 of the Indemnity-cum-undertaking. The obvious purpose behind such an undertaking was to deter the allottee from making any claim against the developer, including the claim on account of the delay in delivery of possession and the claim on account of any latent defect which the allottee may find in the apartment. The execution of such an undertaking would defeat the provisions of Section 23 and 28 of the Indian Contract Act, 1872 and therefore would be against public policy, besides being an unfair trade practice. Any delay solely on account of the allottee not executing such an undertaking would be attributable to the developer and would entitle the allottee to compensation for the period the possession is delayed solely on account of his having not executed the said undertaking-cum-indemnity."*

20. The said judgment of NCDRC was also upheld by the Hon'ble Supreme Court vide its judgement dated 14.12.2020 passed in civil appeal nos. 3864-3889 of 2020 against the order of NCDRC.

21. It is noteworthy that section 18 of the Act stipulates for the statutory right of the allottee against the obligation of the promoter to deliver the possession within stipulated timeframe. Therefore, the liability of the promoter continues even after the execution of indemnity-cum-undertaking at the time of possession. Further, the reliance placed by the respondent counsel on the language of the handover letter that the allottee had waived off his right by signing the said unit handover letter is superficial. In this context, it is appropriate to refer case titled as **Mr. Beatty Tony Vs. Prestige Estate Projects Pvt, Ltd. (Revision petition no.3135 of 2014 dated 18.11.2014**), wherein the Hon'ble NCDRC while rejecting the arguments of the promoter that the possession has since been accepted without protest vide letter dated 23.12.2011 and builder stands discharged of its liabilities under agreement, the allottee cannot be allowed to claim interest at a later date on account of delay in handing over of the possession of the apartment to him, held as under:

"The learned counsel for the opposite parties submits that the complainant accepted possession of the apartment on 23/24.12.2011 without any protest and therefore cannot be permitted to claim interest at a later date on account of the alleged delay in handing over the possession of the apartment to him. We, however, find no merit in the contention. A perusal of the letter dated 23.12.2011, issued by the opposite parties to the complainant would show that the opposite parties unilaterally stated in the said letter that they had discharged all their obligations under the agreement. Even if we assume on the basis of the said printed statement that having accepted possession, the complainant cannot claim that the opposite parties had not discharged all their obligations under the agreement, the said discharge in our opinion would not extend to payment of interest for the delay period, though it would cover handing over of possession of the apartment in terms of the agreement between the parties. In fact, the case of the complainant, as articulated by his counsel is that the complainant had no option but to accept the possession on the terms contained in the letter dated 23.12.2011, since any protest by him or refusal to accept possession would have further delayed the receiving of the possession despite payment having been already made to the opposite parties except to the extent of Rs. 8,86,736/-. Therefore, in our view the aforesaid letter dated 23.12.2011 does not preclude the complainant from exercising his right to claim compensation for the deficiency on the part of the opposite parties in rendering services to him by delaying possession of the apartment, without any justification condonable under the agreement between the parties."

22. The said view was later reaffirmed by the Hon'ble NCDRC in case titled as **Vivek Maheshwari Vs. Emaar MGF Land Ltd. (Consumer case no. 1039 of 2016 dated 26.04.2019)** wherein it was observed as under:

"7. It would thus be seen that the complainants while taking possession in terms of the above referred printed handover letter of the OP, can, at best, be said to have discharged the OP of its liabilities and obligations as enumerated in the agreement. However, this hand over letter, in my opinion, does not come in the way of the complainants seeking compensation from this Commission under section 14(1)(d) of the Consumer

Protection Act for the delay in delivery of possession. The said delay amounting to a deficiency in the services offered by the OP to the complainants. The right to seek compensation for the deficiency in the service was never given up by the complainants. Moreover, the Consumer Complaint was also pending before this Commission at the time the unit was handed over to the complainants. Therefore, the complainants, in my view, cannot be said to have relinquished their legal right to claim compensation from the OP merely because the basis of the unit has been taken by them in terms of printed hand over letter and the Sale Deed has also been got executed by them in their favour."

23. Therefore, the authority is of the view that the aforesaid unit handover letter dated 22.02.2019 does not preclude the complainant from exercising his right to claim delay possession charges as per the provisions of the Act.

F.IV Whether the execution of the conveyance deed extinguishes the right of the allottee to claim delay possession charges?

24. The respondent submitted that the complainant had executed a conveyance deed dated 01.03.2019 and therefore, the transaction between the complainant and the respondent has been concluded and no right or liability can be asserted by respondent or the complainant against the other. Therefore, the complainant is estopped from claiming any interest in the facts and circumstances of the case. The present complaint is nothing but a gross misuse of process of law.

25. It is important to look at the definition of the term 'deed' itself in order to understand the extent of the relationship between an allottee and promoter. A deed is a written document or an

instrument that is sealed, signed and delivered by all the parties to the contract (buyer and seller). It is a contractual document that includes legally valid terms and is enforceable in a court of law. It is mandatory that a deed should be in writing, and both the parties involved must sign the document. Thus, a conveyance deed is essentially one wherein the seller transfers all rights to legally own, keep and enjoy a particular asset, immovable or movable. In this case, the asset under consideration is immovable property. On signing a conveyance deed, the original owner transfers all legal rights over the property in question to the buyer, against a valid consideration (usually monetary). Therefore, a 'conveyance deed' or 'sale deed' implies that the seller signs a document stating that all authority and ownership of the property in question has been transferred to the buyer.

26. From the above, it is clear that on execution of a sale/ conveyance deed, only the title and interests in the said immovable property (herein the allotted unit) is transferred. However, the conveyance deed does not mark an end to the liabilities of a promoter since various sections of the Act provide for continuing liability and obligations of a promoter who may not under the garb of such contentions be able to

avoid its responsibility. The relevant sections are reproduced hereunder:

*"**11. Functions and duties of promoter***

(1) XXX
(2) XXX
(3) XXX
(4) The promoter shall—

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

Provided that the responsibility of the promoter, with respect to the structural defect or any other defect for such period as is referred to in sub-section (3) of section 14, shall continue even after the conveyance deed of all the apartments, plots or buildings, as the case may be, to the allottees are executed.

(b) XXX

(c) XXX

(d) be responsible for providing and maintaining the essential services, on reasonable charges, till the taking over of the maintenance of the project by the association of the allottees;"

(emphasis supplied)

*"**14. Adherence to sanctioned plans and project specifications by the promoter-***

(1) XXX
(2) XXX

(3) In case any structural defect or any other defect in workmanship, quality or provision of services or any other obligations of the promoter as per the agreement for sale

relating to such development is brought to the notice of the promoter within a period of five years by the allottee from the date of handing over possession, it shall be the duty of the promoter to rectify such defects without further charge, within thirty days, and in the event of promoter's failure to rectify such defects within such time, the aggrieved allottees shall be entitled to receive appropriate compensation in the manner as provided under this Act....." *(emphasis supplied)*

27. This view is affirmed by the Hon'ble NCDRC in case titled as **Vivek Maheshwari Vs. Emaar MGF Land Ltd. (Consumer case no. 1039 of 2016 dated 26.04.2019**) wherein it was observed as under:

> *"7. It would thus be seen that the complainants while taking possession in terms of the above referred printed handover letter of the OP, can, at best, be said to have discharged the OP of its liabilities and obligations as enumerated in the agreement. However, this hand over letter, in my opinion, does not come in the way of the complainants seeking compensation from this Commission under section 14(1)(d) of the Consumer Protection Act for the delay in delivery of possession. The said delay amounting to a deficiency in the services offered by the OP to the complainants. The right to seek compensation for the deficiency in the service was never given up by the complainants. Moreover, the Consumer Complaint was also pending before this Commission at the time the unit was handed over to the complainants. Therefore, the complainants, in my view, cannot be said to have relinquished their legal right to claim compensation from the OP merely because the basis of the unit has been taken by them in terms of printed hand over letter and the Sale Deed has also been got executed by them in their favour.*
>
> *8. ... The relationship of consumer and service provider does not come to an end on execution of the Sale Deed in favour of the complainants....."* *(emphasis supplied)*

28. From above, it can be said that taking over the possession and thereafter execution of the conveyance deed can best be

termed as respondent having discharged its liabilities as per the buyer's agreement and upon taking possession, and/or executing conveyance deed, the complainant never gave up his statutory right to seek delayed possession charges as per the provisions of the said Act. Also, the same view has been upheld by the Hon'ble Supreme Court in case titled as **Wg. Cdr. Arifur Rahman Khan and Aleya Sultana and Ors. Vs. DLF Southern Homes Pvt. Ltd. (now Known as BEGUR OMR Homes Pvt. Ltd.) and Ors. (Civil appeal no. 6239 of 2019) dated 24.08.2020**, the relevant paras are reproduced herein below:

> *"34 The developer has not disputed these communications. Though these are four communications issued by the developer, the appellants submitted that they are not isolated aberrations but fit into a pattern. The developer does not state that it was willing to offer the flat purchasers possession of their flats and the right to execute conveyance of the flats while reserving their claim for compensation for delay. On the contrary, the tenor of the communications indicates that while executing the Deeds of Conveyance, the flat buyers were informed that no form of protest or reservation would be acceptable. The flat buyers were essentially presented with an unfair choice of either retaining their right to pursue their claims (in which event they would not get possession or title in the meantime) or to forsake the claims in order to perfect their title to the flats for which they had paid valuable consideration. In this backdrop, the simple question which we need to address is whether a flat buyer who seeks to espouse a claim against the developer for delayed possession can as a consequence of doing so be compelled to defer the right to obtain a conveyance to perfect their title. It would, in our view, be manifestly unreasonable to expect that in order to pursue a claim for compensation*

for delayed handing over of possession, the purchaser must indefinitely defer obtaining a conveyance of the premises purchased or, if they seek to obtain a Deed of Conveyance to forsake the right to claim compensation. This basically is a position which the NCDRC has espoused. We cannot countenance that view.

35. The flat purchasers invested hard earned money. It is only reasonable to presume that the next logical step is for the purchaser to perfect the title to the premises which have been allotted under the terms of the ABA. But the submission of the developer is that the purchaser forsakes the remedy before the consumer forum by seeking a Deed of Conveyance. To accept such a construction would lead to an absurd consequence of requiring the purchaser either to abandon a just claim as a condition for obtaining the conveyance or to indefinitely delay the execution of the Deed of Conveyance pending protracted consumer litigation."

29. It is observed that all the agreements/ documents signed by the allottee reveals stark incongruities between the remedies available to both the parties. In most of the cases these documents and contracts are ex-facie one sided, unfair and unreasonable whether the plea has been taken by the allottee while filing its complaint that the documents were signed under duress or not. The right of the allottee to claim delayed possession charges shall not be abrogated simply for the said reason.

30. The allottees have invested their hard-earned money which there is no doubt that the promoter has been enjoying benefits of and the next step is to get their title perfected by executing a conveyance deed which is the statutory right of the allottee. Also, the obligation of the developer – promoter does not end

with the execution of a conveyance deed. The essence and purpose of the Act was to curb the menace created by the developer/promoter and safeguard the interests of the allottees by protecting them from being exploited by the dominant position of the developer which he thrusts on the innocent allottees. Therefore, in furtherance to the Hon'ble Apex Court judgement and the law laid down in the **Wg. Cdr. Arifur Rahman (supra)**, this authority holds that even after execution of the conveyance deed, the complainant cannot be precluded from his right to seek delay possession charges from the respondent-promoter.

G. Findings on the reliefs sought by the complainant

G.I Delay possession charges

31. **Relief sought by the complainant**: Direct the respondent to pay 18% interest on account of delay in offering possession on amount paid by the complainant from the date of payment till the date of delivery of possession.

32. In the present complaint, the complainant intends to continue with the project and is seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under.

"Section 18: - Return of amount and compensation

18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building, —

.....

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."

33. Clause 14(a) of the buyer's agreement provides for time period for handing over of possession and is reproduced below:

"**14. POSSESSION**

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

Subject to terms of this clause and barring force majeure conditions, and subject to the Allottee having complied with all the terms and conditions of this Agreement, and not being in default under any of the provisions of this Agreement and compliance with all provisions, formalities, documentation etc., as prescribed by the Company. The Company proposes to hand over the possession of the Unit within 36 (Thirty Six) months from the date of start of construction., subject to timely compliance of the provisions of the Agreement by the Allottee. The Allottee agrees and understands that the Company shall be entitled to a grace period of 5 (five) months, for applying and obtaining the completion certificate/occupation certificate in respect of the Unit and/or the Project."

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

heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment time period for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject 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.

35. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within 36 (thirty-six) months from the date of start of construction and further provided in agreement that promoter shall be entitled to a grace period of 5 months for applying and obtaining completion certificate/occupation certificate in respect of said unit. The date of start of construction is 14.06.2013 as per statement of account dated 18.11.2020. The period of 36 months expired on 14.06.2016. As a matter of fact, the promoter has not applied to the concerned authority for

obtaining completion certificate/ 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 5 months cannot be allowed to the promoter at this stage.

36. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges at 18%. 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.*

37. The legislature in its wisdom in the subordinate legislation under the rule 15 of the rules has determined the prescribed rate of interest. The rate of interest so determined by the

legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.

38. Taking the case from another angle, the complainant-allottee was entitled to the delayed possession charges/interest only at the rate of Rs.7.50/- per sq. ft. per month as per relevant clauses 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 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 authority 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 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.

39. 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., 22.07.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

40. 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;"

41. Therefore, interest on the delay payments from the complainant 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 complainant in case of delayed possession charges.

42. On consideration of the documents available on record and submissions made by the parties regarding contravention as per provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 14(a) of the buyer's agreement executed between the parties on 08.05.2013, possession of the said unit was to be delivered within a period of 36 months from the date of start of construction i.e. 14.06.2013. 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 14.06.2016. In the present case, the complainant was offered possession by the respondent on 12.12.2018. Subsequently, the complainant had taken possession of the said unit vide unit handover letter dated 22.02.2019 and thereafter conveyance deed was executed between the parties on 01.03.2019. 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 08.05.2013 executed between the parties.

43. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 05.12.2018. However, the respondent offered the possession of the unit in question to the complainant only on 12.12.2018, so it can be said that the complainant came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, he should be given 2 months' time from the date of offer of possession. These 2 months' of reasonable time is being given to the complainant keeping in mind that even after intimation of possession practically he has to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e. 14.06.2016 till the expiry of 2 months from the

date of offer of possession (12.12.2018) which comes out to be 12.02.2019.

44. 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 @ 9.30 % p.a. w.e.f. 14.06.2016 till 12.02.2019 as per provisions of section 18(1) of the Act read with rule 15 of the Rules.

45. Also, the amount of Rs.3,08,799/- (as per statement of account dated 18.11.2020) so paid by the respondent to the complainant towards compensation for delay in handing over possession shall be adjusted towards the delay possession charges to be paid by the respondent in terms of proviso to section 18(1) of the Act.

H. Directions of the authority

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

i. The respondent is directed to pay the interest at the prescribed rate i.e. 9.30 % per annum for every month of delay on the amount paid by the complainant from due

date of possession i.e. 14.06.2016 till 12.02.2019 i.e. expiry of 2 months from the date of offer of possession (12.12.2018). The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order as per rule 16(2) of the rules.

ii. Also, the amount of Rs.3,08,799/- so paid by the respondent to the complainant towards compensation for delay in handing over possession shall be adjusted towards the delay possession charges to be paid by the respondent in terms of proviso to section 18(1) of the Act.

iii. The respondent shall not charge anything from the complainant which is not the part of the buyer's agreement. The respondent is not entitled to claim holding charges from the complainant/allottee at any point of time even after being part of the builder buyer's agreement as per law settled by hon'ble Supreme Court in civil appeal nos. 3864-3899/2020 decided on 14.12.2020.

47. Complaint stands disposed of.

48. File be consigned to registry.

(Vijay Kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 22.07.2021

Judgement uploaded on 14.09.2021.