BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 2136 of 2021
First date of hearing : 13.05.2021
Date of decision : 29.07.2021

1. Sanjay Kumar Lakra
2. Tejaswini Lakra
Both RR/o: L-289, Vijay Rattan Vihar,
Sector 15, Part II, Gurugram,
Haryana122001.

Complainants

Versus

M/s Emaar MGF Land Ltd.
Address: Emaar Business Park,
MG Road, Sikanderpur Chowk, Sector-28
Gurugram, Haryana -122002.

Respondent

CORAM:
Shri Samir Kumar — **Member**
Shri Vijay Kumar Goyal — **Member**

APPEARANCE:
Shri Sanjeev Dhingra — Advocate for the complainants
Shri J.K. Dang — Advocate for the respondent

ORDER

1. The present complaint dated 16.04.2021 has been filed by the complainants/allottees in Form CRA under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is

inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions to the allottee as per the agreement for sale executed inter se them.

2. Since, the buyer's agreement has been executed on 10.09.2010 i.e. prior to the commencement of the Act ibid, therefore, the penal proceedings cannot be initiated retrospectively. Hence, the authority has decided to treat the present complaint as an application for non-compliance of statutory obligation on part of the promoter/respondent in terms of section 34(f) of the Act ibid.

A. Project and unit related details

3. The particulars of the project, the details of 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	Palm Hills, Sector 77, Gurugram.
2.	Project area	29.34 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no. and validity status	a) 56 of 2009 dated 31.08.2009 (For 24.4 acres) Valid/renewed up to 30.08.2024 b) 62 of 2013 dated 05.08.2013 (For 4.87 acres) Valid/renewed up to 04.08.2019

5.	Name of licensee	Robin Software Pvt. Ltd. and another C/o Emaar MGF Land Ltd.
6.	HRERA registered/ not registered	Registered vide no. 256 of 2017 dated 03.10.2017 for 45425.87 sq. mtrs.
7.	HRERA registration valid up to	02.10.2022
8.	Occupation certificate received on	24.12.2019 [Page 127 of reply]
9.	Provisional allotment letter dated	05.04.2010 [Page 14 of complaint]
10.	Unit no.	PH4-68-0602, 6th floor, building no. 68 [Page 20 of complaint]
11.	Unit measuring	1950 sq. ft.
12.	Date of execution of buyer's agreement	10.09.2010 [Page 18 of complaint]
13.	Payment plan	Construction linked payment plan [Page 48 of complaint]
14.	Total consideration as per statement of account dated 26.04.2021 at page 68 of reply	Rs.80,31,077/-
15.	Total amount paid by the complainants as per statement of account dated 26.04.2021 at page 69 of reply	Rs.80,59,204/-
16.	Date of start of construction as per statement of account dated 26.04.2021 at page 68 of reply	25.02.2011

17.	Due date of delivery of possession as per clause 11(a) of the said agreement i.e. 33 months from the date of start of construction plus grace period of 3 months for applying and obtaining the CC/OC in respect of the unit and/or the project. [Page 31 of complaint]	25.11.2013 **[Note:** Grace period is not included]
18.	Date of offer of possession to the complainants	30.12.2019 [Page 140 of reply]
19.	Delay in handing over possession till 01.03.2020 i.e. date of offer of possession (30.12.2019) + 2 months	6 years 3 months 5 days
20.	Unit handover letter dated	02.07.2020 [Page 145 of reply]

B. Facts of the complaint

4. The complainants have made following submissions in the complaint:

i. That on 18.03.2010, M/s Grand Infrastructure Private Limited (original allottee) was approached by the respondent in relation of booking of flat/unit bearing no. PH4-68-0602 in the said project. On 05.04.2010, provisional allotment letter was issued by the respondent in respect of the said unit. The said flat was transferred in the name of complainant no.1 and his wife (Mrs. Sohney Lakra) and in respect of that respondent issued letter dated 05.06.2010.

ii. That on 10.09.2010, complainant no.1 and his wife entered into a buyer's agreement with the respondent and as per Annexure-3 of said agreement dated 10.09.2010 the total sale consideration price was Rs. 76,06,500/- including PLC and other charges. As per clause 11(a) of the said agreement, respondent was liable to handover the possession of the said unit within 33 months from the date of start of construction i.e. 25.02.2011.

iii. That present complaint before this hon'ble authority arises out of the consistent and persistent non-compliance of the respondent herein with regard to the deadlines as prescribed under the said buyer's agreement executed between the parties.

iv. That on 25.05.2016, after the death of Mrs. Sohney Lakra, the booking was transferred in the name of complainants. The daughter of Mr. Sanjay Kumar Lakra and Mrs. Sohney Lakra i.e. complainant no. 2 name was added by the respondent and in respect of that respondent issued letter dated 25.05.2016 to complainants.

v. That on 30.12.2019, after 5 years, the respondents issued the letter of offer of possession in respect of the said unit to complainants. Till 30.06.2020, the total amount of Rs. 81,31,080/- was paid by the complainants to the

respondent in view of the installments towards the payment of flat as and when the demand letter was raised by the respondent herein.

vi. That on 02.07.2020, the respondent handed over the actual physical possession of the unit to complainants and in respect of that on the same day complainants had sent an email to respondent in which it was clearly mentioned that complainants are taking the possession of flat under protest. The complainant no. 1 Mr. Sanjay Lakra is working in Indian Army and due to his job, it was not allowed to him to meet with his daughter and old age mother in Covid-19 situation. In respect of that complainants decided to take possession of flat for her daughter and old age mother. Courts were also not functioning, and it was a complete uncertainty about future. So, no option was left except to take the physical possession of above said flat. The acts of the respondent herein have caused severe harassment both physically and mentally and that respondent has duped the hard-earned money of the complainants.

C. Relief sought by the complainants

5. The complainants have filed the present compliant for seeking following reliefs:

i. Direct the respondents to pay for delay in offer of possession by paying interest as prescribed under the Act read with the rules on the entire deposited amount which has been deposited against the property in question so booked by the complainants.

ii. Any other relief which this hon'ble authority deems fit and proper.

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 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 complainants had filed the present complaint seeking payment of interest on account of the alleged delay in delivering possession of the apartment booked by them. The complaints pertaining to refund, compensation and interest 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. Moreover, it is respectfully submitted that the adjudicating officer derives his jurisdiction from the

central act which cannot be negated by the rules made thereunder.

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 10.09.2010. 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. It is further submitted that merely because the Act applies to ongoing projects which are registered with the authority, the Act cannot be said to be operating retrospectively. The provisions of the Act relied upon by the complainants for seeking interest cannot be called in to aid in derogation and ignorance of the provisions of the buyer's agreement. The interest is compensatory in nature and cannot be granted in derogation and ignorance of the provisions of the buyer's agreement.

iii. That the complainants are not an "allottee" but an investor who have booked the apartment in question as a speculative investment in order to earn rental income/profit from its resale. The apartment in question has been booked by the complainants as a speculative

investment and not for the purpose of self-use as a residence.

iv. That the original allottee (M/s Grand Infrastructure Pvt. Ltd.) vide application form dated 21.03.2010 applied to respondent for provisional allotment of a unit in the project. The original allottee, in pursuance of the aforesaid application, was allotted an independent unit bearing no. PH4-68-0602, located on the sixth floor, in the project vide provisional allotment letter dated 05.04.2010. The original allottee consciously and willfully opted for a construction linked plan for remittance of the sale consideration for the unit in question and further represented to respondent that the original allottee shall remit every installment on time as per the payment schedule.

v. That thereafter complainant no. 1 and Mrs. Sohney Lakra approached the original allottee for purchasing its rights and title in the unit in question. The original allottee acceded to the request of complainant no. 1 and Mrs. Sohney Lakra and agreed to transfer and convey its rights, entitlement and title in the unit in question in their favor. An agreement to sell dated 26.05.2010 was executed between the original allottee and complainant no. 1 and Mrs. Sohney Lakra.

vi. That complainant no. 1 and Mrs. Sohney Lakra had executed an affidavit dated 26.05.2010 and an indemnity cum undertaking dated 26.05.2010 whereby complainant no. 1 and Mrs. Sohney Lakra had consciously and voluntarily declared and affirmed that they would be bound by all the terms and conditions of the provisional allotment in favour of the original allottee. Furthermore, the respondent, at the time of endorsement of the unit in question in favour of complainant no. 1 and Mrs. Sohney Lakra, had specifically indicated to them that being the nominees of the original allottee, they shall not be entitled for any compensation/interest in the event of any delay in delivery of possession of the unit in question to them. The said position was duly accepted and acknowledged by the complainants. The complainants are conscious and aware of the fact that they are not entitled to any right or claim against respondent. The complainants have intentionally distorted the real and true facts and have filed the present complaint in order to harass the respondent and mount undue pressure upon it.

vii. That complainant no. 1 and Mrs. Sohney Lakra had defaulted in remittance of installments on time. Respondent was compelled to issue demand notices, reminders etc. calling upon them to make payment of

outstanding amounts payable by them under the payment plan/instalment plan applicable to the unit in question. However, the complainant no. 1 and Mrs. Sohney Lakra despite having received the payment request letters, reminders etc. failed to remit the instalments on time to the respondent. Statement of account dated 26.04.2021 maintained by respondent in due course of its business reflects the delay in remittance of various instalments on the part of complainant no. 1 and Mrs. Sohney Lakra.

viii. That clause 13 of the buyer's agreement provides that compensation for any delay in delivery of possession shall only be given to such allottees who are not in default of their obligations envisaged under the agreement and who have not defaulted in payment of instalments as per the payment plan incorporated in the agreement. In case of delay caused due to non- receipt of occupation certificate, completion certificate or any other permission/sanction from the competent authorities, no compensation or any other compensation shall be payable to the allottees. complainant no. 1 and Mrs. Sohney Lakra, having defaulted in timely remittance of instalment, were thus not entitled to any compensation or any amount towards interest as an indemnification for delay, if any, under the buyer's agreement.

ix. That complainant no. 1 had approached the respondent in 2016 requesting it to change the ownership of the unit in question. It was stated by complainant no. 1 that Mrs. Sohney Kalra had died on 29.11.2015 leaving behind the complainants as her legal heirs. Accordingly, complainant no. 1 requested to substitute the name of Mrs. Sohney Lakra with complainant no. 2 against the provisional allotment of the unit in question. The respondent, believing the aforesaid representations to be true in good faith, acceded to the request of complainant no. 1 and issued the letter dated 25.05.2016 to the complainants reflecting the change in ownership of the allotment of the unit in question. It is submitted all the rights and liabilities of Ms.Sohney Lakra was transferred to complainant no. 2.

x. That as per clause 11 of the buyer's agreement, the time period for delivery of possession was 33 months along with grace period of 3 months from the date of start of construction subject to the allottee(s) having strictly complied with all the terms and conditions of the buyer's agreement and not being in default of any provision of the buyer's agreement including remittance of all amounts due and payable by the allottee(s) under the agreement as per the schedule of payment incorporated in the buyer's agreement. It is further provided therein that the

time period for delivery of possession of the unit shall stand extended on occurrence of circumstances/reasons which are beyond the power and control of the respondent. The complainants have completely misconstrued, misinterpreted and miscalculated the time period as determined in the buyer's agreement. That in case of any default/delay by the allottees in payment as per schedule of payment incorporated in the buyer's agreement, the date of handing over of possession shall be extended accordingly, solely on respondent's discretion till the payment of all outstanding amounts to the satisfaction of respondent. Since, the complainants have defaulted in timely remittance of payments as per schedule of payment, the date of delivery of possession is not liable to be determined in the manner sought to be done in the present case by the complainants.

xi. That the time period utilised by the concerned statutory authority to grant occupation certificate to respondent needs to be necessarily excluded from computation of the time period for implementation of the project. Furthermore, no compensation or interest or any other amount can be claimed for the period utilised by the concerned statutory authority for issuing occupation certificate in terms of the buyer's agreement. The

respondent had submitted an application dated 21.02.2019 for issuance of occupation certificate before the concerned statutory authority. Occupation certificate was thereafter issued in favour of the respondent vide memo bearing no. ZP-567-Vol-I/JD(RD)/2019/31934 dated 24.12.2019. It is submitted that once an application is submitted before the statutory authority, the respondent ceases to exercise any control over the matter. The grant of occupation certificate is the prerogative of the concerned statutory authority, and the respondent cannot exercise any influence over the same. Thus, the time period utilised by the concerned statutory authority to grant occupation certificate to respondent needs to be necessarily excluded from computation of the time period for implementation of the project.

xii. That the project of the respondent is an "ongoing project" under RERA and the same has been registered under the Act and the rules. Registration certificate has been granted by the Haryana Real Estate Regulatory Authority vide memo no. HRERA-606/2017/1248 dated 03.10.2017. This hon'ble authority has granted 02.10.2022 as the date of completion of the project and therefore cause of action, if any, would accrue in favour of the complainants to file a complaint for seeking any

interest as alleged if and only the respondent fails to offer possession of the unit in question within the aforesaid time. Thus, the complaint is liable to be dismissed on this ground alone.

xiii. That respondent submitted that the project has got delayed on account of following reasons which were/are beyond the power and control of the respondent. *Firstly*, the National Building Code was revised in the year 2016 and in terms of the same, all high-rise buildings (i.e. buildings having area of less than 500 sq. mtrs. and above), irrespective of area of each floor, are now required to have two staircases. The respondent has taken a decision to go ahead and construct the second staircase. The respondent has constructed the second staircase as expeditiously as possible. Thereafter, upon completion of the second staircase, the respondent had obtained the occupation certificate in respect of the tower in which the unit is located and has already delivered possession of the unit in question to the complainants. *Secondly*, the respondent had to engage the services of Mitra Guha, a reputed contractor in real estate, to provide multi-level car parking in the project. The said contractor started raising certain false and frivolous issues with the respondent due to which the contractor slowed down the

progress of work at site. Any lack of performance from a reputed cannot be attributed to the respondent as the same was beyond its control.

xiv. That the complainants were offered possession of the unit in question through letter of offer of possession dated 30.12.2019. The complainants were called upon to remit balance payment including delayed payment charges and to complete the necessary formalities/documentation necessary for handover of the unit in question to them. However, the complainants have consciously refrained from obtaining possession of the unit in question.

xv. That the respondent has paid an amount of Rs. 26,046/- as benefit on account of anti-profiting. Furthermore, an amount of Rs. 6,28,915/- + Rs. 3,97,640/- has been credited by the respondent to the account of the complainants as compensation. The aforesaid amounts have been duly accepted by the complainants in full and final satisfaction of their alleged grievances. Without prejudice to the rights of the respondent, delayed interest if any has to calculated only on the amounts deposited by the allottees/complainants towards the basic principle amount of the unit in question and not on any amount credited by the respondent, or any payment made by the

allottees/complainants towards delayed payment charges (DPC) or any taxes/statutory payments etc.

xvi. That the complainants approached the respondent requesting it to deliver the possession of the unit in question. A unit handover letter dated 02.07.2020 was executed by the complainants, specifically and expressly agreeing that the liabilities and obligations of the respondent as enumerated in the allotment letter or the buyer's agreement stand satisfied. It is pertinent to mention that the complainants have an amount of Rs. 13,096/- towards CAM, Rs. 3,96,880/- towards Stamp Duty and Rs. 40,000/- towards E-challan as outstanding and payable by them to the respondent. The complainants have intentionally distorted the real and true facts in order to generate an impression that the respondent has reneged from its commitments. No cause of action has arisen or subsists in favour of the complainants to institute or prosecute the instant complaint.

xvii. That the complainants approached the respondent requesting it to deliver the possession of the unit in question. A unit handover letter dated 02.07.2020 was executed by the complainants, specifically and expressly agreeing that the liabilities and obligations of the respondent as enumerated in the allotment letter or the

buyer's agreement stand satisfied. It is pertinent to mention that the complainants have an amount of Rs. 13,096/- towards CAM, Rs. 3,96,880/- towards stamp duty and Rs. 40,000/- towards e-challan as outstanding and payable by them to the respondent. The complainants have intentionally distorted the real and true facts in order to generate an impression that the respondent has reneged from its commitments. No cause of action has arisen or subsists in favour of the complainants to institute or prosecute the instant complaint. Hence, the present complaint deserves to be dismissed at the very threshold.

E. Jurisdiction of the authority

8. 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

9. 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

10. 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

11. 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.

12. The authority is of the view that the Act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of ***Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)*** which provides as under:

> *"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter.....*
>
> *122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the*

larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."

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

"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."

14. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the 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

15. 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 21.02.2019 and thereafter vide memo no. ZP-567-Vol-I/JD(RD)/2019/31934 dated 24.12.2019, the occupation certificate has been granted by the competent authority under the prevailing law. The authority cannot be a silent spectator to the deficiencies in the application submitted by the promoter for issuance of occupancy certificate. It is evident from the occupation certificate dated 24.12.2019 that an incomplete application for grant of OC was applied on 21.02.2019 as fire NOC from the competent authority was granted only on 12.12.2019 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 06.12.2019. The District Town Planner, Gurugram and Senior Town Planner, Gurugram has submitted requisite report about this project on

29.11.2019 and 02.12.2019 respectively. As such, the application submitted on 21.02.2019 was incomplete and an incomplete application is no application in the eyes of law.

16. 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 12.12.2019 and consequently the concerned authority has granted occupation certificate on 24.12.2019. Therefore, in view of the deficiency in the said application dated 21.02.2019 and aforesaid reasons, no delay in granting occupation certificate can be attributed to the concerned statutory authority.

F.III Objection regarding entitlement of DPC on ground of complainants being investors

17. The respondent submitted that the complainants are investor and not consumers/allottees, thus, the complainants are not entitled to the protection of the Act and thus, the present complaint is not maintainable.

18. The authority observed that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states main aims and objects of enacting a statute but at the same time preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that under section 31 of the Act, 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 buyer's agreement, it is revealed that the complainants are an allottee/buyer and they have paid total price of Rs.80,59,204/- to the promoter towards purchase of the said unit 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;"*

19. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the buyer's agreement executed

between respondent and complainants, it is crystal clear that the complainants are allottees 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 complainants-allottees being investors are not entitled to protection of this Act stands rejected.

F.IV Objection regarding handing over possession as per declaration given under section 4(2)(l)(C) of RERA Act

20. The respondent submitted that authority has granted 02.10.2022 as the date of completion of the project and therefore cause of action, if any, would accrue in favour of the complainants to file a complaint for seeking any interest as alleged if and only the respondent fails to offer possession of the unit in question within the aforesaid time. Thus, the complaint is liable to be dismissed on this ground alone. Therefore, next question of determination is whether the respondent is entitled to avail the time given to him by the

authority at the time of registering the project under section 3 & 4 of the Act.

21. It is now settled law that the provisions of the Act and the rules are also applicable to ongoing project and the term ongoing project has been defined in rule 2(1)(o) of the rules. The new as well as the ongoing project are required to be registered under section 3 and section 4 of the Act.

22. Section 4(2)(l)(C) of the Act requires that while applying for registration of the real estate project, the promoter has to file a declaration under section 4(2)(l)(C) of the Act and the same is reproduced as under: -

> *Section 4: - Application for registration of real estate projects*
>
> *(2) The promoter shall enclose the following documents along with the application referred to in sub-section (1), namely: — .....*
>
> *(l): -a declaration, supported by an affidavit, which shall be signed by the promoter or any person authorised by the promoter, stating: — .....*
>
> *(C) the time period within which he undertakes to complete the project or phase thereof, as the case may be....."*

23. The time period for handing over the possession is committed by the builder as per the relevant clause of buyer's agreement and the commitment of the promoter regarding handing over of possession of the unit is taken accordingly. The new timeline indicated in respect of ongoing project by the promoter while making an application for registration of the project does not

change the commitment of the promoter to hand over the possession by the due date as per the buyer's agreement. The new timeline as indicated by the promoter in the declaration under section 4(2)(l)(C) is now the new timeline as indicated by him for the completion of the project. Although, penal proceedings shall not be initiated against the builder for not meeting the committed due date of possession but now, if the promoter fails to complete the project in declared timeline, then he is liable for penal proceedings. The due date of possession as per the agreement remains unchanged and promoter is liable for the consequences and obligations arising out of failure in handing over possession by the due date as committed by him in the apartment buyer agreement and he is liable for the delayed possession charges as provided in proviso to section 18(1) of the Act. The same issue has been dealt by hon'ble Bombay High Court in case titled as ***Neelkamal Realtors Suburban Pvt. Ltd. and anr. vs Union of India and ors***. and has observed 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..."*

F.V Whether the subsequent allottee who had executed an indemnity-cum-undertaking with waiver clause is entitled to claim delay possession charges

24. The authority has heard the arguments of the both the parties at length. With regard to the above contentions raised by the promoter/developer, it is worthwhile to examine following four sub-issues:

i. Whether subsequent allottee is also an allottee as per provisions of the Act?

ii. Whether the subsequent allottee is entitled to delayed possession charges w.e.f. due date of handing over possession or w.e.f. the date of nomination letter/endorsement (i.e. date on which he became allottee)?

iii. Whether delay possession charges are in the nature of statutory legal obligation of the promoter other than compensation?

iv. Whether indemnity-cum-undertaking with waiver clause at the time of transfer of unit is arbitrary and whether statutory rights can be waived of by such one sided and unreasonable undertaking?

i. **Whether subsequent allottee is also an allottee as per provisions of the Act?**

25. The term "allottee" as defined in the Act also includes and means the subsequent allottee, hence is entitled to the same

relief as that of the original allottee. The definition of the allottee as provided in the Act is reproduced as under:

> *"2 In this Act, unless the context otherwise requires-*
>
> *(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".*

26. Accordingly, following are allottees as per this definition:

(a) Original allottee: A 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.

(b) Allottees after subsequent transfer from the original allottee: A person who acquires the said allotment through sale, transfer or otherwise. However, an allottee would not be a person to whom any plot, apartment or building is given on rent.

27. From a bare perusal of the definition, it is clear that the transferee of an apartment, plot or building who acquires it by any mode is an allottee. This may include (i) allotment; (ii) sale; (iii) transfer; (iv) as consideration of services; (v) by exchange of development rights; or (vi) by any other similar means. It can be safely reached to the only logical conclusion that no difference has been made between the original allottee and the subsequent allottee and once the unit, plot, apartment

or building, as the case may be, has been re-allotted in the name of the subsequent purchaser by the promoter, the subsequent allottee enters into the shoes of the original allottee for all intents and purposes and he shall be bound by all the terms and conditions contained in the buyer's agreement including the rights and liabilities of the original allottee. Thus, as soon as the unit is re-allotted in his name, he will become the allottee and nomenclature "subsequent allottee" shall only remain for identification for use by the promoter. Therefore, the authority does not draw any difference between the allottee and subsequent allottee per se.

28. Reliance is placed on the judgment dated 26.11.2019 passed in consumer complaint no. 3775 of 2017 titled as **Rajnish Bhardwaj Vs. M/s CHD Developers Ltd.** by NCDRC wherein it was held as under:

> *"15. So far as the issue raised by the Opposite Party that the Complainants are not the original allottees of the flat and resale of flat does not come within the purview of this Act, is concerned, in our view, having issued the Re-allotment letters on transfer of the allotted Unit and endorsing the Apartment Buyers Agreement in favour of the Complainants, this plea does not hold any water....."*

29. The authority concurs with the Hon'ble NCDRC's decision dated 26.11.2019 in **Rajnish Bhardwaj vs. M/s CHD Developers Ltd.** (supra) and observes that it is irrespective of the status of the allottee whether it is original or subsequent,

an amount has been paid towards the consideration for a unit and the endorsement by the developer on the transfer documents clearly implies his acceptance of the complainant as an allottee.

30. Therefore, taking the above facts into account, the authority is of the view that the term subsequent allottee has been used synonymously with the term allottee in the Act. The subsequent allottee at the time of buying a unit/plot takes on the rights as well as obligations of the original allottee vis-a-viz the same terms and conditions of the buyer's agreement entered into by the original allottee. Moreover, the amount if any paid by the subsequent or original allottee is adjusted against the unit in question and not against any individual. Furthermore, the name of the subsequent allottee has been endorsed on the same builder buyer's agreement which was executed between the original allottee and the promoter. Therefore, the rights and obligation of the subsequent allottee and the promoter will also be governed by the said builder buyer's agreement.

ii. **Whether the subsequent allottee is entitled to delayed possession charges w.e.f. due date of handing over possession or w.e.f. the date of nomination letter (i.e. date on which he became allottee)?**

31. The respondent/promoter contended that the subsequent allottee shall not be entitled to any compensation/delayed

possession charges since at the time of the execution of transfer documents/agreement for sale, they was well aware of the due date of possession and have knowingly waived off their right to claim any compensation for delay in handing over possession or any rebate under a scheme or otherwise or any other discount. The respondent/ promoter had spoken about the disentitlement of compensation/delayed possession charges to the subsequent allottee who had clear knowledge of the fact w.r.t. the due date of possession and whether the project was already delayed. But despite that they entered into the agreement for sell and/or indemnity-cum-undertaking knowingly waiving off their right of compensation. During the course of proceedings, the respondent/promoter has placed reliance on the case titled as **HUDA Vs. Raje Ram (2008)** wherein it has been held by the Apex Court that the subsequent allottees cannot be treated at par with the original allottees. Further, the respondent placed reliance on the judgment of **Wg. Cdr. Arifur Rahman Khan and Aleya Sultana and Ors. V. 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,** wherein the Apex Court had rejected the contention of the appellants that the subsequent transferees can step into the shoes of the

original buyer for the purpose of seeking compensation for delay in handing over possession.

32. The above referred cases cited by the respondent are no longer being relied upon by the authority as in the recent case titled as ***M/s Laureate Buildwell Pvt. Ltd. Vs. Charanjeet Singh, civil appeal no. 7042 of 2019 dated 22.07.2021***, the Apex Court has held that relief of interest on refund, enunciated by the decision in Raje Ram (supra) which was applied in Wg. Commander Arifur Rehman (supra) cannot be considered good law and has held that the subsequent purchaser/respondent had stepped into the shoes of the original allottee, and intimated Laureate (builder) about this fact in April 2016, the interest of justice demand that the interest at least from that date should be granted, in favour of the respondent. The relevant paras of the judgment are being reproduced as follows:

> *"31. In view of these considerations, this court is of the opinion that the per se bar to the relief of interest on refund, enunciated by the decision in Raje Ram (supra) which was applied in Wg. Commander Arifur Rehman (supra) cannot be considered good law. The nature and extent of relief, to which a subsequent purchaser can be entitled to, would be fact dependent. However, it cannot be said that a subsequent purchaser who steps into the shoes of an original allottee of a housing project in which the builder has not honoured its commitment to deliver the flat within a stipulated time, cannot expect any – even reasonable time, for the performance of the builder's obligation. Such a conclusion would be arbitrary, given that there may be a large number- possibly thousands of flat buyers, waiting for their promised flats or residences; they surely would be entitled to all reliefs under the Act. In such case, a purchaser who no doubt*

enters the picture later surely belongs to the same class. Further, the purchaser agrees to buy the flat with a reasonable expectation that delivery of possession would be in accordance within the bounds of the delayed timeline that he has knowledge of, at the time of purchase of the flat. Therefore, in the event the purchaser claims refund, on an assessment that he too can (like the original allottee) no longer wait, and face intolerable burdens, the equities would have to be moulded. It would no doubt be fair to assume that the purchaser had knowledge of the delay. However, to attribute knowledge that such delay would continue indefinitely, based on an a priori assumption, would not be justified. The equities, in the opinion of this court, can properly be moulded by directing refund of the principal amounts, with interest @ 9% per annum from the date the builder acquired knowledge of the transfer, or acknowledged it.

32. In the present case, there is material on the record suggestive of the circumstance that even as on the date of presentation of the present appeal, the occupancy certificate was not forthcoming. In these circumstances, given that the purchaser/respondent had stepped into the shoes of the original allottee, and intimated Laureate about this fact in April 2016, the interests of justice demand that interest at least from that date should be granted, in favour of the respondent. The directions of the NCDRC are accordingly modified in the above terms."

.....(Emphasis supplied)

33. In the present case, the complainants/subsequent allottees had been acknowledged as an allottee by the respondent vide nomination letter dated 05.06.2010. The authority has observed that the promoter has confirmed the transfer of allotment in favour of subsequent allottees (complainants) and the instalments paid by the original allottee were adjusted in the name of the subsequent allottees and the next instalments were payable/due as per the original allotment letter. Also, in the present case, the buyer's agreement was executed between the subsequent allottees and the promoter

and both the parties are bound by the terms of the buyer's agreement.

34. Though the promised date of delivery was 25.11.2013 but the construction of the tower in question was not completed by the said date and it was offered by the respondent only on 30.12.2019 i.e. after delay of 6 years 3 months approx. If these facts are taken into consideration, the complainants/subsequent allottees have agreed to buy the unit in question with the expectation that the respondent/promoter would abide by the terms of the builder buyer's agreement and would deliver the subject unit by the said due date. At this juncture, the subsequent purchaser cannot be expected to have knowledge, by any stretch of imagination, that the project will be delayed, and the possession would not be handed over within the stipulated period. So, the authority is of the view that in cases where the subsequent allottee had stepped into the shoes of original allottee before the due date of handing over possession, the delayed possession charges shall be granted w.e.f. due date of handing over possession. In the present complaint, the respondent had acknowledged the complainants as allottees before the expiry of due date of handing over possession, therefore, the complainants are entitled for delay possession

charges w.e.f. due date of handing over possession as per the buyer's agreement.

iii. **Whether delay possession charges are in the nature of statutory legal obligation of the promoter other than compensation?**

35. It is important to understand that the Act has clearly provided interest and compensation as separate entitlement/right which the allottee can claim. An allottee is entitled to claim compensation under sections 12, 14, 18 and section 19, to be decided by the adjudicating officer as per section 71 and the quantum of compensation shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The interest is payable to the allottee by the promoter in case where there is refund or payment of delay possession charges i.e., interest at the prescribed rate for every month of delay. The interest to be paid to the allottee is fixed and as prescribed in the rules which an allottee is legally entitled to get and the promoter is obligated to pay. The compensation is to be adjudged by the adjudicating officer and may be expressed either lumpsum or as interest on the deposited amount after adjudgment of compensation. This compensation expressed as interest needs to be distinguished with the interest at the prescribed rate payable by the promoter to the allottee in case of delay in handing over of possession or interest at the prescribed rate payable by the

allottee to the promoter in case of default in due payments. Here, the interest is pre-determined, and no adjudication is involved. Accordingly, the distinction has to be made between the interest payable at the prescribed rate under section 18 or 19 and adjudgment of compensation under sections 12, 14, 18 and section 19. The compensation shall mean an amount paid to the flat purchasers who have suffered agony and harassment, as a result of the default of the developer including but not limited to delay in handing over of the possession.

36. In addition, the quantum of compensation to be awarded shall be subject to the extent of loss and injury suffered by the negligence of the opposite party and is not a definitive term. It may be in the form of interest or punitive in nature. However, the Act clearly differentiates between the interest payable for delayed possession charges and compensation. Section 18 of the Act provides for two separate remedies which are as under:

i. In the event, the allottee wishes to withdraw from the project, he/she shall be entitled without prejudice to any other remedy refund of the amount paid along with interest at such rate as may be prescribed in this behalf **including compensation** in the manner as provided under this Act;

ii. In the event, the allottee does not intend to withdraw from the project, he/she 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.

37. The rate of interest in both the scenarios is fixed as per rule 15 of the rules which shall be the State Bank of India's highest marginal cost of lending rate +2%. However, for adjudging compensation or interest under sections 12,14,18 and section 19, the adjudicating officer has to take into account the various factors as provided under section 72 of the Act.

iv. **Whether indemnity-cum-undertaking with waiver clause at the time of transfer of unit is arbitrary and whether statutory rights can be waived of by such one sided and unreasonable undertaking?**

38. The authority further is unable to gather any reason or has not been exposed to any reasonable justification as to why a need arose for the complainants to sign any such affidavit or indemnity-cum-undertaking and as to why the complainants have agreed to surrender their legal rights which were available or had accrued in favour of the original allottee. In the instant matter in dispute, it is not the case of the respondent that the re-allotment of the unit was made in the name of the subsequent purchasers after the expiry of the due date of delivery of possession of the unit. Thus, so far as the due date of delivery of possession had not come yet and before that the unit had been re-allotted in the name of the subsequent allottees, the subsequent-allottees will be bound

by all the terms and conditions of the buyer's agreement including the rights and liabilities. Thus, no sane person would ever execute such an affidavit or indemnity-cum-undertaking unless and until some arduous and/or compelling conditions are put before him with a condition that unless and until, these arduous and/or compelling conditions are performed by him, he will not be given any relief and he is thus left with no other option but to obey these conditions. Exactly same situation has been demonstratively happened here, when the subsequent-allottees have been asked to give the affidavit or indemnity-cum-undertaking in question before transferring the unit in their name otherwise such transfer may not be allowed by the promoter. Such an undertaking/ indemnity bond given by a person thereby giving up their valuable rights must be shown to have been executed in a free atmosphere and should not give rise to any suspicion. No reliance can be placed on any such affidavit/ indemnity-cum-undertaking and the same is liable to be discarded and ignored in its totality. Therefore, this authority does not place reliance on the said affidavit/indemnity cum undertaking. To fortify this view, we place reliance on the order dated 03.01.2020 passed by Hon'ble NCDRC 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 section 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."*

39. 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

40. Hon'ble Supreme Court and various High Courts in a plethora of judgments have held that the terms of a contract shall not be binding if it is shown that the same were one sided and unfair and the person signing did not have any other option but to sign the same. Reference can also be placed on the directions rendered by the Hon'ble Apex Court in civil appeal no. 12238 of 2018 titled as **Pioneer Urban Land and Infrastructure Limited Vs. Govindan Raghavan** (decided on 02.04.2019) as well as by the Hon'ble Bombay High Court in the **Neelkamal Realtors Suburban Pvt. Ltd.** (supra). A similar view has also been taken by the Apex court in **IREO Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Ors.** (supra) as under:

> *".....that the incorporation of such one-sided and unreasonable clauses in the Apartment Buyer's Agreement constitutes an unfair trade practice under Section 2(1)(r) of the Consumer Protection Act. Even under the 1986 Act, the powers of the consumer fora were in no manner constrained to declare a contractual term as unfair or one-sided as an incident of the power to discontinue unfair or restrictive trade practices. An "unfair contract" has been defined under the 2019 Act, and powers have been conferred on the State Consumer Fora and the National Commission to declare contractual terms which are unfair, as null and void. This is a statutory recognition of a power which was implicit under the 1986 Act.*
>
> *In view of the above, we hold that the Developer cannot compel the apartment buyers to be bound by the one-sided contractual terms contained in the Apartment Buyer's Agreement."*

41. The same analogy can easily be applied in the case of execution of an affidavit or indemnity-cum-undertaking which got executed from the subsequent-allottees before getting the unit

transferred in their name in the record of the promoter as an allottee in place of the original allottee.

42. The authority may deal with this point from yet another aspect. By executing an affidavit/undertaking, the subsequent-allottees cuts their hands from claiming delay possession charges in case there occurs any delay in giving possession of the unit to them beyond the stipulated time or the due date of possession. But the question which arises before the authority is that what does allottee got in return from the promoter by giving such a mischievous and unprecedented undertaking. However, the answer would be "nothing". If it is so, then why did the complainants executed such an affidavit/undertaking which is beyond the comprehension and understanding of this authority.

43. The authority holds that irrespective of the execution of the affidavit/undertaking by the subsequent allottees/ complainants at the time of transfer of their name as an allottee in place of the original allottee in the record of the promoter does not disentitle them from claiming the delay possession charges in case there occurs any delay in delivering the possession of the unit beyond the due date of delivery of possession as promised even after executing an indemnity-cum-undertaking.

F.VI 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.

44. The respondent is contending that at the time of taking possession of the apartment vide unit hand over letter dated 02.07.2020, the complainants had certified themselves to be fully satisfied with regard to the measurements, location, direction, developments et cetera of the unit and also admitted and acknowledge that they 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."*

45. 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."

46. 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.

47. 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 complainants have waived off their 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."

48. 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."*

49. Therefore, the authority is of the view that the aforesaid unit handover letter dated 02.07.2020 does not preclude the complainants from exercising their right to claim delay possession charges as per the provisions of the Act.

G. Findings on the relief sought by the complainants

G.I Delay possession charges

50. **Relief sought by the complainants:** Direct the respondents to pay for delay in offer of possession by paying interest as prescribed under the Act read with the rules on the entire deposited amount which has been deposited against the property in question so booked by the complainants.

51. 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, —*
>
> .....
>
> *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."*

52. As per clause 11(a) of the agreement provided for time period for handing over of possession and is reproduced below:

> *"**11. POSSESSION***
>
> ***(a) Time of handing over the possession***
>
> *Subject to terms of this clause and subject to the Allottee(s) having complied with all the terms and conditions of this Buyer's Agreement, and not being in default under any of the provisions of this Buyer's Agreement and compliance with all provisions, formalities, documentation etc. as prescribed by the Company, the Company proposes to hand over the possession of the unit within 33 months from the date of start of construction, subject to timely compliance of the provisions of the Buyer's Agreement by the Allottee. The Allottee(s) agrees and understands that the Company shall be entitled to a grace period of 3 months, for applying and obtaining the completion*

certificate/occupation certificate in respect of the Unit and/or the Project."

53. 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 complainants 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 allottees 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.

54. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within 33 (thirty-

three) months from the date of start of construction and further provided in agreement that promoter shall be entitled to a grace period of 3 months for applying and obtaining completion certificate/occupation certificate in respect of said unit. The date of start of construction is 25.02.2011 as per statement of account dated 26.04.2021. The period of 33 months expired on 25.11.2013. 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 3 months cannot be allowed to the promoter at this stage.

55. **Admissibility of delay possession charges at prescribed rate of interest**: The complainants are seeking delay possession charges at the prescribed rate. 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.

56. 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.

57. Taking the case from another angle, the complainants-allottees were entitled to the delayed possession charges/interest only at the rate of Rs.7.50/- per sq. ft. per month as per relevant clause 13(a) 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.

58. 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., 29.07.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

59. **Rate of interest to be paid by complainants for delay in making payments:** The respondent contended that the complainants have defaulted in making timely payments of the instalments as per the payment plan, therefore, the

complainants are liable to pay interest on the outstanding payments.

60. The authority observed that 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;"*

61. 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

62. 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 11(a) of the buyer's agreement executed between the parties on 10.09.2010, possession of the booked unit was to be delivered within a period of 33 months from the date of start of construction i.e. 25.02.2011. 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 25.11.2013. The respondent has offered possession of the subject unit on 30.12.2019 after receipt of occupation certificate dated 24.12.2019. 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 complainants as per the terms and conditions of the buyer's agreement dated 10.09.2010 executed between the parties.

63. 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 24.12.2019. However, the respondent offered the possession of the unit in question to the complainants only on 30.12.2019, so it can be said that the complainants 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 complainants 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. 25.11.2013 till the expiry of 2 months from the date of offer of possession (30.12.2019) which comes out to be 01.03.2020.

64. 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 complainants are entitled to delayed possession charges at rate of the prescribed interest i.e. 9.30% p.a. w.e.f. due date of delivery of possession 25.11.2013 till 01.03.2020 as per provisions of section 18(1) of the Act read with rule 15 of the Rules.

65. Also, the amount of Rs.6,28,915/- and Rs. 3,97,640/- (as per statement of account dated 26.04.2021) so paid by the respondent to the complainants 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

66. 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 complainants from due date of possession i.e. 25.11.2013 till 01.03.2020 i.e. expiry of 2 months from the date of offer of possession (30.12.2019). The arrears of interest accrued so far shall be paid to the complainants within 90 days from the date of this order as per rule 16(2) of the rules.

ii. Also, the amount of Rs.6,28,915/- and Rs. 3,97,640/- so paid by the respondent to the complainants 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 complainants which is not the part of the buyer's agreement. The respondent is not entitled to claim

holding charges from the complainants/allottees 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.

iv. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.

v. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.30% by the respondents/promoters which is the same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

67. Complaint stands disposed of.

68. File be consigned to registry.

(Samir Kumar)
Member

(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 29.07.2021

Judgement uploaded on 14.09.2021.