

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

Complaint no. : 3108 of 2020
First date of hearing : 26.11.2020
Date of Decision : 29.07.2021

1. Ajay Wahi
2. Monica Wahi
Both R/o: B-2/30, Safdarjung Enclave,
New Delhi-110029

Complainants

Versus

SS Group Private Limited
Address: 77, SS House Sector-44
Gurugram, Haryana-122003

Respondent

CORAM

Shri Samir Kumar
Shri Vijay Kumar Goyal

**Member
Member**

APPEARANCE

Sh. Venket Rao Advocate for the complainants
Sh. Dhruv Dutt Sharma Advocate for the respondent

ORDER

1. The present complaint dated 12.10.2020 has been filed by the complainants/allottees 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 under the



provision of the Act or the rules and regulations made there under or to the allottee as per the agreement for sale executed inter se.

A. Unit and project related details

2. The particulars of project, unit, 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	"The Coralwood & Almeria", Sector-84, Gurugram.
2.	Project area	15.275 acres
3.	Nature of the project	Group Housing Complex
4.	DTCP license no.	59 of 2008 dated 19.03.2008
	License valid up to	18.03.2020
	Name of the licensee	M/s North Star Apartment Private Limited
5.	RERA registered/not registered	381 of 2017 dated 12.12.2017
	Registration valid up to	31.12.2019
6.	Building Plan Approved on	19.12.2011
7.	Unit no.	1903, 19 th Floor, Type E, Tower-J [Page no. 52 of complaint]
8.	Unit measuring	1425 sq. ft.
9.	Allotment letter	05.03.2013 [Page no. 43 of complaint]
10.	Date of execution of buyer's agreement	27.09.2013 [Page no. 51 of complaint]



11.	Payment plan	Construction Linked Payment Plan [Page no. 70 of complaint]
12.	Due date of delivery of possession as per clause 8.1 of buyer's agreement, 36 months from the date of execution of said agreement plus 90 days of additional grace period [Page no. 57 of complaint]	27.09.2016 [Note: Grace period is not included]
13.	Total consideration	Rs.81,96,050/- [As per payment schedule on page no. 70 of complaint]
14.	Total amount paid by the complainants	Rs.90,73,633/- [As per applicant ledger dated 29.10.2020 on page no. 45 of reply]
15.	Offer of Possession for fits out	13.08.2018 [Page no. 39 of the reply]
16.	Indemnity-Cum-Undertaking for taking over physical possession	01.04.2019 [Page no. 48 of the reply]
17.	Handing over of possession	30.01.2020 [Page no. 51 of the reply]
18.	Delay in handing over the possession	3 years 6 months 3 days
19.	Occupation Certificate	17.10.2018 [Page no. 41 of the reply]

B. Facts of the complaint

The complainants have submitted the following facts:

3. That the complainants booked an apartment no.1903 admeasuring super area 1425 sq. ft. in Tower-J in the project namely "The Coralwood" situated at sector-84, Gurugram, Haryana on 14.02.2013, for the basic sale consideration of Rs.



74,10,000/- and accordingly paid an amount of Rs. 5,00,000/- via cheque no. 299791 dated 07.02.2013, Rs. 6,50,000/- via cheque no. 299798 dated 14.02.2013 and Rs. 63,276/- via cheque no. 454848 dated 24.04.2013.

4. That on 05.03.2013 the respondent issued the allotment letter whereby the complainants were allotted the said unit. It is submitted that the as per clause 9 of the terms of the allotment letter the possession of the unit was to be delivered within 36 months along with grace period of 3 months from the date of execution of the agreement. The allotment letter also contains the terms of payment.
5. That thereafter the complainants on 14.08.2013 made the payment of Rs. 12,13,275/- towards the total sale consideration of the unit as per the payment schedule communicated by the respondent.
6. That a flat buyer's agreement was executed between the complainants and the respondent company on 27.09.2013 at the base price of Rs. 74,10,000/-. As per clause 8.1 (a) of the agreement, the possession of the unit was to be handed over to the complainants within 36 months along with further grace period of 90 days from the date of execution of the agreement. Therefore, the date of handing over of the possession of the unit was 26.12.2016. Thereafter, the



complainants in bona-fide believe made further the payments of Rs. 48,53,096/- between the period of 13.11.2013 to 13.04.2017.

7. That the respondent was supposed to handover the unit to the complainants on 26.12.2016 as per the terms and conditions of the agreement, however, due to dishonest and mischievous intention, the respondent failed to hand over the possession. As per clause 8.1(a) of the agreement, the respondent was liable to handover the unit within 36 months along with a grace period of 90 days i.e., on or before 26.12.2016, however, the respondent miserably failed to offer the unit. The complainants believing on the respondent, till 26.12.2016 had paid almost 80% amount of the total sale consideration.
8. That the respondent on 07.06.2017 raised a demand titled as "on completion of finishing work in the flat including, wooden, flooring and fixing of modular kitchen" which should have been raised after completion of the finishing work in the flat including, wooden, flooring and fixing of modular kitchen. The complainantss in bona fide believe paid an amount of Rs. 3,90,856/- vide cheque bearing no. 022888 dated 15.06.2017 as demanded by the respondent.



9. That the complainants visited the site of the project and came to know that the respondent had raised the demand without achieving the particular stage of construction which was appalling for the complainants. The complainants tried to contact to the representatives of the respondent present at the site of the project, however, no representatives answered the concern raised by the complainants nor mentioned the date of handing over of possession.
10. That the respondent without completing the previous pending work, on 30.11.2017 sent an e-mail to the complainants stating that the flat is ready for fit outs. However, the respondent falsely stated and claimed that the flat is ready for fit outs whereas the flat was not completed in various aspects like wooden work, toilet fitting work, painting work etc. were pending.
11. Thereafter the respondent on 23.05.2018, raised a demand which should have been raised at the time of offering of possession. The respondent raised the demand on 23.05.2018 with mala fide intention without obtaining the occupation certificate which was illegal and not tenable in the eyes of law.
12. That feeling aggrieved and cheated by the hands of the respondent the complainants raised his concern through



various emails. On 23.10.2018 the complainants received a mail from the respondent stating that they have got the OC and further threatened the complainants to make payment towards the demand within 7 days from the date of the email. the respondent threatened the complainant stating that in case of non-payment of instalment within 7 days, they will start charging the interest upon the due amount. it is also appurtenant to note here that despite of their claim of obtaining of OC, the respondent did not provide a copy to the complainants.

13. That on 02.11.2018 the complainants made the payment of Rs. 8,00,000/- via cheque No. 870845 dated 02.11.2018, Rs. 2,20,271/- via cheque no. 000180 dated 02.11.2018 and Rs. 2,20,271/- via NEFT as demanded by the respondent under protest reserving their rights. The respondent acknowledged the same vide two receipts dated 24.11.2018. The complainants up to November 2018 had made the entire payment of Rs. 89,80,567/- towards the total sale consideration of the unit.
14. That on 01.04.2019 the complainants was asked to sign a document namely "Indemnity-Cum-Undertaking" so that the possession of the unit could be offered to the complainant. The complainant signed such document with the hope of



getting the possession of their unit. However, the respondent dishonestly with mala fide intention cheated the complainants by taking sign on the documents without offering them the possession of the unit and even after taking signatures the unit was not offered to the complainant.

C. Relief sought by the complainant:

15. The complainant has sought following relief:

- (i) Direct the respondent to provide prescribed rate of interest per annum for the delay in handing over of possession from the due date of delivery of possession till the legal offer of possession as per the terms of the agreement and provisions of the RERA, 2016.
- (ii) Direct the respondent to provide legal offer of possession with a copy of occupation certificate as per the buyer agreement.
- (iii) Direct the respondent to execute a conveyance deed of the complainant's unit immediately.
- (iv) Direct the respondent to withdraw the maintenance demand till the complete possession of the unit as per the terms of the agreement and various provisions of the RERA, 2016.
- (v) Direct the respondent not to charge any other interest or charges on any maintenance etc.

16. On the date of hearing, the authority explained to the respondent/promoter about the contravention as alleged to

have been committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent

17. The respondent has contested the complaint on the following grounds:

1. That the complaint filed by the complainant before this authority, besides being misconceived and erroneous, was untenable in the eyes of law. The complainant has misdirected herself in filing the above captioned complaint before this authority as the reliefs being claimed by the complainant, besides being illegal, misconceived and erroneous, cannot be said to even fall within the realm of jurisdiction of this authority.
2. That the provisions of the Real Estate (Regulation and Development) Act, 2016 and the Haryana Real Estate (Regulation and Development) Rules, 2017, made by the Government of Haryana in exercise of powers conferred by sub-section 1 read with sub-section 2 of section 84 of 2016 Act. Section 31 of 2016 Act provides for filing of complaints with this authority or the Adjudicating Officer. Sub-Section (1) thereof provides that any aggrieved person may file a complaint with the authority or the adjudicating officer, as the case may be, for any violation or contravention of the provisions of 2016 Act or the rules and regulations made there under against any promoter, allottee or real estate agent, as



the case may be. Sub-section (2) provides that the form, manner and fees for filing complaint under sub-section (1) shall be such as may be prescribed. Rule 28 of 2017 Haryana Rules provides for filing of complaint with this authority, in reference to section 31 of 2016 Act. Sub-clause (1) *inter alia*, provides that any aggrieved person may file a complaint with the authority for any violation of the provisions of 2016 Act or the rules and regulations made thereunder, *save as those provided to be adjudicated by the Adjudicating Officer*, in Form 'CRA'. Significantly, reference to the "authority", which is this authority in the present case and to the "Adjudicating Officer", is separate and distinct. "Adjudicating Officer" has been defined under section 2(a) to mean the Adjudicating Officer appointed under sub-section (1) of section 71, whereas the "authority" has been defined under Section 2(i) to mean the Real Estate Regulatory Authority, established under sub-section (1) of section 20.

3. That under Section 71, the Adjudicating Officer is appointed by the authority in consultation with the appropriate Government for the purpose of adjudging compensation under sections 12, 14, 18 and 19 of the 2016 Act and for holding an enquiry in the prescribed manner. A reference may also be made to section 72, which provides for factors to be taken into account by the Adjudicating Officer while adjudging the quantum

of compensation and interest, as the case may be, under section 71 of 2016 Act. The domain of the Adjudicating Officer cannot be said to be restricted to adjudging only compensation in the matters which are covered under Sections 12, 14, 18 and 19 of the 2016 Act. The inquiry, as regards the compliance with the provisions of Sections 12, 14, 18 and 19, is to be made by the Adjudicating Officer. This submission find support from reading of Section 71(3) which *inter alia*, provides that the Adjudicating Officer, while holding inquiry, shall have power to summon and enforce the attendance of any person and if on such inquiry he is satisfied that the person had failed to comply with the provisions of any of the sections specified in sub-section (1) he may direct to pay such compensation or interest, as the case may be, as he thinks fit in accordance with the provisions of any of those sections. Suffice it is to mention that the sections specified in sub-section (1) of section 71 are sections 12, 14, 18 and 19.

4. That the complainant is seeking interest which, from reading of the provisions of the 2016 act and 2017 rules, especially those mentioned hereinabove, would be liable for adjudication, if at all, by the Adjudicating Officer and not this authority. Thus, on this ground alone the complaint is liable to be rejected.
5. That further, without prejudice to the aforementioned, even if it was to be assumed though not admitting that



the filing of the complaint is not without jurisdiction, even then the claim as raised cannot be said to be maintainable and is liable to be rejected for the reasons as ensuing.

6. That the complainant has miserably and willfully failed to make payments in time or in accordance with the terms of the allotment/flat buyer's agreement. The respondent has also waived off the interest applicable on the delayed payments.
7. That it has been categorically agreed between the parties that subject to the complainants having complied with all the terms and conditions of the flat buyer's agreement and not being in default under any of the provisions of the said agreement and having complied with all provisions, formalities, documentation etc., the developer proposed to handover the possession of the unit in question within a period of 36 months from the date of signing of the agreement, which period would automatically stand extended for the time taken in getting the building plan sanctioned. It had been agreed that the respondent would also be entitled to a further grace period of 90 days after expiry of 36 months or such extended period for want of building sanction plans.
8. Further, it had been also agreed and accepted that in case of any default/delay in payment as per the schedule of payments as provided in clause 8.1(b)(iii)



to the flat buyer's agreement, the date of handing over of the possession shall be extended accordingly.

9. In the present case, it is a matter of record that the complainants have not fulfilled their obligation and have not paid the installments on time that had fallen due. Accordingly, no relief much less as claimed can be granted to the complainants.
10. That the respondent initially offered the possession for fit outs to the complainants vide letter dated 13.08.2018 in order to complete the unit and handover the same to the complainants immediately after receiving the occupation certificate, which had thereafter been even issued through memo dated 17.10.2018. The complainants sent an e-mail dated 25.08.2018 to the respondent to pay the compensation at the rate of Rs. 5 per sq. ft.
11. The respondent on 06.09.2018 itself revised its previous demand dated 13.08.2018 and thereby adjusted the compensation for delay in handing over possession and the complainants agreed to the same and paid the said amount. Accordingly on the request of the complainants, the respondent adjusted a sum of Rs. 85,498/- as compensation from the amount due from the complainants towards the sale consideration of the said flat on 08.03.2019 and waived off the applicable interest and did not charge holding charges for maintenance for the period up to January 2020 from



the complainants. Therefore, the complainants are now estopped from demanding any amount from the respondent as the respondent has already compensated the complainants as per the terms of agreement.

12. That the respondent through email dated 23.10.2018 informed the complainants that it has received the occupation certificate and also asked the complainant to make the outstanding payment.
13. That the complainants after fully satisfying themselves with respect to the completion work in the flat have executed and submitted an Indemnity-Cum-Undertaking on a non-judicial stamp paper dated 01.04.2019 for taking over physical and vacant possession of its allotted unit. The complainants have already taken the legal possession of the Unit on 30.01.2020 vide handing-over possession letter dated 30.01.2020. Therefore, the complaint filed by the complainants, being in any case belated, is even subsequent to the date of grant of occupation certificate and handing over of possession. No indulgence much less as claimed by the complainants is liable to be shown to them.
14. That it is submitted that the said flat is complete in all respect as agreed. It is pertinent to mention here that large numbers of families, i.e., about 350, have already

shifted after having taken possession in the said project.

18. 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 and submission made by the parties

E. Jurisdiction of the authority

The contention of the respondent regarding rejection of complaint on ground of jurisdiction 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

19. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, 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

20. The respondent contended that the relief regarding refund and compensation are within the jurisdiction of the



adjudicating officer and jurisdiction w.r.t the same does not lie with the authority. It seems that the reply given by the respondent is without going through the facts of the complaint as the same is totally out of context. The complainant has nowhere sought the relief of refund and regarding compensation part the complainant has stated that it is reserving the right for compensation and at present he is seeking only delayed possession charges. The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as held in *Simmi Sikka v/s M/s EMAAR MGF Land Ltd. (complaint no. 7 of 2018)* leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage. The said decision of the authority has been upheld by the Haryana Real Estate Appellate Tribunal in its judgement dated 03.11.2020, in appeal nos. 52 & 64 of 2018 titled as *Emaar MGF Land Ltd. V. Simmi Sikka and anr.*

F. Findings on the objections raised by the respondent

F.1 Objection regarding format of the compliant

21. The respondent has further raised contention that the present complaint is not maintainable as the complainant have filed the present complaint before the adjudicating officer and the same is not in amended CRA format. The reply



is patently wrong as the complaint has been addressed to the authority and not to the adjudicating officer. The authority has no hesitation in saying that the respondent is trying to mislead the authority by saying that the said complainant is filed before adjudicating officer. There is a prescribed proforma for filing complaint before the authority under section 31 of the Act in form CRA. There are 9 different headings in this form (i) particulars of the complainant- have been provided in the complaint (ii) particulars of the respondent- have been provided in the complaint (iii) is regarding jurisdiction of the authority- that has been also mentioned in para 14 of the complaint (iv) facts of the case have been given at page no. 5 to 8 (v) relief sought that has also been given at page 10 of complaint (vi) no interim order has been prayed for (vii) declaration regarding complaint not pending with any other court- has been mentioned in para 15 at page 8 of complaint (viii) particulars of the fees already given on the file (ix) list of enclosures that have already been available on the file. Signatures and verification part is also complete. Although complaint should have been strictly filed in proforma CRA but in this complaint all the necessary details as required under CRA have been furnished along with necessary enclosures. Reply has also been filed. At this



stage, asking complainant to file complaint in form CRA strictly will serve no purpose and it will not vitiate the proceedings of the authority or can be said to be disturbing/violating any of the established principle of natural justice, rather getting into technicalities will delay justice in the matter. Therefore, the said plea of the respondent w.r.t rejection of complaint on this ground is also rejected and the authority has decided to proceed with this complaint as such.

F.2 Whether signing of indemnity-cum-undertaking at the time of possession or unit hand over letter extinguishes the right of the allottee to claim delay possession charges?

22. The respondent is contending that after being fully satisfied with respect to the completion work in the flat, the complainants have executed and submitted an Indemnity-Cum-Undertaking on a non-judicial stamp paper dated 01.04.2019 for taking over physical and vacant possession of its allotted unit. The complainants have already taken the legal possession of the unit on 30.01.2020 vide handing-over possession letter dated 30.01.2020. The complainants have 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:

2. That I/We have taken physical vacant possession of the Flat as per the Flat Buyer's Agreement to my/our complete satisfaction and after due inspection and verification at my/our end. Now I/We have no claim against the company of any nature whatsoever in respect of the super area, size, measurement, dimensions, location, quality of construction and material used, services of the Flat etc.

23. At times, the allottee is asked to give the affidavit or indemnity-cum-undertaking in question before taking possession. The allottee has waited for long for his cherished dream home and now when it is ready for taking possession, he has either 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 their 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."

24. 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.
25. 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 has 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."

26. 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."

27. Therefore, in light of the aforesaid discussion and judgements, the authority is of the view that the aforesaid unit handover letter or execution of indemnity-cum-undertaking dated 01.04.2019 does not preclude the complainants/allottees from exercising their right to claim delay possession charges as per the provisions of the Act.

G. Findings of the authority

Relief sought by the complainants - Direct the respondent to provide prescribed rate of interest per annum for the delay in handing over of possession from the due date of delivery of possession till the legal offer of possession.

28. In the present complaint, the complainants 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."

Admissibility of delay possession charges at prescribed

rate of interest: The complainants are seeking delay possession charges as per the Act, 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.

29. The legislature in its wisdom in the subordinate legislation under the provision of 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. The Haryana Real Estate Appellate

Tribunal in **Emaar MGF Land Ltd. vs. Simmi Sikka** observed as under:-

"64. Taking the case from another angle, the allottee was only entitled to the delayed possession charges/interest only at the rate of Rs.15/- per sq. ft. per month as per clause 18 of the Buyer's Agreement for the period of such delay; whereas, the promoter was entitled to interest @ 24% per annum compounded at the time of every succeeding instalment for the delayed payments. The functions of the Authority/Tribunal 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 homer buyers. This Tribunal 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 dated 09.05.2014 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. Admissibility of grace period:** The promoter has proposed to hand over the possession of the apartment within a period of 36 months from the date of execution of the agreement with grace period of 90 days for applying and obtaining occupation certificate in respect of group housing complex. As a matter of fact, the promoter has not applied for occupation certificate within the time limit prescribed by the promoter in the apartment buyer's agreement. As per the



settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 6 months and 90 days cannot be allowed to the promoter at this stage. The same view has been upheld by the hon'ble Haryana Real Estate Appellate Tribunal in appeal nos. 52 & 64 of 2018 case titled as ***Emaar MGF Land Ltd. VS Simmi Sikka*** case and observed as under: -

68. As per the above provisions in the Buyer's Agreement, the possession of Retail Spaces was proposed to be handed over to the allottees within 30 months of the execution of the agreement. Clause 16(a)(ii) of the agreement further provides that there was a grace period of 120 days over and above the aforesaid period for applying and obtaining the necessary approvals in regard to the commercial projects. The Buyer's Agreement has been executed on 09.05.2014. The period of 30 months expired on 09.11.2016. But there is no material on record that during this period, the promoter had applied to any authority for obtaining the necessary approvals with respect to this project. The promoter had moved the application for issuance of occupancy certificate only on 22.05.2017 when the period of 30 months had already expired. So, the promoter cannot claim the benefit of grace period of 120 days. Consequently, the learned Authority has rightly determined the due date of possession.

31. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., 29.07.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.
32. 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;"*

33. 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.

34. On consideration of the documents available on record and submissions made by both the parties regarding contravention of 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 of the subject unit within the stipulated time as per the said agreement. By virtue of clause 8.1 of the buyer's agreement executed between the parties on 27.09.2013, possession of



the booked unit was to be delivered within a period of 36 months from the date of execution of the agreement with grace period of 90 days. The grace period is not included in calculating the due date of possession for the reasons mentioned above. Therefore, the due date of handing over possession comes out to be 27.09.2016. Accordingly, it is the failure of the promoters to fulfil its obligations, responsibilities as per the buyer's agreement dated 27.09.2013 to hand over the possession within the stipulated period. 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 respondents is established. As such, the complainants are entitled to delayed possession charges i.e., interest at prescribed rate @ 9.30% p.a. w.e.f. 27.09.2016 till 30.01.2020 plus two months i.e. 30.03.2020 as per provisions of section 19(10) 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 interest at the prescribed rate of 9.30% p.a. for every month of delay


from the due date of possession i.e., 27.09.2016 till the date of handing over of possession i.e., 30.01.2020 plus two months i.e. 30.03.2020 as per provisions of section 19(10) of the Act.

- ii. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order and thereafter monthly payment of interest till offer of possession shall be paid before 10th of each subsequent month.
- iii. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
- iv. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.
- v. The respondent shall not charge anything extra which is not a part of BBA. Moreover, holding charges shall not be charged by the promoter at any point of time even after being part of the agreement as per law

settled by the hon'ble Supreme Court in civil appeal no.
3864-3889/2020 dated 14.12.2020.

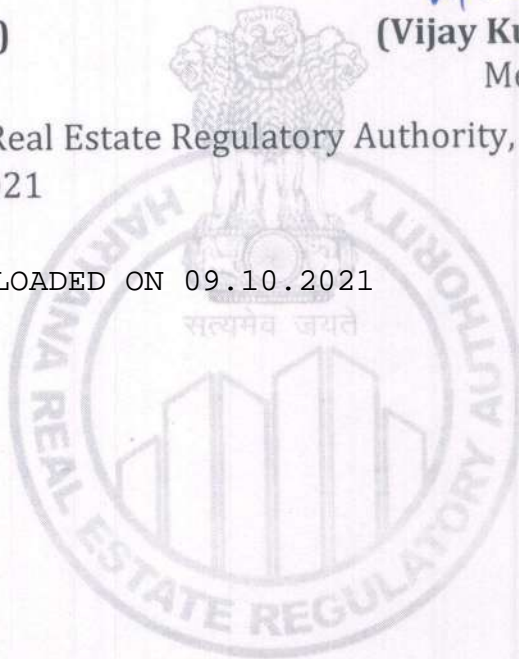
36. Complaint stands disposed of.
37. File be consigned to registry.


(Samir Kumar)
Member


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated:29.07.2021

JUDGMENT UPLOADED ON 09.10.2021



HARERA
GURUGRAM