BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**:**	**4064 of 2020**
First date of hearing	**:**	**14.01.2021**
Date of decision	**:**	**22.07.2021**

1. Madan Mohan Bhasin
2. Jyoti Bhasin
Both RR/o: 9/20, 2nd floor, East Patel Nagar, New Delhi-110008, India. **Complainants**

Versus

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

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

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

ORDER

1. The present complaint dated 23.11.2020 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 11.04.2013 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	Gurgaon Greens, Sector 102, Gurugram.
2.	Project area	13.531 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no. and validity status	75 of 2012 dated 31.07.2012 Valid/renewed up to 30.07.2020
5.	Name of licensee	Kamdhenu Projects Pvt. Ltd. and another C/o Emaar MGF Land Ltd.
6.	HRERA registered/ not registered	**Registered vide no. 36(a) of 2017 dated 05.12.2017 for 95829.92 sq. mtrs.**
	HRERA registration valid up to	**31.12.2018**

7.	HRERA extension of registration vide	**01 of 2019 dated 02.08.2019**
	Extension valid up to	**31.12.2019**
8.	Occupation certificate granted on	30.05.2019 [Page 142 of reply]
9.	Provisional allotment letter dated	31.01.2013 [Page 40 of reply]
10.	Unit no.	GGN-20-0302, 3rd floor, tower 20 [Page 47 of complaint]
11.	Unit measuring	1650 sq. ft.
12.	Date of execution of buyer's agreement	11.04.2013 [Page 44 of complaint]
13.	Payment plan	Construction linked payment plan [Page 76 of complaint]
14.	Total consideration as per statement of account dated 04.01.2021 at page 139 of the reply	Rs.96,88,497/-
15.	Total amount paid by the complainants as per statement of account dated 04.01.2021 at page 140 of reply	Rs.97,02,331/-
16.	Date of start of construction as per statement of account dated 04.01.2021 at page 139 of the reply	16.06.2013
17.	Due date of delivery of possession as per clause 14(a) of the said agreement i.e. 36 months from the date of start of construction i.e. 16.06.2013 + grace period of 5 months, for applying and obtaining completion certificate/	16.06.2016 **[Note:** Grace period is not included**]**

	occupation certificate in respect of the unit and/or the project. [Page 60 of complaint]	
18.	**Date of offer of possession to the complainants**	**01.06.2019** [Page 97 of complaint]
19.	Delay in handing over possession till 01.08.2019 i.e. date of offer of possession (01.06.2019) + 2 months	6 years 1 months 16 days
20.	Unit handover letter	17.07.2019 [Page 145 of reply]
21.	Conveyance deed executed on	01.08.2019 [Page 146 of reply]

B. Facts of the complaint

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

i. That Mr. Ashwani Rawat was the original allottee (hereinafter referred to as the "original allottee"), who was allotted the flat in question bearing no. GGN-20-0302 at Gurgaon Greens, Sector 102, Gurugram, Haryana, having super built up area admeasuring 1650 sq. ft. The original allottee and respondent entered into a builder buyer's agreement (hereinafter referred to as the "buyer's agreement") on 11.04.2013. The complainants purchased the said flat in the project from original allottee vide "agreement to sell" dated 11.07.2013 and endorsement on the

buyer's agreement was subsequently made on 25.07.2013, thus stepping into the shoes of the original allottee. The respondent confirmed nomination of the complainants for the said flat vide nomination letter dated 31.07.2013 and respondent confirmed having received a total sum of Rs.30,61,710/- which is in line with agreement to sell executed between complainants and original allottee. Respondent handover payment receipts and buyer's agreement along with nomination letter to complainants. Complainants found buyer's agreement consisting of very stringent and biased contractual terms which are illegal, arbitrary, unilateral and discriminatory in nature, because every clause of agreement is drafted in a one-sided way and a single breach of unilateral terms of provisional allotment letter by complainants, will cost him forfeiting of 15% of total consideration value of unit. When complainants opposed the unfair trade practices of respondent about the delay payment charges of 24%, they said this is standard rule of company and company will also compensate at the rate of Rs 7.5 per sq. ft. per month in case of delay in possession of flat by company.

ii. That after the endorsement was made on the buyer's agreement in favour of the complainants, the complainants with bona-fide intentions continued to make payments on the basis of the demand raised by the respondent. During the period starting

from 25.07.2013, the date of endorsement on the buyer's agreement, the respondent raised 9 demands of payments vide various demand letter which were positively and duly paid by complainants. A total of more than Rs.96,45,198/- was paid. Thus, showing complete sincerity and interest in project and the said flat.

iii. That as per clause 14 of the buyer's agreement, the respondent had agreed and promise to complete the construction of the said flat and deliver its possession within a period of 36 months with 5 months grace period thereon from the date of start of construction (date of start of construction is 16.06.2013). Therefore, the proposed possession date as per buyer's agreement was due on 16.11.2016. However, the respondent has breached the terms of said buyer's agreement and failed to fulfil its obligations and has not delivered possession of said flat within the agreed time frame of the buyer's agreement.

iv. That as per the statement dated 05.07.2019, issued by the respondent, the complainants had already paid Rs.96,45,198/- towards total sale consideration as demanded by the respondent from time to time and now nothing is pending to be paid on the part of complainants. Although the respondent charged Rs.1,12,576/- extra on sale price without stating any reason for the same.

v. That the offer of possession offered by respondent through "Intimation of Possession" dated 01.06.2019 was not a valid offer of possession because respondent has offered the possession with stringent condition to pay certain amounts which were never part of agreement. At the time of offer of possession, builder did not adjust the penalty for delay possession. Respondent demanded Rs.1,44,540/- towards two-year advance maintenance charges from complainants which was never agreed under the buyer's agreement and respondent also demanded a lien marked FD of Rs. 2,46,099/- on pretext of future liability against HVAT which are also unfair trade practice. The respondent demanded Rs.3,32,600/- towards e-stamp duty and Rs.45,000/- towards registration charges of above said unit in addition to final demand raised by respondent along with offer of possession. That the respondent had charged IFMS twice and had increased the sale consideration. Respondent gave physical handover of aforesaid property on 17.07.2019 after receiving all payments on 26.06.2019 from the complainants.

vi. That after taking possession of flat on 26.06.2019, complainants also identified some major structural changes which were done by respondent in project in comparison to features of project narrated to complainants on 25.07.2013 at the office of

respondent. Area of central park was told 8 acres but in reality, it is very small as compared to 8 acres and respondent also build car parking underneath 'central park', joggers park does not exist whereas respondent charged a PLC of Rs.4,95,000/- from complainants on pretext of central park. Most of the amenities does not exist in project whereas it was highlight at the time of booking of flat. Respondent did not even confirm or revised the exact amount of EDC, IDC and PLC after considering the structural changes neither they provide the receipts or documentary records showing the exact amount of EDC and IDC paid to government.

vii. That the respondent has acted in a very deficient, unfair, wrongful, fraudulent manner by not delivering the said flat within the agreed timelines as agreed in the buyer's agreement and otherwise. The cause of action accrued in the favour of the complainants and the respondent on 29.02.2012 when the said flat was booked by original allottee, and it further arose when respondent failed/neglected to deliver the said flat on proposed delivery date.

C. Relief sought by the complainants

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

i. Direct the respondent to pay 18% interest on account of delay in offering possession on amount paid by the complainants as sale consideration of the said flat from the date of payment till the date of delivery of possession.

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

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

D. Reply by the respondent

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

i. That complainants have filed the present complaint seeking refund of several amounts and interest for alleged delay in delivering possession of the apartment booked by the complainants. It is respectfully submitted that such complaints are to be decided by the adjudicating officer under section 71 of the Act read with rule 29 of the rules and not by this hon'ble authority. The present complaint is liable to be dismissed on this ground alone.

ii. That the present complaint is based on an erroneous interpretation of the provisions of the Act as well as an incorrect understanding of the terms and conditions of the buyer's agreement dated 11.04.2013. That the provisions of the Act are not retrospective in nature. The provisions of the Act cannot undo or modify the terms of an agreement duly executed prior to coming into effect of the Act. 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 cannot be called in to aid in derogation and ignorance of the provisions of the buyer's agreement. Moreover, the complainants cannot demand any interest from the respondent for the period during which no relation subsisted between them.

iii. That the original allottee, Mr. Ashwani Rawat, in pursuance of the application form dated 02.02.2012, was allotted an independent unit bearing no GGN-20-0302, located on the 3rd floor, in the project vide provisional allotment letter dated 31.01.2013. 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 the respondent that they shall remit every installment on time as per the payment schedule. The buyer's agreement dated

11.04.2013 was executed between the original allottee and the respondent.

iv. That thereafter, the complainants approached the original allottee for purchasing his rights and title in the unit in question. The original allottee acceded to the request of the complainants and agreed to transfer and convey his rights, entitlement and title in the unit in question to the complainants for a valuable sale consideration of Rs. 94,99,103/- and agreement to sell executed between the original allottee and the complainants on 11.07.2013. The complainants on executing the aforesaid agreement to sell had approached the respondent requesting it to endorse the provisional allotment of the unit in question in their name. The complainants had further executed an affidavit dated 25.07.2013 and an indemnity cum undertaking dated 25.07.2013 whereby the complainants 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. It was further declared by the complainants that they, having been substituted in the place of the original allottee in respect of the provisional allotment of the unit in question, were 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 the respondent.

v. That in addition thereto, the complainants have executed an indemnity cum undertaking dated 19.06.2019 whereby the complainants had declared and acknowledged that they have no ownership right, title or interest in any other part of the project except in the unit area of the unit in question. Moreover, the complainants have admitted their obligation to discharge their HVAT liability thereunder.

vi. That the respondent had offered possession of the unit in question through letter of offer of possession dated 01.06.2019 to the complainants. The respondent had requested the complainants to remit the amounts mentioned in the said letter and obtain possession of the unit in question.

vii. That, furthermore, as per clause 14(b)(v) of the buyer's agreement, in the event of any default or delay in payment of instalments as per the schedule of payments incorporated in the buyer's agreement, the time for delivery of possession shall also stand extended. It is submitted that the complainants have defaulted in timely remittance of the payments mentioned in the offer of possession. Therefore, the date of delivery option is not liable to determine the matter sought to be done by the complainants. Clause 16 of the buyer's agreement further

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. Complainants, having defaulted in payment of instalments, are thus not entitled to any compensation or any amount towards interest under the buyer's agreement. The complainants by way of present complaint are demanding interest for alleged delay in delivery of possession. The interest is compensatory in nature and cannot be granted in derogation and ignorance of the provisions of the buyer's agreement.

viii. That despite there being a number of defaulters in the project, the respondent itself infused funds into the project and has diligently developed the project in question. The respondent had applied for occupation certificate on 31.12.2018. Occupation certificate was thereafter issued in favour of the respondent vide memo bearing no. ZP-835/AD(RA)/2018/3010 dated 30.05.2019. It is pertinent to note that once an application for grant of occupation certificate is submitted for approval in the office of the concerned statutory authority, the respondent ceases to have any control over the same. The grant of sanction of the occupation certificate is the prerogative of the concerned statutory authority over which the

respondent cannot exercise any influence. As far as the respondent is concerned, it has diligently and sincerely pursued the matter with the concerned statutory authority for obtaining of the occupation certificate. No fault or lapse can be attributed to the respondent in the facts and circumstances of the case. Therefore, the time period utilised by the statutory authority to grant occupation certificate to the respondent is necessarily required to be excluded from computation of the time period utilized for implementation and development of the project.

ix. That the construction of the project/allotted unit in question stands completed and the respondent has already offered possession of the unit in question to the complainants. Furthermore, the project of the respondent has been registered under the Act vide memo no. HRERA-139/2017/2294 dated 05.12.2017. The respondent had applied for extension of the registration and the validity of registration certificate was extended till 31.12.2019. However, since the respondent has delivered possession of the units comprised in the relevant part of the project, the registration of the same has not been extended thereafter.

x. That the complainants had obtained possession of the unit in question and a unit handover letter dated 17.07.2019 had been executed by the complainants. It is submitted that prior to

execution of the unit handover letter, the complainants had satisfied themselves regarding the measurements, location, dimension, development etc. of the unit in question. The complainants only after satisfying themselves with all the aspects including shape, size, location etc. of the unit in question, executed the unit handover letter stating that all the liabilities and obligations of respondent as enumerated in the allotment letter/ buyer's agreement stood satisfied. Furthermore, the complainants have executed a conveyance deed dated 01.08.2019. Therefore, the transaction between the complainants and the respondent has been concluded in August 2019 and no right or liability can be asserted by respondent or the complainants against the other. The present complaint is nothing but a gross misuse of process of law.

xi. That the buyer's agreement is needed to be considered as a whole in order to fully appreciate and determine the respective rights and liabilities of the parties thereto. The clauses of the buyer's agreement cannot be read and interpreted in isolation and in derogation of other provisions of the buyer's agreement. That the nature of the rights and obligations that flow from the buyer's agreement, a developer and a buyer can never be treated on the same footing. A developer is tasked with conceptualization, development, construction of the entire

project, obtaining of various permissions, sanctions, approvals, etc. from various authorities, ensuring statutory compliances, collecting amounts from allottees, raising finances etc. whereas the corresponding obligations cast upon the allottee are far less onerous mainly being payment of instalments on time which too in this case have been delayed time and again. Therefore, entitlement of the developer cannot be construed to be prejudicial to the complainants in the facts and circumstances of the case. That all the amounts demanded from the complainants by the respondent in the offer of possession have been demanded in accordance with the terms and conditions incorporated in the buyer's agreement. In any case, the complainants have accepted the demands of the respondent and have already remitted the amounts to the respondent.

xii. That the respondent denied that IFMS amount has been charged twice from the complainants. It is wrong and denied that the sale consideration has been increased. The sale consideration amount does not include applicable taxes, stamp duty, registration charges and interest on delayed payments. In accordance with clause 21 of the buyer's agreement, the complainants are bound to pay maintenance charges, including advance maintenance charges for a period of one year or as may be decided by the respondent/the maintenance agency at its

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

xiii. That several allottees, including the complainants have defaulted in timely remittance of payment of installments which was an essential, crucial and an indispensable requirement for conceptualization and development of the said project. Furthermore, when the proposed allottees default in their

payments as per schedule agreed upon, the failure has a cascading effect on the operations and the cost for proper execution of the project increases exponentially whereas enormous business losses befall upon the respondent. The respondent, despite default of several allottees, has diligently and earnestly pursued the development of the project in question and has constructed the project in question as expeditiously as possible. Therefore, there is no default or lapse on the part of the respondent and there in no equity in favour of the complainants. It is evident from the entire sequence of events, that no illegality can be attributed to the respondent. Based on the above submissions, the respondent asserted that the present complaint deserves to be dismissed at the very threshold.

E. Written arguments by the complainants

8. The complainants have filed written arguments on 09.04.2021. The complainants submitted that the respondent offered the possession on 01.06.2019 with stringent condition to pay certain amounts which are never be a part of agreement and respondent did not receive the completion certificate of various other towers of the project and as on 01.06.2019 project was delayed by approx. 2 years. At the time of offer of possession builder did not adjust the penalty for delay possession. In case of delay payment, builder charged the

penalty @24% per annum and for delay in possession committed to give the Rs. 7.5/- sq. ft. only, this is illegal, arbitrary, unilateral and discriminatory and above all, respondent did not even adjust a single penny on account of delay in possession even after a delay of 2 years. Respondent did not even allow complainants to visit the property at "Gurgaon Greens" before clearing the final demand raised by respondent along with the offer of possession. Respondent demanded two-year advance maintenance charges from complainants which were never agreed under the buyer's agreement and respondent also demanded a lien marked FD of Rs. 2,46,099/- in pretext of future liability against HVAT which are also an unfair trade practice. Respondent also compelled complainants to furnish indemnity-cum-undertaking for taking possession of flat by referring the unilateral clause 15 (b) of one-sided buyer's agreement. The said indemnity-cum-undertaking was not a voluntary act on the part of the complainants, rather, they had to furnish this indemnity-cum-undertaking under duress and coercion in order to obtain the delivery of legal, and physical possession of flat.

9. That in view of the ratio of law laid down by the hon'ble Apex Court in **Wg. Cdr. Arifur Rahman Khan and Aleya Sultana and others vs. DLF Southern Homes Pvt. Ltd. (now known as BEGUR OMR Homes Pvt. Ltd.) and others** 2020(3) R.C.R.(Civil) 544, it was held that the allottees will not lose their right to claim interest for delayed

possession merely on the ground that the conveyance deed had already been executed. The execution of the conveyance deed cannot extinguish the cause of action which had already accrued to the allottees due to delay in delivery of possession.

10. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents.

F. Jurisdiction of the authority

11. 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.

F.I Territorial jurisdiction

12. 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

13. 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.

G. Findings on the objections raised by the respondent

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

14. One of the contentions of the respondent is that the 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. 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 hon'ble Bombay High Court in ***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.....*
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> *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."*

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

> *"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and <u>will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion</u>. Hence in case of delay in the offer/delivery of*

possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."

16. 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.

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

17. 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 31.12.2018 and thereafter vide memo no. ZP-835-AD(RA)/2018/13010 dated 30.05.2019, the occupation certificate has been granted by the competent authority under the prevailing law. The authority cannot be a silent spectator to the

deficiency in the application submitted by the promoter for issuance of occupancy certificate. It is evident from the occupation certificate dated 30.05.2019 that an incomplete application for grant of OC was applied on 31.12.2018 as fire NOC from the competent authority was granted only on 19.03.2019 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 22.03.2019. The District Town Planner, Gurugram and Senior Town Planner, Gurugram has submitted requisite report about this project on 19.04.2019 and 22.04.2019 respectively. As such, the application submitted on 31.12.2018 was incomplete and an incomplete application is no application in the eyes of law.

18. 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 22.04.2019 and consequently the concerned authority has granted occupation certificate on 30.05.2019. Therefore, in view of the deficiency in the said

application dated 31.12.2018 and aforesaid reasons, no delay in granting occupation certificate can be attributed to the concerned statutory authority.

G.III Whether a subsequent allottee who had executed an indemnity cum undertaking with waiver clause is entitled to claim delay possession charges.

19. The respondent submitted that complainants in question are subsequent allottees and they have executed an affidavit dated 25.07.2013 and an indemnity cum undertaking dated 25.07.2013 whereby the complainants 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. It was further declared by the complainants that they, having been substituted in the place of the original allottee in respect of the provisional allotment of the unit in question, were not entitled to any compensation for delay. Therefore, the complainants are not entitled to any compensation. 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 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?

20. 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".*

21. 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, allottee would not be a person to whom any plot, apartment or building is given on rent.

22. 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 BBA 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.

23. 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....."*

24. The authority concurs with the Hon'ble NCDRC's decision dated 26.11.2019 in **Rajnish Bhardwaj vs. M/s CHD Developers Ltd.** (supra) that it is irrespective of the status of the allottees 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 complainants as allottees.

25. 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 complainants/subsequent allottees 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 complainants/subsequent allottees have been endorsed on the same buyer's agreement which was executed between the original allottee and the promoter. Therefore, the rights and obligation of the complainants/subsequent allottees 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)?**

26. The respondent/promoter contended that the complainants/subsequent allottees shall not be entitled to any compensation/delayed possession charges since at the time of the execution of transfer documents/agreement for sale, they were 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 allottees 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.

27. 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 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 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)

28. In the present case, the complainants/subsequent allottees have been acknowledged as allottees by the respondent vide nomination letter dated 31.07.2013. 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 complainant/subsequent allottees and the next instalments were payable/due as per the original allotment letter. Similarly, we have also perused the buyer's agreement which was originally entered into between the original allottee and the promoter. The same buyer's agreement has been endorsed in favour of the subsequent allottees/complainants. All the terms of builder buyer's agreement remain the same, so it is quite clear that the complainants/subsequent allottee has stepped into the shoes of the original allottee.

29. Though the promised date of delivery was 16.06.2016 but the construction of the tower in question was not completed by the said date and it was offered by the respondent only on 01.06.2019 i.e. after delay of 3 years 1 month approx. If these facts are taken into consideration, the complainants/ subsequent allottees 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 complainants/subsequent purchasers 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?**

30. 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.

31. 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**.

32. 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?

33. 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 complainants/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 complainants/ 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 the complainants 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."

34. 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

35. 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."

36. The same analogy can easily be applied in the case of execution of an affidavit or indemnity-cum-undertaking which got executed from the complainants/subsequent-allottees before getting the unit transferred in their name in the record of the promoter as allottees in place of the original allottee.

37. The authority may deal with this point from yet another aspect. By executing an affidavit/undertaking, the complainants/subsequent-allottees cuts their hands from claiming delay possession charges in case there occurs any delay in giving possession of the unit 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 is beyond the comprehension and understanding of this authority.

38. The authority holds that irrespective of the execution of the affidavit/undertaking by the complainants/subsequent allottees at the time of transfer of their name as allottees 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.

G.IV 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.

39. The respondent is contending that at the time of taking possession of the apartment vide unit hand over letter dated 17.07.2019, 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."

40. 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."*

41. 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.

42. 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."

43. 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."*

44. Therefore, the authority is of the view that the aforesaid unit handover letter dated 17.07.2019 does not preclude the complainants from exercising their right to claim delay possession charges as per the provisions of the Act.

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

45. The respondent submitted that the complainants have executed a conveyance deed dated 01.08.2019 and therefore, the transaction between the complainants and the respondent has been concluded

and no right or liability can be asserted by respondent or the complainants against the other. Therefore, the complainants are estopped from claiming any interest in the facts and circumstances of the case. The present complaint is nothing but a gross misuse of process of law.

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

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

> *"**11. Functions and duties of promoter***
>
> *(1) XXX*
> *(2) XXX*
> *(3) XXX*
> *(4) The promoter shall—*
>
> *(a) be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be.*
>
> *Provided that the responsibility of the promoter, with respect to the structural defect or any other defect for such period as is referred to in sub-section (3) of section 14, shall continue even after the conveyance deed of all the apartments, plots or buildings, as the case may be, to the allottees are executed.*
>
> *(b) XXX*
>
> *(c) XXX*
>
> *(d) be responsible for providing and maintaining the essential services, on reasonable charges, till the taking over of the maintenance of the project by the association of the allottees;"* *(emphasis supplied)*

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

(1) XXX
(2) XXX

(3) In case any structural defect or any other defect in workmanship, quality or provision of services or any other obligations of the promoter as per the agreement for sale relating to such development is brought to the notice of the promoter within a period of five years by the allottee from the date of handing over possession, it shall be the duty of the promoter to rectify such defects without further charge, within thirty days, and in the event of promoter's failure to rectify such defects within such time, the aggrieved allottees shall be entitled to receive appropriate compensation in the manner as provided under this Act....." *(emphasis supplied)*

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

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

8. .....The relationship of consumer and service provider does not come to an end on execution of the Sale Deed in favour of the complainants." *(emphasis supplied)*

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

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

premises purchased or, if they seek to obtain a Deed of Conveyance to forsake the right to claim compensation. This basically is a position which the NCDRC has espoused. We cannot countenance that view.

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

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

51. The complainants have invested their hard-earned money and there is no doubt that the promoter has been enjoying benefits of and the next step is to get their title perfected by executing a conveyance deed which is the statutory right of the allottee. Also, the obligation of the developer – promoter does not end with the execution of a conveyance deed. The essence and purpose of the Act was to curb the menace created by the developer/promoter and safeguard the interests of the allottees by protecting them from being exploited by

the dominant position of the developer which he thrusts on the innocent allottees. Therefore, in furtherance to the Hon'ble Apex Court judgement and the law laid down in the **Wg. Cdr. Arifur Rahman (supra)**, this authority holds that even after execution of the conveyance deed, the complainants cannot be precluded from their right to seek delay possession charges from the respondent-promoter.

H. Findings on the reliefs sought by the complainants

H.I Delay possession charges

52. **Relief sought by the complainants:** The respondent be directed to pay 18% interest on account of delay in offering possession on amount paid by the complainants as sale consideration of the said flat from the date of payment till the date of delivery of possession.

53. 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."*

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

> "**14. POSSESSION**
>
> ***(a)*** **Time of handing over the possession**
>
> *Subject to terms of this clause and barring force majeure conditions, and subject to the Allottee having complied with all the terms and conditions of this Agreement, and not being in default under any of the provisions of this Agreement and compliance with all provisions, formalities, documentation etc., as prescribed by the Company. The Company proposes to hand over the possession of the Unit within 36 (Thirty Six) months from the date of start of construction., subject to timely compliance of the provisions of the Agreement by the Allottee. The Allottee agrees and understands that the Company shall be entitled to a grace period of 5 (five) months, for applying and obtaining the completion certificate/occupation certificate in respect of the Unit and/or the Project."*

55. 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 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.

56. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within 36 (thirty-six) months from the date of start of construction and further provided in agreement that promoter shall be entitled to a grace period of 5 months for applying and obtaining completion certificate/occupation certificate in respect of said unit. The date of start of construction is 16.06.2013 as per statement of account dated 04.01.2021. The period of 36 months expired on 16.06.2016. As a matter of fact, the promoter has not applied to the concerned authority for obtaining completion certificate/ occupation certificate within the time limit prescribed by the promoter in the buyer's agreement. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 5 months cannot be allowed to the promoter at this stage.

57. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges at the rate of 18% p.a. 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.*

58. 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.

59. Taking 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 clauses of the buyer's agreement for the period of such delay; whereas, the promoter was entitled to interest @ 24% per annum compounded at the time of every succeeding instalment for the delayed payments. The functions of the authority are to safeguard the interest of the aggrieved person, may be the allottee or the promoter. The rights of the parties are to be balanced and must be equitable. The promoter cannot be allowed to take

undue advantage of his dominate position and to exploit the needs of the home buyers. This authority is duty bound to take into consideration the legislative intent i.e., to protect the interest of the consumers/allottees in the real estate sector. The clauses of the buyer's agreement entered into between the parties are one-sided, unfair and unreasonable with respect to the grant of interest for delayed possession. There are various other clauses in the buyer's agreement which give sweeping powers to the promoter to cancel the allotment and forfeit the amount paid. Thus, the terms and conditions of the buyer's agreement are ex-facie one-sided, unfair and unreasonable, and the same shall constitute the unfair trade practice on the part of the promoter. These types of discriminatory terms and conditions of the buyer's agreement will not be final and binding.

60. Consequently, as per website of the State Bank of India i.e., https://sbi.co.in, the marginal cost of lending rate (in short, MCLR) as on date i.e., 22.07.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

61. 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;"

62. 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.

63. On consideration of the documents available on record and submissions made by the parties regarding contravention as per provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 14(a) of the buyer's agreement executed between the parties on 11.04.2013, possession of the said unit was to be delivered within a period of 36 months from the date of start of construction i.e. 16.06.2013. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over possession comes out to be 16.06.2016. In the present case, the complainants were offered possession by the respondent on 01.06.2019. Subsequently, the complainants had taken

possession of the said unit vide unit handover letter dated 17.07.2019 and thereafter, conveyance deed was executed between the parties on 01.08.2019. 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 11.04.2013 executed between the parties.

64. 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 30.05.2019. However, the respondent offered the possession of the unit in question to the complainants only on 01.06.2019, 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, the complainants 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 they have 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. 16.06.2016 till the expiry of 2 months from the date of offer of possession (01.06.2019) which comes out to be 01.08.2019.

65. 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 delay possession charges at prescribed rate of the interest @ 9.30 % p.a. w.e.f. 16.06.2016 till 01.08.2019 as per provisions of section 18(1) of the Act read with rule 15 of the rules.

I. 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. 16.06.2016 till the expiry of 2 months from the date of offer of possession i.e. 01.08.2019. 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. 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 charge holding charges from the complainants/allottees at any point of time even after being part of the buyer's agreement as per law settled by hon'ble Supreme Court in civil appeal nos. 3864-3899/2020 decided on 14.12.2020.

67. Complaint stands disposed of.

68. File be consigned to registry.

(Vijay Kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 22.07.2021

Judgement uploaded on 18.09.2021