

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

Complaint no. : 512 of 2021
First date of hearing : 19.03.2021
Date of decision : 22.07.2021

Shri Prasanta Banerjee
R/o: 9-B, DDA Flats,
Kalkaji Extension, New Delhi.

Complainant

Versus

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

Respondent

CORAM:

Dr. K.K. Khandelwal
Shri Vijay Kumar Goyal

Chairman
Member

APPEARANCE:

Shri Varun Chugh
Shri J.K. Dang

Advocate for the complainant
Advocate for the respondent

ORDER

1. The present complaint dated 11.02.2021 has been filed by the complainant/allottee in Form CRA under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible

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

2. Since the buyer's agreement has been executed on 26.02.2010 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	Emerald Hills-Floors, Sector 65, Gurugram, Haryana
2.	Project area	102.7412 acres
3.	Nature of the project	Residential gated colony
4.	DTCP license no. and validity status	10 of 2009 dated 21.05.2009 Valid/renewed up to 20.05.2019
5.	Name of licensee	Active Promoters Pvt. Ltd. and others, C/o Emaar MGF Land Ltd.
6.	HRERA registered/ not registered	Not registered
7.	Occupation certificate granted on	09.05.2019 [Page 159 of reply]
8.	Provisional allotment letter dated	06.07.2009 [Page 36 of reply]

9.	Unit no.	EHF-267-A-FF-074, 1 st floor, Sector Amber [Page 43 of reply]
10.	Unit measuring	1380 sq. ft.
11.	Date of execution of buyer's agreement	26.02.2010 [Page 41 of reply]
12.	Payment plan	Construction linked payment plan [Page 77 of reply]
13.	Total consideration as per statement of account dated 16.03.2021 at page 179 of the reply	Rs.54,97,578/-
14.	Total amount paid by the complainant as per statement of account dated 16.03.2021 at page 180 of the reply	Rs.55,03,054/-
15.	Due date of delivery of possession as per clause 13(i) of the said agreement i.e. 27 months from the date of execution of agreement (26.02.2010) + grace period of 6 months, for applying and obtaining completion certificate/ occupation certificate in respect of the unit and/or the project. [Page 56 of reply]	26.05.2012 [Note: Grace period is not included]
16.	Nomination letter issued in favour of the complainant	02.05.2014 [Page 40 of complaint]
17.	Date of offer of possession to the complainant	26.09.2019 [Page 150 of reply]
18.	Delay in handing over possession till w.e.f. 02.05.2014 (nomination letter) till 26.11.2020 i.e. date of offer of possession (26.09.2019) + 2 months	6 years 6 months and 24 months
19.	Unit handover letter	26.11.2019 [Page 158 of reply]

20.	Conveyance deed executed on	15.01.2020 [Page 119 of reply]
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B. Facts of the complaint

4. The complainant has made the following submissions in the complaint:
 - i. That initially, the property in question i.e. floor bearing no. EHF-267-A-FF-074 on 267 sq. yds. plot in the project known as Emerald Hills- Floors, was booked by Sh. Saurabh Garg and Smt. Megha Singhal (original allottees). Thereafter, on 26.02.2010, the original allottees entered into buyer's agreement with the respondent. Subsequent thereto, the complainant herein, entered into an agreement with the original allottees to purchase the said property and the property was later assigned by the respondent to the complainant by virtue of assignment letter dated 02.05.2014.
 - ii. That as per clause 13(i) of the said buyer's agreement dated 26.02.2010, the respondent had categorically stated that the possession of the said apartment would be handed over within 27 months from the date of signing of the builder buyer's agreement, with a further grace period of another 6 months. Moreover, at the time of transferring the floor in question, the complainant was further coerced by the respondent to sign affidavits/indemnity cum undertaking, in favour of the respondent wherein the complainant was required to undertake, not to claim or raise any compensation for delay in handing over possession of the property.

The respondent had promised to complete the project by November 2012, including the grace period of six months. The buyer's agreement was executed on 26.02.2010 and the possession was offered not prior to 26.09.2019 resulting into considerable delay of 82 months in handing over the possession of the property.

- iii. That the said buyer's agreement and the indemnity cum undertaking are totally one sided, which impose completely biased terms and conditions upon the complainant, thereby tilting the balance of power in favour of the respondent, which is further manifest from the fact that the delay in handing over the possession by the respondent would attract only a meagre penalty of Rs.10/- per sq. ft., on the super area of the flat, on monthly basis, whereas the penalty for failure to take possession would attract holding charges of Rs.10/- per sq. ft. and 15% penal interest per annum compounded quarterly on the unpaid amount of instalment due to the respondent.
- iv. That the respondent has breached the fundamental term of the contract by inordinately delaying in delivery of the possession by 82 months. It is pertinent to mention here that the possession of the property in question was finally offered on 26.09.2019. The respondent has breached the fundamental term of the contract by inordinately delaying in delivery of the possession and not providing adequate compensation in line with the provisions of the

Act. In fact, the respondent has even failed to provide the compensation as per the terms of the buyer's agreement and has flatly refused to indemnify the complainant, who sought compensation for the entire period of delay in handing over the possession of the unit. The respondent had committed gross violation of the provisions of section 18 (1) of the Act by not handing over the timely possession of the unit in question and not giving the interest and compensation to the buyers.

C. Relief sought by the complainant

5. The complainant has filed the present compliant for seeking following reliefs:
 - i. Direct the respondent to pay interest @ 18% p.a. as payment towards delay in handing over the property in question as per the provisions of the Act and the Rules.
 - ii. Pass such order or further order as this hon'ble authority may deem fit and proper in the facts and circumstances of the present case.
6. On the date of hearing, the authority explained to the respondent/promoter about the contravention as alleged to have been committed in relation to section 11(4)(a) of the Act and to plead guilty or not to plead guilty.

D. Reply by the respondent

7. The respondent has raised certain preliminary objections and has contested the present complaint on the following grounds:
- i. That the complainant has filed the present complaint seeking, inter alia, interest for alleged delay in delivering possession of the apartment purchased by the complainant. It is respectfully submitted that such complaints are to be decided by the adjudicating officer under section 71 of the Act read with rule 29 of the rules and not by this hon'ble authority. The present complaint is liable to be dismissed on this ground alone. Moreover, it is respectfully submitted that the adjudicating officer derives his jurisdiction from the central act which cannot be negated by the rules made thereunder.
 - ii. That the provisions of the Act are not applicable to the project in question. The occupation certificate in respect of the part of the project in which the unit in question is situated had been sanctioned on 09.05.2019. Furthermore, the possession of the unit in question had been delivered to the complainant on 26.11.2019. Moreover, conveyance deed dated 15.01.2020 has already been executed in favour of the complainant by the respondent. The project does not require registration and consequently has not been registered under the provisions of the Act. This hon'ble authority does not have the jurisdiction to entertain and decide the

present complaint. The present complaint is liable to be dismissed on this ground alone.

- iii. 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 26.02.2010. That the provisions of the Act are not retrospective in nature. The provisions of the Act cannot undo or modify the terms of an agreement duly executed prior to coming into effect of the Act. It is further submitted that merely because the Act applies to ongoing projects which are registered with the authority, the Act cannot be said to be operating retrospectively. The provisions of the Act relied upon by the complainant for seeking interest cannot be called in to aid in derogation and in negation of the provisions of the buyer's agreement. The interest is compensatory in nature and cannot be granted in derogation and while ignoring the provisions of the buyer's agreement. That 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 the terms and conditions incorporated in the buyer's agreement.
- iv. That the original allottees, Mrs. Megha Singhal and Mr. Saurabh Garg, vide application form dated 05.06.2009 applied to respondent for provisional allotment of a floor in the project. The

initial allottees, in pursuance of the aforesaid application, were allotted an independent floor bearing no. EHF-267-A-AFF-074, located on the first floor, in the said project vide provisional allotment letter dated 06.07.2009. The initial allottees consciously and willfully opted for a construction linked plan for remittance of the sale consideration for the said unit and further represented to respondent that they shall remit every installment on time as per the payment schedule. The initial allottees further undertook to be bound by the terms and conditions of the application form.

- v. That the buyer's agreement dated 26.02.2010 was executed between the initial allottees and the respondent. It is pertinent to mention that clause 15 of the buyer's agreement provides that compensation for any delay in delivery of possession shall only be given to such allottees who are not in default of their obligations envisaged under the agreement and who have not defaulted in payment of instalments as per the payment plan incorporated in the agreement. The complainant, having defaulted in timely remittance of instalment, are thus not entitled to any compensation or any amount towards interest as an indemnification for delay, if any, under the buyer's agreement.
- vi. That the assignment letter dated 01.05.2014 was issued to the respondent by the initial allottees requesting the respondent to assign the unit in favour of the complainant. That the complainant

had executed affidavit dated 01.05.2014 and indemnity cum undertaking dated 16.04.2014 voluntarily and after carefully going through the terms and conditions incorporated therein. That the complainant was well aware of the status of the said unit while purchasing the same. It is further submitted that the complainant in his affidavit had undertaken that he would not be entitled to any compensation for delay in handing over of possession of the said unit or any rebate under a scheme or otherwise or any other discount for which the initial allottees might have been entitled. Furthermore, it had also been specifically mentioned in the indemnity cum undertaking dated 16.04.2014 executed by the complainant in favour of the respondent that the complainant was not entitled to claim any compensation for delay in handing over of possession or any discount from the respondent for which the initial allottees might have been entitled. Moreover, the complainant had also undertaken not to raise any claim pertaining to the aforesaid charges from the company.

- vii. That letter of offer of possession dated 26.09.2019 had been issued to the complainant by the respondent. Thereafter, handover advice letter dated 11.11.2019 had been issued by the respondent to the complainant. Consequently, unit handover letter dated 26.11.2019 had been executed by the complainant subsequent to the complainant having taken over peaceful and vacant physical

possession of the said unit after fully satisfying himself with regard to its measurement, location, dimension, development etc. The complainant, vide the aforesaid unit handover letter had also undertaken not to raise any claim of any nature whatsoever against the respondent with regard to the size, dimension, area, location and legal status of the said area. Thereafter, on 15.01.2020, the conveyance deed had been executed by the respondent in favour of the complainant.

- viii. That the complainant has completely misconstrued, misinterpreted and miscalculated the time period as determined in the buyer's agreement. It is pertinent to mention that it is categorically provided therein that in case of any default/delay by the allottees in payment as per schedule of payment incorporated in the buyer's agreement, the date of handing over of possession shall be extended accordingly, solely on respondent's discretion till the payment of all outstanding amounts to the satisfaction of respondent. Since, the complainant has defaulted in timely remittance of payments as per schedule of payment, the date of delivery of possession is not liable to be determined in the manner sought to be done in the present case by the complainant.
- ix. Clause 15 of the buyer's agreement provides that compensation for any delay in delivery of possession shall only be given to such allottees who are not in default of their obligations envisaged under

the agreement and who have not defaulted in payment of instalments as per the payment plan incorporated in the agreement. In case of delay caused due to non- receipt of occupation certificate, completion certificate or any other permission/sanction from the competent authorities, no compensation or any other compensation shall be payable to the allottees. The respondent had issued several payment reminders letters to the initial allottees/complainant for making payments. The latest statement of account dated 16.03.2021 shows the delayed payment charges levied upon the initial allottees/complainant by the respondent. Thus, it is most respectfully submitted that the present complaint deserves to be dismissed at the very threshold.

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

E. Jurisdiction of the authority

9. The preliminary objections raised by the respondent regarding jurisdiction of the authority to entertain the present complaint stands rejected. The authority 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 Whether a subsequent allottee who had executed an indemnity cum undertaking with waiver clause is entitled to claim delay possession charges?

16. The respondent submitted that complainant in question is a subsequent allottee and complainant had executed an affidavit dated 16.04.2014 and an indemnity cum undertaking dated 16.04.2014 whereby the complainant had consciously and voluntarily declared and affirmed that he would be bound by all the terms and conditions of the provisional allotment in favour of the original allottees. It was further declared by the complainant that he, having been substituted in the place of the original allottees in respect of the provisional allotment of the unit in question, was not entitled to any compensation for delay. Therefore, the complainant is 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?**

17. 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**".

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

(a) Original allottee: A person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter.

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

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

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

20. 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....."

21. The authority concurs with the Hon'ble NCDRC's decision dated 26.11.2019 in **Rajnish Bhardwaj vs. M/s CHD Developers Ltd.** (supra) and observes that it is irrespective of the status of the allottee whether it is original or subsequent, an amount has been paid towards the consideration for a unit and the endorsement by the developer on the

transfer documents clearly implies his acceptance of the complainant as an allottee.

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

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

23. The respondent/promoter contended that the subsequent allottee shall not be entitled to any compensation/delayed possession charges since at the time of the execution of transfer documents/agreement for sale, he was well aware of the due date of possession and has knowingly waived off his right to claim any compensation for delay in handing over possession or any rebate under a scheme or otherwise or any other

discount. The respondent/ promoter had spoken about the disentanglement of compensation/delayed possession charges to the subsequent allottee who had clear knowledge of the fact w.r.t. the due date of possession and whether the project was already delayed. But despite that he entered into the agreement for sell and/or indemnity-cum-undertaking knowingly waiving off his 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.

24. 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)

25. In the present case, the complainant/subsequent allottee had been acknowledged as an allottee by the respondent vide nomination letter dated 02.05.2014. The authority has observed that the promoter has confirmed the transfer of allotment in favour of subsequent allottee (complainant) and the installments paid by the original allottees were adjusted in the name of the subsequent allottee and the next installments were payable/due as per the original allotment letter. Also, we have also perused the buyer's agreement which was originally entered into between the original allottees and the promoter. The same buyer's agreement has been endorsed in favour of the subsequent allottee/complainant. All the terms of buyer's agreement remain the same, so it is quite clear that the subsequent allottee has stepped into the shoes of the original allottee. Though the promised date of delivery was 26.05.2012 but the construction of the tower in question was not completed by the said date and it was offered by the respondent only on 26.09.2019 i.e. after delay of 6 years 6 months approx.
26. In the present complaint, the complainant/subsequent allottee had purchased the unit after expiry of the due date of handing over possession, the authority is of the view that the subsequent allottee cannot be expected to wait for any uncertain length of time to take possession. Even the complainant had been waiting for his promised flats and surely, he would be entitled to all the reliefs under this Act. It

would no doubt be fair to assume that the subsequent allottee/complainant had knowledge of delay, however, to attribute knowledge that such delay would continue indefinitely, based on priori assumption, would not be justified. Therefore, in light of ***Laureate Buildwell judgment (supra)***, the authority holds that in cases where subsequent allottee had stepped into the shoes of original allottee after the expiry of due date of handing over possession and before the coming into force of the Act, the subsequent allottee shall be entitled to delayed possession charges w.e.f. the date of entering into the shoes of original allottee i.e. nomination letter. In the present complainant, the nomination letter was issued by the respondent in the favour of the complainant on 02.05.2014, therefore, the complainant would be entitled to delay possession charges w.e.f. 02.05.2014.

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

27. 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 lump sum 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.

28. 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.**

29. 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?**

30. The authority further is unable to gather any reason or has not been exposed to any reasonable justification as to why a need arose for the complainant to sign any such affidavit or indemnity-cum-undertaking and as to why the complainant had agreed to surrender his legal rights which were available or had accrued in favour of the original allottee.

Thus, no sane person would ever execute such an affidavit or indemnity-cum-undertaking unless and until some arduous and/or compelling conditions are put before him with a condition that unless and until, these arduous and/or compelling conditions are performed by him, he will not be given any relief and he is thus left with no other option but to obey these conditions. Exactly same situation has been demonstratively happened here, when the complainant/subsequent-allottee has been asked to give the affidavit or indemnity-cum-undertaking in question before transferring the unit in his name otherwise such transfer may not be allowed by the promoter. 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. 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."

31. 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.
32. 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.** in civil appeal no. 5785 of 2019 and the same is reproduced 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."

33. The same analogy can easily be applied in the case of execution of an affidavit or indemnity-cum-undertaking which got executed from the subsequent-allottee before getting the unit transferred in his name in the record of the promoter as an allottee in place of the original allottee.
34. The authority may deal with this point from yet another aspect. By executing an affidavit/undertaking, the complainant/subsequent allottee cuts his hands from claiming delay possession charges in case of 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 complainant executed such an affidavit/undertaking is beyond the comprehension and understanding of this authority.

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

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

36. The respondent is contending that at the time of taking possession of the unit in question vide unit hand over letter dated 26.11.2019, the complainant had certified himself to be fully satisfied with regard to the measurements, location, direction, developments et cetera of the unit and also admitted and acknowledge that he does not have any claim of any nature whatsoever against the respondent and that upon acceptance of possession, the liabilities and obligations of the respondent as enumerated in the allotment letter/buyer's agreement,

stand fully satisfied. The relevant para of the unit handover letter relied upon reads as under:

"The Allottee, hereby, certifies that he / she has taken over the peaceful and vacant physical possession of the aforesaid Unit after fully satisfying himself / herself with regard to its measurements, location, dimension and development etc. and hereafter the Allottee has no claim of any nature whatsoever against the Company with regard to the size, dimension, area, location and legal status of the aforesaid Home.

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

37. 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."

38. 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.

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

"The learned counsel for the opposite parties submits that the complainant accepted possession of the apartment on 23/24.12.2011 without any protest and therefore cannot be permitted to claim interest at a later date on account of the alleged delay in handing over the possession of the apartment to him. We, however, find no merit in the contention. A perusal of the letter dated 23.12.2011, issued by the opposite parties to the complainant would show that the opposite parties unilaterally stated in the said letter that they had discharged all their obligations under the agreement. Even if we assume on the basis of the said printed statement that having accepted possession, the complainant cannot claim that the opposite parties had not discharged all their obligations under the agreement, the said discharge in our opinion would not extend to payment of interest for the delay period, though it would cover handing over of possession of the apartment in terms of the agreement between the parties. In fact, the case of the complainant, as articulated by his counsel is

that the complainant had no option but to accept the possession on the terms contained in the letter dated 23.12.2011, since any protest by him or refusal to accept possession would have further delayed the receiving of the possession despite payment having been already made to the opposite parties except to the extent of Rs. 8,86,736/-. Therefore, in our view the aforesaid letter dated 23.12.2011 does not preclude the complainant from exercising his right to claim compensation for the deficiency on the part of the opposite parties in rendering services to him by delaying possession of the apartment, without any justification condonable under the agreement between the parties."

40. 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."

41. Therefore, the authority is of the view that the aforesaid unit handover letter dated 26.11.2019 does not preclude the complainant from exercising his right to claim delay possession charges as per the provisions of the Act.

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

42. The respondent submitted that the complainant had executed a conveyance deed dated 15.01.2020 and therefore, the transaction between the complainant and the respondent has been concluded and no right or liability can be asserted by respondent or the complainant against the other. Therefore, the complainant is estopped from claiming any interest in the facts and circumstances of the case. The present complaint is nothing but a gross misuse of process of law.
43. 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.

44. 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 clauses of section 11 of the Act are reproduced hereunder:

"11. Functions and duties of promoter

(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.

(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-

(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)

45. 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)*

46. From above, it can be said that taking over the possession and thereafter execution of the conveyance deed can best be termed as respondent having discharged its liabilities as per the buyer's agreement and upon taking possession, and/or executing conveyance deed, the complainant never gave up his statutory right to seek delayed possession charges as

per the provisions of the said Act. Also, the same view has been upheld by the Hon'ble Supreme Court in case titled as **Wg. Cdr. Arifur Rahman Khan and Aleya Sultana and Ors. Vs. DLF Southern Homes Pvt. Ltd. (now Known as BEGUR OMR Homes Pvt. Ltd.) and Ors. (Civil appeal no. 6239 of 2019) dated 24.08.2020**, the relevant paras of dictum 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."

47. 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.
48. The allottees have invested their hard-earned money which there is no doubt that the promoter has been enjoying benefits of and the next step is to get their title perfected by executing a conveyance deed which is the statutory right of the allottee. Also, the obligation of the developer - promoter does not end with the execution of a conveyance deed. The essence and purpose of the Act was to curb the menace created by the developer/promoter and safeguard the interests of the allottees by protecting them from being exploited by the dominant position of the developer which he thrusts on the innocent allottees. Therefore, in furtherance to the Hon'ble Apex Court judgement and the law laid down in the **Wg. Cdr. Arifur Rahman (supra)**, this authority holds that even after execution of the conveyance deed, the complainant cannot be precluded from his right to seek delay possession charges from the respondent-promoter.

G. Findings on the reliefs sought by the complainant

G.I Delay possession charges

49. **Relief sought by the complainant:** Direct the respondent to pay interest @ 18% p.a. as payment towards delay in handing over the property in question as per the provisions of the Act and the Rules.
50. 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, section 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.”

51. Clause 13(i) of the buyer’s agreement provides for time period for handing over of possession and is reproduced below:

“13. POSSESSION

(i) 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 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 Floor within 27 months from the date execution of this Agreement. The Allottee(s) agrees and understands that the Company shall be entitled to a grace period of six months, for applying and obtaining the occupation certificate in respect of the Floor and/or the Project.”

52. 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.

53. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within 27 (Twenty-Seven) months from the date of execution of agreement and it is further provided in agreement that promoter shall be entitled to a grace period of 6 months for applying and obtaining completion certificate/occupation certificate in respect of said unit. The date of execution of agreement is 26.02.2010 as per the agreement. The period of 27 months expired on 26.05.2012

As a matter of fact, the promoter has not applied to the concerned authority for obtaining 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, the grace period of 6 months cannot be allowed to the promoter.

54. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges at the rate of 18% p.a. 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.

55. 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.

56. Taking the case from another angle, the complainant-allottee was entitled to the delayed possession charges/interest only at the rate of Rs.10/- per sq. ft. per month of super area as per clause 15(a) of the buyer's agreement for the period of such delay; whereas, as per clause 12 of the buyer's agreement, the promoter was entitled to interest @ 24% per annum compounded monthly/quarterly 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

57. 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%.
58. 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;"*

59. 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.
60. 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 13(i) of the buyer's agreement executed between the parties on 26.02.2010, possession of the said unit was to be delivered within a period of 27 months from the date of execution of agreement. As far as grace period is concerned, the same is disallowed for the reasons stated above. Therefore, the due date of handing over possession comes out to be 26.05.2012. In the present case, the complainant is subsequent allottee and had been acknowledged by the respondent vide nomination letter dated 02.05.2014. Thereafter, the complainant was offered possession of the subject unit by the respondent on 26.09.2019. Subsequently, the complainant had taken possession of the said unit vide unit handover letter dated 26.11.2019 and thereafter conveyance deed was executed between the parties on 15.01.2020. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the complainant as per the terms and conditions of the buyer's agreement dated 26.02.2010 executed between the parties.

61. 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 09.05.2019. However, the respondent offered the possession of the unit in question to the

complainant only on 26.09.2019. 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 date of entering into the shoes of original allottee i.e. nomination letter (02.05.2014) till the expiry of 2 months from the date of offer of possession (26.09.2019) which comes out to be 26.11.2019.

62. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainant is entitled to delay possession charges at prescribed rate of the interest @ 9.30 % p.a. w.e.f. 02.05.2014 till 26.11.2019 as per provisions of section 18(1) of the Act read with rule 15 of the Rules.

H. Directions of the authority

63. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of


obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

- i. The respondent is directed to pay the interest at the prescribed rate i.e. 9.30 % per annum for every month of delay on the amount paid by the complainant from 02.05.2014 till 26.11.2019 i.e. expiry of 2 months from the date of offer of possession (26.09.2019). 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 also 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. 3864-3889/2020 decided on 14.12.2020.

64. Complaint stands disposed of.

65. File be consigned to registry.


(Vijay Kumar Goyal)
Member
Haryana Real Estate Regulatory Authority, Gurugram


(Dr. K.K. Khandelwal)
Chairman
Haryana Real Estate Regulatory Authority, Gurugram

Dated: 22.07.2021

Judgement uploaded on 28.09.2021.