

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

Complaint no. : 1281 of 2021
First date of hearing : 16.04.2021
Date of decision : 12.08.2021

Umesh Singh
R/o: A-1A, Central Jail Road, Varanasi,
Uttar Pradesh-221002.

Complainant

Versus

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

Respondent

CORAM:

Dr. K.K. Khandelwal
Shri Samir Kumar
Shri Vijay Kumar Goyal

Chairman
Member
Member

APPEARANCE:

Shri Varun Chugh
Shri J.K. Dang along with Shri Ishaan Dang

Advocate for the complainant
Advocates for the respondent

ORDER

1. The present complaint dated 08.03.2021 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 07.07.2010 i.e. prior to the commencement of the Act ibid, therefore, the penal proceedings cannot be initiated retrospectively. Hence, the authority has decided to treat the present complaint as an application for non-compliance of statutory obligation on part of the promoter/respondent in terms of section 34(f) of the Act ibid.

A. Project and unit related details

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

S.No.	Heads	Information
1.	Project name and location	"Emerald Estate Apartments at Emerald Estate" in Sector 65, Gurugram, Haryana.
2.	Project area	25.499 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	"Emerald Estate" 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 134 of reply]
8.	Provisional allotment letter	24.09.2009 [Page 35 of reply]

9.	Revised provisional allotment letter dated	16.04.2010 [Page 37 of reply]
10.	Unit no.	EEA-G-F11-06, 11 th floor, building no. G [Page 17 of complaint]
11.	Unit measuring	1310 sq. ft.
12.	Date of execution of buyer's agreement	25.05.2010 [Page 45 of reply]
13.	Payment plan	Construction linked payment plan [Page 38 of reply]
14.	Total consideration as per statement of account dated 24.03.2021 [Page 117 of reply]	Rs.56,65,560/-
15.	Total amount paid by the complainant as per statement of account dated 24.03.2021 [Page 118 of reply]	Rs.61,18,196/-
16.	Date of start of construction as per statement of account dated 24.03.2021 [Page 117 of reply]	26.08.2010
17.	Due date of delivery of possession as per clause 11(a) of the said agreement i.e. 36 months from the date of commencement of construction (26.08.2010) + grace period of 6 months, for applying and obtaining completion certificate/ occupation certificate in respect of the unit and/or the project. [Page 30 of complaint]	26.08.2013 [Note: Grace period is not included]
18.	Date of offer of possession to the complainant	21.11.2020 [Page 50 of complaint]
19.	Delay in handing over possession till 21.01.2021 i.e. date of offer of possession (21.11.2020) + 2 months	7 year 4 months 26 days

B. Facts of the complaint

4. The complainant has made the following submissions in the complaint:

- i. That the property in question i.e. EEA-G-F11-06 (eleventh floor) admeasuring 1310 sq. ft., in the said project was booked by the complainant in the year 2010. The total cost of the apartment is Rs.56,65,560/- only and since it was a construction linked plan, hence the payment was to be made on the basis of schedule of payment provided by the respondent.
- ii. That thereafter, on 25.05.2010, the complainant entered into a buyer's agreement with the respondent, by virtue of which the respondent allotted apartment no. EEA-G-F11-06, having super area of 1310 sq. ft. located on the eleventh floor, along-with car parking space in the said project.
- iii. That complainant has already paid the entire amount towards the cost of the property, and nothing is due and payable by the complainant and in fact, a sum of Rs.3,20,073/- is lying in credit balance of the complainant which is due and payable by the respondent as is evident from the statement of account.
- iv. That as per clause 11(a) of the buyer's agreement dated 25.05.2010, the respondent had categorically stated that the possession of the said apartment would be handed over to the complainant within 36 months from the date of commencement of the construction and

development of the unit i.e. 26.08.2010 with a further grace period of another 6 months.

- v. That the said buyer's agreement is totally one sided, which impose completely biased terms and conditions upon the complainant, thereby tilting the balance of power in favour of the respondent, which is further manifested from the fact that the delay in handing over the possession by the respondent would attract only a meagre penalty of Rs.5/- per sq. ft. on the super area of the apartment, on monthly basis, whereas the penalty for failure to take possession would attract holding charges of Rs.50/- per sq. ft. and 24% penal interest on the unpaid amount of instalment due to the respondent.
- vi. That the complainant also visited the project site and observed that there are serious qualities issues with respect to the construction carried out by respondent. The apartments were sold by representing that the same will be luxurious apartment however all such representations seem to have been made in order to lure complainant to purchase the floor at extremely high prices. The respondent has compromised with levels of quality and is guilty of mis-selling. There are various deviations from the initial representations. The respondent marketed luxury high end apartment, but has compromised even with the basic features, designs and quality to save costs. The structure, which has been constructed on face of it is of extremely poor quality. The

construction is totally unplanned, with sub-standard, low grade, defective and despicable construction quality.

- vii. That the respondent has breached the fundamental term of the contract by inordinately delaying in delivery of the possession by 81 months. The complainant was made to make advance deposit on the basis of information contained in the brochure, which is false on the face of it as is evident from the construction done at site.
- viii. That the complainant, without any default, had been paying the instalments towards the property, as and when demanded by the respondent. The respondent had promised to complete the project by February 2014 including the grace period of six months. The buyer's agreement was executed on 25.05.2010 and the possession was finally offered on 21.11.2020 which resulted in extreme kind of mental distress, pain and agony to the complainant.
- ix. That the complainant vide his emails addressed to the respondent had asked to indemnify him, for the delay in handing over the possession of the apartment but the respondent company had indemnified the complainant as per the buyer's agreement and had only offered a meagre sum of Rs.4,90,550/-. In fact, the complainant vide his email demanded compensation as per RERA but the respondent had miserably failed to accede to his legitimate request and has turned a deaf ear.

- x. The respondent had breached the fundamental term of the contract by inordinately delaying in delivery of possession and the project had been inordinately delayed. 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 interest and compensation to the buyer as per the provisions of the Act.

C. Relief sought by the complainant

5. The complainant has filed the present compliant for seeking following relief:
- 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. Direct the respondent to handover the possession of the property to the complainant in a time bound manner.
 - iii. Pass such other order or further order as this hon'ble authority may deem fit and proper in the facts and circumstances of the present case.
6. On the date of hearing, the authority explained to the respondent/promoter about the contravention as alleged to have been committed in relation to section 11(4)(a) of the Act and to plead guilty or not to plead guilty.

D. Reply by the respondent

7. The respondent has raised certain preliminary objections and has contested the present complaint on the following grounds:

- i. That the complainant has filed the present complaint seeking, inter-alia, interest and compensation for alleged delay in delivering possession of the apartment purchased by the complainant. It is respectfully submitted that complaints pertaining to compensation are to be decided by the adjudicating officer under section 71 of the Act read with rule 29 of the rules 2017 and not by this authority. The present complaint is liable to be dismissed on this ground alone.
- ii. That 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 25.05.2010. The provisions of the Act are not retrospective in nature. The provisions of the Act cannot undo or modify the terms of an agreement duly executed prior to coming into effect of the Act. The provisions of the Act relied upon by the complainant for seeking interest cannot be called in to aid in derogation and 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 for the alleged delay demanded by the complainant is beyond the scope of the buyer's agreement. The complainant cannot demand any interest or

compensation beyond the terms and conditions incorporated in the buyer's agreement.

- iii. That initially apartment bearing no. EEA-M-F06-03 was provisionally allotted to the complainant having tentative super area of 1020 sq. ft. vide letter dated 24.09.2009. Subsequently, unit no. EEA-G-F11-06 was provisionally allotted to the complainant, having super area of 1310 sq. ft. approx. vide revised allotment letter dated 16.04.2010 in favour of the complainant.
- iv. That the buyer's agreement dated 25.05.2010 was executed between the complainant and the respondent. The complainant had opted for a construction linked payment plan and had agreed and undertaken to make payment in accordance therewith. However, the complainant defaulted in payments on several occasions. Consequently, the respondent was constrained to issue notices and reminders for payment. The statement of account reflects the payments made by the complainant and the accrued delayed payment interest thereon as on 24.03.2021. The project has been registered under the Act and the registration of the project is valid till 23.08.2022.
- v. That 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. Furthermore, clause 11(b)(iv) provides that in the event of any default or delay in payment of instalments as per the schedule of payments incorporated in the buyer's agreement, the time for delivery of possession shall also stand extended. Furthermore, in the event of delay due to force majeure conditions and other events beyond the control of the respondent, time taken by statutory/government authorities in according approvals, permissions, sanctions etc., such time period is also to be excluded while reckoning the time period for delivery of possession. As delineated hereinabove, the complainant, having defaulted in payment of several instalments, are/were thus not entitled to any compensation or any amount towards interest under the buyer's agreement.

- vi. That the respondent has already credited an amount of Rs. 4,90,550/- as delay compensation in accordance with the buyer's agreement. Thus, the complainant is not entitled to any compensation or interest in addition to the aforesaid amount both in law and on facts. Additionally, the respondent has also credited Rs.45,658/- as benefit on account of anti-profiting. Without prejudice to the rights of the respondent, delayed interest if any has to be calculated only on the amounts deposited by the allottee/complainant 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 allottee/complainant towards delayed payment charges or any taxes/statutory payments etc.
- vii. That the respondent completed construction of the apartment/building and applied for the issuance of the occupation certificate on 20.07.2020. The occupation certificate has been issued by the competent authority on 11.11.2020. Upon receipt of the occupation certificate, possession of the apartment has been offered to the complainant vide offer of possession letter dated 21.11.2020. The complainant has been called upon to make remaining payment and complete the necessary formalities required to enable the respondent to hand over possession to the complainant.
- viii. That instead of making balance payment and taking possession of the unit, the complainant has filed the present false and frivolous complaint. That the respondent has duly fulfilled its obligations under the buyer's agreement by completing construction and offering possession in accordance with the buyer's agreement, within the period of validity of registration of the project under the Act, i.e. before 23.08.2022. Thus, there is no default or lapse on the part of the respondent.
- ix. That the project got delayed on account of various reasons which were/are beyond the power and control of the respondent and hence the respondent cannot be held responsible for the same. *Firstly*, the respondent was constrained to terminating the contract

with one of the contractors of the project which has also contributed to delay in construction activities at the site. The contractor was unable to meet the agreed timelines for construction of the project. After termination of the contract, the respondent had filed petition before the Hon'ble High Court seeking interim protection against the contractor. Similar petition was also filed by the contractor against the respondent. The Hon'ble High Court appointed Justice A.P. Shah (Retd.) as sole arbitrator for adjudication of dispute between the respondent and contractor. The Hon'ble Arbitrator vide order dated 27.04.2019 gave liberty to the respondent to appoint another contractor w.e.f. 15.05.2019. The respondent had been diligently pursuing the matter with the contractor before the sole arbitrator and no fault can be attributed to the respondent in this regard and the respondent cannot be held responsible for the same. *Secondly*, in the meanwhile, the National Building Code (NBC) was revised in the year 2016 and in terms of the same, all high-rise buildings (i.e buildings having height of 15 mtrs and above), irrespective of the area of each floor, are now required to have two staircases. Furthermore, it was notified vide Gazette published on 15.03.2017 that the provisions of NBC 2016 supersede provisions of NBC 2005. The respondent had accordingly sent representations to various authorities identifying the problems in constructing a second staircase. Eventually, so as to not cause any further delay in the

project and so as to avoid jeopardising the safety of the occupants of the buildings in question, the respondent had taken a decision to go ahead and construct the second staircase. However, due to the impending BL Kashyap (contractor) issue of non-performance, the construction of the second staircase could not be started as well.

- x. 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. Thus, it is most respectfully submitted that the present complaint deserves to be dismissed at the very threshold.

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

E. Jurisdiction of the authority

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

E.I Territorial jurisdiction

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

E.II Subject-matter jurisdiction

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

F. Findings on the objections raised by the respondent

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

12. One of the contentions of the respondent is that the 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. 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 hon'ble Bombay High Court in *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** 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 Objection regarding handing over possession as per declaration given under section 4(2)(I)(C) of RERA Act

15. The counsel for the respondent has stated that there is no default on the part of the respondent as the respondent has offered possession of the subject unit within the period of validity of registration of the project under the Act i.e. before 23.08.2022. Therefore, next question of determination is whether the respondent is entitled to avail the time given to him by the authority at the time of registering the project under section 3 & 4 of the Act.
16. 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.
17. Section 4(2)(I)(C) of the Act requires that while applying for registration of the real estate project, the promoter has to file a declaration under section 4(2)(I)(C) of the Act and the same is reproduced as under: -

Section 4: - Application for registration of real estate projects

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

(1): -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...."

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

"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement

for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter..."

F.III Objection regarding exclusion of time taken by the competent authority in processing the application and issuance of occupation certificate

19. 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 deficiency 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 24.09.2020 & 22.09.2020. The District Town Planner, Gurugram and Senior Town Planner, Gurugram has submitted requisite report 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.

20. 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.

G. Findings on the reliefs sought by the complainant

G.I Delay possession charges

21. 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."

22. 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 the Allottee(s) having complied with all the terms and conditions of this Buyer's Agreement, and not being in default under any of the provisions of this Buyer's Agreement and compliance with all provisions, formalities, documentation etc., as prescribed by the Company, the Company proposes to hand over the possession of the Unit within 36 months from the date of commencement of construction and development of the Unit. The Allottee(s) agrees and understands that the Company shall be entitled to a grace period of six months, for applying and obtaining the completion certificate/occupation certificate in respect of the Unit and/or the Project."

23. 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.

24. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within 36 (thirty-six) months from the date of commencement of construction and further provided in agreement that promoter shall be entitled to a grace period of 6 months for applying and obtaining completion certificate/occupation certificate in respect of said unit. The date of start of construction is 26.08.2010 as per statement of account dated 24.03.2021. The period of 36 months expired on 26.08.2013. As a matter of fact, the promoter has not applied to the concerned authority for obtaining completion certificate/ occupation certificate within the grace period 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 6 months cannot be allowed to the promoter at this stage.

25. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is 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.

26. 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.
27. 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 as per clause 13(a) of the buyer's agreement for the period of such delay; whereas, as per clause 1.2(c) of the buyer's agreement, the promoter was entitled to interest @ 24% per annum at the time of every succeeding instalment for the delayed payments. The functions of the authority are to safeguard the interest of the aggrieved person, may be the allottee or the promoter. The rights of the parties are to be balanced and must be equitable. The promoter cannot be allowed to take undue advantage of his dominate position and to exploit the needs of the home buyers. This authority is duty bound to take into

consideration the legislative intent i.e., to protect the interest of the consumers/allottees in the real estate sector. The clauses of the buyer's agreement entered into between the parties are one-sided, unfair and unreasonable with respect to the grant of interest for delayed possession. There are various other clauses in the buyer's agreement which give sweeping powers to the promoter to cancel the allotment and forfeit the amount paid. Thus, the terms and conditions of the buyer's agreement are ex-facie one-sided, unfair and unreasonable, and the same shall constitute the unfair trade practice on the part of the promoter. These types of discriminatory terms and conditions of the buyer's agreement will not be final and binding.

28. 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., 12.08.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.
29. The definition of term 'interest' as defined under section 2(z a) 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;"*

30. 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.
31. 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 25.05.2010, possession of the said unit was to be delivered within a period of 36 months from the date of commencement of construction i.e. 26.08.2010. 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 26.08.2013. In the present case, the complainant was offered possession by the respondent on 21.11.2020. 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 25.05.2010 executed between the parties.

32. 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 21.11.2020. 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, the complainant should be given 2 months' time from the date of offer of possession. These 2 months' of reasonable time is being given to the complainant keeping in mind that even after intimation of possession practically he has to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e. 26.08.2013 till the expiry of 2 months from the date of offer of possession (21.11.2020) which comes out to be 21.01.2021.
33. 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. 26.08.2013



till 21.01.2021 as per provisions of section 18(1) of the Act read with rule 15 of the Rules.

34. Also, the amount of Rs.4,90,550/- (as per statement of account dated 24.03.2021) so paid by the respondent to the complainant towards compensation for delay in handing over possession shall be adjusted towards the delay possession charges to be paid by the respondent in terms of proviso to section 18(1) of the Act.

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 complainant from due date of possession i.e. 26.08.2013 till 21.01.2021 i.e. expiry of 2 months from the date of offer of possession (21.11.2020). 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. Also, the amount of Rs.4,90,550/- so paid by the respondent to the complainant towards compensation for delay in handing over possession shall be adjusted towards the delay possession charges

to be paid by the respondent in terms of proviso to section 18(1) of the Act.

- iii. The respondent shall not charge anything from the complainant which is not the part of the buyer's agreement. The respondent is also not entitled to claim holding charges from the complainant/allottee at any point of time even after being part of the builder buyer's agreement as per law settled by hon'ble Supreme Court in civil appeal nos. 3864-3889/2020 decided on 14.12.2020.

36. Complaint stands disposed of.

37. File be consigned to registry.


(Vijay Kumar Goyal)
Member


(Samir Kumar)
Member


(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 12.08.2021

Judgement uploaded on 14.10.2021.