

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

Complaint no. : 4433 of 2020
First date of hearing : 02.02.2021
Date of decision : 12.08.2021

1. Shri Naresh Kumar
2. Smt. Rekha Gupta
Both RR/o:24, Vishnupuri, Behind Sanghi Farm,
Tonk Road, Jaipur, Rajasthan-302018.

Complainants

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 Naresh Kumar Complainant in person
Shri Sanjeev Sharma Advocate for the complainants
Shri J.K. Dang along with Shri Ishaan Dang Advocates for the respondent

ORDER

1. The present complaint dated 17.12.2020 has been filed by the complainants/allottees in Form CRA under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all

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

A. Project and unit related details

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

S.No.	Heads	Information
1.	Project name and location	"The Palm Drive" in Sector 66, Gurugram, Haryana.
2.	Project area	45.4767 acres
3.	Nature of the project	Group housing colony
4.	DTCP licenses no. and validity status	i. 228 of 2007 dated 27.09.2007 (For 31.62 acres) Valid/renewed up to 26.09.2019 ii. 93 of 2008 dated 12.05.2008 (For 6.19 acres) Valid/renewed up to 11.05.2020 iii. 50 of 2010 dated 24.06.2010 (For 7.67 acres) Valid/renewed up to 23.06.2020
5.	HRERA registered/ not registered	Not registered
6.	Occupation certificate granted on	13.02.2017 [Page 96 of reply]
7.	Provisional allotment letter dated	19.03.2008 [Page 39 of reply]
8.	Unit no.	K-1303, 13 th floor, tower K [Page 202 of reply]
9.	Unit measuring	2125 sq. ft.
10.	Increase in area of the unit vide letter of offer of possession dated 20.03.2017	2202.09 sq. ft.



11.	Date of execution of buyer's agreement	Undated, therefore, date of stamp is taken i.e. 11.04.2008 [Page 18 of complaint]
12.	Payment plan	Construction linked payment plan [Page 35 of complaint]
13.	Total consideration as per statement of account dated 28.01.2021 [Page 199 of reply]	Rs. 1,29,96,580/-
14.	Total amount paid by the complainants as per statement of account dated 28.01.2021 [Page 200 of reply]	Rs.1,30,06,198/-
15.	Nomination letter in favour of the complainants	10.08.2011 [Page 178 of reply]
16.	Due date of delivery of possession as per clause 14(a) of the said agreement i.e. the company proposes to handover the possession of the apartment/villa/penthouse by December 2010 + grace period of 90 days, for applying and obtaining completion certificate/ occupation certificate in respect of the unit and/or the project. [Page 26 of complaint]	31.12.2010 [Note: Grace period is not included]
17.	Date of offer of possession to the complainants	20.03.2017 [Page 202 of reply]
18.	Delay in handing over possession w.e.f. 10.08.2011 (nomination letter) till 20.05.2017 i.e. date of offer of possession (20.03.2017) + 2 months	5 years 9 months 10 days

B. Facts of the complaint

3. The complainants have made the following submissions in the complaint:
- That upon the representation by the respondent and advertisement done in said behalf, the complainants purchased a unit / apartment

- no. K-1203, 12th floor, tower-K, admeasuring 2125 sq. ft. in the project i.e. "**Premier Terraces-The Palm Drive**" located at Sector-66, Urban Estate, Gurgaon, Haryana floated by the respondent and on the inducement that the possession of the unit purchased shall be handed over on time with all amenities as promised.
- ii. That the said unit was allotted to the erstwhile allottees Mrs. Ashoo Malik & Mr. Umesh Malik and the said unit was later on endorsed in favour of the complainants wherein the complainants were allotted unit no. TPD K-13-1303, on the 13th floor, tower-K. Furthermore, the statement of account dated 30.05.2017 also reflects that there has been change in the area as 77.09 sq. ft. area has been increased and the new area of the unit in question is 2202.09 sq. ft. The buyer's agreement was executed on 11.04.2008. That the respondent being in the dominant position, the complainants were never in a position to negotiate the terms and conditions of the agreement.
- iii. That as per statement of account, the total sale consideration of the said unit was agreed to be Rs. 1,30,11,580/-. The Complainant till date has paid a total sum of Rs. 1,30,23,311/- to the respondent, which is more than the cost of the property/ total sale consideration already afore-mentioned. Further as per the clause 14 (a) of the buyer's agreement, the possession of the unit was to be given December 2010 and if grace period of 3 months is added, then the possession was to be delivered latest by March 2010. However, after

the lapse of 6 long years, the offer of possession was made by the respondent on 20.03.2017 wherein the area was increased from 2125 sq. ft. to 2202.09 sq. ft and the complainants took the possession by June 2017.

- iv. That the complainants thereafter filed a complaint before the Hon'ble Haryana Real Estate Regulatory Authority, Gurugram bearing complaint no. 1063 of 2019 for the interest for the delay possession and the said complaint was unilaterally dismissed vide order dated 09.08.2019. Now, the complainants are before the authority seeking interest for the delay possession from 30th March 2011 to 20th March 2017.

C. Relief sought by the complainants

4. The complainants have filed the present complaint for seeking following relief:
- i. Direct the respondent to provide the complainants with prescribed rate of interest on delay in handing over of possession of the apartment on the amount paid by the complainants as per provisions of the Act.
 - ii. Promoter be ordered to pay for harassment caused to the complainant as damages along with cost of litigation to the tune of Rs.1,00,000/-.
5. 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

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

- i. That the unit in question in the present proceedings i.e. complaint no. HRR/GGM/CRN/4433/2020 titled as Naresh Kumar and Rekha Gupta Versus Emaar MGF[™] Land Limited has already been adjudicated upon by this honourable authority in an earlier complaint no. HRR/GGM/CRN/1063/2019 under the title of Naresh Kumar and Rekha Gupta versus Emaar MGF Land Limited. The relief sought in the present proceedings has already been sought by the complainants in earlier complaint no. HRR/GGM/CRN/1063/2019 and the relief was denied to the complainants by this honourable authority under a detailed reasoned order dated 08.03.2019. In case the complainants were aggrieved by the order/judgement dated 08.03.2019 rendered by this honourable authority, clearly the remedy against the said order does not lie before this honourable authority as this honourable authority has already applied its mind to the facts and merits of the case. It is respectfully submitted that the complainants cannot agitate the same relief before this honourable authority which has already been adjudicated by this honourable authority.

- ii. That provisions of the Act are not applicable to the project in question. The occupation certificate in respect of the project in question had been granted in favour of the respondent on 13.02.2017 i.e well before the notification of the rules, 2017. Thus, the project in question is not an 'ongoing project' under rule 2(1)(o) of the rules. The project has not been registered under the provisions of the act. This honourable authority does not have the jurisdiction to entertain and decide the present complaint. The present complaint is liable to be dismissed on this ground alone.
- iii. That the complainants have filed the present complaint seeking interest towards alleged delay in handing over the property, amongst other reliefs. It is respectfully submitted that complaints pertaining to refund/ compensation/ interest are to be decided by the adjudicating officer under the Act read with relevant rules and not by this hon'ble authority. The Haryana Real Estate (Regulation & Development) Amendment Rules, 2019 do not have the force of law being contrary to the scheme of the parent Act. The present complaint is liable to be dismissed on this ground alone.
- iv. That Mrs. Ashoo Malik and Mr. Umesh Malik (hereinafter called as "original allottee") had submitted an application dated 23.02.2008 to the respondent seeking provisional allotment of a unit in the said project. In pursuance of the aforesaid application, the "original allottee" was allotted a unit bearing no. TPD K-F13-1303 (also

known as unit no. K1203A) in the said project vide provisional allotment letter dated 19.03.2008. The original allottee opted for a construction linked plan for remittance of the sale consideration for the unit and further represented to the respondent that they shall remit all instalments on time as per schedule of payment. Subsequently, a buyer's agreement dated 11.04.2008 was also executed between the parties.

- v. That the original allottees were irregular regarding the remittance of installments on time and had defaulted/delayed the payments. Due to irregular remittance of payment, the respondent was constrained to issue several payment request letters, reminders etc. to the original allottees requesting them to make payments of outstanding dues under the payment plan opted by them.
- vi. That the original allottees submitted letters dated 20.07.2011 to the respondent with a request to transfer / assign / nominate the aforesaid unit in the name of the complainants. The complainants also submitted a letter wherein they had undertook to pay the entire balance dues of the consideration and other charges as per the terms of the conditions of the company and undertook to execute the agreement in the standard format of the company. The complainants also submitted indemnity-cum-undertaking and an affidavit dated 20.07.2011. Based upon the documents submitted by the original allottees and the complainants, nomination letter dated 10.08.2011

was issued intimating that the captioned property stands in the name of the complainants. the complainants were also irregular regarding remittance of instalments on time. The respondent was constrained to issue several payment request letters, reminders etc. to the complainants requesting them to make payment of outstanding amounts payable by them under the payment plan. The statement of accounts maintained by the respondent clearly indicates that delayed payment charges were levied on the aforesaid unit.

- vii. That the respondent had applied on 02.07.2014 for grant of occupation certificate to the competent authority and the competent authority issued the occupation certificate vide letter dated 13.02.2017. It is respectfully submitted that once an application for grant of occupation certificate is submitted for approval in the office of the concerned statutory authority, the respondent ceases to have any control over the same. The grant of sanction of the occupation certificate is the prerogative of the concerned statutory authority over which the respondent cannot exercise any influence. As far as the respondent is concerned, it diligently and sincerely pursued the matter with the concerned statutory authority for obtaining of the occupation certificate. No fault or lapse can be attributed to the respondent in the facts and circumstances of the case. Therefore, the time period utilised by the statutory authority to grant occupation

certificate to the respondent is necessarily required to be excluded from computation of the time period utilised for implementation and development of the project. Subsequently the letter of offer of possession dated 20.03.2017 was sent to the complainant and the sale deed was registered on 21.02.2019. The present complaint in the facts and circumstances of the case is liable to be dismissed.

viii. That if the contention of the complainant is looked carefully it would imply that the physical possession of the unit was to be offered by December 2010 i.e. even before their submitting request for transfer of the unit vide their letter dated 20.07.2011. In fact, prior to approaching the respondents, the complainant had conducted extensive and independent enquiries regarding the project and it was only after he was fully satisfied with regard to all aspects of the project, that they took an independent and informed decision to seek allotment of the unit, un-influenced in any manner by the respondents. The complainants were aware of the actual status of the project and the subject unit. Also, possession of a unit can only be handed over once all the statutory permissions/approvals have been obtained. Thus, the above facts would clearly show that the claim made by the complainants is absolutely wrong, incorrect and has no merit at all.

ix. That many of the allottees of the project, including the complainants, have defaulted/delayed in making payment of the amounts which

resulted in slowdown in pace of the development. It is submitted that the development of the project was dependent upon the availability of funds from the allottees who were under a contractual obligation to make payments as per the schedule of payment opted by them. Delayed payments such as towards the unit in question, have an adverse impact on the project deliverables. The complainants cannot be allowed to take advantage of their own wrong. 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 unit in question as expeditiously as possible. It is a matter of record that on receipt of occupation certificate, letter of offer of possession for the unit was issued to the complainant. The complainant has also taken possession of the unit. There is no default or lapse on the part of the respondent and there is no equity in favour of the complainant. It is evident from the entire sequence of events, that no illegality can be attributed to the respondent. It is most respectfully submitted that the present complaint deserves to be dismissed at the very threshold.

7. 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

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

E.I Territorial jurisdiction

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

E.II Subject-matter jurisdiction

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

F. Findings on the objections raised by the respondent

F.I Objection regarding maintainability of present complaint.

11. The complainants submitted that they have filed a complaint before the Hon'ble Haryana Real Estate Regulatory Authority, Gurugram bearing complaint no. 1063 of 2019 for the interest for the delay possession and the said complaint was unilaterally dismissed vide order dated 09.08.2019. On the other hand, the counsel for the respondent has stated that in case the complainants were aggrieved by the order/judgement dated 08.03.2019 rendered by this authority, clearly the remedy against the said order does not lie before this authority as this authority has already applied its mind to the facts and merits of the case. It is respectfully submitted that the complainants cannot agitate the same relief before this honourable authority which has already been adjudicated by this honourable authority.
12. The authority observed that a complaint bearing no.1063/2019 titled as Naresh Kumar and Rekha Gupta versus Emaar was disposed of by Administrative Officer (petitions-cum-Registrar) on 09.08.2019 and the same was dismissed with the liberty to approach this authority under section 14 (3) of the Act in case they find any structural defects in the unit within a period of 5 years from the date of handing over the possession. However, the said order was never endorsed by the authority and it cannot be said that the order was passed by the authority after application of judicial mind. Moreover, the Hon'ble Haryana Real Estate

Appellate Tribunal, Chandigarh in *appeal no. 330 of 2020 titled as Emaar MGF Land Ltd. Versus Puneet Tripathi* has held that judicious powers cannot be delegated, therefore, order so passed by Administrative Officer (petitions-cum-Registrar) was considered bad in law and the said order was set-aside. Therefore, keeping in view the aforesaid reasons, the authority has decided to recall the order dated 09.08.2019 and has decided to entertain the present complaint.

F.II Whether a subsequent allottee is entitled to claim delay possession charges.

13. The respondent submitted that if the contention of the complainant is looked carefully it would imply that the physical possession of the unit was to be offered by December 2010 i.e. even before their submitting request for transfer of the unit vide their letter dated 20.07.2011. Since at the time of the execution of transfer documents/agreement for sale, the complainants were well aware of the due date of possession and the position of the project.

With regard to the above contentions raised by the promoter/developer, it is worthwhile to examine following three sub-issues:

- (i) Whether subsequent allottee is also allottee as per provisions of the Act?
- (ii) Whether delay possession charges are in the nature of statutory legal obligation of the promoter other than compensation?
- (iii) Whether the subsequent allottee is entitled to delayed possession charges w.e.f. due date of handing over possession or w.e.f. the date of nomination letter/endorsement (i.e. date on which he became allottee)?

i. Whether subsequent allottee is also an allottee as per provisions of the Act?

14. The term "allottee" as defined in the Act also includes and means the subsequent allottee, hence is entitled to the same relief as that of the original allottee. The definition of the allottee as provided in the Act is reproduced as under:

"2. In this Act, unless the context otherwise requires-

(d) "allottee" in relation to a real estate project, means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent".

15. Accordingly, following are allottees as per this definition:

(a) Original allottee: A person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter.

(b) Allottees after subsequent transfer from the original allottee: A person who acquires the said allotment through sale, transfer or otherwise. However, an allottee would not be a person to whom any plot, apartment or building is given on rent.

16. From a bare perusal of the definition, it is clear that the transferee of an apartment, plot or building who acquires it by any mode is an allottee. This may include (i) allotment; (ii) sale; (iii) transfer; (iv) as consideration of services; (v) by exchange of development rights; or (vi) by any other similar means. It can be safely reached to the only logical conclusion that no difference has been made between the original allottee

and the subsequent allottee and once the unit, plot, apartment or building, as the case may be, has been re-allotted in the name of the subsequent purchaser by the promoter, the subsequent allottee enters into the shoes of the original allottee for all intents and purposes and he shall be bound by all the terms and conditions contained in the buyer's agreement including the rights and liabilities of the original allottee. Thus, as soon as the unit is re-allotted in his name, he will become the allottee and nomenclature "subsequent allottee" shall only remain for identification for use by the promoter. Therefore, the authority does not draw any difference between the allottee and subsequent allottee per se.

17. Reliance is placed on the judgment dated 26.11.2019 passed in consumer complaint no. 3775 of 2017 titled as **Rajnish Bhardwaj Vs. M/s CHD Developers Ltd.** by NCDRC wherein it was held as under:

"15. So far as the issue raised by the Opposite Party that the Complainants are not the original allottees of the flat and resale of flat does not come within the purview of this Act, is concerned, in our view, having issued the Re-allotment letters on transfer of the allotted Unit and endorsing the Apartment Buyers Agreement in favour of the Complainants, this plea does not hold any water....."

18. The authority concurs with the Hon'ble NCDRC's decision dated 26.11.2019 in **Rajnish Bhardwaj vs. M/s CHD Developers Ltd.** (supra) and observes that it is irrespective of the status of the allottees whether it is original or subsequent, an amount has been paid towards the consideration for a unit and the endorsement by the developer on the

transfer documents clearly implies his acceptance of the complainants as allottees.

19. Therefore, taking the above facts into account, the authority is of the view that the term subsequent allottee has been used synonymously with the term allottee in the Act. The complainants/subsequent allottees at the time of buying a unit/plot takes on the rights as well as obligations of the original allottee vis-a-viz the same terms and conditions of the buyer's agreement entered into by the original allottee. Moreover, the amount if any paid by the subsequent or original allottee is adjusted against the unit in question and not against any individual. Furthermore, the name of the complainants/subsequent allottees have been endorsed on the same buyer's agreement which was executed between the original allottee and the promoter. Therefore, the rights and obligation of the complainants/subsequent allottees and the promoter will also be governed by the said buyer's agreement.

ii. **Whether delay possession charges are in the nature of statutory legal obligation of the promoter other than compensation?**

20. It is important to understand that the Act has clearly provided interest and compensation as separate entitlement/right which the allottee can claim. An allottee is entitled to claim compensation under sections 12, 14, 18 and section 19, to be decided by the adjudicating officer as per section 71 and the quantum of compensation shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section

72. The interest is payable to the allottee by the promoter in case where there is refund or payment of delay possession charges i.e., interest at the prescribed rate for every month of delay. The interest to be paid to the allottee is fixed and as prescribed in the rules which an allottee is legally entitled to get and the promoter is obligated to pay. The compensation is to be adjudged by the adjudicating officer and may be expressed either lumpsum or as interest on the deposited amount after adjudgment of compensation. This compensation expressed as interest needs to be distinguished with the interest at the prescribed rate payable by the promoter to the allottee in case of delay in handing over of possession or interest at the prescribed rate payable by the allottee to the promoter in case of default in due payments. Here, the interest is pre-determined, and no adjudication is involved. Accordingly, the distinction has to be made between the interest payable at the prescribed rate under section 18 or 19 and adjudgment of compensation under sections 12, 14, 18 and section 19. The compensation shall mean an amount paid to the flat purchasers who have suffered agony and harassment, as a result of the default of the developer including but not limited to delay in handing over of the possession.
21. In addition, the quantum of compensation to be awarded shall be subject to the extent of loss and injury suffered by the negligence of the opposite party and is not a definitive term. It may be in the form of interest or punitive in nature. However, the Act clearly differentiates between the

interest payable for delayed possession charges and compensation. Section 18 of the Act provides for two separate remedies which are as under:

- i. In the event, the allottee wishes to withdraw from the project, he/she shall be entitled without prejudice to any other remedy refund of the amount paid along with interest at such rate as may be prescribed in this behalf **including compensation** in the manner as provided under this Act;
 - ii. In the event, the allottee does not intend to withdraw from the project, he/she 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. The rate of interest in both the scenarios is fixed as per rule 15 of the rules which shall be the State Bank of India's highest marginal cost of lending rate +2%. However, for adjudging compensation or interest under sections 12,14,18 and section 19, the adjudicating officer has to take into account the various factors as provided under section 72 of the Act.
- iii. **Whether the subsequent allottee is entitled to delayed possession charges w.e.f. due date of handing over possession or w.e.f. the date of nomination letter (i.e. date on which he became allottee)?**
23. The respondent/promoter contended that the complainants/subsequent allottees shall not be entitled to any delayed possession charges since at the time of the execution of transfer documents/agreement for sale, they were well aware of the due date of possession. The respondent/promoter had spoken about the disentanglement of compensation/delayed

possession charges to the subsequent allottees who had clear knowledge of the fact w.r.t. the due date of possession and whether the project was already delayed. But despite that they entered into the agreement for sell with the original allottee.

24. The authority place reliance on a recent case titled as ***M/s Laureate Buildwell Pvt. Ltd. Vs. Charanjeet Singh, civil appeal no. 7042 of 2019 dated 22.07.2021*** wherein the Apex Court has held that relief of interest on refund, enunciated by the decision in HUDA Vs. Raje Ram (2008) which was applied in Wg. Commander Arifur Rehman (Wg. Cdr. Arifur Rahman Khan and Aleya Sultaná 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) cannot be considered good law and has held that the subsequent purchaser/respondent had stepped into the shoes of the original allottee, and intimated Laureate (builder) about this fact in April 2016, the interest of justice demand that the interest at least from that date should be granted, in favour of the respondent. The relevant paras of the said judgment are being reproduced as follows:

"31. In view of these considerations, this court is of the opinion that the per se bar to the relief of interest on refund, enunciated by the decision in Raje Ram (supra) which was applied in Wg. Commander Arifur Rehman (supra) cannot be considered good law. The nature and extent of relief, to which a subsequent purchaser can be entitled to, would be fact dependent. However, it cannot be said that a subsequent purchaser who steps into the shoes of an original allottee of a housing project in which the builder has not honoured its commitment to deliver the flat within a stipulated time, cannot expect any – even reasonable time, for the performance of the builder's obligation. Such a conclusion would be arbitrary, given that there may be a large number – possibly thousands of flat buyers, waiting for their promised flats or

residences; they surely would be entitled to all reliefs under the Act. In such case, a purchaser who no doubt enters the picture later surely belongs to the same class. Further, the purchaser agrees to buy the flat with a reasonable expectation that delivery of possession would be in accordance within the bounds of the delayed timeline that he has knowledge of, at the time of purchase of the flat. Therefore, in the event the purchaser claims refund, on an assessment that he too can (like the original allottee) no longer wait, and face intolerable burdens, the equities would have to be moulded. It would no doubt be fair to assume that the purchaser had knowledge of the delay. However, to attribute knowledge that such delay would continue indefinitely, based on an a priori assumption, would not be justified. The equities, in the opinion of this court, can properly be moulded by directing refund of the principal amounts, with interest @ 9% per annum from the date the builder acquired knowledge of the transfer, or acknowledged it.

32. In the present case, there is material on the record suggestive of the circumstance that even as on the date of presentation of the present appeal, the occupancy certificate was not forthcoming. In these circumstances, given that the purchaser/respondent had stepped into the shoes of the original allottee, and intimated Laureate about this fact in April 2016, the interests of justice demand that interest at least from that date should be granted, in favour of the respondent. The directions of the NCDRC are accordingly modified in the above terms.”(Emphasis supplied)

25. In the present case, the complainants/subsequent allottees have been acknowledged as allottees by the respondent vide nomination letter dated 10.08.2011. The authority has observed that the promoter has confirmed the transfer of allotment in favour of subsequent allottees (complainants) and the installments paid by the original allottee were adjusted in the name of the subsequent allottees and the next installments were payable/due as per the original allotment letter. Also, we have also perused the buyer's agreement which was originally entered into between the original allottee and the promoter. The same buyer's agreement has been endorsed in favour of the subsequent allottees/complainants. All the terms of buyer's agreement remain the

same, so it is quite clear that the subsequent allottees has stepped into the shoes of the original allottee. Though the promised date of delivery was 31.12.2010 but the construction of the tower in question was not completed by the said date and it was offered by the respondent only on 20.03.2017.

26. In the present complaint, the complainants/subsequent allottees had purchased the unit after expiry of the due date of handing over possession, the authority is of the view that the subsequent allottee cannot be expected to wait for any uncertain length of time to take possession. Even the complainants have been waiting for their promised flats and surely, they would be entitled to all the reliefs under this Act. It would no doubt be fair to assume that the subsequent allottees/complainants had knowledge of delay, however, to attribute knowledge that such delay would continue indefinitely, based on priori assumption, would not be justified. Therefore, in light of *Laureate Buildwell judgment (supra)*, the authority holds that in cases where subsequent allottee had stepped into the shoes of original allottee after the expiry of due date of handing over possession and before the coming into force of the Act, the subsequent allottee shall be entitled to delayed possession charges w.e.f. the date of entering into the shoes of original allottee i.e. nomination letter. In the present complaint, the nomination letter was issued by the respondent in the favour of the complainants on

10.08.2011, therefore, the complainants would be entitled to delay possession charges w.e.f. 10.08.2011.

G. Findings on the reliefs sought by the complainants

G.I Delay possession charges

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

"Section 18: - Return of amount and compensation

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

.....

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

28. Clause 14(a) of the buyer's agreement provides for time period for handing over of possession and is reproduced below:

"14. POSSESSION

(a) Time of handing over the Possession

Subject to terms of this clause and subject to the Apartment Allottee having complied with all the terms and conditions of this Agreement, and not being in default under any of the provisions of this Agreement and compliance with all provisions, formalities, documentation etc., as prescribed by the Company, the Company proposes to hand over the possession of the Apartment/Villa/Penthouse by December 2010. The Apartment Allottee agrees and understands that the Company shall be entitled to a grace period of ninety (90) days, for applying and obtaining the occupation certificate in respect of the Group Housing Complex."

29. **Due date of possession and admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit by

December 2010 and further provided in agreement that promoter shall be entitled to a grace period of 90 days for applying and obtaining occupation certificate in respect of said unit. 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 90 days cannot be allowed to the promoter at this stage. Therefore, the due date of possession comes out to be 31.12.2010.

30. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges at the prescribed rate. 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.



31. 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.
32. Taking the case from another angle, the complainants-allottees were entitled to the delayed possession charges/interest only at the rate of Rs.5/- per sq. ft. per month of super area as per clause 16(a) of the buyer's agreement for the period of such delay; whereas, as per clause 13 of the buyer's agreement, the promoter was entitled to interest @ 15% per annum compounded at the time of every succeeding instalment from the due date of installment, as per the schedule of payments, till the date of payment. 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.

33. 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%.

34. **Rate of interest to be paid by complainants on account of delay in making payments:** 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;"*

35. 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.
36. On consideration of the documents available on record and submissions made by the parties regarding contravention as per provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 14(a) of the buyer's agreement executed between the parties, the possession of the said unit was to be delivered by December 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 31.12.2010. In the present case, the complainants were offered possession by the respondent on 20.03.2017. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the complainants as per the terms and conditions of the buyer's agreement executed between the parties.
37. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 13.02.2017. However, the

respondent offered the possession of the unit in question to the complainants only on 20.03.2017. So, it can be said that the complainants came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the complainants should be given 2 months' time from the date of offer of possession. These 2 months' of reasonable time is being given to the complainants keeping in mind that even after intimation of possession practically they have to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the date of entering into the shoes of original allottee i.e. nomination letter (10.08.2011) till the expiry of 2 months from the date of offer of possession (20.03.2017) which comes out to be 20.05.2017.

38. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainants are entitled to delay possession charges at prescribed rate of the interest @ 9.30 % p.a. w.e.f. 10.08.2011 till 20.05.2017 as per provisions of section 18(1) of the Act read with rule 15 of the Rules.



G.II Compensation for damages

39. The complainants are also seeking delay possession charges of Rs.1,00,000/- for harassment. An allottee is entitled for claiming compensation under sections 12, 14, 18 and section 19 to be decided by the adjudicating officer as per section 71 and the quantum of compensation shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. Therefore, the complainants are advised to approach the adjudicating officer for seeking compensation.

H. Directions of the authority

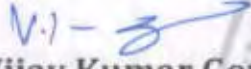
40. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

- i. The respondent is directed to pay the interest at the prescribed rate i.e. 9.30 % per annum for every month of delay on the amount paid by the complainants from the date of entering into the shoes of original allottee i.e. nomination letter (10.08.2011) till 20.05.2017 i.e. expiry of 2 months from the date of offer of possession (20.03.2017). The arrears of interest accrued so far shall be paid to the complainants within 90 days from the date of this order as per rule 16(2) of the rules.

- ii. The respondent shall not charge anything from the complainants which is not the part of the buyer's agreement. The respondent is also not entitled to claim holding charges from the complainants/allottees at any point of time even after being part of the 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.

41. Complaint stands disposed of.

42. 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 26.10.2021.