

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

Complaint no. : 1517 of 2021  
First date of hearing : 16.04.2021  
Date of decision : 12.08.2021

Radhika Bansal  
R/o: H.no. H-100, South City-I,  
N.H. 8, Gurugram, Haryana.

**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 16.03.2021 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 24.04.2010 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 121 of reply]
8.	Provisional allotment letter dated	24.09.2009 [Page 39 of reply]





9.	Revised allotment letter in respect of the unit in question	09.04.2010 [Page 12 of complaint]
10.	Unit no.	EEA-G-F03-03, 3 <sup>rd</sup> floor, building no. G [Page 22 of complaint]
11.	Unit measuring	1310 sq. ft.
12.	Date of execution of buyer's agreement	24.04.2010 [Page 20 of complaint]
13.	Payment plan	Construction linked payment plan [Page 100 of reply]
14.	Total consideration as per statement of account dated 07.04.2021 [Page 56 of reply]	Rs. 57,33,419/-
15.	Total amount paid by the complainant as per statement of account dated 07.04.2021 [Page 57 of reply]	Rs.57,37,037/-
16.	Date of start of construction as per statement of account dated 07.04.2021 [Page 56 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 35 of complaint]	26.08.2013 <b>[Note: Grace period is not included]</b>
18.	<b>Date of offer of possession to the complainant</b>	<b>20.11.2020</b> [Page 58 of complaint]
19.	Delay in handing over possession till 20.01.2021 i.e. date of offer of possession (20.11.2020) + 2 months	7 years 4 months 25 days

20.	Unit handover letter dated	15.02.2021 [Page 148 of reply]
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**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-F03-03 (third floor) admeasuring 1310 sq. ft., in the said project was booked by the complainant along with her father Sh. Satish Kumar Bansal as co-applicant, in the year 2010. The same was allotted in their favour of vide provisional allotment letter dated 09.04.2010. However, later on, upon the complainant's request, the name of the co-applicant was deleted, and it was endorsed exclusively in the favour of the complainant vide re-allotment letter dated 29.12.2020. The total cost of the apartment is Rs.57,33,419/- 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 24.04.2010, the complainant entered into a buyer's agreement with the respondent, by virtue of which the respondent allotted apartment no. EEA-G-F03-03, having super area of 1310 sq. ft. located on the third floor, along-with covered car parking space and club membership 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. In fact, the complainant was slapped with recurring holding charges of Rs.30,492/- as on 04.03.2021, increasing on daily



basis, despite making the timely payments to the respondent in accordance with the offer of possession letter and as reflected in statement of account.

- iv. That as per clause 11(a) of the buyer's agreement dated 24.04.2010, 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. The respondent has miserably failed to honour its part of commitment to handover possession of the apartment, as per the schedule provided by it and has breached the very terms of the said agreement and after a considerable delay of more than 7 years has finally offered possession to the complainant on 20.11.2020.
- 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 was additionally burdened to pay increased stamp duty charges @ 5% instead of the previously charged 4 % due to the subsequent revision in the stamp duty charges introduced by the Government, in view of the project falling within the municipal



limits and in this manner, the complainant was constrained to pay a sum of Rs.48,670/- additionally towards the revised stamp duty charges. The said additional cost borne by the complainant is solely attributable to the respondent in light of the considerable delay in handing over of the apartment to the complainant.

- ix. That due to the delay and lapses on the part of the respondent in handing over the possession of the property, the complainant has been additionally burdened to pay Service Tax / GST of Rs.2,50,398/- on the cost of the property, which was introduced much lately and ought not to be paid by the complainant, had the possession of the property been offered in the February 2014 i.e. the due date of possession.
- x. That the complainant vide her emails addressed to the respondent had asked to indemnify her, for the delay in handing over the possession of the floor/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 her emails demanded compensation as per the Act, but the respondent has miserably failed to accede to her legitimate requests and has turned a deaf ear.
- xi. That the complainant, without any default, had been timely 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 24.04.2010 and the possession was finally offered on 20.11.2020 which resulted in extreme kind of mental distress, pain and agony to the complainant. The respondent had breached the fundamental term of the contract by inordinately delaying in delivery of possession. 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 complaint for seeking following relief:
- i. Direct the respondent to pay interest @ 18% p.a. towards delay in handing over the property in question, till the actual date of handing over of possession, as per the provisions of the Act and the rules.
  - ii. Direct the respondent to return the entire amount of holding charges levied till date, wrongly levied by the respondent, upon the complainant.
  - iii. Direct the respondent to pay a sum of Rs 48,670/- along with interest to the complainant towards the additional amount paid towards stamp duty, after revision in stamp duty charges.



- iv. Direct the respondent to return with interest HVAT (post February 2014) amounting Rs.10,966/- and Service Tax / GST amount of Rs.2,50,398/- charged from the complainant, as per provisions of the Act and the rules.
- v. 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 refund of several amounts and interest for alleged delay in delivering possession of the unit booked by the complainant. It is respectfully submitted that such complaints are to be decided by the adjudicating officer under section 71 of the Act read with rule 29 of the rules 2017 and not by this authority. The present complaint is liable to be dismissed on this ground alone. Moreover, it is respectfully submitted that the adjudicating officer derives his

jurisdiction from the central act which cannot be negated by the rules made thereunder.

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 24.04.2010. 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 Act applies to ongoing projects which are registered with the authority, the Act cannot be said to be operating retrospectively. The provisions of the Act relied upon by the 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 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 the complainant and Mr. Satish Kumar Bansal vide application form dated 19.08.2009 applied to the respondent for provisional allotment of a unit in the project. The complainant and Mr. Satish Kumar Bansal, in pursuance of the aforesaid application, were



initially allotted an independent unit bearing no. EEA-L-F06-02 vide provisional allotment letter dated 24.09.2009. The complainant and Mr. Satish Kumar Bansal consciously and willfully opted for a construction linked plan for remittance of the sale consideration for the unit in question and further represented to the respondent that the complainant and Mr. Satish Kumar Bansal shall remit every installment on time as per the payment schedule.

- iv. That on account of changes in the layout plan, the location of the unit allotted to the complainant had been changed and consequently, the unit number allotted to the complainant was renumbered to EEA-G-F03-03 located on the third floor.
- v. That that the complainant and Mr. Satish Kumar Bansal had defaulted in remittance of installments on time. Respondent was compelled to issue demand notices, reminders etc. calling upon the complainant and Mr. Satish Kumar Bansal to make payment of outstanding amounts payable by them under the payment plan/instalment plan opted by them. However, the complainant and Mr. Satish Kumar Bansal despite having received the payment request letters, reminders etc. failed to remit the instalments on time to the respondent. Statement of account dated 07.04.2021 maintained by respondent in due course of its business reflects the delay in remittance of various instalments on the part of the complainant and Mr. Satish Kumar Bansal.

vi. That buyer's agreement dated 24.04.2010 was executed between the complainant and Mr. Satish Kumar Bansal and respondent. It is pertinent to mention 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. In case of delay caused due to non-receipt of occupation certificate, completion certificate or any other permission/sanction from the competent authorities, no compensation or any other compensation shall be payable to the allottees. As delineated hereinabove, the complainant and Mr. Satish Kumar Bansal, having defaulted in timely remittance of instalment, were thus not entitled to any compensation or any amount towards interest as an indemnification for delay, if any, under the buyer's agreement.

vii. That it is categorically provided in clause 11(b)(iv) that in case of any default/delay by the allottees in payment as per schedule of payment incorporated in the buyer's agreement, the date of handing over of possession shall be extended accordingly, solely on respondent's discretion till the payment of all outstanding amounts to the satisfaction of respondent. Since, the complainant and Mr. Satish Kumar Bansal have defaulted in timely remittance of



payments as per schedule of payment, the date of delivery of possession is not liable to be determined in the manner sought to be done in the present case by the complainant.

viii. That the time period utilised by the concerned statutory authority to grant occupation certificate to respondent needs to be necessarily excluded from computation of the time period for implementation of the project. Furthermore, no compensation or interest or any other amount can be claimed for the period utilised by the concerned statutory authority for issuing occupation certificate in terms of the buyer's agreement. The respondent had submitted an application dated 20.07.2020 for issuance of occupation certificate before the concerned statutory authority. Occupation certificate was thereafter issued in favour of the respondent vide memo bearing no. ZP-441-Vol.-II/AD(RA)/2020/20094 dated 11.11.2020. It is submitted that once an application is submitted before the statutory authority, the respondent ceases to exercise any control over the matter. The grant of occupation certificate is the prerogative of the concerned statutory authority and the respondent cannot exercise any influence over the same. Thus, the time period utilised by the concerned statutory authority to grant occupation certificate to respondent needs to be necessarily excluded from computation of the time period for implementation of the project.

- ix. That the 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. 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.
- x. That the complainant and Mr. Satish Kumar Bansal were offered possession of the unit in question through letter of offer of possession dated 20.11.2020. The complainant and Mr. Satish Kumar Bansal were called upon to remit balance payment including delayed payment charges and to complete the necessary



formalities/documentation necessary for handover of the unit in question to them. However, the complainant and Mr. Satish Kumar Bansal have consciously refrained from obtaining possession of the unit in question. That the complainant/Mr. Satish Kumar Bansal did not/does not have adequate funds to remit the balance payments requisite for obtaining possession in terms of the buyer's agreement and thus refrained from obtaining possession of the unit in question.

- xi. That thereafter the complainant and Mr. Satish Kumar Bansal had approached the respondent and requested it to delete the name of Mr. Satish Kumar Bansal as a co-applicant pertaining to the allotment of the unit in question. It is pertinent to mention that after deletion of his name as a co-applicant, Mr. Satish Kumar Bansal is left with no right, title or interest in the unit in question.
- xii. That the project of the respondent has been registered under the Act and the rules. Registration certificate granted by the Haryana Real Estate Regulatory Authority vide memo no. HRERA-482/2017/829 dated 24.08.2017. Without admitting or acknowledging in any manner the truth or legality of the allegations levelled by the complainant and without prejudice to the contentions of the respondent, it is respectfully submitted that the complaint preferred by the complainant is devoid of any cause of action. It is submitted that the registration of the project is valid till 23.08.2022 and therefore cause of action, if any, would accrue in favor of the

complainant to prefer a complaint if the respondent fails to deliver possession of the unit in question within the aforesaid period.

xiii. That the respondent has paid Rs.4,90,550/- to the complainant towards compensation as a gesture of goodwill. Furthermore, the respondent has paid an amount of Rs. 45,625/- as benefit on 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 principle 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 possession charges or any taxes/statutory payments etc.

xiv. That after receipt of the aforesaid amount, the complainant approached the respondent requesting it to deliver the possession of the unit in question. A unit handover letter dated 15.02.2021 was executed by the complainant, specifically and expressly agreeing that the liabilities and obligations of the respondent as enumerated in the allotment letter or the buyer's agreement stand satisfied. No cause of action has arisen or subsists in favour of the complainant to institute or prosecute the instant complaint. That after execution of the unit handover letter dated 15.02.2021 and obtaining of possession of the unit in question, the complainant is left with no right, entitlement or claim against the respondent.



xv. That the respondent denied that the complainant has borne any so-called "additional burden" of revised stamp duty charges on account of the alleged delay in delivery of possession of the unit in question. It is submitted that the complainant is under a legal and contractual obligation to pay stamp duty for execution of a conveyance deed in her favour. It is wrong and denied that the complainant had to pay an amount of Rs. 48,670/- or any part thereof as additional amount to the respondent. It has been unambiguously stated in the buyer's agreement that stamp duty is a separate and independent charge which is liable to be paid by the complainant apart from the sale consideration of the unit in question. The said charge is liable to be paid by the complainant at the time of execution of the conveyance deed.

xvi. That denied that the complainant has borne any so-called "additional burden" of service tax/GST on account of the alleged delay in delivery of possession of the unit in question. It is submitted that the complainant is under a legal and contractual obligation to pay all the taxes levied in respect of the unit in question. It is wrong and denied that the complainant had to pay an amount of Rs. 2,58,398/- or any part thereof as additional amount to the respondent. It has been unambiguously stated in the buyer's agreement that the taxes pertaining to the unit in question are separate and independent charge which are liable to be paid by the

complainant apart from the sale consideration of the unit in question. In any event, the said charges are levied by the Government and payable to the concerned statutory authority. The respondent does not derive any advantage by collecting any taxes from the concerned allottees.

xvii. 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 the Act**

15. The counsel for the respondent has stated that the entitlement to claim possession or refund would arise once the possession has not been handed over as per declaration given by the promoter under section 4(2)(I)(C). 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: — .....*



*(I): -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.

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

21. The respondent argued that at the time of taking possession of the apartment vide unit hand over letter dated 15.02.2021, the complainant has specifically and expressly agreed that the liabilities and obligations of

the respondent as enumerated in the allotment letter or the buyer's agreement stand satisfied and obtaining of possession of the unit in question, the complainant is left with no right, entitlement or claim against the respondent. The relevant para of the unit handover letter relied upon reads as under:

*"The Allottee/s, hereby, certifies that he / she / they has/have taken over the peaceful and vacant physical possession of the aforesaid Unit after fully satisfying himself / herself with regard to its measurements, location, dimension and development etc. and hereafter the Allottee/s has/have no claim of any nature whatsoever against the Company with regard to the size, specification, dimension, area, location and legal status of the aforesaid Home.*

*Upon acceptance of possession, the liabilities and obligations of the Company as enumerated in the allotment letter/Agreement executed in favour of the Allottee/s stand satisfied."* सत्यमेव जयते

22. At times, the allottee is asked to give the indemnity-cum-undertaking before taking possession. The allottee has waited for long for his cherished dream home and now when it is ready for possession, he either has to sign the indemnity-cum-undertaking and take possession or to keep struggling with the promoter if indemnity-cum-undertaking is not signed by him. Such an undertaking/ indemnity bond given by a person thereby giving up his valuable rights must be shown to have been executed in a free atmosphere and should not give rise to any suspicion. If a slightest of doubt arises in the mind of the adjudicator that such an agreement was not executed in an atmosphere free of doubts and suspicions, the same would be deemed to be against public policy and would also amount to unfair trade practices. No reliance can be placed on



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

*"Indemnity-cum-undertaking*

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

*Clause 13 of the said indemnity-cum-undertaking required the allottee to confirm and acknowledge that by accepting the offer of possession, he would have no further demands/claims against the company of any nature, whatsoever. It is an admitted position that the execution of the undertaking in the format prescribed by the developer was a pre-requisite condition, for the delivery of the possession. The opposite party, in my opinion, could not have insisted upon clause 13 of the Indemnity-cum-undertaking. The obvious purpose behind such an undertaking was to deter the allottee from making any claim against the developer, including the claim on account of the delay in delivery of possession and the claim on account of any latent defect which the allottee may find in the apartment. The execution of such an undertaking would defeat the provisions of Section 23 and 28 of the Indian Contract Act, 1872 and therefore would be against public policy, besides being an unfair trade practice. Any delay solely on account of the allottee not executing such an undertaking would be attributable to the developer and would entitle the allottee to compensation for the*



*period the possession is delayed solely on account of his having not executed the said undertaking-cum-indemnity."*

23. The said judgment of NCDRC was also upheld by the Hon'ble Supreme Court vide its judgement dated 14.12.2020 passed in civil appeal nos. 3864-3889 of 2020 against the order of NCDRC.
24. It is noteworthy that section 18 of the Act stipulates for the statutory right of the allottee against the obligation of the promoter to deliver the possession within stipulated timeframe. Therefore, the liability of the promoter continues even after the execution of indemnity-cum-undertaking at the time of possession. Further, the reliance placed by the respondent counsel on the language of the handover letter that the complainant has waived off her right by signing the said unit handover letter is superficial. In this context, it is appropriate to refer case titled as **Mr. Beatty Tony Vs. Prestige Estate Projects Pvt, Ltd. (Revision petition no.3135 of 2014 dated 18.11.2014)**, wherein the Hon'ble NCDRC while rejecting the arguments of the promoter that the possession has since been accepted without protest vide letter dated 23.12.2011 and builder stands discharged of its liabilities under agreement, the allottee cannot be allowed to claim interest at a later date on account of delay in handing over of the possession of the apartment to him, held as under:

*"The learned counsel for the opposite parties submits that the complainant accepted possession of the apartment on 23/24.12.2011 without any protest and therefore cannot be permitted to claim interest at a later date on account of the alleged delay in handing over the possession of the apartment*



*to him. We, however, find no merit in the contention. A perusal of the letter dated 23.12.2011, issued by the opposite parties to the complainant would show that the opposite parties unilaterally stated in the said letter that they had discharged all their obligations under the agreement. Even if we assume on the basis of the said printed statement that having accepted possession, the complainant cannot claim that the opposite parties had not discharged all their obligations under the agreement, the said discharge in our opinion would not extend to payment of interest for the delay period, though it would cover handing over of possession of the apartment in terms of the agreement between the parties. In fact, the case of the complainant, as articulated by his counsel is that the complainant had no option but to accept the possession on the terms contained in the letter dated 23.12.2011, since any protest by him or refusal to accept possession would have further delayed the receiving of the possession despite payment having been already made to the opposite parties except to the extent of Rs. 8,86,736/-. Therefore, in our view the aforesaid letter dated 23.12.2011 does not preclude the complainant from exercising his right to claim compensation for the deficiency on the part of the opposite parties in rendering services to him by delaying possession of the apartment, without any justification condonable under the agreement between the parties."*

25. The said view was later reaffirmed by the Hon'ble NCDRC in case titled as **Vivek Maheshwari Vs. Emaar MGF Land Ltd. (Consumer case no. 1039 of 2016 dated 26.04.2019)** wherein it was observed as under:

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

26. Therefore, the authority is of the view that the aforesaid unit handover letter dated 15.02.2021 does not preclude the complainant from



exercising her right to claim delay possession charges as per the provisions of the Act.

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

**G.I Delay possession charges**

27. 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."*

28. 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."*

29. 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.

30. **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 07.04.2021. 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.

31. **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.

32. 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.



33. 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.

34. 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%.

35. 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;"*

36. 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.

37. 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 24.04.2010, 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 20.11.2020. 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 24.04.2010 executed between the parties.

38. 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 20.11.2020. 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 she 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 (20.11.2020) which comes out to be 20.01.2021.

39. 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 20.01.2021 as per provisions of section 18(1) of the Act read with rule 15 of the rules.

40. Also, the amount of Rs.4,90,550/- (as per statement of account dated 07.04.2021) 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.

#### **G.II Holding charges**

41. In the present complaint, the complainant has disputed the demand raised by the respondent developer on account of holding charges. On the other hand, the respondent argued that the complainant had been called upon to take possession of the said unit after making payment of



the outstanding amount and complete the documentation formalities. However, the complainant never came forward to do the same. And as a result, the complainant is liable to make payment of holding charges to the respondent.

42. With regards to the same, it has been observed that as per sub-clause (b) of clause 12 of the buyer's agreement, in the event the allottee fails to take the possession of the unit within the time limit prescribed by the company in its intimation/offer of possession, then the promoter shall be entitled to charge holding charges. Clause 14 of the buyer's agreement prescribes the amount of holding charges. The relevant clauses from the buyer's agreement are reproduced hereunder:

**"12. PROCEDURE FOR TAKING POSSESSION:**

(a) .....

(b) *Upon intimation in writing from the Company, the Allottee(s) shall within thirty (30) days take possession of the said Unit..... If the Allottee(s) fails to take possession of the Unit as aforesaid with the time limit prescribed by the Company in its notice, then the said Unit shall lie at risk, responsibility and cost of the Allottee(s) in relation to all the outgoing cess, taxes, levies etc and the Company shall have no liability or concern thereof and further that the Company shall also be entitled to holding charges as provided under clause 14.1.*

**14. FAILURE TO TAKE POSSESSION**

14.1 .....

(a) *holding charges @ 50/- per sq. ft. of the Super Area of the said Unit per month for the entire period of such delay."*

43. It is interesting to note that the term holding charges has not been clearly defined in the builder buyer's agreement and or any other relevant document submitted by the respondent promoter. Therefore, it is firstly

important to understand the meaning of holding charges which is generally used in common parlance. The term holding charges or also synonymously referred to as non-occupancy charges become payable or applicable to be paid if the possession has been offered by the builder to the owner/allottee and physical possession of the unit not taken over by allottee but the flat/unit is lying vacant even when it is in a ready-to-move condition. Therefore, it can be inferred that holding charges is something which an allottee has to pay for his own unit for which he has already paid the consideration just because he has not physically occupied or moved in the said unit. The next thing that pops up for consideration is as to what are then maintenance charges being taken by the developer/RWA. Maintenance charges are the charges, either annually or monthly, applicable to be paid by the owner/allottee once he/she has taken possession of the property/unit. These charges are paid for the general maintenance and upkeep of the building and/or society. A person purchases a flat for his own residential usage/or for letting it out further as per his own discretion and requirement. He is bound as per law to pay the maintenance charges for his flat/unit whether he is personally residing or even if the flat is kept locked and being unused. The member has to pay the full maintenance charges without any concessions and in most cases, pays advance maintenance charges as well. Maintenance charges are applicable right from the time possession of a flat/unit is taken over by any prospective buyer/allottee. However, payment of



maintenance charges is carried out on a monthly basis for the upkeep of the entire building and project. Therefore, simply understood, the flat closed/locked/vacant/not occupied for any period is equal to self-occupied, which is further equal to regular full maintenance charges and non-occupancy charges/holding charges should not be levied.

44. The Hon'ble NCDRC in its order dated 03.01.2020 in case titled as ***Capital Greens Flat Buyer Association and Ors. Vs. DLF Universal Ltd., Consumer case no. 351 of 2015*** held as under:

*"36. It transpired during the course of arguments that the OP has demanded holding charges and maintenance charges from the allottees. As far as maintenance charges are concerned, the same should be paid by the allottee from the date the possession is offered to him unless he was prevented from taking possession solely on account of the OP insisting upon execution of the Indemnity-cum-Undertaking in the format prescribed by it for the purpose. If maintenance charges for a particular period have been waived by the developer, the allottee shall also be entitled to such a waiver. As far as holding charges are concerned, the developer having received the sale consideration has nothing to lose by holding possession of the allotted flat except that it would be required to maintain the apartment. **Therefore, the holding charges will not be payable to the developer. Even in a case where the possession has been delayed on account of the allottee having not paid the entire sale consideration, the developer shall not be entitled to any holding charges though it would be entitled to interest for the period the payment is delayed.**" (Emphasis supplied)*

45. The said judgment of Hon'ble NCDRC was also upheld by the Hon'ble Supreme Court vide its judgement dated 14.12.2020 passed in the civil appeal nos. 3864-3889/2020 filed by DLF against the order of Hon'ble NCDRC (supra). In the light of the recent judgement of the Hon'ble NCDRC and Hon'ble Apex Court (supra), the authority concurring with the view taken therein decides that a respondent/promoter cannot levy holding

charges on a homebuyer/ allottee as it does not suffer any loss on account of the allottee taking possession at a later date even due to an ongoing court case.

46. As far as holding charges are concerned, the respondent having received the sale consideration has nothing to lose by holding possession of the allotted flat except that it would be required to maintain the apartment. Therefore, the holding charges will not be payable to the respondent. Even in a case where the possession has been delayed on account of the allottee having not paid the entire sale consideration, the developer shall not be entitled to any holding charges though it would be entitled to interest for the period the payment is delayed by the allottees.

**G.III Return of HVAT (Post February 2014)**

47. The complainant sought relief return of HVAT (Post February 2014). The authority observed that as per demand raised by the respondent along with letter of offer of possession dated 20.11.2020, the respondent had not demanded any amount towards HVAT. Therefore, the said relief is vague and is hereby, not allowed.

**G.IV Return of GST amount**

48. The complainant submitted that due to the delay and lapses on the part of the respondent in handing over the possession of the property, the complainant has been additionally burdened to pay the GST which was introduced much lately and ought not to be paid by the complainant, had the possession of the property been offered by the due date of possession.



On the other hand, the counsel for the respondent submitted that GST has been levied strictly in accordance with the terms and conditions of the buyer's agreement.

49. The relevant clause from the agreement is reproduced as under:

**"10.(f) Taxes and levies:**

- (i) *The Allottee(s) shall be responsible for payment of all taxes, levies, assessments, demands or charges including but not limited to sale tax, VAT, if applicable, levied or leviable in future on the Plot, building or Unit or any part of the Project in proportion to his/her/their/its Super Area of the Unit.*
- (ii) *....."*

50. As per the builder buyer's agreement, taxes shall be payable as per the government rules as applicable from time to time. Taxes are levied as per government norms and rules and are leviable in respect of real estate projects as per the government policies from time to time. Therefore, there is no substance in the plea of the complainant in regard to the illegality of the levying of the said taxes. However, the issue pending determination is as to whether the allottee shall be liable to pay such taxes which became payable on account of default and delay in handing over of possession by the builder beyond the deemed date of possession.

51. The authority after hearing the parties at length is of the view that admittedly, the due date of possession of the unit was 26.08.2013 but the offer of possession has been made only on 20.11.2020. Had the unit been delivered within the due date or even with some justified delay, the incidence of GST would not have fallen on the allottee. Therefore, an additional tax burden with respect to GST was enforced upon the buyer



for no fault of her since and is due to the wrongful act of the promoter in not delivering the unit within due date of possession; also, the tax liability would have been very less as compared with the GST, if levied.

52. The authority has also perused the judgement dated 04.09.2018 in complaint no. 49/2018, titled as **Parkash Chand Arohi Vs. M/s Pivotal Infrastructure Pvt. Ltd.** of the Haryana Real Estate Regulatory Authority, Panchkula wherein it has been observed that the possession of the flat in term of buyer's agreement was required to be delivered on 1.10.2013 and the incidence of GST came into operation thereafter on 01.07.2017. So, the complainant cannot be burdened to discharge a liability which had accrued solely due to respondent's own fault in delivering timely possession of the flat. The relevant portion of the judgement is reproduced below:

*"8. The complainant has then argued that the respondent's demand for GST/VAT charges is unjustified for two reasons: (i) the GST liability has accrued because of respondent's own failure to handover the possession on time and (ii) the actual VAT rate is 1.05% instead of 4% being claimed by the respondent. The authority on this point will observe that the possession of the flat in term of buyer's agreement was required to be delivered on 1.10.2013 and the incidence of GST came into operation thereafter on 01.07.2017. So, the complainant cannot be burdened to discharge a liability which had accrued solely due to respondent's own fault in delivering timely possession of the flat. Regarding VAT, the Authority would advise that the respondent shall consult a service tax expert and will convey to the complainant the amount which he is liable to pay as per the actual rate of VAT fixed by the Government for the period extending upto the deemed date of offer of possession i.e., 10.10.2013."*

53. In appeal no. 21 of 2019 titled as **M/s Pivotal Infrastructure Pvt. Ltd. Vs. Prakash Chand Arohi**, Haryana Real Estate Appellate Tribunal, has



upheld the **Parkash Chand Aroahi Vs. M/s Pivotal Infrastructure Pvt. Ltd. (supra)**. The relevant para is reproduced below:

*"93. This fact is not disputed that the GST has become applicable w.e.f. 01.07.2017. As per the first Flat Buyer's Agreement dated 14.02.2011, the deemed date of possession comes to 13.08.2014 and as per the second agreement dated 29.03.2013 the deemed date of possession comes to 28.09.2016. So, taking the deemed date of possession of both the agreements, GST has not become applicable by that date. No doubt, in Clauses 4.12 and 5.1.2 the respondent/allottee has agreed to pay all the Government rates, tax on land, municipal property taxes and other taxes levied or leviable now or in future by Government, municipal authority or any other government authority. But this liability shall be confined only up to the deemed date of possession. The delay in delivery of possession is the default on the part of the appellant/promoter and the possession was offered on 08.12.2017 by that time the GST had become applicable. But it is settled principle of law that a person cannot take the benefit of his own wrong/default. So, the appellant/promoter was not entitled to charge GST from the respondent/allottee as the liability of GST had not become due up to the deemed date of possession of both the agreements."*

54. Therefore, the delay in delivery of possession is the default on the part of the respondent/promoter and the possession was offered on 20.11.2020 and by that time the GST had become applicable. But it is settled principle of law that a person cannot take the benefit of his own wrong/default. So, the respondent/promoter is not entitled to charge GST from the complainant/allottee as the liability of GST had not become due up to the due date of possession as per the said agreement.

#### **G.V Stamp Duty Charges**

55. The complainant pleaded that as per buyer's agreement dated 24.04.2010, the respondent-builder was required to complete construction of the project of the allotted unit within a period of 36 months from the commencement of construction i.e. 26.08.2010. The due



date of handing over possession comes out to be 26.08.2013. But the subject unit was not delivered within the stipulated period and rather, the respondent builder received occupation certificate on 11.11.2020 and thereafter, offered possession of the allotted unit to the complainant on 20.11.2020 i.e after delay of more than 7 years. So, besides the amount of delayed possession charges, the complainant is also entitled to the difference in the stamp duty charges to the tune of Rs. 48,670/- which was increased as the Government of Haryana included Village Maidawas within municipal limits of Gurugram. If the possession of the allotted unit had been offered within the stipulated period as per buyer's agreement, then the allottees would not have been burdened with additional liability as mentioned above.

56. On the other hand, the respondent argued that the stamp duty is in accordance with the applicable rate prevailing upon the date of registration of the conveyance deed is payable by the complainant. The complainant is under a legal and contractual obligation to pay stamp duty for execution of a conveyance deed in her favour. It has been unambiguously stated in the buyer's agreement that stamp duty is a separate and independent charge which is liable to be paid by the complainant apart from the sale consideration of the unit in question. The said charge is liable to be paid by the complainant at the time of execution of the conveyance deed. Therefore, the respondent cannot be held liable for the defaults committed by the complainant.



57. It is observed that clause 5 of the buyer's agreement dated 24.04.2010 provides for execution of sale deed in favor of an allottee within 6 months from the date of receipt of occupation certificate. The relevant clause of the buyer's agreement reads under:

**"5. SALE DEED**

*The sale deed ("Sale Deed") shall be executed and got registered in favour of the Allottee(s) within six months from the date of receipt of occupation certificate. Total Consideration, PLC, additional EDC, and additional IDC, if any, late payment charges, interest and other charges and subject to compliances of all other terms and conditions of this Buyer's Agreement by the Allottee(s). The cost of stamp duty, registration charges and other incidental charges and expenses will be borne by the Allottee in addition to the Total Consideration of the Unit, as and when demanded by the Company. The Allottee(s) may with the prior approval of the Company raise or avail loan from banks and other Housing Finance companies for this purpose only. The Allottee(s) agrees that the provisions of this Agreement are and shall continue to be subject and subordinate to the lien of any mortgage heretofore or hereafter made/created by the Company and any payments or expenses already made or incurred or which hereafter may be made or incurred pursuant to the terms thereof or incidental thereto or to protect the security thereof, to the fullest extent thereof and such mortgage(s) or encumbrances shall not continue an objection to the title of the said Unit or excuse the Allottee(s) from making the payment of the Total Consideration of the said Unit or performing all the Allottee(s)' other obligations hereunder or be the basis of any claim against or liability of the Company, provided that at the time of the execution of the Sale Deed, the said Unit shall be free and clear of all encumbrances, lien and charges whatsoever." (Emphasis supplied)*

58. It is specifically provided in the aforesaid clause that the cost of stamp duty, registration charges, other incidental charges and expenses will be borne by the allottee in addition to the total sale consideration of the unit. It is important to note that the state government collects stamp duty to validate the registration agreement. A registration document with a stamp duty paid on it acts as a legal document to prove the ownership of the property in the court. Without paying stamp duty charges, one cannot



claim the property to be his/her own legally. Thus, it is very important to pay the full stamp duty charge. A stamp duty is a mandatory payment and usually has to be borne by the buyer. So, as per the stipulation as agreed upon between the parties at the time of execution of buyer's agreement, the complainant-allottee is liable to get the conveyance deed/ sale deed executed on payment of the requisite stamp duty charges at the rate applicable on the date of registration as per the policy of the state government.

#### **H. Directions of the authority**

59. 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 20.01.2021 i.e. expiry of 2 months from the date of offer of possession (20.11.2020). 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/promoter is not entitled to charge any amount towards GST from the complainant/allottee as the liability of GST had not become due up to the due date of possession as per the buyer's agreement.
- iv. The complainant is directed to pay stamp duty as per the norms of the State Government existing at the time of execution of sale deed/conveyance deed.
- v. 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.

60. Complaint stands disposed of.

61. 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.