

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

Complaint no. : 1188 of 2021
First date of hearing : 18.03.2021
Date of decision : 22.07.2021

Nishchint Bhatia
R/o: Flat no.102, Millennium Residency, GHS-4,
Sector 47, Gurugram-122002, Haryana.

Complainant

Versus

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

Respondent

CORAM:

Dr. K.K. Khandelwal
Shri Vijay Kumar Goyal

**Chairman
Member**

APPEARANCE:

Shri Maninder Singh
Shri J.K. Dang

Advocate for the complainant
Advocate for the respondent

ORDER

1. The present complaint dated 01.03.2021 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 03.04.2012 i.e. prior to the commencement of the Act ibid, therefore, the penal proceedings cannot be initiated retrospectively. Hence, the authority has decided to treat the present complaint as an application for non-compliance of statutory obligation on part of the promoter/respondent in terms of section 34(f) of the Act ibid.

A. Project and unit related details

3. The particulars of the project, the details of sale consideration, the amount paid by the complainant, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S.No.	Heads	Information
1.	Project name and location	Emerald Floors Premier III at Emerald Estate, Sector 65, Gurugram.
2.	Project area	25.49 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no. and validity status	06 of 2008 dated 17.01.2008 Valid/renewed up to 16.01.2025
5.	Name of licensee	Active Promoters Pvt. Ltd. and 2 others C/o Emaar MGF Land Ltd.
6.	HRERA registered/ not registered	Registered vide no.104 of 2017 dated 24.08.2017 for 82768 sq. mtrs.
	HRERA registration valid up to	23.08.2022
7.	Occupation certificate granted on	11.11.2020 [Page 138 of reply]
8.	Provisional allotment letter dated	22.12.2011 [Page 43 of reply]
9.	Unit no.	EPF-III-56-0201, 2 nd floor, building no. 56 [Page 21 of complaint]

10.	Unit measuring	1975 sq. ft.
11.	Date of execution of buyer's agreement	03.04.2012 [Page 21 of complaint]
12.	Payment plan	Construction linked payment plan [Page 41 of reply]
13.	Total consideration as per statement of account dated 23.03.2021 at page 62 of the reply	Rs.1,39,46,400/-
14.	Total amount paid by the complainant as per statement of account dated 23.03.2021 at page 64 of reply	Rs.1,40,79,899/-
15.	Due date of delivery of possession as per clause 11(a) of the said agreement i.e. 24 months from the date of execution of buyer's agreement (03.04.2012) + grace period of 3 months, for applying and obtaining the occupation certificate in respect of the unit and/or the project. [Page 30 of complaint]	03.04.2014 [Note: Grace period is not included]
16.	Date of offer of possession to the complainant	19.11.2020 [Page 141 of reply]
17.	Delay in handing over possession till 19.01.2021 i.e. date of offer of possession (19.11.2020) + 2 months	6 years 9 months 16 days

B. Facts of the complaint

4. The complainant has made the following submissions in the complaint:
 - i. That in 2011, the respondent, through its marketing executives and advertisement done through various medium and means, approached the complainant with an offer to invest and buy a flat in the project namely "Emerald Floors Premier" in revenue estate of village

Maidawas, Sector-65, Gurugram. The respondent had represented to the complainant that that the respondent has already secured all the necessary sanctions and approvals from the appropriate and concerned authorities for the development and completion of said project on time with the promised quality and specification. The complainant while relying on the representations and warranties of the respondent and believing them to be true had agreed to the proposal of the respondent to book the residential flat in the project of respondent.

- ii. That relying upon those assurances and believing them to be true, the complainant booked a residential flat bearing **EFP-III-56-0201** on 2nd floor having super area of 1975 sq. ft. for total sale consideration of Rs.1,39,46,400/- at the proposed project to be developed by respondent. Accordingly, the complainant had paid Rs.10,00,000/- through two cheques bearing no. 042718 and 689489 respectively dated 06.12.2011 as booking amount. That the respondent assured the complainant that it would execute the flat buyer agreement at the earliest and maximum within one week. However, the respondent did not fulfil its promise and have not executed the agreement as agreed by it and belatedly executed it on 03.04.2012.
- iii. That thereafter, the respondent started raising the demand of money /installments from the complainant as per the agreed timelines and complainant as on today had paid total amount of Rs.1,40,79,899/- to

the respondent as sale consideration of the aforesaid flat, which is actually in excess of the amount demanded by the respondent as on today.

- iv. That the complainant thereafter had tried their level best to reach the representatives of the respondent to seek a satisfactory reply in respect of the possession of said flat or but all in vain. The respondent has started ignoring the complainant and had not given any satisfactory reply.
- v. That after repeated requests and reminders of the complainant, the respondent finally and after inordinate and unexplained delay had offered the possession of said flat vide its possession letter dated 19.11.2020. That as per clause 11 of the buyer's agreement the respondent was bound to handover the possession of said flat within 24 months of execution of buyer's agreement having three months grace period. The respondent therefore had delayed the possession of said flat by 78 months.
- vi. That when complainant visited respondent's office on 08.02.2021 and 15.02.2021, the respondent along with the letter of possession has asked the complainant to sign and execute one illegal, one-sided, unilateral and arbitrary full and final settlement agreement and indemnity cum undertaking for possession without having any justified and valid reason. That after the execution of buyer's agreement between the parties in respect of the said flat, the demand

- by the respondent to sign one more document just to bypass the provisions of applicable law upon the present transaction is totally illegal and arbitrary. The respondent asked the complainant to sign this document named "Indemnity and undertaking for possession" just to deprive the complainant from his legal right to claim the delay possession charges from the respondent as per provisions of the Act. In addition, respondent's representatives also mentioned to sign another illegal document (settlement form, which they mentioned but never shared on e-mail) before possession could be formally handed over. The complainant objected to such an illegal act of respondent vide his email dated 19.02.2021, in which the complainant had categorically agreed to take the possession of said flat but without signing any of such illegal documents as suggested by the respondent and the complainant had also asked the respondent not to levy any kind of holding charges or penalty as the complainant never refused to accept the possession of said flat.
- vii. That the cause of action accrued in favor of the complainant and against the respondent in December 2011, when the complainant had booked the said flat and it further arose when respondent failed /neglected to construct the said flat qua the project as agreed by the respondent, while booking the said flat by showing rosy picture to the complainant. It further arose on 03.04.2012 when buyer's agreement of said flat was executed between the parties. It further arose on

promised date of delivery of said flat. The cause of action is continuing and is still subsisting on day-to-day basis as the respondent has neither delivered the possession of said flat nor paid the delay possession charges as on today.

C. Relief sought by the complainant

5. The complainant has filed the present compliant for seeking following reliefs:

- i. Direct the respondent to pay the interest at the rate prescribed under the Act and the rules thereof as applicable on the total amount paid by the complainant amounting to Rs.1,40,79,899/- for the said flat on account of delay in delivering possession from the date of payment till delivery of said flat.
- ii. Direct the respondent to immediately deliver the completed possession of the said flat to the complainant without insisting and forcing the complainant to sign the arbitrary and unilateral document titled as "Indemnity cum undertaking for possession" and another settlement form which their representative is insisting as pre-condition to take the handover of the said flat and to restrain the respondent to levy holding charges upon the complainant.

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 interest for alleged delay in delivering possession of the unit booked by the complainant. It is respectfully submitted that such complaints are to be decided by the adjudicating officer under section 71 of the Act read with rule 29 of the rules and not by this hon'ble authority. The present complaint is liable to be dismissed on this ground alone. Moreover, the adjudicating officer derives his jurisdiction from the central statute which cannot be negated by the rules made thereunder.
 - ii. That the present complaint is based on an erroneous interpretation of the provisions of the Act as well as an incorrect understanding of the terms and conditions of the buyer's agreement dated 03.04.2012. That the provisions of the Act are not retrospective in nature. The provisions of the Act cannot undo or modify the terms of an agreement duly executed prior to coming into effect of the Act. It is further submitted that merely because the Act applies to ongoing projects which are registered with the authority, the Act cannot be said to be operating retrospectively. The provisions of the Act relied upon by the complainant for seeking interest cannot be called into aid in derogation and ignorance of the provisions of the buyer's agreement. The interest is compensatory in nature and cannot be

granted in derogation and ignorance of the provisions of the buyer's agreement. The interest demanded by the complainant for the alleged delay is beyond the scope of the buyer's agreement. The complainant cannot demand any interest beyond the terms and conditions incorporated in the buyer's agreement.

- iii. That the complainant, in pursuance of the aforesaid application form dated 04.12.2011, was allotted unit bearing no EFP-III-56-0201, located on the 2nd floor, in the project vide provisional allotment letter dated 22.12.2011. The complainant consciously and willfully opted for a construction linked plan for remittance of the sale consideration for the unit in question and further represented to the respondent that he shall remit every installment on time as per the payment schedule. The respondent had no reason to suspect the bona fide of the complainant at the relevant time. The complainant further undertook to be bound by the terms and conditions of the application form.
- iv. That the complainant was irregular regarding the remittance of installments on time. Respondent was compelled to issue demand notices, reminders etc. calling upon the complainant to make payment of outstanding amounts payable by him under the payment plan/instalment plan opted by him. However, the complainant despite having received the payment request letters, reminders etc. failed to remit the instalments on time to the respondent. Statement

of account dated 23.03.2021 maintained by respondent in due course of its business reflects the delay in remittance of various instalments on the part of the complainant.

- v. That the buyer's agreement dated 03.04.2012 was executed between the complainant and respondent. Clause 13 of the buyer's agreement provides that compensation for any delay in delivery of possession shall only be given to such allottees who are not in default of their obligations envisaged under the agreement and who have not defaulted in payment of instalments as per the payment plan incorporated in the agreement. In case of delay caused due to non-receipt of occupation certificate, completion certificate or any other permission/sanction from the competent authorities, no compensation or any other compensation shall be payable to the allottees. The complainant, having defaulted in timely remittance of instalment, is thus not entitled to any compensation or any amount towards interest as an indemnification for delay, if any, under the buyer's agreement.
- vi. That the complainant consciously and maliciously chose to ignore the payment request letters and reminders issued by the respondent and flouted in making timely payments of the instalments which was an essential, crucial and an indispensable requirement under the buyer's agreement. 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 and further causes enormous business losses to the respondent. The complainant chose to ignore all these aspects and wilfully defaulted in making timely payments. It is submitted that the respondent despite defaults of several allottees earnestly fulfilled its obligations under the buyer's agreement and completed the project as expeditiously as possible in the facts and circumstances of the case. Therefore, there is no equity in favour of the complainant.

- vii. That the rights and obligations of the complainant as well as respondent are completely and entirely determined by the covenants incorporated in the buyer's agreement. As per clause 11 of the buyer's agreement dated 03.04.2012, the time period for delivery of possession was 24 months along with grace period of 3 months from the date of execution of the buyer's agreement subject to the allottee(s) having strictly complied with all terms and conditions of the buyer's agreement and not being in default of any provision of the buyer's agreement including remittance of all amounts due and payable by the allottee(s) under the agreement as per the schedule of payment incorporated in the buyer's agreement. Clause 11(b)(iv) provides that in case of any default/delay by the allottees in payment as per schedule of payment incorporated in the buyer's agreement, the date of handing over of possession shall be extended accordingly,

solely on the respondent's discretion till the payment of all outstanding amounts to the satisfaction of the respondent. 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.

- viii. That the project has got delayed on account of the following reasons which were/are beyond the power and control of the respondent. *Firstly*, the National Building Code was revised in the year 2016 and in terms of the same, all high-rise buildings (i.e. buildings having area of less than 500 sq. mtrs. and above), irrespective of area of each floor, are now required to have two staircases. Eventually, so as not to cause any further delay in the project and so as to avoid jeopardising the safety of the occupants of the building in question including the building in which the unit in question is situated, the respondent had taken a decision to go ahead and construct the second staircase. The respondent has constructed the second staircase as expeditiously as possible. Thereafter, upon completion of the second staircase, the respondent had obtained the occupation certificate in respect of the tower/building in which the unit is located and has already offered possession of the unit in question to the complainant. *Secondly*, the defaults on the part of the contractor as the contractor was not able to meet the agreed timelines for construction of the project.

- ix. That the respondent had applied to the statutory authority for grant of occupation certificate in respect of the tower in which the unit in question is located on 20.07.2020 and the same was granted on 11.11.2020. That once an application for issuance of occupation certificate is submitted before the concerned competent authority, the respondent ceases to have any control over the same. The grant of occupation certificate is the prerogative of the concerned statutory authority, and the respondent does not exercise any control over the matter. Therefore, the time period utilised by the concerned statutory authority for granting the occupation certificate needs to be necessarily excluded from computation of the time period utilised in the implementation of the project in terms of the buyer's agreement. As far as the respondent is concerned, it has diligently and sincerely pursued the development and completion of the project in question.
- x. That the complainant was offered possession of the unit in question through letter of offer of possession dated 19.11.2020. The complainant was called upon to remit balance payment including delayed payment charges and to complete the necessary formalities/documentation necessary for handover of the unit in question to her. However, the complainant has consciously refrained from obtaining possession of the unit in question. The complainant did not/do not have adequate funds to remit the balance payments requisite for obtaining possession in terms of the Buyer's agreement

and thus the complainant has refrained from obtaining possession of the unit in question.

- xi. That the respondent has paid Rs.6,67,496/- as delay compensation in accordance with the buyer's agreement. Furthermore, an amount of Rs. 1,33,499/- has been credited as benefit on account of Anti-Profiting. The said amounts have been accepted by the complainant in full and final satisfaction of his alleged grievances. Furthermore, without prejudice to the contentions of the respondent, it is submitted that interest for delay, if any, has to be calculated only on the amounts deposited by the allottees/complainants towards the basic principal amount of the unit in question and not on any amount credited by the respondent, or any payment made by the allottees/complainant towards Delayed Payment Charges or any Taxes/Statutory payments etc. Therefore, the relief claimed by the complainant in the present form is misconceived and erroneous.
- xii. That the project of the respondent is an "ongoing project" under RERA and the same has been registered under the Act and the Rules. It is submitted that the registration of the project is valid till 23.08.2022 and therefore, cause of action, if any, would accrue in favour of the complainant to prefer a complaint if the respondent fails to deliver possession of the unit in question within the aforesaid period.
- xiii. That several allottees have defaulted in timely remittance of payment of installments which was an essential, crucial and an indispensable

requirement for conceptualisation and development of the project in question. Furthermore, when the proposed allottees default in their payments as per schedule agreed upon, the failure has a cascading effect on the operations and the cost for proper execution of the project increases exponentially whereas enormous business losses befall upon the respondent. The respondent, despite default of several allottees, has diligently and earnestly pursued the development of the project in question and has constructed the project in question as expeditiously as possible. It is submitted that the construction of the tower in which the unit in question is situated has been completed by the respondent. The respondent has already delivered possession of the unit in question to the complainant. Therefore, there is no default or lapse on the part of the respondent and there is no equity in favour of the complainant. It is evident from the entire sequence of events, that no illegality can be attributed to the respondent. The allegations levelled by the complainant are totally baseless. Thus, it is most respectfully submitted that the present complaint deserves to be dismissed at the very threshold.

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

E. Jurisdiction of the authority

9. The preliminary objections raised by the respondent regarding jurisdiction of the authority to entertain the present complaint stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

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 exclusion of time taken by the competent authority in processing the application and issuance of occupation certificate

16. As far as contention of the respondent with respect to the exclusion of time taken by the competent authority in processing the application and issuance of occupation certificate is concerned, the authority observed that the respondent had applied for grant of occupation certificate on 21.07.2020 and thereafter vide memo no. ZP-441-Vol.-II/AD(RA)/2020/20094 dated 11.11.2020, the occupation certificate has been granted by the competent authority under the prevailing law. The authority cannot be a silent spectator to the deficiencies in the application submitted by the promoter for issuance of occupancy certificate. It is evident from the occupation certificate dated 11.11.2020 that an incomplete application for grant of OC was applied on 21.07.2020 as fire NOC from the competent authority was granted only on 25.09.2020 which is subsequent to the filing of application for occupation certificate. Also, the Chief Engineer-I, HSVP, Panchkula has submitted his requisite report in respect of the said project on 22.09.2020 and 24.09.2020. The District Town Planner, Gurugram and Senior Town Planner, Gurugram has

submitted requisite reports' about this project on 21.09.2020 and 23.09.2020 respectively. As such, the application submitted on 21.07.2020 was incomplete and an incomplete application is no application in the eyes of law.

17. The application for issuance of occupancy certificate shall be moved in the prescribed forms and accompanied by the documents mentioned in sub-code 4.10.1 of the Haryana Building Code, 2017. As per sub-code 4.10.4 of the said Code, after receipt of application for grant of occupation certificate, the competent authority shall communicate in writing within 60 days, its decision for grant/ refusal of such permission for occupation of the building in Form BR-VII. In the present case, the respondent has completed its application for occupation certificate only on 25.09.2020 and consequently the concerned authority has granted occupation certificate on 11.11.2020. Therefore, in view of the deficiency in the said application dated 21.07.2020 and aforesaid reasons, no delay in granting occupation certificate can be attributed to the concerned statutory authority.

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

18. The counsel for the respondent has stated that the registration of the project is valid till 23.08.2022 and therefore cause of action, if any, would accrue in favour of the complainant to prefer a complaint if the respondent fails to deliver possession of the unit in question within the aforesaid period. That the entitlement to claim possession or interest would arise

once the possession has not been handed over as per declaration given by the promoter under section 4(2)(l)(C). Therefore, next question of determination is whether the respondent is entitled to avail the time given to it by the authority at the time of registering the project under section 3 & 4 of the Act.

19. It is now settled law that the provisions of the Act and the rules are also applicable to ongoing project and the term ongoing project has been defined in rule 2(1)(o) of the rules. The new as well as the ongoing project are required to be registered under section 3 and section 4 of the Act.
20. Section 4(2)(l)(C) of the Act requires that while applying for registration of the real estate project, the promoter has to file a declaration under section 4(2)(l)(C) of the Act and the same is reproduced as under: -

Section 4: - Application for registration of real estate projects

(2) The promoter shall enclose the following documents along with the application referred to in sub-section (1), namely: —

(l): -a declaration, supported by an affidavit, which shall be signed by the promoter or any person authorised by the promoter, stating: —

.....

(C) the time period within which he undertakes to complete the project or phase thereof, as the case may be...."

21. The time period for handing over the possession is committed by the builder as per the relevant clause of buyer's agreement and the commitment of the promoter regarding handing over of possession of the unit is taken accordingly. The new timeline indicated in respect of ongoing project by the promoter while making an application for registration of the

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

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

G. Findings on the reliefs sought by the complainant

G.I Delay possession charges

22. **Relief sought by the complainant:** Direct the respondent to handover the possession of the floor to the complainant in a time bound manner and to

pay interest @ 18% p.a. as interest towards delay in handing over the property in question as per provisions of the Act and the Rules.

23. 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."

24. Clause 11(a) of the buyer's agreement provides for time period for handing over of possession and is reproduced below:

"11. POSSESSION

(a) Time of handing over the possession

Subject to terms of this clause and subject to Allottee(s) having complied with all the terms and conditions of this Buyer's Agreement, and not being in default under any of the provisions of this Buyer's Agreement and compliance with all provisions, formalities, documentation etc., as prescribed by the Company, the Company proposes to hand over the possession of the Unit within 24 months from the date of execution of Buyer's Agreement. The Allottee(s) agrees and understands that the Company shall be entitled to a grace period of three months, for applying and obtaining the completion certificate/ occupation certificate in respect of the Unit and/or the Project."

25. 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.

26. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within 24 (twenty -four) months from the date of execution of buyer's agreement dated 03.04.2012 and further provided in agreement that promoter shall be entitled to a grace period of 3 months for applying and obtaining completion certificate/occupation certificate in respect of said unit. The period of 24 months expired on 03.04.2014. 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.

27. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges as per the provisions of the Act and the Rules. 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.

28. 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.
29. Taking the case from another angle, the complainant-allottee was entitled to the delayed possession charges/interest only at the rate of Rs.5/- per sq. ft. per month of the super area as per clause 13(a) of the buyer's

agreement for the period of such delay; whereas, the promoter was entitled to interest @ 24% per annum compounded at the time of every succeeding installment for the delayed payments. The functions of the authority are to safeguard the interest of the aggrieved person, may be the allottee or the promoter. The rights of the parties are to be balanced and must be equitable. The promoter cannot be allowed to take undue advantage of his dominate position and to exploit the needs of the home buyers. This authority is duty bound to take into consideration the legislative intent i.e., to protect the interest of the consumers/allottees in the real estate sector. The clauses of the buyer's agreement entered into between the parties are one-sided, unfair and unreasonable with respect to the grant of interest for delayed possession. There are various other clauses in the buyer's agreement which give sweeping powers to the promoter to cancel the allotment and forfeit the amount paid. Thus, the terms and conditions of the buyer's agreement are ex-facie one-sided, unfair and unreasonable, and the same shall constitute the unfair trade practice on the part of the promoter. These types of discriminatory terms and conditions of the buyer's agreement will not be final and binding.

30. 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%.

31. 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;"

32. 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.

33. As far as execution of indemnity-cum-undertaking at the time of handing over of the possession is concerned, the NCDRC vide 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."

34. The said judgment of NCDRC was also upheld by the Hon'ble Supreme Court vide judgement dated 14.12.2020 passed in civil appeal nos. 3864-3889 of 2020 against the order of NCDRC.
35. The authority is of the view that 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. Therefore, keeping in view the discussion above and dictum laid in **Capital Greens Flat Buyer Association** (supra), the authority directs the respondent not to insist the complainant to sign any indemnity-cum-undertaking which is prejudicial to the rights of the complainant.

36. 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 03.04.2012, possession of the said unit was to be delivered within a period of 24 months from the date of execution of the buyer's agreement. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over possession comes out to be 03.04.2014. In the present case, the complainant was offered possession by the respondent on 19.11.2020 after receipt of occupation certificate dated 11.11.2020. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the

complainant as per the terms and conditions of the buyer's agreement dated 03.04.2012 executed between the parties.

37. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 11.11.2020. However, the respondent offered the possession of the unit in question to the complainant only on 19.11.2020. So, it can be said that the complainant came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, she should be given 2 months' time from the date of offer of possession. These 2 months' of reasonable time is being given to the complainant keeping in mind that even after intimation of possession practically she has to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e. 03.04.2014 till the expiry of 2 months from the date of offer of possession (19.11.2020) which comes out to be 19.01.2021. Furthermore, the complainant is directed to take possession within two weeks from the date of this order.

38. 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. 03.04.2014 till 19.01.2021 as per provisions of section 18(1) of the Act read with rule 15 of the Rules.

H. Directions of the authority

39. 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. 03.04.2014 till 19.01.2021 i.e. expiry of 2 months from the date of offer of possession (19.11.2020). The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order as per rule 16(2) of the rules.
- ii. The respondent shall not charge anything from the complainant which is not the part of the buyer's agreement. The respondent is not entitled to charge holding charges from the complainant/allottee at any point of time even after being part of the buyer's agreement as per law settled by hon'ble Supreme Court in civil appeal nos. 3864-3889/2020 decided on 14.12.2020.


iii. The respondent shall not insist the complainant to sign any indemnity-cum-undertaking which is prejudicial to the rights of the complainant.

40. Complaint stands disposed of.

41. File be consigned to registry.


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram


(Dr. K.K. Khandelwal)
Chairman

Dated: 22.07.2021

Judgement uploaded on 28.09.2021.