

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

Complaint no. : 200 of 2020
First date of hearing : 06.03.2020
Date of decision : 29.07.2021

Rahul Chawla
R/o: C-294, Defence Colony,
New Delhi-110024

Complainant

Versus

M/s Emaar MGF Land Ltd.
Registered Office: 306-308, Square One,
C-2, District Centre, Saket,
New Delhi-110017

Corporate Office: Emaar Business Park,
MG Road, Sikanderpur Chowk, Sector-28
Gurugram-122002

Respondent

CORAM:

Shri Samir Kumar
Shri Vijay Kumar Goyal

Member
Member

APPEARANCE:

Shri Harshit Goyal
Shri J.K. Dang

Advocate for the complainant
Advocate for the respondent

ORDER

1. The present complaint dated 15.01.2020 has been filed by the complainant/allottee in Form CRA under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for

violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all 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 22.12.2010 i.e. prior to the commencement of the Act *ibid*, therefore, the penal proceedings cannot be initiated retrospectively. Hence, the authority has decided to treat the present complaint as an application for non-compliance of statutory obligation on part of the promoter/respondent in terms of section 34(f) of the Act *ibid*.

A. Project and unit related details

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



		Valid/renewed up to 04.08.2019
5.	Name of licensee	Robin Software Pvt. Ltd. and another C/o Emaar MGF Land Ltd.
6.	HRERA registered/ not registered	Registered vide no. 256 of 2017 dated 03.10.2017 for 45425.87 sq. mtrs.
7.	HRERA registration valid up to	02.10.2022
8.	Occupation certificate received on	24.12.2019 [Page 143 of reply]
9.	Provisional allotment letter dated	30.04.2010 [Page 12 of complaint]
10.	Unit no.	PH4-69-0101, 1 st floor, building no. 69 [Page 19 of complaint]
11.	Unit measuring	1950 sq. ft.
12.	Date of execution of buyer's agreement	22.12.2010 [Page 16 of complaint]
13.	Payment plan	Construction linked payment plan [Page 47 of complaint]
14.	Total consideration as per statement of account dated 27.03.2020 at page 116 of reply	Rs.92,51,773/-
15.	Total amount paid by the complainant as per statement of account dated 27.03.2020 at page 117 of reply	Rs.86,16,345/-
16.	Date of start of construction as per statement of account dated 27.03.2020 at page 116 of reply	22.05.2011

17.	Due date of delivery of possession as per clause 11(a) of the said agreement i.e. 33 months from the date of start of construction plus grace period of 3 months for applying and obtaining the CC/OC in respect of the unit and/or the project. [Page 30 of complaint]	22.02.2014 [Note: Grace period is not included]
18.	Date of offer of possession to the complainant	09.01.2020 [Page 146 of reply]
19.	Delay in handing over possession till 09.03.2020 i.e. date of offer of possession (09.01.2020) + 2 months	6 years 16 days

B. Facts of the complaint

4. The complainant has made following submissions in the complaint:
 - i. That in the year 2010, the representatives of the respondent approached the complainant and presented a rosy picture of the project in question and assured timely delivery of the possession of the project in question. On the basis of the assurances as given by the representative of the respondent, the complainant approached the respondent and submitted application form dated 09.03.2010 for booking of an apartment in the project in question.
 - ii. That the respondent company issued allotment letter dated 30.04.2010 of the apartment no. PH4-69-0101 in

the name of the complainant. Thereafter, the buyer's agreement was duly executed between the complainant and the respondent on 22.12.2010 and according to clause 11 (a) of the buyer's agreement dated 22.12.2010, the respondent was liable to deliver the possession of the unit within a period of 33 months from the date of start of construction and a grace period of 3 months. Accordingly, the due date of possession comes out to be 22.12.2014 inclusive of grace period. However, the respondent has failed to fulfil its liability under clause 11(a) of the buyer's agreement and section 11(4)(a) of the Act.

- iii. That the respondent has failed to abide all the obligations of him stated orally and under the buyer's agreement duly executed between both the present parties. That the complainant had already paid Rs.80,99,687/- out of the total sale consideration of Rs. 86,79,000/- as and when demanded by the respondent. Hence, this complaint.

C. Relief sought by the complainant

5. The complainant has filed the present complaint for seeking following reliefs:
 - i. Direct the respondent to pay delay possession charges at the prescribed rate of interest to the complainant for the

period of delay in delivery of the possession of the booked unit.

- ii. Any other relief which this hon'ble authority deems fit and proper.
6. On the date of hearing, the authority explained to the respondent/promoter about the contravention as alleged to have been committed in relation to section 11(4)(a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent

7. The respondent has raised certain preliminary objections and has contested the present complaint on the following grounds:
- i. That the complainant has filed the present complaint seeking, inter alia, interest and compensation for alleged delay in delivering possession of the apartment booked by them. The complaints pertaining to compensation and interest are to be decided by the adjudicating officer under section 71 of the act read with rule 29 of the rules and not by this hon'ble authority. The present complaint is liable to be dismissed on this ground alone.
 - 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 22.12.2010. That the

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

- iii. That apartment bearing no. PH4-69-0101, admeasuring 1950 sq. ft. approx. of super area, was provisionally allotted to the complainant vide allotment letter dated 11.05.2010. Thereafter, buyer's agreement was executed between the parties on 22.12.2010.
- iv. That the complainant is not an "allottee" but an investor who has booked the apartment in question as a

speculative investment in order to earn rental income/ profit from its resale. The apartment in question has been booked by the complainant as speculative investment and not for the purpose of self-use as a residence.

- v. That the complainant had agreed and undertaken to make payment of sale consideration in accordance with the payment plan but failed to do so. Consequently, the respondent was constrained to issue demand notices and reminders for payment to the complainant. Statement of account dated 27.03.2020 reflects the payments made by the complainant and the delayed payment interest accrued thereon as on 27.03.2020.
- vi. That by letters dated 3.03.2017 and 12.07.2018, the complainant was informed that the site plan approved earlier for the project, was proposed to be revised. Accordingly, suggestions/objections against the proposed revision were invited by the respondents as per the requirements of the Town and Country Planning Department, Haryana. In the meanwhile, the project was registered under the provisions of the Act. vide number HRERA-606/2017/1248 dated 03.10.2017. It is pertinent to mention herein that the registration of the project is valid up till 02.10.2022. In other words, the respondent is

required to complete the construction of the apartment in question and offer possession of the same to the complainant on or before 02.10.2022 or within the extended period of registration, if any. However, the respondent has already completed construction of the apartment and offered possession to the complainant on 09.01.2020.

- vii. That in terms of clause 11 read with clause 27 of the buyer's agreement, subject to timely compliance of the provisions of the buyer's agreement by the allottees, and subject to delay for reasons beyond the control of the respondent, possession of the apartment in question is proposed to be handed over within a period of 33 months from the date of start of construction, with grace period of 3 months for applying/obtaining the occupation certificate from the competent authorities.
- viii. That clause 1.2(b) of the buyer's agreement provides that time shall be the essence with regard to the allottee's obligation to pay the total consideration as provided in the payment plan, along with other payments, on or before the due date or as demanded by the respondent. Failure to make timely payment of demanded amounts shall attract interest @ 24% per annum. Clause 1.2(h) of

the agreement provides that in the event of the failure of the allottee to comply with the terms and conditions of the buyer's agreement or failure to execute the same within 30 days of its receipt by the allottee, the respondent shall have the right to forfeit the earnest money (representing 15% of the total consideration. Clause 13 of the buyer's agreement deals with payment of compensation in case of delay in offering possession. Clause 13(c) provides that compensation shall be payable only if the allottees have not breached the terms and conditions of the buyer's agreement or defaulted in payment as per the schedule of payment. Clause 13(d) of the buyer's agreement provides that in case of delay in handing over of possession due to delay or nonreceipt of the occupation certificate, completion certificate and/or any other permission/sanction from the competent authorities, in such case no compensation shall be payable to the allottees.

- ix. That the respondent submitted that the project has got delayed on account of following reasons which were/are beyond the power and control of the respondent. *Firstly*, the National Building Code was revised in the year 2016 and in terms of the same, all high-rise buildings (i.e.

buildings having area of less than 500 sq. mtrs. and above), irrespective of area of each floor, are now required to have two staircases. Eventually, so as not to cause any further delay in the project and so as to avoid jeopardizing the safety of the occupants of the buildings in question including the building in which the apartment in question is situated, the respondent had taken a decision to go ahead and construct the second staircase and the respondent has succeeded in completing construction of the apartment in question and the occupation certificate in respect thereof has been received on 24.12.2019. Thereafter, possession of the apartment has been offered to the complainant vide offer of possession letter dated 09.01.2020. *Secondly*, the respondent had to engage the services of Mitra Guha, a reputed contractor in real estate, to provide multi-level car parking in the project. The said contractor started raising certain false and frivolous issues with the respondent due to which the contractor slowed down the progress of work at site. Any lack of performance from a reputed cannot be attributed to the respondent as the same was beyond its control.

- x. That despite all the adversities faced by the respondent, the respondent has succeeded in completing construction of the apartment in question and the occupation certificate in respect thereof has been received on 24.12.2019. Thereafter, possession of the apartment has been offered to the complainant vide offer of possession letter dated 09.01.2020. The complainant has been called upon to make payment of balance sale consideration and complete necessary formalities so as to enable the respondent to hand over possession of the apartment to the complainant.
- xi. That several allottees, including the complainant had defaulted in timely remittance of payment of installments which was an essential, crucial and an indispensable requirement for conceptualization 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. 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. The complainant has filed written arguments on 24.09.2020 wherein the complainant has reiterated the facts of the complaint. 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. The authority, on the basis of information, explanation, other submissions made, and the documents filed by both the parties, is of considered view that there is no need of further hearing in the complaint.

E. Jurisdiction of the authority

9. The preliminary objections raised by the respondent regarding jurisdiction of the authority to entertain the present complaint stands rejected. The authority observed that it has

territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below:

E.I Territorial jurisdiction

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

E.II Subject-matter jurisdiction

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

F. Findings on the objections raised by the respondent

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

12. The respondent contended that authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the buyer's agreement

executed between the parties and no agreement for sale as referred to under the provisions of the Act or the said rules has been executed inter se parties. The respondent further submitted that the provisions of the Act are not retrospective in nature and the provisions of the Act cannot undo or modify the terms of buyer's agreement duly executed prior to coming into effect of the Act.

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

"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under

RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter.....

122. *We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."*

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

"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and 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 entitlement of DPC on ground of complainant being investor

16. The respondent submitted that the complainant is investor and not consumer/allottee, thus, the complainant is not entitled to the protection of the Act and thus, the present complaint is not maintainable.
17. The authority observed that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states main aims and objects of enacting a statute but at the same time preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that under section 31 of the Act, any aggrieved person can file a complaint against the promoter if the promoter contravenes or violates any provisions of the Act or rules or

regulations made thereunder. Upon careful perusal of all the terms and conditions of the buyer's agreement, it is revealed that the complainant is an allottee/buyer, and he has paid total price of Rs.89,16,345/- to the promoter towards purchase of the said unit in the project of the promoter. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

"2(d) "allottee" in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;"

18. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the buyer's agreement executed between respondent and complainant, it is crystal clear that the complainant is allottee as the subject unit was allotted to them by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 000600000010557 titled as ***M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr.*** has also held that the concept of investor is

not defined or referred in the Act. Thus, the contention of promoter that the complainant-allottee being investors is not entitled to protection of this Act stands rejected.

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

19. The respondent submitted that authority has granted 02.10.2022 as the date of completion of the project and therefore cause of action, if any, would accrue in favour of the complainant to file a complaint for seeking any interest as alleged if and only the respondent fails to offer possession of the unit in question within the aforesaid time. Thus, the complaint is liable to be dismissed on this ground alone. Therefore, next question of determination is whether the respondent is entitled to avail the time given to him by the authority at the time of registering the project under section 3 & 4 of the Act.
20. 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.
21. 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: —

.....

(I): -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...."

22. 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)(I)(C) is now the new timeline as indicated by him for the completion of the project. Although, penal proceedings shall not be initiated against the builder for not meeting the committed due date of possession but now, if the promoter fails to complete the project in declared timeline, then he is liable for penal proceedings. The due date of

possession as per the agreement remains unchanged and promoter is liable for the consequences and obligations arising out of failure in handing over possession by the due date as committed by him in the apartment buyer agreement and he is liable for the delayed possession charges as provided in proviso to section 18(1) of the Act. The same issue has been dealt by hon'ble Bombay High Court in case titled as ***Neelkamal Realtors Suburban Pvt. Ltd. and anr. vs Union of India and ors.*** and has observed as under:

"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter..."

G. Findings on the relief sought by the complainant

G.I Delay possession charges

23. **Relief sought by the complainant:** Direct the respondent to pay delay possession charges at the prescribed rate of interest to the complainant for the period of delay in delivery of the possession of the booked unit.
24. 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."

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

"11. POSSESSION

(a) Time of handing over the possession

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

26. 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.

27. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within 33 (thirty-three) months from the date of start of construction and further provided in agreement that promoter shall be entitled to a grace period of 3 months for applying and obtaining completion certificate/occupation certificate in respect of said unit. The date of start of construction is 22.05.2011 as per statement of account dated 27.03.2020. The period of 33 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.

28. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges at the prescribed rate. Proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

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

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

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

29. 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

30. Taking the case from another angle, the complainant-allottee was entitled to the delayed possession charges/interest only at the rate of Rs.7.50/- per sq. ft. per month as per relevant clauses of the buyer's agreement for the period of such delay; whereas, the promoter was entitled to interest @ 24% per annum compounded at the time of every succeeding instalment for the delayed payments. The functions of the authority are to safeguard the interest of the aggrieved person, may be the allottee or the promoter. The rights of the parties are to be balanced and must be equitable. The promoter cannot be allowed to take undue advantage of his dominate position and to exploit the needs of the home buyers. This authority is duty bound to take into consideration the legislative intent i.e., to protect the interest of the consumers/allottees in the real estate sector. The clauses of the buyer's agreement entered into between the parties are one-sided, unfair and unreasonable with respect to the grant of interest for delayed possession. There are various other clauses in the buyer's agreement which give sweeping powers to the promoter to cancel the allotment and forfeit the amount

paid. Thus, the terms and conditions of the buyer's agreement are ex-facie one-sided, unfair and unreasonable, and the same shall constitute the unfair trade practice on the part of the promoter. These types of discriminatory terms and conditions of the buyer's agreement will not be final and binding.

31. 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%.

32. **Rate of interest to be paid by complainant for delay in making payments:** The respondent contended that the complainant has defaulted in making timely payments of the instalments as per the payment plan, therefore, the complainant is liable to pay interest on the outstanding payments.

33. The authority observed that the definition of term 'interest' as defined under section 2(z) 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;”*

34. 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
35. 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 22.12.2010, possession of the booked unit was to be delivered within a period of 33 months from the date of start of construction i.e. 22.05.2011. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over possession comes out to be 22.02.2014. The respondent has

offered possession of the subject unit on 09.01.2020 after receipt of occupation certificate dated 24.12.2019. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the complainant as per the terms and conditions of the buyer's agreement dated 22.12.2010 executed between the parties.

36. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 24.12.2019. However, the respondent offered the possession of the unit in question to the complainant only on 09.01.2020, 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, he should be given 2 months' time from the date of offer of possession. These 2 months' of reasonable time is being given to the complainant keeping in mind that even after intimation of possession practically he has to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in

habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e. 22.02.2014 till the expiry of 2 months from the date of offer of possession (09.01.2020) which comes out to be 09.03.2020.

37. 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 delayed possession charges at rate of the prescribed interest i.e. 9.30% p.a. w.e.f. due date of delivery of possession 22.02.2014 till 09.03.2020 as per provisions of section 18(1) of the Act read with rule 15 of the Rules.

H. Directions of the authority

38. 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 09.03.2020 i.e. expiry of 2 months from the date of offer of possession (09.01.2020). 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 claim holding charges from the complainant/allottee at any point of time even after being part of the builder buyer's agreement as per law settled by hon'ble Supreme Court in civil appeal nos. 3864-3899/2020 decided on 14.12.2020.
- iii. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
- iv. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delayed possession charges as per section 2(z) of the Act.

39. Complaint stands disposed of.

40. File be consigned to registry.


(Samir Kumar)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 29.07.2021


(Vijay Kumar Goyal)

Member

Judgement uploaded on 15.09.2021.