

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

Complaint no. : 4326 of 2020
First date of hearing : 14.01.2021
Date of decision : 22.07.2021

1. Sita Nair
2. Narayanan Bhadran Nair
Both RR/o: H. No. 61, Block 20, Lodhi Colony, New
Delhi -110003.

Complainants

M/s Emaar MGF Land Ltd.
Address: 306-308, 3rd floor, Square One,
C2, District Centre, Saket,
New Delhi -110017.

Respondent

CORAM:

Dr. K.K. Khandelwal
Shri Vijay Kumar Goyal

**Chairman
Member**

APPEARANCE:

Shri Jagdeep Kumar
Shri J.K. Dang

Advocate for the complainants
Advocate for the respondent

ORDER

1. The present complaint dated 11.12.2020 has been filed by the complainants/allottees in Form CRA under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all

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

A. Project and unit related details

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

S.No.	Heads	Information
1.	Project name and location	Gurgaon Greens, Sector 102, Gurugram.
2.	Project area	13.531 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no. and validity status	75 of 2012 dated 31.07.2012 Valid/renewed up to 30.07.2020
5.	Name of licensee	Kamdhenu Projects Pvt. Ltd. and another C/o Emaar MGF Land Ltd.
6.	HRERA registered/ not registered	Registered vide no. 36(a) of 2017 dated 05.12.2017 for 95829.92 sq. mtrs.
	HRERA registration valid up to	31.12.2018
7.	HRERA extension of registration vide	01 of 2019 dated 02.08.2019
	Extension valid up to	31.12.2019
8.	Occupation certificate granted on	16.07.2019 [Page 134 of reply]
9.	Provisional allotment letter dated	05.01.2017 [Page 39 of complaint]
10.	Unit no.	GGN-27-0601, 6 th floor, tower 27 [Page 59 of complaint]
11.	Unit measuring (super area)	1650 sq. ft.

12.	Date of execution of buyer's agreement	11.07.2018 [Page 45 of complaint]
13.	Payment plan	Right size right price payment plan [Page 96 of complaint]
14.	Total consideration as per statement of account dated 25.06.2021 at page 128 of the reply	Rs.1,06,25,440/-
15.	Total amount paid by the complainants as per statement of account dated 25.06.2021 at page 128 of reply	Rs.1,06,27,072/-
16.	Due date of delivery of possession as per clause 7(a) of the said agreement i.e. the company shall offer the possession of the unit to the allottee on or before 31.12.2018. [Page 67 of complaint]	31.12.2018
17.	Date of offer of possession to the complainants	19.07.2019 [Page 121 of complaint]
18.	Delay in handing over possession till 19.09.2019 i.e. date of offer of possession (19.07.2019) + 2 months	6 months 19 days
19.	Unit handover letter	23.09.2019 [Page 146 of reply]
20.	Conveyance deed executed on	25.11.2019 [Page 147 of reply]

B. Facts of the complaint

3. The complainants have made following submissions in the complaint:
 - i. That somewhere in the mid of 2017, the respondent through its representatives approached the complainants with an offer to invest and buy a flat in the proposed project of respondent. On 21.12.2017,

the complainants had a meeting with respondent where the respondent explained the project details and highlighted the amenities of the project like Joggers Park, Joggers Track, rose garden, 2 swimming pool, amphitheater and many more. Relying on these details, the complainants enquired about the availability of flat on 6th floor in tower 27 which was a unit consisting area of 1650 sq. ft. It was represented to the complainants that the respondent has already processed the file for all the necessary sanctions and approvals from the appropriate and concerned authorities for the development and completion of said project on time with the promised quality and specification. The respondent had also shown the brochures and advertisement material of the said project to them and assured that the allotment letter and builder buyer agreement for the said project would be issued to them within one week of booking. The complainants, relying upon those assurances and believing them to be true, booked a residential flat bearing no. 0601 on 6th floor in tower - 27 in the said project measuring approximately super area of 1650 sq. ft. Accordingly, they paid Rs. 9,50,000/- as booking amount on 21.12.2017.

- ii. That on 05.01.2018, the respondent issued a provisional allotment to complainant. Thereafter, on 11.07.2018, the builder buyer agreement was executed on similar terms narrated by respondent in provisional allotment letter. As per the clause 7(a) of the said buyer's

agreement dated 11.07.2018, the respondent had agreed and promised to complete the construction of the said flat and deliver its possession on or before 31.12.2018. However, the respondent has breached the terms of said buyer's agreement and failed to fulfill its obligations and has not delivered possession of said flat within the agreed time frame of the buyer's agreement. The proposed possession date as per buyer's agreement was due on 31.12.2018.

- iii. That from the date of booking 21.12.2017 and till 06.09.2019, the respondent had raised various demands for payment of installments towards sale consideration of the said flat and the complainants had duly paid and satisfied all those demands without any default or delay on their part and had also otherwise fulfilled their part of obligations as agreed in the said buyer's agreement. The complainants were and had always been ready and willing to fulfill their part of agreement, if any pending.
- iv. That as per the statement dated 22.09.2020, issued by the respondent, the complainants have already paid Rs.1,06,27,72/- towards total sale consideration as demanded by the respondent from time to time and now nothing is pending to be paid on the part of complainants.
- v. That the possession was offered by respondent through letter "Intimation of Possession" dated 19.07.2019 which was not a valid offer of possession because respondent had offered the possession

with stringent condition to pay certain amounts which were never part of agreement. At the time of offer of possession, builder did not adjust the penalty for delay possession. Respondent demanded Rs.1,44,540/- towards two-year advance maintenance charges and other charges of Rs.1,22,662/- from complainants which were never agreed under the buyer's agreement. The respondent demanded Rs.348,880/- towards e-stamp duty and Rs.45,000/- towards registration charges of above said unit in addition to final demand raised by respondent along with offer of possession. Respondent scheduled physical inspection and gave physical handover of aforesaid property on 23.09.2019 after receiving all payments on 06.09.2019 from complainants.

- vi. That after taking possession of flat on 23.09.2019, the complainants also identified some major structural changes which were done by respondent in project in comparison to features of project narrated to them on 21.12.2012 at the office of respondent. The area of the central park was told 8 acres but in reality, it is very small as compared to 8 acres; respondent-built car parking underneath 'Central Park' and joggers park does not exist whereas the respondent had charged huge amount of PLC for that.
- vii. That the respondent has acted in a very deficient, unfair, wrongful, fraudulent manner by not delivering the said flat within the agreed timelines as agreed in the buyer's agreement and otherwise. The

cause of action accrued in the favour of the complainants and against the respondent on 21.12.2017 when the said flat was booked by the complainants, and it further arose when respondent failed/neglected to deliver the said flat on proposed delivery date. The cause of action is continuing and is still subsisting on day-to-day basis.

C. Relief sought by the complainants

4. The complainants have filed the present compliant for seeking following reliefs (as amended by the complainants vide application dated 02.07.2021):
 - i. Direct the respondent to pay interest at the rate of 18% on account of delay in offering possession on amount paid by the complainants from the date of payment till the date of delivery of possession.
 - ii. Any other relief/order or direction which this authority deems fit and proper considering the facts and circumstances of the present complaint.
5. On the date of hearing, the authority explained to the respondent/promoter about the contravention as alleged to have been committed in relation to section 11(4)(a) of the Act and to plead guilty or not to plead guilty.

D. Reply by the respondent

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

- i. That the complainants have filed the present complaint seeking interest and compensation for alleged delay in delivering possession of the apartment booked by the complainants. 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 and not by this hon'ble authority. The present complaint is liable to be dismissed on this ground alone.
- ii. That the 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 11.07.2018.
- iii. That the complainants were provisionally allotted apartment no. GGN-27-0601 vide provisional allotment letter dated 05.01.2017. The complainants had opted for construction linked payment plan. Thereafter, the buyer's agreement was executed between the complainants and the respondent on 11.07.2018.
- iv. That the complainants had opted for a payment plan in which payment was required to be made in three instalments. The first instalment was payable upon booking, the second instalment within 45 days from the issuance of the allotment letter and buyer's agreement and the final instalment upon intimation of possession or 25th March 2018, whichever was later. Although the complainants had agreed and undertaken to make timely payments in accordance

with the payment schedule, but the complainants were irregular in payment of instalments. The respondent issued notices for payment and reminders and the statement of account reflects the payments made by the complainants as well as the delayed payment interest as on 25.06.2021.

- v. That the respondent registered the project under the provisions of the Act. The project had been initially registered till 31.12.2018. Subsequently, the registration of the project was extended uptill 31.12.2019. In the meanwhile, the respondent completed construction of the tower in which the apartment in question is situated and applied for the occupation certificate in respect thereon on 11.02.2019. The occupation certificate was issued by the competent authority on 16.07.2019.
- vi. That upon receipt of the occupation certificate, the respondent offered possession of the apartment in question to the complainants vide letter dated 19.07.2019. The complainants were called upon to remit balance amount as per the attached statement and also to complete the necessary formalities and documentation so as to enable the respondent to hand over possession of the apartment to the complainants. However, instead of clearing their outstanding dues and taking possession of the apartment, the complainants delayed the matter on false and frivolous pretexts and the respondent was constrained to issue a reminder for possession

dated 23.08.2019. Eventually, the complainants took possession of the apartment in question on 23.09.2019. Thereafter, conveyance deed has also been registered in favour of the complainants on 25.11.2019.

vii. That at the time of taking possession of the apartment, the complainants have certified themselves to be fully satisfied with regard to the measurements, location, direction, developments et cetera of the unit and also admitted and acknowledged that the complainants do not have any claim of any nature whatsoever against the respondent and that upon acceptance of possession, the liabilities and obligations of the respondent as enumerated in the allotment letter/buyer's agreement, stand fully satisfied. Thus, the complainants are estopped from filing the present complaint. The complaint is not maintainable after execution and registration of the conveyance deed in favour of the complainants. The institution of the present complaint is nothing but an afterthought.

viii. That the contractual relationship between the complainants and the respondent is governed by the terms and conditions of the buyer's agreement dated 11.07.2018. Clause 7 of the buyer's agreement provides that subject to force majeure conditions and delay caused on account of reasons beyond the control of the respondent, and subject to the allottee not being in default of any of the terms and conditions of the same, the respondent expects to deliver possession



of the apartment within a period of 60 days from the date of issuance of the occupation certificate by the competent authority. The occupation certificate was issued by the competent authority on 16.07.2019 and the offer of possession was made three days later, i.e. on 19.07.2019. Thus, there is no delay in so far as the respondent is concerned.

- ix. That respondent had completed construction of the apartment/tower by February 2019 and had applied for issuance of the occupation certificate on 11.02.2019. The occupation certificate was issued by the competent authority on 16.07.2019. It is respectfully submitted that after submission of the application for issuance of the occupation certificate, the respondent cannot be held liable in any manner for the time taken by the competent authority to process the application and issue the occupation certificate. Thus, the said period taken by the competent authority in issuing the occupation certificate as well as time taken by Government/statutory authorities in according approvals, permissions etc, necessarily.
- x. That denied that the respondent is not entitled to demand maintenance charges from the complainants. On the contrary, in accordance with clause 19 of the buyer's agreement, the complainants are bound to pay maintenance charges, including advance maintenance charges for a period of one year or as may be

decided by the respondent/the maintenance agency at its discretion. That the complainants are liable to pay all taxes, levies, fees that are applicable upon the apartment booked by the complainants as per clause 3 of the buyer's agreement and stamp duty and registration charges are also payable by the complainants in accordance with clause 7(a) of the buyer's agreement. That insofar as PLC is concerned, the same is not a Government levy but a premium payable upon apartments which are preferentially located. It is reiterated at the cost of repetition that the respondent has duly constructed the project in accordance with the plans duly sanctioned and approved by the competent authority. It is submitted that had there been any irregularity on the part of the respondent, the competent authority would not have issued the occupation certificate in favour of the respondent. All the payments demanded by the respondent are strictly in accordance with the buyer's agreement. Thus, it is most respectfully submitted that the present complaint deserves to be dismissed at the very threshold.

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

E. Jurisdiction of the authority

8. The preliminary objections raised by the respondent regarding jurisdiction of the authority to entertain the present complaint stands

rejected. The authority observed that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I Territorial jurisdiction

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

E.II Subject-matter jurisdiction

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

F. Findings on the objections raised by the respondent

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

11. 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 11.02.2019 and thereafter vide memo no. ZP-835-AD(RA)/2018/16816 dated 16.07.2019, the occupation certificate has been granted by the competent authority under the prevailing law. The authority cannot be a silent spectator to the deficiencies in the application submitted by the promoter for issuance of occupancy certificate. It is evident from the occupation certificate dated 16.07.2019 that an incomplete application for grant of OC was applied on 11.02.2019 as fire NOC from the competent authority was granted only on 30.05.2019 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 19.06.2019. The District Town Planner, Gurugram and Senior Town Planner, Gurugram has submitted requisite report about this project on 03.06.2019 and 10.06.2019 respectively. As such, the application submitted on 11.02.2019 was incomplete and an incomplete application is no application in the eyes of law.

12. 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 19.06.2019 and consequently the concerned authority has granted occupation certificate on 16.07.2019. Therefore, in view of the deficiency in the said application dated 11.02.2019 and aforesaid reasons, no delay in granting occupation certificate can be attributed to the concerned statutory authority.

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

13. The respondent is contending that at the time of taking possession of the apartment vide unit hand over letter dated 23.09.2019, the complainants had certified themselves to be fully satisfied with regard to the measurements, location, direction, developments et cetera of the unit and also admitted and acknowledge that they do not have any claim of any nature whatsoever against the respondent and that upon acceptance of possession, the liabilities and obligations of the respondent as enumerated in the allotment letter/buyer's agreement, stand fully satisfied. The relevant para of the unit handover letter relied upon reads as under:

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

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

14. At times, the allottee is asked to give the indemnity-cum-undertaking before taking possession. The complainants have waited for long for their cherished dream home and now when it is ready for possession, they either have to sign the indemnity-cum-undertaking and take possession or to keep struggling with the promoter if indemnity-cum-undertaking is not signed by them. Such an undertaking/ indemnity bond given by a person thereby giving up their valuable rights must be shown to have been executed in a free atmosphere and should not give rise to any suspicion. If a slightest of doubt arises in the mind of the adjudicator that such an agreement was not executed in an atmosphere free of doubts and suspicions, the same would be deemed to be against public policy and would also amount to unfair trade practices. No reliance can be placed on any such indemnity-cum-undertaking and the same is liable to be discarded and ignored in its totality. Therefore, this authority does not place reliance on such indemnity-cum-undertaking. To fortify this view, the authority place reliance on the NCDRC order dated 03.01.2020 in case titled as **Capital Greens Flat Buyer Association and Ors. Vs. DLF Universal Ltd., Consumer case no. 351 of 2015**, wherein it was held that the execution of indemnity-cum-undertaking would defeat the provisions of sections 23 and 28 of the Indian Contract Act, 1872 and therefore would be against public policy, besides being an unfair trade practice. The relevant portion of the said judgment is reproduced herein below.

"Indemnity-cum-undertaking

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

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

15. 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.
16. It is noteworthy that section 18 of the Act stipulates for the statutory right of the allottee against the obligation of the promoter to deliver the possession within stipulated timeframe. Therefore, the liability of the promoter continues even after the execution of indemnity-cum-undertaking at the time of possession. Further, the reliance placed by the respondent counsel on the language of the handover letter that the allottees had waived off their right by signing the said unit handover letter is superficial. In this context, it is appropriate to refer case titled as

Mr. Beatty Tony Vs. Prestige Estate Projects Pvt, Ltd. (Revision petition no.3135 of 2014 dated 18.11.2014), wherein the Hon'ble NCDRC while rejecting the arguments of the promoter that the possession has since been accepted without protest vide letter dated 23.12.2011 and builder stands discharged of its liabilities under agreement, the allottee cannot be allowed to claim interest at a later date on account of delay in handing over of the possession of the apartment to him, held as under:

"The learned counsel for the opposite parties submits that the complainant accepted possession of the apartment on 23/24.12.2011 without any protest and therefore cannot be permitted to claim interest at a later date on account of the alleged delay in handing over the possession of the apartment to him. We, however, find no merit in the contention. A perusal of the letter dated 23.12.2011, issued by the opposite parties to the complainant would show that the opposite parties unilaterally stated in the said letter that they had discharged all their obligations under the agreement. Even if we assume on the basis of the said printed statement that having accepted possession, the complainant cannot claim that the opposite parties had not discharged all their obligations under the agreement, the said discharge in our opinion would not extend to payment of interest for the delay period, though it would cover handing over of possession of the apartment in terms of the agreement between the parties. In fact, the case of the complainant, as articulated by his counsel is that the complainant had no option but to accept the possession on the terms contained in the letter dated 23.12.2011, since any protest by him or refusal to accept possession would have further delayed the receiving of the possession despite payment having been already made to the opposite parties except to the extent of Rs. 8,86,736/-. Therefore, in our view the aforesaid letter dated 23.12.2011 does not preclude the complainant from exercising his right to claim compensation for the deficiency on the part of the opposite parties in rendering services to him by delaying possession of the apartment, without any justification condonable under the agreement between the parties."

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

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

18. Therefore, the authority is of the view that the aforesaid unit handover letter dated 23.09.2019 does not preclude the complainants from exercising their right to claim delay possession charges as per the provisions of the Act.

F.III Whether the execution of the conveyance deed extinguishes the right of the allottee to claim delay possession charges?

19. The respondent submitted that the complainants had executed a conveyance deed dated 25.11.2019 and therefore, the transaction between the complainants and the respondent has been concluded and no right or liability can be asserted by respondent or the complainants against the other. Therefore, the complainants are estopped from claiming any interest in the facts and circumstances of the case. The present complaint is nothing but a gross misuse of process of law.

20. It is important to look at the definition of the term 'deed' itself in order to understand the extent of the relationship between an allottee and promoter. A deed is a written document or an instrument that is sealed,



signed and delivered by all the parties to the contract (buyer and seller). It is a contractual document that includes legally valid terms and is enforceable in a court of law. It is mandatory that a deed should be in writing, and both the parties involved must sign the document. Thus, a conveyance deed is essentially one wherein the seller transfers all rights to legally own, keep and enjoy a particular asset, immovable or movable. In this case, the asset under consideration is immovable property. On signing a conveyance deed, the original owner transfers all legal rights over the property in question to the buyer, against a valid consideration (usually monetary). Therefore, a 'conveyance deed' or 'sale deed' implies that the seller signs a document stating that all authority and ownership of the property in question has been transferred to the buyer.

21. From the above, it is clear that on execution of a sale/ conveyance deed, only the title and interests in the said immovable property (herein the allotted unit) is transferred. However, the conveyance deed does not mark an end to the liabilities of a promoter since various sections of the Act provide for continuing liability and obligations of a promoter who may not under the garb of such contentions be able to avoid its responsibility. The relevant sections are reproduced hereunder:

"11. Functions and duties of promoter

- (1) XXX
- (2) XXX
- (3) XXX
- (4) *The promoter shall—*

- (a) *be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be.*

Provided that the responsibility of the promoter, with respect to the structural defect or any other defect for such period as is referred to in sub-section (3) of section 14, shall continue even after the conveyance deed of all the apartments, plots or buildings, as the case may be, to the allottees are executed.

- (b) XXX
- (c) XXX
- (d) *be responsible for providing and maintaining the essential services, on reasonable charges, till the taking over of the maintenance of the project by the association of the allottees;*

(emphasis supplied)

"14. Adherence to sanctioned plans and project specifications by the promoter-

- (1) XXX
- (2) XXX

- (3) *In case any structural defect or any other defect in workmanship, quality or provision of services or any other obligations of the promoter as per the agreement for sale relating to such development is brought to the notice of the promoter within a period of five years by the allottee from the date of handing over possession, it shall be the duty of the promoter to rectify such defects without further charge, within thirty days, and in the event of promoter's failure to rectify such defects within such time, the aggrieved allottees shall be entitled to receive appropriate compensation in the manner as provided under this Act......"*

(emphasis supplied)

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

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

23. From above, it can be said that taking over the possession and thereafter execution of the conveyance deed can best be termed as respondent having discharged its liabilities as per the buyer's agreement and upon taking possession, and/or executing conveyance deed, the complainants never gave up their statutory right to seek delayed possession charges as per the provisions of the said Act. Also, the same view has been upheld by the Hon'ble Supreme Court in case titled as **Wg. Cdr. Arifur Rahman Khan and Aleya Sultana and Ors. Vs. DLF Southern Homes Pvt. Ltd. (now Known as BEGUR OMR Homes Pvt. Ltd.) and Ors. (Civil appeal no. 6239 of 2019) dated 24.08.2020**, the relevant paras are reproduced herein below:

- "34. The developer has not disputed these communications. Though these are four communications issued by the developer, the appellants submitted that they are not isolated aberrations but fit into a pattern.

The developer does not state that it was willing to offer the flat purchasers possession of their flats and the right to execute conveyance of the flats while reserving their claim for compensation for delay. On the contrary, the tenor of the communications indicates that while executing the Deeds of Conveyance, the flat buyers were informed that no form of protest or reservation would be acceptable. The flat buyers were essentially presented with an unfair choice of either retaining their right to pursue their claims (in which event they would not get possession or title in the meantime) or to forsake the claims in order to perfect their title to the flats for which they had paid valuable consideration. In this backdrop, the simple question which we need to address is whether a flat buyer who seeks to espouse a claim against the developer for delayed possession can as a consequence of doing so be compelled to defer the right to obtain a conveyance to perfect their title. It would, in our view, be manifestly unreasonable to expect that in order to pursue a claim for compensation for delayed handing over of possession, the purchaser must indefinitely defer obtaining a conveyance of the premises purchased or, if they seek to obtain a Deed of Conveyance to forsake the right to claim compensation. This basically is a position which the NCDRC has espoused. We cannot countenance that view. सत्यमेव जयते

35. *The flat purchasers invested hard earned money. It is only reasonable to presume that the next logical step is for the purchaser to perfect the title to the premises which have been allotted under the terms of the ABA. But the submission of the developer is that the purchaser forsakes the remedy before the consumer forum by seeking a Deed of Conveyance. To accept such a construction would lead to an absurd consequence of requiring the purchaser either to abandon a just claim as a condition for obtaining the conveyance or to indefinitely delay the execution of the Deed of Conveyance pending protracted consumer litigation."*
24. It is observed that all the agreements/ documents signed by the allottee reveals stark incongruities between the remedies available to both the parties. In most of the cases, these documents and contracts are ex-facie one sided, unfair and unreasonable whether the plea has been taken by the allottee while filing its complaint that the documents were signed under duress or not. The right of the allottee to claim delayed possession charges shall not be abrogated simply for the said reason.

25. The allottees have invested their hard-earned money and there is no doubt that the promoter has been enjoying benefits of and the next step is to get their title perfected by executing a conveyance deed which is the statutory right of the allottee. Also, the obligation of the developer - promoter does not end with the execution of a conveyance deed. The essence and purpose of the Act was to curb the menace created by the developer/promoter and safeguard the interests of the allottees by protecting them from being exploited by the dominant position of the developer which he thrusts on the innocent allottees. Therefore, in furtherance to the Hon'ble Apex Court judgement and the law laid down in the **Wg. Cdr. Arifur Rahman (supra)**, this authority holds that even after execution of the conveyance deed, the complainants cannot be precluded from their right to seek delay possession charges from the respondent-promoter.

G. Findings on the relief sought by the complainants

G.I Delay possession charges

26. **Relief sought by the complainants:** Direct the respondent to pay interest at the rate of 18% on account of delay in offering possession on amount paid by the complainants from the date of payment till the date of delivery of possession.
27. In the present complaint, the complainants intend to continue with the project and are seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under.

"Section 18: - Return of amount and compensation

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

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

28. Clause 7(a) of the buyer's agreement provides for time period for handing over of possession and is reproduced below:

"7. POSSESSION AND SALE DEED

(a) *Within 60 (sixty) days from the date of Issuance of Occupation Certificate by the Concerned Authorities, the Company shall offer the possession of the Unit to the Allottee. Subject to Force Majeure and fulfilment by the Allottee of all the terms and conditions of this Agreement including but limited to timely payment by the Allottee of the Total Price payable in accordance with Payment Plan, Annexure III, along with stamp duty, registration and incidental charges and other charges in connection thereto due and payable by the Allottee and also subject to the Allottee having complied with all formalities or documentation as prescribed by the Company, the Company shall offer the possession of the Unit to the Allottee on or before 31-12-2018."*

29. **Due date of handing over possession:** As per clause 7(a) of the buyer's agreement, the respondent was under obligation to offer the possession of the unit to the allottee on or before 31.12.2018.

30. In the light of the above clause, the promoter was under obligation to handover possession of the subject unit by 31.12.2018 as mentioned in the registration certificate and buyer's agreement. The respondent was unable to handover the possession as there was a delay in construction of the said project. Since, the construction of the said project was not complete within the time frame as mentioned in the registration certificate consequently, the respondent applied for extension of

registration. Therefore, it can be concluded that the due date of handing over possession is 31.12.2018 as mentioned in the registration certificate and clause 7(a) of the buyer's agreement. In other words, the respondent was liable to handover possession by 31.12.2018 and the respondent has failed to handover possession by the due date.

31. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges at the rate of 18%. However, proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]

(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.

Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.

32. The legislature in its wisdom in the subordinate legislation under the rule 15 of the rules has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases

33. 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., 22.07.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.
34. **Rate of interest to be paid by complainants for delay in making payments:** The respondent contended that the complainants have defaulted in making timely payments of the instalments as per the payment plan, therefore, the complainants are liable to pay interest on the outstanding payments.
35. The authority observed that the definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:
- "(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.*
- Explanation. —For the purpose of this clause—*
- (i) *the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*
- (ii) *the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"*
36. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter

which is the same as is being granted to the complainants in case of delayed possession charges.

37. On consideration of the documents available on record and submissions made by the parties regarding contravention as per provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 7(a) of the buyer's agreement executed between the parties on 11.07.2018, possession of the said unit was to be delivered by 31.12.2018. Occupation certificate has been received by the respondent on 16.07.2019 and the possession of the subject unit was offered to the complainants on 19.07.2019. Copies of the same have been placed on record. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the complainants as per the terms and conditions of the buyer's agreement dated 11.07.2018 executed between the parties. It is the failure on part of the promoter to fulfil its obligations and responsibilities as per the buyer's agreement dated 11.07.2018 to hand over the possession within the stipulated period.

38. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 16.07.2019. However, the

respondent offered the possession of the unit in question to the complainants only on 19.07.2019, so it can be said that the complainants came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, they should be given 2 months' time from the date of offer of possession. These 2 months' of reasonable time is being given to the complainants keeping in mind that even after intimation of possession practically they have to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e. 31.12.2018 till the expiry of 2 months from the date of offer of possession (19.07.2019) which comes out to be 19.09.2019.

39. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainants are entitled to delay possession charges at prescribed rate of the interest @ 9.30 % p.a. w.e.f. 31.12.2018 till 19.09.2019 as per provisions of section 18(1) of the Act read with rule 15 of the Rules.

H. Directions of the authority


40. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations


cast upon the promoter as per the function entrusted to the authority under section 34(f):

- i. The respondent is directed to pay the interest at the prescribed rate i.e. 9.30 % per annum for every month of delay on the amount paid by the complainants from due date of possession i.e. 31.12.2018 till 19.09.2019 i.e. expiry of 2 months from the date of offer of possession (19.07.2019). The arrears of interest accrued so far shall be paid to the complainants within 90 days from the date of this order as per rule 16(2) of the rules.
- ii. The respondent shall not charge anything from the complainants which is not the part of the buyer's agreement. The respondent is also not entitled to claim holding charges from the complainants/allottees at any point of time even after being part of the builder buyer's agreement as per law settled by hon'ble Supreme Court in civil appeal nos. 3864-3899/2020 decided on 14.12.2020.

41. Complaint stands disposed of.

42. File be consigned to registry.


(Vijay Kumar Goyal)
Member


(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 22.07.2021

Judgement uploaded on 26.10.2021.