

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

Complaint no. : 4841 of 2020
First date of hearing : 18.03.2021
Date of decision : 22.07.2021

1. Sumesh Mahendra
R/o: 131 SFS DDA Flats, Hauz Khas,
South Delhi-110016

2. Sangeeta Mahendra
R/o: BD, 2E, DDA Flats, Munirka,
J.N.U., South-West Delhi, Delhi-110067

Complainants

Versus

M/s Emaar India Ltd.
Address: Emaar MGF Business Park,
Mehrauli Gurgaon Road, Sikandarpur Chowk,
Sector-28, Gurugram-122002, Haryana.

Respondent

Coram:

Dr. K.K. Khandelwal
Shri Vijay Kumar Goyal

**Chairman
Member**

Appearance:

Shri Varun Chug
Shri J.K. Dang

Advocate for the complainants
Advocate for the respondent

ORDER

1. The present complaint dated 15.01.2021 have been filed by the complainants/allottees in Form CRA under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all

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

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

S.No.	Heads	Information
1.	Project name and location	Emerald Hills-Floors, Sector 65, Urban Estate Gurgaon
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	Registered vide no. 162 of 2017 dated 29.08.2017 for 55.962 acres [Note: The part of the project where unit in question is located is not registered]
	HRERA registration valid up to	28.08.2022



7.	Occupation certificate granted on	09.06.2016 [Page 22 of reply]
8.	Provisional allotment letter dated	29.07.2009 [Page 35 of reply]
9.	Unit no.	EHF-267-J-GF-044, Ground Floor, Block-Jemma [Page 17-18 of complaint]
10.	Unit measuring	1380 sq. ft.
11.	Date of execution of buyer's agreement	26.02.2010 [Page 16 of complaint]
12.	Payment plan	Construction linked payment plan [Page 51 of reply]
13.	Total consideration as per statement of account dated 19.02.2021 at page 51-52 of reply	Rs.65,15,468/-
14.	Total amount paid by the complainants as per statement of account dated 19.02.2021 at page 51-52 of reply	Rs.64,82,427/-
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 this agreement (26.02.2010) + grace period of 6 months, for applying and obtaining the occupation certificate in respect of the unit and/or the project. [Page 31 of complaint]	26.05.2012 [Note: Grace period is not included]
16.	Date of offer of possession to the complainants	11.01.2017 [Page 89 of reply]
17.	Delay in handing over possession till 11.03.2017 i.e. date of offer of possession (11.01.2017) + 2 months	4 year 9 months 13 days

18.	Unit handover letter	17.06.2017 [Page 23 of reply]
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B. Facts of the complaint

4. The complainants have made the following submissions in the complaint:
- i. That the property in question i.e. floor bearing no. EHF-267-J-GF-044 (ground floor) admeasuring 1380 sq. ft. along-with car parking space in the project of the respondent known as “Emerald Hills Floors” situated at Sector-65, Gurugram, Haryana, was booked by the complainants, in the year 2009. Thereafter, on 26.02.2010, the complainants entered into a buyer’s agreement with the respondent in respect of the unit in question.
 - ii. That the said buyer’s agreement is totally one sided, which impose completely biased terms and conditions upon the complainants, 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 installment due to the respondent.
 - iii. That as per the clause 13(i) of the said buyer’s agreement dated 26.02.2010, the respondent had agreed and promised to complete the construction of the said flat and deliver its possession within a period

of 27 months with a six (6) months grace period thereon from the date of execution of this agreement. However, the respondent has breached the terms of said buyer's agreement and failed to fulfill its obligations and has not delivered possession of said flat within the agreed time frame of the buyer's agreement.

- iv. That the proposed possession date as per buyer's agreement was due on 26.05.2012. It is pertinent to mention that the possession of the property in question was finally offered on 11.01.2017. The respondent has breached the fundamental term of the contract by inordinately delaying in delivery of the possession and not providing 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 builder 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.
- v. That the respondent has not acknowledged the requests of the complainants in regard to the delayed compensation. In fact, the promised amenities are missing. The complainants were made to make advance deposit on the basis of information contained in the brochure, which is false on the face of it.
- vi. That as per the statement of account dated 19.02.2021, issued by the respondent, the complainants had already paid Rs.64,82,427/- towards total sale consideration i.e. Rs.65,15,468/- as demanded by

the respondent from time to time. The complainants, without any default, had been timely paying the installments towards the property, as and when demanded by the respondent. Complainants got the handover of the property vide unit handover letter dated 17.06.2017.

- vii. Moreover, the respondent's lackadaisical approach in development of the project as non-compliance with applicable rules and regulations is evinced from the fact that the licence of the said project has not been renewed. It is further substantiated by the fact that the respondent has not got the proposed project registered as required by the Act. That 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 flat in question and not giving the interest and compensation to the complainants

C. Relief sought by the complainants

5. The complainants have filed the present compliant for seeking following reliefs:
- i. Direct the respondent to pay interest @18% p.a. 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 complainants have filed the present complaint seeking interest for alleged delay in delivering possession of the apartment purchased by the complainants. It is respectfully submitted that such complaints are to be decided by the adjudicating officer under section 71 of the Act read with rule 29 of the rules and not by this hon'ble authority. The present complaint is liable to be dismissed on this ground alone. 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 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 complainants 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 ignorance of the provisions of the buyer's agreement. The interest for the alleged delay demanded by the complainants is beyond the scope of the buyer's agreement. The complainants cannot demand any interest or compensation beyond the terms and conditions incorporated in the buyer's agreement.

- iii. That without prejudice to the foregoing, 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 09.06.2016 i.e before the notification of the rules. Furthermore, the possession of the unit in question had been delivered to the complainants on 17.06.2017. Thus, part of the project in question is not an 'Ongoing Project" under rule 2(1)(o) of the rules. The project does not require registration and consequently has not been registered under the provisions of the Act and this devoid the authority of jurisdiction to try the matter.
- iv. That the complainants were provisionally allotted unit bearing no. EHF-267-J-GF-044 vide provisional allotment letter dated 29.07.2009. The complainants consciously and willfully opted for a

construction linked plan for remittance of the sale consideration for the unit in question and further represented to respondent that the complainants shall remit every installment on time as per the payment schedule. The complainants further undertook to be bound by the terms and conditions of the application form.

- v. That since the complainants were not forthcoming with the payment of instalments, the respondent was constrained to issue final notice dated 30.09.2013 to the complainants. The respondent had categorically notified the complainants that they had defaulted in remittance of the amounts due and payable by them. It was further conveyed by the respondent to the complainants that in the event of failure of the complainants to remit the amounts mentioned in the said notice, the respondent would be constrained to cancel the provisional allotment of the unit in question. Upon receipt of the aforesaid final notice issued by the respondent, the complainants approached the respondent requesting it to not give effect to the said notice and further promised the respondent that they would remit the remaining instalments on time. The respondent did not have any reason to suspect the bona fide of the complainants and consequently desisted from cancellation of the provisional allotment issued in favour of the complainants. However, as has been highlighted hereinabove, the complainants did not amend their ways and defaulted in remittance of the instalments on time. Therefore, the

reliefs sought by the complainants are impermissible both in law and on facts. The complainants 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.

- vi. Thereafter, the buyer's agreement was executed between the complainants and the respondent on 26.02.2010. 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. As delineated hereinabove, the complainants, 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.
- vii. That the rights and obligations of the complainants as well as respondent are completely and entirely determined by the covenants incorporated in the buyer's agreement. As per clause 13 of the buyer's

agreement the time period for delivery of possession was 27 months alongwith grace period of 6 months from the date of execution of the buyer's agreement subject to the allottee(s) having strictly complied with all the 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. It is further provided therein that the time period for delivery of possession of the unit shall stand extended on occurrence of circumstances/reasons which are beyond the power and control of the respondent. 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 complainants have defaulted in timely remittance of payments as per schedule of payment, the date of delivery of possession is not liable to be determined in the manner sought to be done in the present case by the complainants.

- viii. That the time period utilised by the concerned statutory authority to grant occupation certificate to respondent needs to be necessarily excluded from computation of the time period for implementation of

the project. Furthermore, no compensation or interest or any other amount can be claimed for the period utilised by the concerned statutory authority for issuing occupation certificate in terms of the buyer's agreement. The respondent had submitted an application for issuance of occupation certificate before the concerned statutory authority. occupation certificate was thereafter issued in favour of the respondent vide memo bearing no. 2115 dated 09.06.2016. It is submitted that once an application is submitted before the statutory authority, the respondent ceases to exercise any control over the matter. The grant of occupation certificate is the prerogative of the concerned statutory authority and the respondent cannot exercise any influence over the same. Thus, the time period utilised by the concerned statutory authority to grant occupation certificate to respondent needs to be necessarily excluded from computation of the time period for implementation of the project.

- ix. That the complainants were offered possession of the unit in question through letter of offer of possession dated 11.01.2017. The complainants were 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 them. However, the complainants have consciously refrained from obtaining possession of the unit in question. That the complainants did not have adequate funds to remit the balance



payments requisite for obtaining possession in terms of the buyer's agreement and thus refrained from obtaining possession of the unit in question. Therefore, there is no equity in favour of the complainants.

- x. That the complainants approached the respondent requesting it to deliver the possession of the unit in question. A unit handover letter dated 17.06.2017 was executed by the complainants, specifically and expressly agreeing that the liabilities and obligations of the respondent as enumerated in the allotment letter or the buyer's agreement stand satisfied. Moreover, the complainants have consciously refrained from executing conveyance deed in respect of the unit in question. Letter dated 20.05.2018 was issued by the respondent to the complainants requesting them to come forward for execution of the conveyance deed. Based on the above submissions, the respondent asserted that the present complaint deserves to be dismissed at the threshold.

E. Jurisdiction of the authority

8. 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

9. 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

10. 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

11. 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.

12. 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."

13. 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."

14. 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 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.

15. The respondent is contending that at the time of taking possession of the apartment vide unit hand over letter dated 17.06.2017, the complainants have certified themselves to be fully satisfied with regard to the measurements, location, direction, developments et cetera of the unit and also admitted and acknowledge that they do 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."

16. At times, the allottee is asked to give the indemnity-cum-undertaking before taking possession. The allottee has waited for long for his cherished dream home and now when it is ready for possession, he either has to sign the indemnity-cum-undertaking and take possession or to keep struggling with the promoter if indemnity-cum-undertaking is not signed by him. Such an undertaking/ indemnity bond given by a person thereby giving up his valuable rights must be shown to have been executed in a free atmosphere and should not give rise to any suspicion. If a slightest of doubt arises in the mind of the adjudicator that such an agreement was not

executed in an atmosphere free of doubts and suspicions, the same would be deemed to be against public policy and would also amount to unfair trade practices. No reliance can be placed on any such indemnity-cum-undertaking and the same is liable to be discarded and ignored in its totality. Therefore, this authority does not place reliance on such indemnity-cum-undertaking. To fortify this view, the authority place reliance on the NCDRC order dated 03.01.2020 in case titled as **Capital Greens Flat Buyer Association and Ors. Vs. DLF Universal Ltd., Consumer case no. 351 of 2015**, wherein it was held that the execution of indemnity-cum-undertaking would defeat the provisions of sections 23 and 28 of the Indian Contract Act, 1872 and therefore would be against public policy, besides being an unfair trade practice. The relevant portion of the said judgment is reproduced herein below.

"Indemnity-cum-undertaking

30. *The developer, while offering possession of the allotted flats insisted upon execution of the indemnity-cum-undertaking before it would give possession of the allotted flats to the concerned allottee.*

Clause 13 of the said indemnity-cum-undertaking required the allottee to confirm and acknowledge that by accepting the offer of possession, he would have no further demands/claims against the company of any nature, whatsoever. It is an admitted position that the execution of the undertaking in the format prescribed by the developer was a pre-requisite condition, for the delivery of the possession. The opposite party, in my opinion, could not have insisted upon clause 13 of the Indemnity-cum-undertaking. The obvious purpose behind such an undertaking was to deter the allottee from making any claim against the developer, including the claim on account of the delay in delivery of possession and the claim on account of any latent defect which the allottee may find in the apartment. The execution of such an undertaking would

defeat the provisions of Section 23 and 28 of the Indian Contract Act, 1872 and therefore would be against public policy, besides being an unfair trade practice. Any delay solely on account of the allottee not executing such an undertaking would be attributable to the developer and would entitle the allottee to compensation for the period the possession is delayed solely on account of his having not executed the said undertaking-cum-indemnity."

17. 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.
18. 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."

19. 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.

20. Therefore, the authority is of the view that the aforesaid unit handover letter dated 17.06.2017 does not preclude the complainants from exercising their right to claim delay possession charges as per the provisions of the Act.

G. Findings on the reliefs sought by the complainants

G.I Delay possession charges

21. **Relief sought by the complainants:** Direct the respondent to pay interest @18% p.a. towards delay in handing over the property in question as per the provisions of the Act and the Rules.

22. In the present complaint, the complainants intend to continue with the project and are seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under.

“Section 18: - Return of amount and compensation

18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building, —

.....

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.”

23. 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 of 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."

24. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement, and the complainants not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment time period for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject floor and to deprive the allottees of their 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.

25. **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 this agreement and further provided in agreement that promoter shall be entitled to a grace period of six months for applying and obtaining occupation certificate in respect of said floor. The date of execution of this agreement is 26.02.2010. 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, this grace period of six months cannot be allowed to the promoter at this stage.
26. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges at the rate of 18%. However, proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

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

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

Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such

benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.

27. 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.
28. Taking the case from another angle, the complainants-allottees were entitled to the delayed possession charges/interest only at the rate of Rs.10/- per sq. ft. per month as per clause 15(a) of the buyer's agreement for the period of such delay; whereas, the promoter was entitled to interest @ 24% per annum compounded quarterly at the time of every succeeding instalment for the delayed payments as per clause 12(a) of the buyer's agreement. 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.

29. 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%.

30. The definition of term 'interest' as defined under section 2(z) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

"(z) "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;"*

31. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter

which is the same as is being granted to the complainants in case of delayed possession charges.

32. 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 this 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 26.05.2012. In the present case, the complainants were offered possession by the respondent on 11.01.2017. Subsequently, the complainants have taken possession of the said unit vide unit handover letter dated 17.06.2017. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the complainants as per the terms and conditions of the buyer's agreement dated 26.02.2010 executed between the parties.

33. 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 09.06.2016. However, the

respondent offered the possession of the unit in question to the complainants only on 11.01.2017, so it can be said that the complainants came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, they should be given 2 months' time from the date of offer of possession. These 2 months' of reasonable time is being given to the complainants keeping in mind that even after intimation of possession practically they have to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e. 26.05.2012 till the expiry of 2 months from the date of offer of possession. (11.01.2017) which comes out to be 11.03.2017.

34. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainants are entitled to delay possession charges at prescribed rate of the interest @ 9.30 % p.a. w.e.f. 26.05.2012 till 11.03.2017 as per provisions of section 18(1) of the Act read with rule 15 of the Rules.

H. Directions of the authority

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

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

- i. The respondent is directed to pay the interest at the prescribed rate i.e. 9.30 % per annum for every month of delay on the amount paid by the complainants from due date of possession i.e. 26.05.2012 till 11.03.2017 i.e. expiry of 2 months from the date of offer of possession (11.01.2017). The arrears of interest accrued so far shall be paid to the complainants within 90 days from the date of this order as per rule 16(2) of the rules.
- ii. The respondent shall not charge anything from the complainants which is not the part of the buyer's agreement. The respondent is also not entitled to claim holding charges from the complainants/allottees at any point of time even after being part of the buyer's agreement as per law settled by hon'ble Supreme Court in civil appeal nos. 3864-3889/2020 decided on 14.12.2020.

36. Complaint stands disposed of.

37. File be consigned to registry.


(Vijay Kumar Goyal)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 22.07.2021


(Dr. K.K. Khandelwal)

Chairman

Judgement uploaded on 28.09.2021.