# BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

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| **Complaint no.** | : | **1907 of 2021** |
| **First date of hearing** | : | **01.07.2021** |
| **Date of decision** | : | **01.07.2021** |

Devendra Kumar Pathak
R/O- 611, 6th floor, Tower- Jasmin
Our Homes, Sector- 37C
Gurugram **Complainant**

Versus

M/s Apex Buildwell Pvt. Ltd.
Address: 14A/36, W.E.A, Karol Bagh,
New Delhi -110053 **Respondent**

**CORAM:**

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| Dr. K.K. Khandelwal | **Chairman** |
| Shri Samir Kumar | **Member** |
| Shri V.K. Goyal | **Member** |

**APPEARANCE:**

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| Shri Karan Govel | Advocate for the complainant |
| Shri Sandeep Choudhary | Advocate for the respondent |

**ORDER**

1. The present complaint dated 09.04.2021 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 allottees as per the agreement for sale executed inter se them.

**A. Unit and project related details.**

2. 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 | "Our Homes", Sector 37-C, Gurugram. |
| 2. | Project area | 10.144 acres |
| 3. | Nature of the project | Low cost /affordable group housing colony |
| 4. | DTCP license no. | 13 of 2012 dated 22.02.2012 |
| | License valid/renewed up to | 01.12.2019 |
| | Name of licensee | Prime IT Solution & Phonix Datatech Service |
| 5. | HRERA registered/ not registered | **Registered vide no. 40 of 2019 dated 08.07.2019** |
| | HRERA registration valid up to | **01.12.2019** |
| 6. | **Occupation certificate** | i. **19.5.2017**- Primary School<br>ii. **29.11.2019** Type-1 (5 nos. towers), Type-1 (3 nos. towers), Type-2 (2 nos. towers)<br>iii. **24.02.2020** Type-1 (16 nos. towers) & Commercial |

| | | |
|---|---|---|
| 7. | Unit no. | 611, 6th floor, Tower Jasmin<br>[Page 65 of complaint] |
| 8. | Unit measuring (carpet area) | 48 sq. mtrs. |
| 9. | Date of allotment letter | Not attached |
| 10. | Date of execution of apartment buyer's agreement | 11.02.2013<br>[Page 15 of complaint] |
| 11. | Payment plan | Time linked payment plan<br>[Page 43 of complaint] |
| 12. | Total Consideration | Rs.16,00,000/-<br>[Page 18 of complaint] |
| 13. | Total amount paid by the complainant as per conveyance deed at page 48 of complaint | Rs.16,00,000/- |
| 14. | Consent to establish granted by the HSPCB on | **02.12.2013**<br>**(Note: Time for computation of due date of delivery of possession)** |
| 15. | Due date of delivery of possession as per clause 3(a) of apartment buyer's agreement<br>(36 months + 6 months' grace period from the date of commencement of construction upon receipt of all approvals) | 02.12.2016<br>(Grace period is not allowed) |
| 16. | **Date of offer of possession to the complainant** | **01.12.2019**<br>[as alleged by complainant on page 3 of complaint and agreed on page 8 of reply] |
| 17. | Delay in handing over possession till 01.02.2020 i.e. date of offer of possession (01.12.2019) + 2 months | 3 years 1 months 30 days |
| 18. | Conveyance deed executed on | 11.02.2021<br>[Page 49 of complaint] |

**B. Brief facts of the complaint**

3. The complainant submitted that after seeing advertisements of the respondent, in the newspaper namely Times of India for launching the project namely "Our Homes" (hereinafter referred to as "the said project") situated at Village Garaui-Khurd, Sector 37C, Gurugram, Haryana, came into contact with the executives of the respondent, who embarked upon the complainant with their sales team with various promises of timely completion of project and swift delivery of possession on time. The complainant, trusting and believing completely in the words, assurances and towering claims made by the respondent, fell into their trap and agreed to book a unit in the said project.

4. The complainant further submitted that a sum of Rs. 4,12,360/- was paid, as demanded by the respondent on 31.08.2012 and booked a Unit no. 611 on the 6th Floor, Tower Jasmin, in the name of the complainant and a buyer's agreement was also signed between the parties on 11.02.2013.

5. The complainant submitted that further payments were made to the respondent from time to time by the complainant as per the demand letters. As per clause 3(a) of the Buyer's agreement, the respondent agreed to handover possession of unit by within a period of 36 months with a grace period of 6 months from the

date of commencement of construction of the complex. Till date the complainant has paid a sum of Rs. 16,00,000/-.

6. The complainant submitted that since the date of booking, the complainant has been visiting at proposed site, where they find that the construction of the project is at lowest swing and there is no possibility in near future of its completion.

7. That the complainant tried his level best to resolve the issue of the delayed possession, but the respondent did not pay any heed to the said requests of the complainant. On the contrary the respondent kept on asking for illegal demand of payment to the complainant by adding delayed payment interest and other illegal charges like maintenance etc. That the complainant has time and again requested the respondent to provide the account statement of the said unit, but the respondent did not pay any heed to the said request.

8. The complainant submitted that the respondent by providing false and fabricated advertisement, thereby, concealing true and material facts about the status of project and mandatory regulatory compliances, wrongfully induced the complainant to deposit his hard earned money in their so called upcoming project, with sole dishonest intention to cheat them and cause wrongful loss to them and in this process the respondents gained wrongfully , which is purely

a criminal act. That the respondent has also played a fraud upon HDFC was facilitating the loan amount in favour of the buyer and taking untimely payments without reaching the milestone of construction.

9. The complainant submitted that as per the BBA, the Builder was required to give the possession of the unit by 10.08.2016. However, after much delay and harassment, the Builder only gave the offer of possession on 01.12.2019.The respondent had not delivered the possession of the apartment, of which the complainant is suffering from economic loss as well as mental agony, pain and harassment by the act and conduct of the respondent and thus, the complainant is entitled to a compensation. Furthermore, the complainant has been constrained by the respondent to live in a rented accommodation and pay extra interest on his home loan due to this delay.

10. The complainant submitted that the complainant, thereafter had tried his level best to reach the representatives of respondent to seek a satisfactory reply for delayed possession compensation as per the rules and provisions of the Real Estate Regulatory Act in respect of the said dwelling unit but all in vain. The complainant had also informed the respondent about his financial hardship of paying monthly rent

and extra interest on his home loan due to delay in getting possession of the said unit. The complainant had requested the respondent to deliver possession of the apartment citing the extreme financial and mental pressure he was going through, but respondent never cared to listen to his grievances and left them with more suffering and pain on account of default and negligence.

## C. Relief sought by the complainant

11. The complainant is seeking the following relief:

i. Direct the respondent to interest @ 18% p.a. which he charged from consumer as per rolling interest @ 18% per annum for the delay which has to calculated as and when the thirty six months was completed and thereafter the grace period was exhausted. Further, the calculation shall be done on the total amount paid at the above-mentioned interest rate till the date of order pendente -lite.

## D. Reply by the respondent

12. The respondent had contested the complaint on the following grounds:

(i) That the complainant has no cause of action against the respondent and the alleged cause of action is nothing but false and frivolous and the respondent has neither caused any violation of the provisions of the Act nor caused any

breach of agreed obligation as per the agreement between the parties. The complaint is neither tenable nor maintainable and has been filed with an oblique motive when the respondent has already offered possession of the flat and the complainant has already taken over possession and the complaint has been merely filed with an intent to gain wrongfully and arm twist the respondent through the process of law once all the obligations on behalf of the respondent are complete.

(ii) That the respondent has been very well committed to the development of the real estate project and secured the occupation certificates for both the phases of the project named "Our Homes". And the delay occasioned in delivering the possession of the project is only because of explainable and extendable as per the agreed terms i.e. clause 3 of the Apartment Buyer's Agreement and is due to causes beyond the control of the respondent. And in view of the same the complainant has without objection, protest or reserving any further rights to claim compensation for delay has already taken over the possession upon execution of the conveyance deed dated 11.02.2021.

(iii) That firstly, on grant of License bearing No. 13/2012 dated **22.02.2012** the respondent applied for all other relevant permissions and could secure the BRIII for Sanction of Building plans only on **7.05.2013** and the Consent to Establish by the Office of Haryana State Pollution Control Board, Panchkula was only granted on **2.12.2013**. Since then the respondent is continuing the construction of the project, but the License so granted expired on **21.02.2016** i.e. prior to the permissible period of construction of 36 months and since 11.02.2016 the respondent had been seeking the renewal of the License from the Office of Director General Town & Country Planning, Haryana and finally the same was received on **26.04.2019** and the respondent in a duty bound manner had completed the entire construction and development of the project and obtained the first Occupation Certificate on **29.11.2019** and the second Occupation Certificate on **24.02.2020**. And thereupon offered possession of the flat to the complainant in all its bona fides on **01.12.2019** and the same was taken over by the complainant without any objection. And lastly the conveyance for the said unit was also executed and registered on **11.02.2021.**

(iv) That the provisions of Real Estate (Regulation and Development) Act, 2016 came into force on 28.07.2017 for which the respondent duly filed an application dated 28.08.2017 and due to lapse of license No. 13/2012 the same got dismissed vide Orders dated 19.01.2018 and finally after regular follow ups and initial rejections the project has been registered vide Registration No. **40 of 2019** dated **8.07.2019** and the said fact even lead to further operational obstacles & restrictions of funds in completion of the project and leading to delay in completion of the project which had been beyond the control of the respondents and was extendable as per the agreed terms. That the respondent company had been hard trying to avail all the approvals, permissions and sanctions from the relevant Authorities and discharging the additional costs of renewal of license, plans and sanctions. And had the approvals & renewal of license be granted in time the respondent, would have duly completed the project within the permissible time period. More so the bans to construction activity imposed by the NGT from time to time and lastly in the months of October – November 2019 have further lead to delay in

completion of the project which are per se beyond the control of the respondent.

(v) That if the period of pendency of the license is condoned and extended than the respondent has delivered the project well within the agreed period of completion and therefore, there is no occasion or cause of action in favour of the complainant to file the present complaint. The delay being occasioned is beyond the control of the Respondent i.e. firstly due to the grant of Consent to Establish and thereafter due to the lapse of License and the same is excusable as contemplated and agreed by the parties vide para 3(b) (i) & (ii) of the Apartment Buyer's Agreement executed between the parties and the agreed period of 36 months plus 6 months grace period is extendable and the complainant is estopped from filing the present complaint.

(vi) Further it is stated that it is the Respondent who had been suffering due to the delay that is being occasioned and has to face extra charges and costs and expenses in getting all the above permissions renewed and in particular the renewal of license and the costs of registration under RERA. Pertinent to note that the respondent has not received any exaggerated advance amounts from the

complainant and construction as on date is much more advanced than the amount received.

(vii) That the complainant is estopped to file the present complaint due to his own acts and conduct of accepting the possession along with non-monetary benefits including waiver of interest and other charges on possession as the complainant has not complied with the demands of the due amounts as made by the respondent at the time of offer of possession and instead is wrongfully filing the present complaint. Pertinent to note that the entire obligations of completion of the project is upon the respondent and the failure to pay the due amounts in a timely manner by so many of the allottees including the complainant have led to multiple problems and extra costs on the respondent leading to further delays.

(viii) That the complainant does not have any cause of action under the jurisdiction of the Hon'ble Authority and hence the complaint is liable to be dismissed.

(ix) That last and not the least the complainant in actual is only seeking a relief of compensation and interest, apart from direction for possession which has already been offered, which are beyond the scope of jurisdiction of the Hon'ble Authority under Section 36 to 38 of the Act. And

hence the complaint on the face of it is liable to be rejected.

## E. Jurisdiction of the authority

### E.I Territorial jurisdiction

13. 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

14. The respondent has contended that the complainant in actual is only seeking a relief of compensation and interest, apart from direction for possession which has already been offered which are beyond the scope of jurisdiction of the hon'ble authority under section 36 and 38 of the Act. The authority observed 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 compensation in the complaint. 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 complainants 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.I Whether the execution of the conveyance deed extinguishes the right of the allottee to claim delay possession charges?

15. The respondent submitted that the complainant has executed a conveyance deed dated 11.02.2021 and rebutted the contention of complainant and contended that the complainant has already taken the possession and executed conveyance deed and thus, not reserving any further rights to claim compensation for delay.

16. The authority is of the view that the execution of a conveyance deed does not conclude the relationship or marks an end to the liabilities and obligations of the promoter towards the said unit where right, title and interest has been

transferred in the name of the allottee on execution of the conveyance deed.

17. This view is affirmed by the Hon'ble NCDRC in case titled as **Vivek Maheshwari V. Emaar MGF Land Ltd. (Consumer case no. 1039 of 2016 dated 26.04.2019)** wherein it was observed as under:

> *"7. It would thus be seen that the complainants while taking possession in terms of the above referred printed handover letter of the OP, can, at best, be said to have discharged the OP of its liabilities and obligations as enumerated in the agreement. However, this hand over letter, in my opinion, does not come in the way of the complainants seeking compensation from this Commission under section 14(1)(d) of the Consumer Protection Act for the delay in delivery of possession. The said delay amounting to a deficiency in the services offered by the OP to the complainants. The right to seek compensation for the deficiency in the service was never given up by the complainants. Moreover, the Consumer Complaint was also pending before this Commission at the time the unit was handed over to the complainants. Therefore, the complainants, in my view, cannot be said to have relinquished their legal right to claim compensation from the OP merely because the basis of the unit has been taken by them in terms of printed hand over letter and the Sale Deed has also been got executed by them in their favour.*
>
> *8. ..... The relationship of consumer and service provider does not come to an end on execution of the Sale Deed in favour of the complainants....."*
>
> *(emphasis supplied)*

18. From above it can be said that the taking over the possession and thereafter execution of the conveyance deed can best be termed as respondent having discharged its liabilities as per

the buyer's agreement and upon taking possession, the complainant never gave up his statutory right to seek delayed possession charges as per the provisions of the said Act. The allottees have invested their hard-earned money which there is no doubt that the promoter has been enjoying benefits of and the next step is to get their title perfected by executing a conveyance deed which is the statutory right of the allottee. The obligation of the developer – promoter does not end with the execution of a conveyance deed. Also, the same view has been upheld by the hon'ble Supreme Court in case titled as **Wg. Cdr. Arifur Rahman Khan and Aleya Sultana and Ors. V. DLF Southern Homes Pvt. Ltd. (now Known as BEGUR OMR Homes Pvt. Ltd.) and Ors. (Civil Appeal No. 6239 of 2019) dated 24.08.2020,** the relevant paras are reproduced herein below:

> *"34 The developer has not disputed these communications. Though these are four communications issued by the developer, the appellants submitted that they are not isolated aberrations but fit into a pattern. The developer does not state that it was willing to offer the flat purchasers possession of their flats and the right to execute conveyance of the flats while reserving their claim for compensation for delay. On the contrary, the tenor of the communications indicates that while executing the Deeds of Conveyance, the flat buyers were informed that no form of protest or reservation would be acceptable. The flat buyers were essentially presented with an unfair choice of either retaining their right to pursue their claims (in which event they would not get possession or title in the meantime) or to forsake the claims in order to perfect their title to the flats for which*

*they had paid valuable consideration. In this backdrop, the simple question which we need to address is whether a flat buyer who seeks to espouse a claim against the developer for delayed possession can as a consequence of doing so be compelled to defer the right to obtain a conveyance to perfect their title. It would, in our view, be manifestly unreasonable to expect that in order to pursue a claim for compensation for delayed handing over of possession, the purchaser must indefinitely defer obtaining a conveyance of the premises purchased or, if they seek to obtain a Deed of Conveyance to forsake the right to claim compensation. This basically is a position which the NCDRC has espoused. We cannot countenance that view.*

*35. The flat purchasers invested hard earned money. It is only reasonable to presume that the next logical step is for the purchaser to perfect the title to the premises which have been allotted under the terms of the ABA. But the submission of the developer is that the purchaser forsakes the remedy before the consumer forum by seeking a Deed of Conveyance. To accept such a construction would lead to an absurd consequence of requiring the purchaser either to abandon a just claim as a condition for obtaining the conveyance or to indefinitely delay the execution of the Deed of Conveyance pending protracted consumer litigation."*

19. Therefore, in furtherance to the Hon'ble Apex Court judgement and the law laid down in the **Wg. Cdr. Arifur Rahman (supra)**, this authority holds that even after execution of the conveyance deed, the complainant allottee cannot be precluded from his right to seek delay possession charges as per provisions of the Act from the respondent-promoter.

**F.II The period of renewal of license shall be excluded while computing delay in handing over possession.**

20. The respondent contended that on grant of license bearing no. 13/2012 dated 22.02.2012, the respondent applied for all other

relevant permissions and could secure the BRIII for sanction of building plans only on 07.05.2013 and the Consent to Establish by the Office of Haryana State Pollution Control Board, Panchkula was only granted on 02.12.2013. Since then, the respondent continued the construction of the project, but the license so granted expired on 21.02.2016 i.e. prior to the permissible period of construction of 36 months and since 11.02.2016, the respondent had been seeking the renewal of the license from the office of Director General Town & Country Planning, Haryana and finally the same has now been received on 26.04.2019.

21. The respondent is claiming that due to non-renewal of license by the competent authority, the promoter was not able to complete the project in question within the stipulated time and had the license be granted in time, the respondent would have duly completed the project within the permissible time period. The authority is of the considered view that if there is lapse on the part of competent authority in granting the renewal of license within reasonable time and that the respondent was not at fault in fulfilling the conditions of renewal of license then the respondent should approach the competent authority for getting this time period i.e. 21.02.2016 till 26.04.2019 be declared as 'zero time period' for computing delay in

completing the project. However, for the time being, the authority is not considering this time period as zero period and the respondent is liable for the delay in handing over possession as per provisions of the Act.

**G. Findings on the relief sought by the complainant**

22. **Relief sought by the complainant-** Direct the respondent to pay interest @ 18% p.a. which is charged from consumers as per rolling interest @ 18% per annum for the delay which has to calculated as and when the thirty-six months was completed and thereafter, the grace period was exhausted. Further, the calculation shall be done on the total amount paid at the above-mentioned interest rate till the date of order pendente -lite.

**G.1 Admissibility of delay possession charges**

23. In the present complaint, the complainant intends to continue with the project and is seeking delayed possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under:

> *"Section 18: - Return of amount and compensation*
>
> *18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building, —*
>
> .....
>
> *Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."*

24. Clause 3(a) of the apartment buyer's agreement (in short, agreement) provides for time period for handing over of possession and is reproduced below:

> **"3. POSSESSION**
>
> ***(a)*** **Offer of possession:**
>
> *"That subject to terms of this Clause 3, and subject to the APARTMENT ALLOTTEE(S) having complied with all the terms and conditions of this Agreement and not being in default under any of the provisions, formalities, registration of sale deed, documentation, payment of all amount due and payable to the DEVELOPER by the APARTMENT ALLOTTEE(S) under this agreement etc., as prescribed by the DEVELOPER, the DEVELOPER proposes to hand over the possession of the APARTMENT within a period of thirty (36) months with a grace period of 6 months, from the date of commencement of construction of the Complex upon the receipt of all project related approvals including sanction of building plan/revised plan and approval of all concerned authorities including the Fire Service Department , Civil Aviation Department, Traffic Department, Pollution Control Department etc. as may be required for commencing, carrying on and completing the said Complex subject to force majeure, restraints or restriction from any court/authorities. It is however understood between the parties that the possession of various Blocks/Towers comprised in the Complex as also the various common facilities planned therein shall be ready & completed in phases and will be handed over to the allottees of different Block/Towers as and when completed in a phased manner."*

25. The authority has gone through the possession clause of the agreement and observed that 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 agreements 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 situation may make the possession clause irrelevant for the purpose of allottee and the committed date for handing over possession loses its meaning. If the said possession clause is read in entirety, the time period of handing over possession is only a tentative period for completion of the construction of the flat in question and the promoter is aiming to extend this time period indefinitely on one eventuality or the other. Moreover, the said clause is an inclusive clause wherein the numerous approvals have been mentioned for commencement of construction and the said approvals are sole liability of the promoter for which allottee cannot be allowed to suffer. It is settled proposition of law that one cannot get the advantage of his own fault. 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.

**Admissibility of grace period:** The apartment buyer's agreement was executed on 11.02.2013 and as per clause 3(a) of the said agreement, the promoter has proposed to hand over the possession of the said unit within 36 months with an extended period of 6 months from the date of commencement of construction. The Consent to Establish by the office of Haryana State Pollution Board, Panchkula was granted on 02.12.2013. The due date of handing over possession has been calculated from the date of consent to establish. In the present case, the promoter is seeking 6 months' time as grace period. The said period of 6 months shall not be granted as the possession clause clearly states that the promoter will give the possession of the said unit within 36 months plus 6 months grace period asked by the promoter was for getting the approvals needed to complete the construction work i.e. after receiving OC but the promoter has not applied for occupation certificate within the time limit prescribed i.e. by 02.12.2016. So, as per 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. 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.*

26. So, in settled preposition of law discussed above, the facts and circumstances detailed the builder/promoter can't be allowed, 6 months of grace period for the purpose of calculating delayed possession charges.

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

28. The legislature in its wisdom in the subordinate legislation under 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 appeal nos. 52 & 64 of 2018 titled as 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."*

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., 01.07.2021 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(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;"*

31. Therefore, interest on the delayed 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.

32. On consideration of the documents available on record and the submissions made by the parties, 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 3(a) of the apartment buyer's agreement executed between the parties on 11.02.2013, the possession of the booked unit was to be delivered within a period of 36 months plus 6 months grace period from the date of commencement of construction upon receipt of all project related approvals. The grace period of 6 months is not allowed to the respondent as the promoter has not applied for occupation certificate within the time limit prescribed by the promoter in the apartment buyer's clause. In the present case, the consent to establish was granted to the respondent on 02.12.2013. Therefore, the due date of handing over possession will be computed from the date of consent to establish i.e. 02.12.2013 and the due date of possession comes out to be 02.12.2016. The possession was offered on 01.12.2019 after receiving occupation certificate.

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 29.11.2019. The respondent offered the possession of the unit in question to the complainant only on 01.12.2019, so it can be said that the complainant came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the complainant should be given 2 months' time from the date of offer of possession. This 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. 02.12.2016 till the expiry of 2 months from the date of offer of possession (01.12.2019) which comes out to be 01.02.2020.

34. Accordingly, it is the failure of the promoter to fulfil its obligations and responsibilities as per the agreement dated 11.02.2013 to hand over the possession within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with proviso to section 18(1) of the Act on the part of the respondent is established. As such

the allottee shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 02.12.2016 till 01.02.2020, at prescribed rate i.e., 9.30 % p.a. as per proviso to 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 functions 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. 02.12.2016 till the expiry of 2 months from the date of offer of possession i.e. 01.12.2019. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order as per rule 16(2) of the rules.

ii. The respondent shall not charge anything from the complainant which is not the part of the buyer's agreement.

36. Complaint stands disposed of.

37. File be consigned to registry.

**(Samir Kumar)**
Member

**(V.K. Goyal)**
Member

**(Dr. K.K. Khandelwal)**
Chairman
Haryana Real Estate Regulatory Authority, Gurugram
Dated: 01.07.2021

Judgement uploaded on 13.10.2021.