

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

**Complaint no.** : 453 of 2021  
**First date of hearing:** 12.03.2021  
**Date of decision** : 29.07.2021

Anjana Nagpal  
R/o: 106, Hope Apartments, Sector 15 Part II,  
Gurugram-122001, Haryana.

**Complainant**

**Versus**

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

**Respondent**

**CORAM:**

Shri Samir Kumar  
Shri Vijay Kumar Goyal

**Member**  
**Member**

**APPEARANCE:**

Shri Varun Chugh  
Shri J.K. Dang

Advocate for the complainant  
Advocate for the respondent

**ORDER**

1. The present complaint dated 28.01.2021 has been filed by the complainant/allottee in Form CRA under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all

obligations, responsibilities and functions to the allottee as per the agreement for sale executed inter se them.

2. Since, the buyer's agreement has been executed on 22.02.2012 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 complainant, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S.No.	Heads	Information
1.	Project name and location	Emerald Floors Premier III at Emerald Estate, Sector 65, Gurugram.
2.	Project area	25.49 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no. and validity status	06 of 2008 dated 17.01.2008 Valid/renewed up to 16.01.2025
5.	Name of licensee	Active Promoters Pvt. Ltd. and 2 others C/o Emaar MGF Land Ltd.
6.	HRERA registered/ not registered	<b>Registered vide no.104 of 2017 dated 24.08.2017 for 82768 sq. mtrs.</b>

	HRERA registration valid up to	<b>23.08.2022</b>
7.	Occupation certificate granted on	11.11.2020 [Page 163 of reply]
8.	Provisional allotment letter dated	16.09.2011 [Page 41 of reply]
9.	Unit no.	EPF-III-39-0302, 3 <sup>rd</sup> floor, building no. 39 [Page 16 of complaint]
10.	Unit measuring	1975 sq. ft.
11.	Date of execution of buyer's agreement	22.02.2012 [Page 14 of complaint]
12.	Payment plan	Construction linked payment plan [Page 42 of reply]
13.	Total consideration as per statement of account dated 03.03.2021 at page 53 of the reply	Rs.1,40,48,494/-
14.	Total amount paid by the complainant as per statement of account dated 03.03.2021 at page 55 of reply	Rs.1,42,13,645/-
15.	Due date of delivery of possession as per clause 11(a) of the said agreement i.e. 24 months from the date of execution of buyer's agreement (22.02.2012) + grace period of 3 months, for applying and obtaining completion certificate/occupation certificate in respect of the unit and/or the project. [Page 23 of complaint]	22.02.2014  <b>[Note: Grace period is not included]</b>
16.	<b>Date of offer of possession to the complainant</b>	<b>19.11.2020</b> [Page 166 of reply]

17.	Delay in handing over possession till 19.01.2021 i.e. date of offer of possession (19.11.2020) + 2 months	6 years 10 months 28 days
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**B. Facts of the complaint**

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

- i. That the property in question i.e. floor bearing no. EFP-III-39-0302 admeasuring 1975 sq. ft., along-with car parking space in the project known as "Emerald Floors Premier, Phase - III" situated at Sector-65, Gurugram, Haryana was booked by Smt. Aishwarya Nedungadi and Sh. AK Ravindranath Nedungadi, (original allottees) in the year 2011. Thereafter, on 22.02.2012, the original allottees entered into a builder buyer's agreement with the respondent. The total cost of the floor was Rs. 13,712,494/- only. Since, it was a construction linked plan, hence the payment was to be made on the basis of schedule of payment provided by the respondent.
- ii. That subsequent thereto, the complainant herein, entered into an agreement to sell with the original allottees with regard to the said property and the property was later assigned to the complainant, by the respondent, by virtue

of the endorsement on the buyer's agreement dated 18.12.2013.

- iii. That the complainant had made the entire payment towards the cost of the floor, and nothing is due and payable by her. In fact, a sum of Rs 16,955/- is still lying in the credit balance of the complainant which is due and payable by the respondent. Also, due to the delay in handing over of the possession of the property, the complainant is further burdened with an increase of additional 2% stamp duty charges owing to subsequent revision in the stamp duty charges i.e. from earlier 3% to 5% at present, which otherwise were not payable, had the property been handed over on time, thereby causing the complainant an additional loss of Rs 2,41,980/-.
- iv. That due to the delay and lapses on the part of the respondent in handing over the possession of the property, the complainant has been additionally burdened to pay the GST of Rs 4,80,156/- on the cost of the property, which was introduced much lately and ought not to be paid by the complainant, had the possession of the property been offered in the February 2014 i.e. the due date of possession.

- v. That in the said buyer's agreement dated 22.02.2012, the respondent has categorically stated that the possession of the said apartment would be handed over to the complainants within 24 months from the date of execution of buyer's agreement, excluding a further grace period of 3 months. The said buyer's agreement is totally one sided which impose completely biased terms and conditions upon the complainant, thereby tilting the balance of power in favour of the respondent, which is further manifested from the fact that the delay in handing over the possession by the respondent would attract only a meagre penalty of Rs. 5 per sq. ft. on the super area of the flat, on monthly basis, whereas the penalty for failure to take possession would attract holding charges of Rs. 5/- per sq. ft. and 24% penal interest on the unpaid amount of instalment due to the respondent.
- vi. That the respondent had promised to complete the project by May 2014, including the grace period of 3 months. The buyer's agreement was executed on 22.02.2012 and the respondent has finally been able to offer possession of the unit on 19.11.2020 which resulted in extreme kind of mental distress, pain and agony to the complainant. The respondent has breached the

fundamental term of the contract by the inordinately delaying in delivery of the possession by 78 months. The complainant was made to make advance deposit on the basis of information contained in the brochure, which is false on the face of it as is evident from the construction done at site. The respondent had committed gross violation of the provisions of section 18 (1) of the Act by not handing over the timely possession of the floor in question and not giving the delayed possession interest to the buyer.

**C. Relief sought by the complainant**

5. The complainant has filed the present compliant for seeking following reliefs:
  - i. Direct the respondent to handover the possession of the floor to the complainant, in a time bound manner.
  - ii. Direct the respondent to pay interest @ 18% p.a. as interest towards delay in handing over the property in question as per provisions of the Act and the Rules.
  - iii. Direct the respondent to return the GST amount of Rs.4,80,156/- charged from the complainant as per provisions of RERA and HRERA.
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. Moreover, the adjudicating officer derives his jurisdiction from the central statute 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 22.02.2012. 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 complainant for seeking interest cannot be called into 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 original allottees, in pursuance of the aforesaid application form dated 04.06.2011, were allotted unit bearing no EFP-III-39-0302, located on the 3<sup>rd</sup> floor in the project vide provisional allotment letter dated 16.09.2011. The original allottees consciously and willfully opted for a construction linked plan for remittance of the sale consideration for the unit in question and further represented to the respondent that the original allottees shall remit every installment on time as per the payment schedule.

iv. That the original allottees were irregular regarding the remittance of installments on time. The respondent was compelled to issue demand notices, reminders etc. calling upon them to make payment of outstanding amounts



payable under the payment plan/instalment plan opted by them. However, the original allottees despite having received the payment request letters, reminders etc. failed to remit the instalments on time to the respondent. Statement of account dated 03.03.2021 maintained by the respondent in due course of its business reflects the delay in remittance of various instalments on the part of the original allottees.

- v. That buyer's agreement dated 22.02.2012 was executed between the original allottees and respondent. 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. As delineated hereinabove, the original allottees, 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.

- vi. That the complainant approached the original allottees for purchasing their rights and title in the unit in question. The original allottees acceded to the request of the complainant and agreed to transfer and convey their rights, entitlement and title in the unit in question to the complainant for a valuable sale consideration of Rs. 1,31,69,099/-. The complainant on executing the aforesaid agreement to sell had approached respondent requesting it to endorse the provisional allotment of the unit in question in her name.
- vii. That complainant had further executed an affidavit on 18.12.2013 and an indemnity cum undertaking on 18.12.2013 whereby she had consciously and voluntarily declared and affirmed that she would be bound by all the terms and conditions of the provisional allotment in favour of the original allottees. It was further declared by her that the complainant having been substituted in the place of the original allottees in respect of the provisional allotment of the unit in question was not entitled to any compensation for delay, if any, in delivery of possession of the unit in question or any rebate under a scheme or

otherwise or any other discount, by whatever name called, from respondent. Furthermore, the respondent, at the time of endorsement of the unit in question in her favour, had specifically indicated to the complainant that the original allottees had defaulted in timely remittance of the instalments pertaining to the unit in question and therefore, have disentitled themselves for any compensation/interest. the respondent had conveyed to the complainant that on account of the defaults of the original allottees, the complainant would not be entitled to any compensation for delay, if any. The said position was duly accepted and acknowledged by the complainant. The complainant is conscious and aware of the fact that she is not entitled to any right or claim against respondent.

- viii. That without prejudice to the foregoing, it is an admitted fact that the complainant had stepped into the shoes of the original allottees and therefore all the rights and liabilities of the original allottees were transferred to the complainant. As has been delineated hereinabove, the original allottees were not entitled to any compensation or interest for delay, if any, in offering possession of the unit in terms of the buyer's agreement on account of

default of terms and conditions thereof by them. Moreover, the complainant too had defaulted in timely remittance of installments to the respondent and the same is duly reflected in the statement of account dated 03.03.2021 as maintained by respondent in due course of its business. Thus, the complainant is estopped from advancing claims in contradiction and derogation of the rights and liabilities transferred to her from the original allottees.

- ix. That as per clause 11 of the buyer's agreement dated 22.02.2012, the time period for delivery of possession was 24 months from the date of execution of the buyer's agreement alongwith grace period of 3 months subject to the allottee(s) having strictly complied with all 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. The complainant has completely misconstrued, misinterpreted and miscalculated the time period as determined in the buyer's agreement. That it was categorically provided in clause 11(b)(iv) 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 the respondent's discretion till the payment of all outstanding amounts to the satisfaction of the respondent. Furthermore, it has been categorically provided in the agreement that the time period for delivery of project shall also stand extended on occurrence of facts and circumstances which are beyond the power and control of the respondent. Since, the complainant as well as original allottees 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 complainant.

- x. 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. As delineated hereinabove, the complainant, having defaulted in payment of instalment, is thus not entitled to any compensation or any amount towards interest under the buyer's agreement.

- xi. That respondent submitted that the project has got delayed on account of the 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. Eventually, so as not to cause any further delay in the project and so as to avoid jeopardising the safety of the occupants of the building in question including the building in which the unit in question is situated, the respondent had 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/building in

which the unit is located and has already offered possession of the unit in question to the complainant.

*Secondly*, the defaults on the part of the contractor as the contractor was not able to meet the agreed timelines for construction of the project.

- xii. That the respondent had applied to the statutory authority for grant of occupation certificate in respect of the tower in which the unit in question is located on 16.07.2020 and the same was granted on 11.11.2020. That once an application for issuance of occupation certificate is submitted before the concerned competent authority, the respondent ceases to have any control over the same. The grant of occupation certificate is the prerogative of the concerned statutory authority, and the respondent does not exercise any control over the matter. Therefore, the time period utilised by the concerned statutory authority for granting the occupation certificate needs to be necessarily excluded from computation of the time period utilised in the implementation of the project in terms of the buyer's agreement. As far as the respondent is concerned, it has diligently and sincerely pursued the development and completion of the project in question.



xiii. That the complainant was offered possession of the unit in question through letter of offer of possession dated 19.11.2020. The complainant was called upon to remit balance payment including delayed payment charges and to complete the necessary formalities/documentation necessary for handover of the unit in question to her. However, the complainant has consciously refrained from obtaining possession of the unit in question.

xiv. That the project of the respondent is an "ongoing project" under RERA and the same has been registered under the Act and the Rules. It is submitted that the registration of the project is valid till 23.08.2022 and therefore cause of action, if any, would accrue in favour of the complainant to prefer a complaint if the respondent fails to deliver possession of the unit in question within the aforesaid period.

xv. That it is denied that the respondent is liable to refund an amount of Rs.2,41,980/- or any part thereof to the complainant. It is wrong and denied that the payment of the stamp duty by the complainant can be construed as an "additional burden" in the facts and circumstances of the case. Moreover, it had been unambiguously and explicitly recited in the buyer's agreement that the concerned

allottee would be liable to pay stamp duty and the said liability. The allegations of the complainant in this regard are unsustainable both in law and on facts. It is denied that the respondent is liable to refund an amount of Rs. 4,80,156/- or any part thereof to the complainant. It is submitted that GST has been levied strictly in accordance with the terms and conditions of the buyer's agreement.

xvi. That several allottees have defaulted in timely remittance of payment of installments which was an essential, crucial and an indispensable requirement for conceptualisation and development of the project in question. 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. It is submitted that the construction of the tower in which the unit in question is situate has been completed by the respondent. The respondent has already delivered possession of the unit

in question to the complainant. Therefore, there is no default or lapse on the part of the respondent and there is 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. The allegations levelled by the complainant are totally baseless. Thus, it is most respectfully submitted 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 observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

**F.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.

#### **F.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 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."*

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 21.07.2020 and thereafter vide memo no. ZP-441-Vol-II/AD(RA)/2020/20094 dated 11.11.2020, 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 11.11.2020 that an incomplete application for grant of OC was applied on 21.07.2020 as fire NOC from the competent authority was granted only on 25.09.2020 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 22.09.2020 and 24.09.2020. The District Town Planner, Gurugram and Senior Town Planner, Gurugram has submitted requisite reports' about this project on 21.09.2020 and 23.09.2020 respectively. As such, the application submitted on 21.07.2020 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 25.09.2020 and consequently the concerned authority has granted occupation certificate on 11.11.2020. Therefore, in view of the deficiency in the said application dated 21.07.2020 and aforesaid reasons, no delay in granting occupation certificate can be attributed to the concerned statutory authority.



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

18. The counsel for the respondent has stated that the registration of the project is valid till 23.08.2022 and therefore cause of action, if any, would accrue in favour of the complainant to prefer a complaint if the respondent fails to deliver possession of the unit in question within the aforesaid period. That the entitlement to claim possession or interest would arise once the possession has not been handed over as per declaration given by the promoter under section 4(2)(I)(C). Therefore, next question of determination is whether the respondent is entitled to avail the time given to it by the authority at the time of registering the project under section 3 & 4 of the Act.
19. 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.
20. Section 4(2)(I)(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)(I)(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: —

(1): -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....”

21. 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)(1)(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 buyer's 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.IV Whether the subsequent allottee who had executed an indemnity-cum-undertaking with waiver clause is entitled to claim delay possession charge?**

22. The authority has heard the arguments of 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?**

23. 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".*

24. 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.

25. 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.

26. 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....."*

27. 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.

28. 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 complainant/subsequent allottee has been endorsed on the same builder buyer's agreement which was executed between the original allottees and the promoter. Therefore, the rights and obligation of the subsequent allottee and the promoter will also be governed by the said 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)?**

29. 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, she was well aware of the due date of possession and has knowingly waived off her 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 disentanglement 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 she entered into the agreement for sell and/or indemnity-cum-undertaking knowingly waiving off her 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.

30. 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 Bulldwell 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 said 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 Roje 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)

31. In the present case, the complainant/subsequent allottee had been acknowledged as an allottee by the respondent vide nomination letter/affidavit dated 18.12.2013. The authority has observe that the promoter has confirmed the transfer of allotment in favour of subsequent allottee (complainant) and the installments paid by the original allottees were adjusted in the name of the subsequent allottee and the next installments were payable/due as per the original allotment letter. Also, we have also perused the buyer's agreement which was originally entered into between the original allottees and the promoter. The same buyer's agreement has been endorsed in favour of the subsequent allottee/complainant. All the terms of buyer's agreement remain the same, so it is quite clear that the subsequent allottee has stepped into the shoes of the original allottee.

32. Though the promised date of delivery was 22.02.2014 but the construction of the tower in question was not completed by the said date and it was offered by the respondent only on

19.11.2020 i.e. after delay of 6 years 9 months approx. If these facts are taken into consideration, the complainant/subsequent allottee had agreed to buy the unit in question with the expectation that the respondent/promoter would abide by the terms of the 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 allottees 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 complainant as an allottee before the expiry of due date of handing over possession, therefore, the complainant is 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?**

33. 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.

34. 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.**

35. 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?**

36. 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 complainant to sign any such affidavit or indemnity-cum-undertaking and as to why the complainant had agreed to surrender her legal rights which were available or had accrued in favour of the original allottees. 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 purchaser 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 allottee, the subsequent allottee was bound by all the terms and conditions of the buyer's agreement including his 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 complainant/subsequent allottee had been asked to give the affidavit or indemnity-cum-undertaking in question before transferring the unit in her 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."*

37. 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



38. 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."*

39. 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 allottee before getting the unit transferred in her name in the record of the promoter as an allottee in place of the original allottee.

40. The authority may deal with this point from yet another aspect. By executing an affidavit/undertaking, the complainant/subsequent allottee cuts her hands from claiming delay possession charges in case there occurs any delay in giving possession of the unit to her beyond the stipulated time or the due date of possession. But the question which arises before the authority is that what does allottee get 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 complainant executed such an affidavit/undertaking which is beyond the comprehension and understanding of this authority.

41. The authority holds that irrespective of the execution of the affidavit/undertaking by the subsequent allottee at the time of transfer of her name as an allottee in place of the original allottee in the record of the promoter does not disentitle her 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.

**G. Findings on the reliefs sought by the complainant****G.I Delay possession charges**

42. **Relief sought by the complainant:** Direct the respondent to handover the possession of the floor to the complainant in a time bound manner and to pay interest @ 18% p.a. as interest towards delay in handing over the property in question as per provisions of the Act and the Rules.

43. 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."*

44. Clause 11(a) of the buyer's agreement provides 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 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 24 months from the date of execution of Buyer's Agreement. The Allottee(s) agrees and understands that the Company shall be entitled to a grace period of three months, for applying and obtaining the completion certificate/ occupation certificate in respect of the Unit and/or the Project."*

45. 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.

46. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within 24 (twenty-four) months from the date of execution of buyer's agreement dated 22.02.2012 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 period of 24 months expired on 22.02.2014. 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.

47. **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.*

48. 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.

49. Taking the case from another angle, the complainant-allottee was entitled to the delayed possession charges/interest only at the rate of Rs.5/- per sq. ft. per month as per 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 installment 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.

50. 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%.

51. 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;"*

52. 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.

53. 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 22.02.2012, possession of the



said unit was to be delivered within a period of 24 months from the date of execution of the buyer's agreement. 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 22.02.2014. In the present case, the complainant was offered possession by the respondent on 19.11.2020 after receipt of occupation certificate dated 11.11.2020. 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 22.02.2012 executed between the parties.

54. 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 11.11.2020. However, the respondent offered the possession of the unit in question to the complainant only on 19.11.2020. 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, she 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 she 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. 22.02.2014 till the expiry of 2 months from the date of offer of possession (19.11.2020) which comes out to be 19.01.2021. Furthermore, the complainant is directed to take possession within two weeks from the date of this order.

55. 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. 22.02.2014 till 19.01.2021 as per provisions of section 18(1) of the Act read with rule 15 of the Rules.

**G.II Direct the respondent to return the GST amount of Rs.4,80,156/- charged from the complainant as per provisions of RERA and HRERA.**

56. The complainant submitted that due to the delay and lapses on the part of the respondent in handing over the possession of

the property, the complainant has been additionally burdened to pay the GST of Rs 4,80,156/- on the cost of the property, which was introduced much lately and ought not to be paid by the complainant, had the possession of the property been offered in the February 2014 i.e. the due date of possession. On the other hand, the counsel for the respondent submitted that GST has been levied strictly in accordance with the terms and conditions of the buyer's agreement.

57. The relevant clause from the agreement is reproduced as under:

**"10.(f) Taxes and levies:**

- (i) *The Allottee(s) shall be responsible for payment of all taxes, levies, assessments, demands or charges including but not limited to sale tax, service tax, VAT, if applicable, levied or leviable in future on the Plot, building or Unit or any part of the Project in proportion to his/her/their/its Super Area of the Unit or on any service provided in relation thereof.*
- (ii) *....."*

58. As per the builder buyer's agreement, taxes shall be payable as per the government rules as applicable from time to time. Taxes are levied as per government norms and rules and are leviable in respect of real estate projects as per the government policies from time to time. Therefore, there is no substance in the plea of the complainant in regard to the illegality of the levying of the said taxes. However, the issue pending determination is as to whether the allottee shall be

liable to pay such taxes which became payable on account of default and delay in handing over of possession by the builder beyond the deemed date of possession.

59. The authority after hearing the parties at length is of the view that admittedly, the due date of possession of the unit was 22.02.2014 but the offer of possession has been made only on 19.11.2020. Had the unit been delivered within the due date or even with some justified delay, the incidence of GST would not have fallen on the allottee. Therefore, an additional tax burden with respect to GST was enforced upon the buyer for no fault of her since and is due to the wrongful act of the promoter in not delivering the unit within due date of possession; also, the tax liability would have been very less as compared with the GST if levied @ 12%.

60. The authority has also perused the judgement dated 04.09.2018 in complaint no. 49/2018, titled as **Parkash Chand Arohi Vs. M/s Pivotal Infrastructure Pvt. Ltd.** of the Haryana Real Estate Regulatory Authority, Panchkula wherein it has been observed that the possession of the flat in term of buyer's agreement was required to be delivered on 1.10.2013 and the incidence of GST came into operation thereafter on 01.07.2017. So, the complainant cannot be burdened to discharge a liability which had accrued solely due to

respondent's own fault in delivering timely possession of the flat. The relevant portion of the judgement is reproduced below:

"8. The complainant has then argued that the respondent's demand for GST/VAT charges is unjustified for two reasons: (i) the GST liability has accrued because of respondent's own failure to handover the possession on time and (ii) the actual VAT rate is 1.05% instead of 4% being claimed by the respondent. The authority on this point will observe that the possession of the flat in term of buyer's agreement was required to be delivered on 1.10.2013 and the incidence of GST came into operation thereafter on 01.07.2017. So, the complainant cannot be burdened to discharge a liability which had accrued solely due to respondent's own fault in delivering timely possession of the flat. Regarding VAT, the Authority would advise that the respondent shall consult a service tax expert and will convey to the complainant the amount which he is liable to pay as per the actual rate of VAT fixed by the Government for the period extending upto the deemed date of offer of possession i.e., 10.10.2013."

61. In appeal no. 21 of 2019 titled as **M/s Pivotal Infrastructure Pvt. Ltd. Vs. Prakash Chand Arohi**, Haryana Real Estate Appellate Tribunal, has upheld the **Parkash Chand Arohi Vs. M/s Pivotal Infrastructure Pvt. Ltd. (supra)**. The relevant para is reproduced below:

"93. This fact is not disputed that the GST has become applicable w.e.f. 01.07.2017. As per the first Flat Buyer's Agreement dated 14.02.2011, the deemed date of possession comes to 13.08.2014 and as per the second agreement dated 29.03.2013 the deemed date of possession comes to 28.09.2016. So, taking the deemed date of possession of both the agreements, GST has not become applicable by that date. No doubt, in Clauses 4.12 and 5.1.2 the respondent/allottee has agreed to pay all the Government rates, tax on land, municipal property taxes and other taxes levied or leviable now or in future by

*Government, municipal authority or any other government authority. But this liability shall be confined only up to the deemed date of possession. The delay in delivery of possession is the default on the part of the appellant/promoter and the possession was offered on 08.12.2017 by that time the GST had become applicable. But it is settled principle of law that a person cannot take the benefit of his own wrong/default. So, the appellant/promoter was not entitled to charge GST from the respondent/allottee as the liability of GST had not become due up to the deemed date of possession of both the agreements."*

62. Therefore, the delay in delivery of possession is the default on the part of the respondent/promoter and the possession was offered on 19.11.2020 and by that time the GST had become applicable. But it is settled principle of law that a person cannot take the benefit of his own wrong/default. So, the respondent/promoter is not entitled to charge GST from the complainant/allottee as the liability of GST had not become due up to the due date of possession as per the said agreement.

**H. Directions of the authority**

63. 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. 22.02.2014 till 19.01.2021 i.e.

expiry of 2 months from the date of offer of possession (19.11.2020). 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. 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 charge 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.
- iii. The respondent/promoter is not entitled to charge any amount towards GST from the complainant/allottee as the liability of GST had not become due up to the due date of possession as per the buyer's agreement.

64. Complaint stands disposed of.

65. File be consigned to registry.

  
**(Vijay Kumar Goyal)**  
Member

  
**(Samir Kumar)**  
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 29.07.2021

Judgement uploaded on 09.09.2021.