BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	:	**1638 of 2021**
First date of hearing	:	**16.04.2021**
Date of decision	:	**12.08.2021**

Shri Daljeet Singh Khurana
R/o: H.no. G-11, First Floor,
Jangpura Extension, New Delhi. **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	**Chairman**
Shri Samir Kumar	**Member**
Shri Vijay Kumar Goyal	**Member**

APPEARANCE:

Shri Daljeet Singh Khurana	Complainant in person
Shri Varun Chugh	Advocate for the complainant
Shri J.K. Dang along with Shri Ishaan Dang	Advocates for the respondent

ORDER

1. The present complaint dated 24.03.2021 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 25.03.2010 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 154 of reply]
8.	Provisional allotment letter dated	18.09.2009 [Page 45 of reply]

9.	Unit no.	EEA-F-F11-02, 11th floor, building no. F [Page 18 of complaint]
10.	Unit measuring	1020 sq. ft.
11.	Date of execution of buyer's agreement	25.03.2010 [Page 16 of complaint]
12.	Payment plan	Construction linked payment plan [Page 87 of reply]
13.	Total consideration as per statement of account dated 06.04.2021 [Page 125 of reply]	Rs.41,77,509/-
14.	Total amount paid by the complainant as per statement of account dated 06.04.2021 [Page 127 of reply]	Rs.42,02,317/-
15.	Date of start of construction as per statement of account dated 06.04.2021 [Page 125 of reply]	26.08.2010
16.	Nomination letter in favour of the complainant	17.07.2014 [Page 119 of reply]
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 31 of complaint]	26.08.2013 **[Note:** Grace period is not included**]**
18.	**Date of offer of possession to the complainant**	**07.12.2020** [Page 54 of complaint]
19.	Delay in handing over possession till 07.02.2021 i.e. date of offer of possession (07.12.2020) + 2 months	7 years 5 months 12 days

B. Facts of the complaint

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

i. That the property in question i.e. EEA-F-F11-02 (eleventh floor) admeasuring 1020 sq. ft., in the said project was booked by the Sh. Raghubir Singh Chugh in the year 2010. The total cost of the apartment is Rs.41,77,509/- only and since it was a construction linked plan, hence the payment was to be made on the basis of schedule of payment provided by the respondent.

ii. That thereafter, on 25.03.2010, Sh. Raghubir Singh Chugh entered into a buyer's agreement with the respondent, by virtue of which the respondent allotted apartment no. EEA-F-F11-02, having super area of 1020 sq. ft. located on the eleventh floor, along-with covered car parking space and club membership in the said project.

iii. That subsequent thereto, the complainant entered into an agreement to sell with Sh. Raghubir Singh Chugh, to purchase the said unit and the property was later assigned to the complainant, by the respondent, by virtue of the assignment letter/nomination letter dated 17.07.2014.

iv. 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.17,806/- as on 01.03.2021, 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.

v. That as per clause 11(a) of the buyer's agreement dated 25.03.2010, 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.

vi. That the respondent has miserably failed to honour its part of commitment to handover the possession of the said unit, 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 the possession to the complainant.

vii. 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.

viii. 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.

ix. That though the possession of the flat was offered to the complainant on 07.12.2020 but the apartment is not in usable condition and hence the possession offered is a defective offer of possession. The possession was offered in haste and with a malafide intention to avoid delay possession charges for the entire period after 07.12.2020 till actual handing over of possession whereas the property is not fit for occupation. In fact, the construction work is still going on and the debris can be seen lying in the surroundings of the tower wherein the complainant hold apartment, which makes it

unfit for habitation as the labourers are present in the entire complex making it even unsafe to use the property and which is why there is further delay in actual handing over of possession of the apartment, despite issuance of intimation of possession letter to the complainant.

x. 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.

xi. That the complainant is additionally burdened to pay increased stamp duty charges @ 7% instead of the previously charged 5 % 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 is constrained to pay a sum of Rs.70,460/- 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.

xii. 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 HVAT (post February 2014) and Service Tax / GST of Rs.1,66,807/- 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.

xiii. That the complainant vide his emails addressed to the respondent had asked to indemnify him, for the delay in handing over the possession of the floor/apartment but the respondent company had indemnified the complainant as per the buyer's agreement. In fact, the complainant vide his emails demanded compensation as per the Act, but the respondent has miserably failed to accede to his legitimate requests and has turned a deaf ear.

xiv. That the complainant, without any default, had been paying the instalments towards the property, as and when demanded by the respondent. The respondent had promised to complete the project by February 2014 including the grace period of six months. The buyer's agreement was executed on 25.03.2010 and the possession was finally offered on 07.12.2020 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 compliant for seeking following relief:

   i. Direct the respondent to handover the possession of the property/ apartment to the complainant, in a time bound manner.

   ii. 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.

   iii. Direct the respondent to return the entire amount of holding charges levied till date, along with interest, wrongly levied by the respondent, upon the complainant.

   iv. Direct the respondent to pay a sum of Rs 70,460/- along with interest to the complainant towards the additional amount paid towards stamp duty, after revision in stamp duty charges.

   v. Direct the respondent to return with interest HVAT (post February 2014) and Service Tax / GST amount of Rs.1,66,807/- charged from the complainant, as per provisions of the Act and the rules.

   vi. 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 compensation 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.

ii. That present complaint is based on an erroneous interpretation of the provisions of the Act as well as an incorrect understanding of the terms and conditions of the buyer's agreement dated 25.03.2010. The provisions of the Act are not retrospective in nature. The provisions of the Act cannot undo or modify the terms of an agreement duly executed prior to coming into effect of the Act. The provisions of the Act relied upon by the complainant for seeking interest or compensation cannot be called in to aid in derogation and ignorance of the provisions of the buyer's agreement. The complainant cannot claim any relief which is not contemplated under the provisions of the buyer's agreement. The interest for the

alleged delay demanded by the complainant is beyond the scope of the buyer's agreement. The complainant cannot demand any interest or compensation beyond the terms and conditions incorporated in the buyer's agreement.

iii. That vide provisional allotment letter dated 18.09.2009 issued by the respondent in favour of the Mr. Raghubir Singh Chugh (original allottee) an apartment bearing no. EEA-F-F11-02 was allotted in the said project. The buyer's agreement executed between the original allottee and the respondent dated 25.03.2010.

iv. That the original allottee had opted for a construction linked payment plan and had agreed and undertaken to make payment in accordance therewith. However, the original allottee (and thereafter the complainant) had defaulted in making timely payments on several occasions. Consequently, the respondent was constrained to issue notices and reminders for payment. The statement of account reflects the payments made by the complainant and the accrued delayed payment interest thereon as on 06.04.2021. The said project has been registered under the Act and the registration of the project is valid till 23.08.2022.

v. That the original allottee, Mr. Raghubir Singh Chugh had entered into an agreement to sell pertaining to the said unit with the complainant. The nomination letter dated 17.07.2014 was issued by the

respondent in favour of the complainant (Mr. Daljeet Singh Khurana) confirming the transfer of the said unit in favour of the complainant.

vi. That there have been numerous defaults on the part of the complainant in making timely payment of sale consideration as per the payment plan. Accordingly, the complainant is not entitled to any compensation for any delay in delivery of possession under clause 13(c) of the buyer's agreement. The contractual relationship between the complainant and the respondent is governed by the terms and conditions of the buyer's agreement which are binding upon the parties with full force and effect. Furthermore, the time lines for delivery of possession are contingent upon various factors such as time taken by the statutory/competent authority in according approvals, permissions, sanctions, including but not limited to the issuance of the occupation certificate/competition certificate, timely payment of instalments by the allottees and other factors which are beyond the power and control of the respondent.

vii. That the respondent has credited an amount of Rs.8,426/- as benefit on account of Early Payment Rebate (EPR) and Rs. 35,770/- on account of Anti-Profiting. Without prejudice to the rights of the respondent, delayed interest if any has to be calculated only on the amounts deposited by the allottees/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

allottees/complainant towards delayed payment charges or any taxes/statutory payments etc.

viii. 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.

ix. That the respondent completed construction of the apartment/ building and applied for the issuance of the occupation certificate on 20.07.2020. The occupation certificate has been issued by the

competent authority on 11.11.2020. Upon receipt of the occupation certificate, possession of the apartment has been offered to the complainant vide offer of possession letter dated 07.12.2020. The complainant has been called upon to make remaining payment and complete the necessary formalities required to enable the respondent to hand over possession to the complainant.

x. That instead of making balance payment and taking possession of the unit, the complainant has filed the present false and frivolous complaint. It is submitted that the respondent has duly fulfilled its obligations under the buyer's agreement by completing construction and offering possession in accordance with the buyer's agreement, within the period of validity of registration of the project under the Act, i.e. before 23.08.2022. Thus, there is no default or lapse on the part of the respondent.

xi. 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. As a result, the complainant is liable to make payment of holding charges to the respondent.

xii. That the respondent denied that the offer of possession was a defective offer or that possession had been offered in haste and with any mala fide intention and to avoid delay penalty charges. It is wrong and denied that the said unit is not fit for occupation. The

respondent submitted that the construction work in the tower in question where the said unit is located has been completed.

xiii. That the respondent denied that the complainant was additionally burdened to make payment of alleged increased stamp duty charges at the rate of 7% instead of 5%. The respondent submitted 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. With effect from 24.12.2020, the Revenue Estate of Maidawas stands included in the Municipal Limits and the complainant is liable to pay stamp duty as per the applicable rate prevailing on the date of registration of the conveyance deed. The letter of offer of possession had been issued to the complainant on 07.12.2020. However, the complainant never came forward for registration of conveyance deed. Therefore, the respondent cannot be held liable for the defaults committed by the complainant.

xiv. That the HVAT amount and the service tax/GST component has been validly and legally charged by the respondent as the same are statutory charges and are liable to be passed on to the Government by the respondent. It is submitted that the respondent is merely a channel between the complainant and the Government as far as the aforesaid statutory charges are concerned.

xv. 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 situate has been completed by the respondent. 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)(l)(C) of the Act

15. The counsel for the respondent has stated that the entitlement to claim possession or interest would arise once the possession has not been handed over as per declaration given by the promoter under section

4(2)(l)(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)(l)(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)(l)(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: —.....*
>
> *(l): -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)(I)(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 a subsequent allottee who had executed an indemnity cum undertaking with waiver clause is entitled to claim delay possession charges?

21. The respondent submitted that complainant in question is a subsequent allottee and complainant had executed an indemnity cum undertaking dated 10.07.2014 whereby the complainant had consciously and voluntarily declared and affirmed that he would be bound by all the terms and conditions of the provisional allotment in favour of the original allottee. It was further declared by the complainant that he, having been substituted in the place of the original allottee in respect of the provisional allotment of the unit in question, was not entitled to any compensation for delay. Therefore, the complainant is not entitled to any compensation. With regard to the above contentions raised by the promoter/developer, it is worthwhile to examine following four sub-issues:

(i) Whether subsequent allottee is also allottee as per provisions of the Act?

(ii) 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)?

(iii) Whether delay possession charges are in the nature of statutory legal obligation of the promoter other than compensation?

(iv) Whether indemnity-cum-undertaking with waiver clause at the time of transfer of unit is arbitrary and whether statutory rights can be waived of by such one sided and unreasonable undertaking?

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

22. 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".*

23. 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.

24. 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.

25. 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....."*

26. 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 allottee 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 complainant as an allottee.

27. 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 subsequent allottee at the time of buying the said unit 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 complainant/subsequent allottee has been endorsed on the same builder buyer's agreement which was executed between the original allottee and the promoter. Therefore, the rights and obligation of the subsequent allottee and the promoter will also be governed by the said buyer's agreement.

ii. 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)?

28. The respondent/promoter contended that the subsequent allottee shall not be entitled to any compensation/delayed possession charges since at the time of the execution of transfer documents/agreement for sale, he was well aware of the due date of possession and has knowingly waived off his right to claim any compensation for delay in handing over

possession or any rebate under a scheme or otherwise or any other discount. The respondent/ promoter had spoken about the disentitlement of compensation/delayed possession charges to the subsequent allottee 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 he entered into the agreement for sell and/or indemnity-cum-undertaking knowingly waiving off his right of compensation.

29. The authority placed reliance on the recent case titled as ***M/s Laureate Buildwell Pvt. Ltd. Vs. Charanjeet Singh, civil appeal no. 7042 of 2019 dated 22.07.2021***, 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 Sultana and Ors. V. DLF Southern Homes Pvt. Ltd. (now Known as BEGUR OMR Homes Pvt. Ltd.) and Ors. (Civil appeal no. 6239 of 2019) dated 24.08.2020) 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)*

30. In the present case, the complainant/subsequent allottee had been acknowledged as an allottee by the respondent vide nomination letter dated 17.07.2014. The authority has observed that the promoter has confirmed the transfer of allotment in favour of subsequent allottee (complainant) and the installments paid by the original allottee were adjusted in the name of the subsequent allottee 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

allottee/complainant. All the terms of buyer's agreement remain the same, so it is quite clear that the subsequent allottee has stepped into the shoes of the original allottee. Though the promised date of delivery was 26.08.2013 but the construction of the tower in question was not completed by the said date and it was offered by the respondent only on 07.12.2020.

31. In the present complaint, the complainant/subsequent allottee 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 complainant had been waiting for his promised flats and surely, he would be entitled to all the reliefs under this Act. It would no doubt be fair to assume that the subsequent allottee/complainant 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 complainant on 17.07.2014, therefore, the

complainant would be entitled to delay possession charges w.e.f. 17.07.2014.

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

32. 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 lump sum 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.

33. 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.**

34. 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.

iv. Whether indemnity-cum-undertaking with waiver clause at the time of transfer of unit is arbitrary and whether statutory rights can be waived of by such one sided and unreasonable undertaking?

35. The authority further is unable to gather any reason or has not been exposed to any reasonable justification as to why a need arose for the complainant to sign any such indemnity-cum-undertaking and as to why the complainant had agreed to surrender his legal rights which were available or had accrued in favour of the original allottee. Thus, no sane person would ever execute such an affidavit or indemnity-cum-undertaking unless and until some arduous and/or compelling conditions are put before him with a condition that unless and until, these arduous and/or compelling conditions are performed by him, he will not be given any relief and he is thus left with no other option but to obey these conditions. Exactly same situation has been demonstratively happened here, when the complainant/subsequent-allottee has been asked to give the indemnity-cum-undertaking in question before transferring the unit in his name otherwise such transfer may not be allowed by the promoter. 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. No reliance can be placed on any such affidavit/ indemnity-cum-undertaking and the same is liable to be discarded and ignored in its totality. Therefore, this authority does not place reliance on the said

affidavit/indemnity cum undertaking. To fortify this view, we place reliance on the order dated 03.01.2020 passed by hon'ble NCDRC 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 section 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."*

36. 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

37. Hon'ble Supreme Court and various High Courts in a plethora of judgments have held that the terms of a contract shall not be binding if it is shown that the same were one sided and unfair and the person signing did not have any other option but to sign the same. Reference can also be placed on the directions rendered by the Hon'ble Apex Court in civil appeal no. 12238 of 2018 titled as **Pioneer Urban Land and Infrastructure Limited Vs. Govindan Raghavan** (decided on 02.04.2019) as well as by the Hon'ble Bombay High Court in the **Neelkamal Realtors Suburban Pvt. Ltd.** (supra). A similar view has also been taken by the Apex court in **IREO Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Ors.** in civil appeal no. 5785 of 2019 and the same is reproduced as under:

> *".....that the incorporation of such one-sided and unreasonable clauses in the Apartment Buyer's Agreement constitutes an unfair trade practice under Section 2(1)(r) of the Consumer Protection Act. Even under the 1986 Act, the powers of the consumer fora were in no manner constrained to declare a contractual term as unfair or one-sided as an incident of the power to discontinue unfair or restrictive trade practices. An "unfair contract" has been defined under the 2019 Act, and powers have been conferred on the State Consumer Fora and the National Commission to declare contractual terms which are unfair, as null and void. This is a statutory recognition of a power which was implicit under the 1986 Act.*
>
> *In view of the above, we hold that the Developer cannot compel the apartment buyers to be bound by the one-sided contractual terms contained in the Apartment Buyer's Agreement."*

38. The same analogy can easily be applied in the case of execution of an affidavit or indemnity-cum-undertaking which got executed from the subsequent-allottee before getting the unit transferred in his name in the record of the promoter as an allottee in place of the original allottee.

39. The authority may deal with this point from yet another aspect. By executing an affidavit/undertaking, the complainant/subsequent allottee cuts his hands from claiming delay possession charges in case of delay in giving possession of the unit beyond the stipulated time or the due date of possession. But the question which arises before the authority is that what does allottee got in return from the promoter by giving such a mischievous and unprecedented undertaking. However, the answer would be "nothing". If it is so, then why did the complainant executed such an affidavit/undertaking is beyond the comprehension and understanding of this authority.

40. The authority holds that irrespective of the execution of the affidavit/undertaking by the complainant/subsequent allottee at the time of transfer of his name as an allottee in place of the original allottee in the record of the promoter does not disentitle him from claiming the delay possession charges in case there occurs any delay in delivering the possession of the unit beyond the due date of delivery of possession as promised even after executing an indemnity-cum-undertaking.

G. Findings on the reliefs sought by the complainant

G.I Delay possession charges

41. 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."*

42. 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."*

43. 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.

44. **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 06.04.2021. 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.

45. **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.*

46. 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.

47. 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.

48. 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%.

49. **Rate of interest to be paid by complainant/allottee for 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;"*

50. 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.

51. On consideration of the documents available on record and submissions made by the parties regarding contravention as per provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 11(a) of the buyer's agreement executed between the parties on 25.03.2010, 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 is subsequent allottee and had been acknowledged by the respondent vide nomination letter dated 17.07.2014. The complainant was offered possession by the respondent on 07.12.2020. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the complainant as per the terms and conditions of the buyer's agreement dated 25.03.2010 executed between the parties.

52. 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 07.12.2020. So, it can be said that the complainant came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the complainant should be given 2 months' time from the date of offer of possession. These 2 months' of reasonable time is being given to the complainant keeping in mind that even after intimation of possession practically he has to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but

this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the date of entering into the shoes of original allottee i.e. nomination letter (17.07.2014) till the expiry of 2 months from the date of offer of possession (07.12.2020) which comes out to be 07.02.2021.

53. 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. 17.07.2014 till 07.02.2021 as per provisions of section 18(1) of the Act read with rule 15 of the rules.

G.II Holding charges

54. 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.

55. 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."*

56. 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.

57. 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)*

58. 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.

59. 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)

60. The complainant is contending that he has been additionally burdened to pay HVAT (Post February 2014). On the other hand, the respondent submitted that the HVAT amount and the service tax/GST component has been validly and legally charged by the respondent as the same are statutory charges and are liable to be passed on to the Government by the respondent.

Here, it is important to understand the background of transgression from VAT to GST regime and quantum of tax which shall be applicable.

61. The liability to pay Value Added Tax by the builder as works contractor has clearly been settled by the **Hon'ble Apex Court in M/s Larsen and Toubro Limited Vs State of Karnataka (2013) 46 PHT 269 (SC)** wherein it was held that the builders/developers etc. engaged in the activities of the construction of building, flat and commercial properties are covered under the definition of "works contract" and are liable to pay Sales Tax as per applicable laws of the state. The provisions of Haryana VAT Act, 2003 (herein after referred as HVAT Act) r/w Haryana Value Added Tax Rules further clarified that the agreements entered with

prospective buyers for sale of constructed flats, apartments or other buildings by builders and/or developers amount to transfer of property of goods involved in the execution of a works contract and thus liable to be subjected to VAT. The above is supported by "sale" as defined under sub-clause (ii) of section 2(1)(ze) of the HVAT Act which includes "the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract." The term "works contract" has been defined under section 2(1)(zt) which "includes any agreement for carrying out for cash, deferred payment or other valuable consideration, the assembling, construction, building, altering, manufacturing, processing, fabrication, installation, fitting out, improvement, repair or commissioning of any movable or immovable property." "Goods" have been defined under section 2(1)(r) of the Act as under:

> *"goods" means every kind of movable property, tangible or intangible, other than newspapers, actionable claims, money, stocks and shares or securities but includes growing crops, grass, trees and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale."*

62. Thus, the provisions of Haryana Value Added Tax Act, 2003 allows charging of Value Added Tax (VAT) only on the goods transferred/utilized in the execution of a works contract. Accordingly, VAT is not chargeable on the labour, land component of the unit as well as other items which are not covered under the definition of "Goods".

63. Further, it is pertinent to point that there is no standard formula as to what percentage of VAT is to be levied on the consideration to be paid by

the prospective buyer. In order to ascertain the tax liability on under-construction property; firstly, the quantification of goods involved in the under-construction property need to be calculated as per the mechanism provided by the State of Haryana vide **notification No. 19/ST-1/H.A.6/2003/S.60/2015 dated 23.07.2015**, thereafter, taxed the taxable turnover according to the rate of tax on various goods such as steel, cement, concrete, wood etc. incorporated, utilized and transferred in the execution of the works contract. The Government of Haryana vide **notification No. 19/ST-1/H.A.6/2003/S.59A/2016 dated 12.09.2016** also provided for an amnesty scheme namely, the Haryana Alternative Tax Compliance Scheme for Contractors, 2016, for the recovery of tax, interest, penalty or other dues payable under the said Act, for the period **up to 31.03.2014**. Therein, an option was provided to the builder/ developer to discharge their Value Added Tax obligation at a flat rate of 1.05% (1% VAT +5% Surcharge on VAT) on the entire aggregate amount received or receivable for the business carried out during the year for the period prior to 31.03.2014; whether assessed or not assessed.

64. It is further noted that the majority of the builders opted for the scheme and discharged their liabilities including the respondent-promoter as per the list available on the website of the Excise and Taxation Department, Haryana. Thus, the VAT liability stands discharged by the developers including the respondent-promoter by paying lump sum tax @ 1.05% up to the period 31-03-2014.

65. That the Govt. of Haryana, Excise and Taxation Department vide **notification no. S.O.89/H.A.6/2003/S.60/2014 dated 12.08.2014** provided a lump-sum scheme in respect of builders/developers which was further amended vide another notification **no. 23/H.A.6/2003/S.60/2015 dated 24.09.2015** according to which the builder/developer can opt for this scheme **w.e.f. 01.04.2014**. Under the above scheme, a developer had an option to pay lump sum tax in lieu of tax payable by him under the Act, by way of lump sum tax calculated at the compounded rate of 1% of entire aggregate amount specified in the agreement or value specified for the purpose of stamp duty, whichever is higher, in respect of the said agreement. The builder/developer opting for this scheme here-in-after shall be referred to as the 'Composition Developer'. **This scheme remained in force till 30.06.2017**. The purpose of the lump sum scheme was to mitigate the hardship being caused in determining the tax liability of the builders/ developers. Again, most of the builders opted/availed the benefit of the scheme. The list of the builders who opted the scheme is also available on the website of Excise and Taxation Department, Haryana. **Thus, the VAT liability for developer/builder opted for this scheme for the period 01.04.2014 to 30.06.2017 comes to 1.05%.**

66. Further, in case any builder/ developer had not opted for any of the above two schemes then the VAT liability comes to approximately 4-5 percent (maximum). It is noteworthy that the amnesty scheme was available up

to 31.03.2014, however the same was silent on the issue of charging VAT @ 1.05% from the buyers/ prospective buyers whereas in the lump-sum/ composition scheme under rule 49(a) of the HVAT Rules, 2003, it was specifically mentioned that incidence of cost has to be borne by the promoter/ builder/developer only. Thus, the builders/developers who opted for the lump-sum scheme, were not eligible to charge any VAT from the buyers/prospective buyers during the period 01-04-2014 to 30-06-2017. In other words, the developer/builder has to discharge the VAT liability out of their own pocket.

67. Therefore, the promoter is entitled to charge VAT from the allottee for the period up to 31.03.2014 @ 1.05% (one percent VAT + 5 percent surcharge on VAT). However, the promoter cannot charge any VAT from the allottees/prospective buyers for the period 01.04.2014 to 30.06.2017 as the same was to be borne by the promoter-developer only. The respondent-promoter is bound to adjust the said amount, if charged from the complainant with the dues payable by him or refund the amount if no dues are payable by him.

G.IV Return of GST amount

68. 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.

69. 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) ....."*

70. 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.

71. 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 07.12.2020. 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 his 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.

72. 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 reason: (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."*

73. 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 Arohi 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."*

74. Therefore, the delay in delivery of possession is the default on the part of the respondent/promoter and the possession was offered on 07.12.2020 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

75. The complainant pleaded that as per buyer's agreement dated 25.03.2010, 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 07.12.2020 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. 70,640/- which was increased w.e.f. 24.12.2020. 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.

76. 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. With effect from 24.12.2020, the Revenue Estate of Maidawas stands included in the Municipal Limits and the complainant is liable to pay stamp duty as per the applicable rate prevailing on the date of registration of the conveyance deed. The letter of offer of possession had been issued to the complainant on 07.12.2020. However, the complainant never came forward for registration of conveyance deed. Therefore, the respondent cannot be held liable for the defaults committed by the complainant.

77. It is observed that clause 5 of the buyer's agreement dated 25.03.2010 provides for execution of sale deed in favor of an allotee 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 Housinh 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)*

78. 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

79. 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 the date of entering into the shoes of original allottee i.e. nomination letter dated 17.07.2014 till 07.02.2021 i.e. expiry of 2 months from the date of offer of possession (07.12.2020). 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. 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.

iii. The promoter is entitled to charge VAT from the allottee for the period up to 31.03.2014 @ 1.05% (one percent VAT + 5 percent surcharge on VAT). However, the promoter cannot charge any VAT from the allottees/prospective buyers for the period 01.04.2014 to 30.06.2017 as the same was to be borne by the promoter-developer only. The respondent-promoter is bound to adjust the said amount, if charged from the complainant with the dues payable by him or refund the amount if no dues are payable by him.

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.

80. Complaint stands disposed of.

81. 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.