# BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

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| **Complaint no.** | **:** | **2255 of 2021** |
| **First date of hearing** | **:** | **12.08.2021** |
| **Date of decision** | **:** | **12.08.2021** |

1. Atul Yadav
2. Mohini Yadav

Both RR/o: H.no. 1672A, Housing Board Colony, Sector 10A, Gurugram, Haryana. **Complainants**

Versus

M/s Emaar MGF Land Ltd.
Address: Emaar MFG Business Park, M.G. Road, Sector 28, Sikandarpur Chowk, Gurugram, Haryana. **Respondent**

**CORAM:**

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

**APPEARANCE:**

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| Shri Varun Chugh | Advocate for the complainants |
| Shri J.K. Dang along with Shri Ishaan Dang | Advocates for the respondent |

## ORDER

1. The present complaint dated 18.05.2021 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.

2. Since, the buyer's agreement has been executed on 20.02.2010 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 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 | "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<br>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<br>[Page 155 of reply] |

| | | |
|---|---|---|
| 8. | Provisional allotment letter dated | 31.10.2009<br>[Page 40 of reply] |
| 9. | Unit no. | EEA-H-F09-04, 9th floor, building no. H<br>[Page 22 of complaint] |
| 10. | Unit measuring | 1395 sq. ft. |
| 11. | Date of execution of buyer's agreement | 20.02.2010<br>[Page 20 of complaint] |
| 12. | Payment plan | Construction linked payment plan<br>[Page 52 of complaint] |
| 13. | Total consideration as per statement of account dated 09.07.2021 [Page 116 of reply] | Rs. 57,63,040/- |
| 14. | Total amount paid by the complainants as per statement of account dated 09.07.2021 [Page 117 of reply] | Rs.59,11,064/- |
| 15. | Date of start of construction as per statement of account dated 09.07.2021 [Page 116 of reply] | 26.08.2010 |
| 16. | 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.<br>[Page 35 of complaint] | 26.08.2013<br>**[Note:** Grace period is not included**]** |
| 17. | **Date of offer of possession to the complainants** | **21.11.2020**<br>[Page 56 of complaint] |
| 18. | Delay in handing over possession till 21.01.2021 i.e. date of offer of possession (21.11.2020) + 2 months | 7 years 4 months 26 days |
| 19. | Unit handover letter dated | 19.04.2021<br>[Page 115 of reply] |

## B. Facts of the complaint

4. The complainants have made the following submissions in the complaint:

i. That the property in question i.e. EEA-H-F09-04 (ninth floor) admeasuring 1395 sq. ft., in the said project was booked by the complainants in the year 2009. The same was allotted in favour of the complainants vide provisional allotment letter dated 31.10.2009. The total cost of the apartment is Rs.57,63,040/- 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 20.02.2010, the complainants entered into a buyer's agreement with the respondent, by virtue of which the respondent allotted apartment no. EEA-H-F09-04, having super area of 1395 sq. ft. located on the ninth floor, along-with covered car parking space in the said project.

iii. That complainants have already paid the entire amount towards the cost of the apartment and nothing is due and payable by the complainants. Moreover, a sum of Rs.1,22,298/- is still lying in the credit balance of the complainants. The complainants were slapped with holding charges of Rs.2,00,238/- despite making the timely payments to the respondent in accordance with the offer of possession letter and as reflected in statement of account.

iv. That as per clause 11(a) of the buyer's agreement dated 20.02.2010, the respondent had categorically stated that the possession of the said apartment would be handed over to the complainants 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 but the respondent never intended to keep its promise and upon the complainant's enquiry regarding the project status via emails, the latter used to hoodwink the complainants by giving false deadlines to complete the project.

v. That the said buyer's agreement is totally one sided, which impose completely biased terms and conditions upon the complainants, thereby tilting the balance of power in favour of the respondent, which is further manifested from the fact that the delay in handing over the possession by the respondent would attract only a meagre penalty of Rs.5/- per sq. ft. on the super area of the apartment, on monthly basis, whereas the penalty for failure to take possession would attract holding charges of Rs.50/- per sq. ft. and 24% penal interest on the unpaid amount of instalment due to the respondent.

vi. That, the complainants 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

complainants to purchase the floor at extremely high prices. The respondent has compromised with levels of quality and is guilty of mis-selling. There are various deviations from the initial representations. The respondent marketed luxury high end apartment, but has compromised even with the basic features, designs and quality to save costs. The structure, which has been constructed on face of it is of extremely poor quality. The construction is totally unplanned, with sub-standard, low grade, defective and despicable construction quality.

vii. That the respondent has breached the fundamental term of the contract by inordinately delaying in delivery of the possession by 85 months. The complainants were made to make advance deposit on the basis of information contained in the brochure, which is false on the face of it as is evident from the construction done at site.

viii. That the complainants were additionally burdened to pay increased stamp duty charges @ 6% instead of the previously charged 4 % due to the subsequent revision in the stamp duty charges introduced by the Government, in view of the project falling within the municipal limits and in this manner, the complainants were constrained to pay a sum of Rs.98,420/- additionally towards the revised stamp duty charges. The said additional cost borne by the complainants is solely attributable to the respondent in light of the considerable delay in handing over of the apartment to the complainants.

ix. That due to the delay and lapses on the part of the respondent in handing over the possession of the property, the complainants have been additionally burdened to pay the HVAT (post February 2014) and GST of Rs.1,95,884/- on the cost of the property, which was introduced much lately and ought not to be paid by the complainants, had the possession of the property been offered in the February 2014 i.e. the due date of possession.

x. That the complainants vide their emails addressed to the respondent had asked to indemnify them, for the delay in handing over the possession of the apartment but the respondent company had indemnified the complainants as per the buyer's agreement and had only offered a meagre sum of Rs.5,22,609/- and that too after the deduction of several months period towards force majeure on account of Covid-19 pandemic, which is not applicable to the present case as the delay in handing over possession of the property is solely attributable to the respondent. That the pandemic situation has taken place much after the due date of possession as committed by the respondent in the buyer's agreement. In fact, the complainants vide their emails demanded compensation as per the Act, but the respondent had miserably failed to accede to their legitimate requests and has turned a deaf ear.

xi. That the complainants, 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 20.02.2010 and the possession was finally offered on 21.11.2020 which resulted in extreme kind of mental distress, pain and agony to the complainants. 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 complainants**

5. The complainants have filed the present compliant for seeking following relief:

   i. Direct the respondent to pay interest @ 18% p.a. towards delay in handing over the property in question as per the provisions of the Act and the rules.

   ii. Direct the respondent to waive/cancel wrongly levied holding charges of Rs.2,00,238/- upon the complainants.

   iii. Direct the respondent to return the HVAT (post February 2014) and GST amount of Rs.1,95,884/- charged from the complainants, as per provisions of the Act and the rules.

iv. Direct the respondent to pay a sum of Rs 98,420/- along with interest to the complainants towards the additional amount paid towards stamp duty, after revision in stamp duty charges.

v. Pass such other order or further order as this hon'ble authority may deem fit and proper in the facts and circumstances of the present case.

6. On the date of hearing, the authority explained to the respondent/promoter about the contravention as alleged to have been committed in relation to section 11(4)(a) of the Act and to plead guilty or not to plead guilty.

**D. Reply by the respondent**

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

i. That the complainants have filed the present complaint seeking inter-alia compensation and interest for alleged delay in delivering possession of the unit 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 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 20.02.2010.

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 complainants for seeking interest cannot be called in to aid in derogation and ignorance of the provisions of the buyer's agreement. The interest for the alleged delay demanded by the complainants is beyond the scope of the buyer's agreement. The complainants cannot demand any interest or compensation beyond the terms and conditions incorporated in the buyer's agreement.

iii. That the complainants vide application form applied to the respondent for provisional allotment of a unit in the project. The complainants, in pursuance of the aforesaid application form, were allotted an independent unit bearing no. EEA-H-F09-04 in the project vide provisional allotment letter dated 31.10.2009. Thereafter, the buyer's agreement was executed between the complainants and the respondent on 20.02.2010.

iv. That the complainants had opted for a construction linked payment plan and had agreed and undertaken to make payment in accordance therewith. However, the complainants 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 dated 09.07.2021 reflects the

payments made by the complainants and the accrued delayed payment interest thereon. The said project has been registered under the Act and the registration of the project is valid till 23.08.2022.

v. That there have been numerous defaults on the part of the complainants in making timely payment of sale consideration as per the payment plan. Accordingly, the complainants are 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 complainants 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.

vi. That the respondent has credited an amount of Rs.4,23,474/- as benefit on account of Early Payment Rebate (EPR) and Rs. 10,591/- as benefit on account of Anti-Profiting. Moreover, compensation amounting to Rs.5,22,609/- has been credited by the respondent in the accounts of the complainants and the same has been duly accepted by the complainants. Without prejudice to the rights of the respondent, delayed interest if any has to be calculated only on the amounts deposited by the allottees/complainants 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/complainants towards delayed possession charges or any taxes/statutory payments etc.

vii. That the timelines 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.

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 21.07.2020. The occupation certificate has been issued by the competent authority on 11.11.2020. Upon receipt of the occupation certificate, letter of offer of possession dated 21.11.2020 had been issued to the complainants by the respondent. Thereafter, indemnity cum undertaking dated 14.12.2020 has been executed by the complainants. Subsequently, the possession of the said unit had been handed over to the complainants on 19.04.2021. The complainants after satisfying themselves with regard to measurement, location, dimensions and development of the said unit had proceeded to execute unit handover letter dated 19.04.2021. It is submitted that the complainants had duly stated in the aforesaid letter that they had no claim of any nature whatsoever against the respondent with regard to the size, specification, dimension, area, location and legal status of the said unit.

x. That instead of getting the conveyance deed executed, the complainants have 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 handing over possession of the said unit 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 respondent denied that the complainants were additionally burdened to make payment of alleged increased stamp duty charges at the rate of 6% instead of 4%. 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 complainants. With effect from 24.12.2020, the Revenue Estate of Maidawas stands included in the Municipal Limits and the complainants are 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 complainants on 21.11.2020. However, the complainants never came forward for registration of conveyance deed. It is the complainants who have themselves delayed registration of the conveyance deed and have rendered themselves liable for the consequences. Therefore, the respondent cannot be held liable for the defaults committed by the complainants.

xii. 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 complainants and the Government as far as the aforesaid statutory charges are concerned.

xiii. That several allottees, including the complainants 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. Therefore, there is no default or lapse on the part of the respondent and there in no equity in favour of the complainants. It is evident from the entire sequence of events, that no illegality can be attributed to 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 refund 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)(l)(C) is now the new timeline as indicated by him for the completion of the project. Although, penal proceedings shall not be initiated against the builder for not meeting the committed due date of possession but now, if the promoter fails to complete the project in declared timeline, then he is liable for penal proceedings. The due date of possession as per the agreement remains unchanged and promoter is liable for the consequences and obligations arising out of failure in handing over possession by the due date as committed by him in the apartment buyer agreement and he is liable for the delayed possession charges as provided in proviso to section 18(1) of the Act. The same issue has been dealt by hon'ble

Bombay High Court in case titled as ***Neelkamal Realtors Suburban Pvt. Ltd. and anr. vs Union of India and ors***. and has observed as under:

> *"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter..."*

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

19. As far as contention of the respondent with respect to the exclusion of time taken by the competent authority in processing the application and issuance of occupation certificate is concerned, the authority observed that the respondent had applied for grant of occupation certificate on 21.07.2020 and thereafter vide memo no. ZP-441-Vol.II/AD(RA)/2020/20094 dated 11.11.2020, the occupation certificate has been granted by the competent authority under the prevailing law. The authority cannot be a silent spectator to the deficiency in the application submitted by the promoter for issuance of occupancy certificate. It is evident from the occupation certificate dated 11.11.2020 that an incomplete application for grant of OC was applied on 21.07.2020 as fire NOC from the competent authority was granted only on 25.09.2020 which is subsequent to the filing of application for occupation certificate. Also, the Chief Engineer-I, HSVP, Panchkula has submitted his requisite report in respect of the said project on 24.09.2020 &

22.09.2020. The District Town Planner, Gurugram and Senior Town Planner, Gurugram has submitted requisite report about this project on 21.09.2020 and 23.09.2020 respectively. As such, the application submitted on 21.07.2020 was incomplete and an incomplete application is no application in the eyes of law.

20. The application for issuance of occupancy certificate shall be moved in the prescribed forms and accompanied by the documents mentioned in sub-code 4.10.1 of the Haryana Building Code, 2017. As per sub-code 4.10.4 of the said Code, after receipt of application for grant of occupation certificate, the competent authority shall communicate in writing within 60 days, its decision for grant/ refusal of such permission for occupation of the building in Form BR-VII. In the present case, the respondent has completed its application for occupation certificate only on 25.09.2020 and consequently the concerned authority has granted occupation certificate on 11.11.2020. Therefore, in view of the deficiency in the said application dated 21.07.2020 and aforesaid reasons, no delay in granting occupation certificate can be attributed to the concerned statutory authority.

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

21. The respondent is contending that at the time of taking possession of the apartment vide unit hand over letter dated 19.04.2021, 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 does 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/s, hereby, certifies that he / she has/have taken over the peaceful and vacant physical possession of the aforesaid Unit after fully satisfying himself / herself with regard to its measurements, location, dimension and development etc. and hereafter the Allottee/s has/have no claim of any nature whatsoever against the Company with regard to the size, specification, dimension, area, location and legal status of the aforesaid Home.*
>
> *Upon acceptance of possession, the liabilities and obligations of the Company as enumerated in the allotment letter/Agreement executed in favour of the Allottee/s stand satisfied."*

22. At times, the allottees are asked to give the indemnity-cum-undertaking before taking possession. The allottees 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 his valuable rights must be shown to have been executed in a free atmosphere and should not give rise to any suspicion. If a slightest of doubt arises in the mind of the adjudicator that such an agreement was not executed in an atmosphere free of doubts and

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

> *"Indemnity-cum-undertaking*
>
> *30. The developer, while offering possession of the allotted flats insisted upon execution of the indemnity-cum-undertaking before it would give possession of the allotted flats to the concerned allottee.*
>
> *Clause 13 of the said indemnity-cum-undertaking required the allottee to confirm and acknowledge that by accepting the offer of possession, he would have no further demands/claims against the company of any nature, whatsoever. It is an admitted position that the execution of the undertaking in the format prescribed by the developer was a pre-requisite condition, for the delivery of the possession. The opposite party, in my opinion, could not have insisted upon clause 13 of the Indemnity-cum-undertaking. The obvious purpose behind such an undertaking was to deter the allottee from making any claim against the developer, including the claim on account of the delay in delivery of possession and the claim on account of any latent defect which the allottee may find in the apartment. The execution of such an undertaking would defeat the provisions of Section 23 and 28 of the Indian Contract Act, 1872 and therefore would be against public policy,*

*besides being an unfair trade practice. Any delay solely on account of the allottee not executing such an undertaking would be attributable to the developer and would entitle the allottee to compensation for the period the possession is delayed solely on account of his having not executed the said undertaking-cum-indemnity."*

23. The said judgment of NCDRC was also upheld by the Hon'ble Supreme Court vide its judgement dated 14.12.2020 passed in civil appeal nos. 3864-3889 of 2020 against the order of NCDRC.

24. It is noteworthy that section 18 of the Act stipulates for the statutory right of the allottee against the obligation of the promoter to deliver the possession within stipulated timeframe. Therefore, the liability of the promoter continues even after the execution of indemnity-cum-undertaking at the time of possession. Further, the reliance placed by the respondent counsel on the language of the handover letter that the complainants have 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."*

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

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

*of the unit has been taken by them in terms of printed hand over letter and the Sale Deed has also been got executed by them in their favour."*

26. Therefore, the authority is of the view that the aforesaid unit handover letter dated 19.04.2021 does not preclude the complainants from exercising their right to claim delay possession charges as per the provisions of the Act.

## G. Findings on the reliefs sought by the complainants

### G.I Delay possession charges

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

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

28. Clause 11(a) of the buyer's agreement provides for time period for handing over of possession and is reproduced below:

> **"11. POSSESSION**
>
> ***(a)*** **Time of handing over the Possession**
>
> *Subject to terms of this clause and subject to the Allottee(s) having complied with all the terms and conditions of this Buyer's Agreement, and not being in default under any of the provisions of this Buyer's Agreement and compliance with all provisions, formalities, documentation etc., as prescribed by the Company, the Company proposes to hand over the possession of the Unit within 36 months from the date of commencement of construction and development of the Unit. The Allottee(s) agrees and understands that the Company shall be entitled to a grace period of six months, for applying and*

*obtaining the completion certificate/occupation certificate in respect of the Unit and/or the Project."*

29. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement, and the complainants not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment time period for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

30. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within 36 (thirty-six) months from the date of commencement of construction and further provided in agreement that promoter shall be entitled to a grace period of 6 months for applying

and obtaining completion certificate/occupation certificate in respect of said unit. The date of start of construction is 26.08.2010 as per statement of account dated 09.07.2021. The period of 36 months expired on 26.08.2013. As a matter of fact, the promoter has not applied to the concerned authority for obtaining completion certificate/ occupation certificate within the grace period prescribed by the promoter in the buyer's agreement. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 6 months cannot be allowed to the promoter at this stage.

31. **Admissibility of delay possession charges at prescribed rate of interest:** The 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. Taking the case from another angle, the complainants-allottees were entitled to the delayed possession charges/interest only at the rate of Rs.5/- per sq. ft. per month as per clause 13(a) of the buyer's agreement for the period of such delay; whereas, as per clause 1.2(c) of the buyer's agreement, the promoter was entitled to interest @ 24% per annum at the time of every succeeding instalment for the delayed payments. The functions of the authority are to safeguard the interest of the aggrieved person, may be the allottee or the promoter. The rights of the parties are to be balanced and must be equitable. The promoter cannot be allowed to take undue advantage of his dominate position and to exploit the needs of the home buyers. This authority is duty bound to take into consideration the legislative intent i.e., to protect the interest of the consumers/allottees in the real estate sector. The clauses of the buyer's agreement entered into between the parties are one-sided, unfair and unreasonable with respect to the grant of interest for delayed possession. There are various other clauses in the buyer's agreement which give sweeping powers to the promoter to cancel the allotment and forfeit the amount paid. Thus, the terms and conditions of the buyer's agreement are ex-facie one-sided, unfair and unreasonable, and the same shall constitute the unfair trade practice on the part of the promoter. These

types of discriminatory terms and conditions of the buyer's agreement will not be final and binding.

34. Consequently, as per website of the State Bank of India i.e., https://sbi.co.in, the marginal cost of lending rate (in short, MCLR) as on date i.e., 12.08.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

35. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

> *"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.*
> *Explanation. —For the purpose of this clause—*
> *(i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*
> *(ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"*

36. Therefore, interest on the delay payments from the 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 11(a) of the buyer's agreement executed between the parties on 20.02.2010, 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 complainants were offered possession by the respondent on 21.11.2020. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the complainants as per the terms and conditions of the buyer's agreement dated 20.02.2010 executed between the parties.

38. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 11.11.2020. However, the respondent offered the possession of the unit in question to the complainants only on 21.11.2020. So, it can be said that the complainants came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the complainants should be given 2 months' time from the date of offer of

possession. These 2 months' of reasonable time is being given to the complainants keeping in mind that even after intimation of possession practically they have to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e. 26.08.2013 till the expiry of 2 months from the date of offer of possession (21.11.2020) which comes out to be 21.01.2021.

39. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainants are entitled to delay possession charges at prescribed rate of the interest @ 9.30 % p.a. w.e.f. 26.08.2013 till 21.01.2021 as per provisions of section 18(1) of the Act read with rule 15 of the Rules.

40. Also, the amount of Rs.5,22,609/- (as per statement of account dated 09.07.2021) so paid by the respondent to the complainants towards compensation for delay in handing over possession shall be adjusted towards the delay possession charges to be paid by the respondent in terms of proviso to section 18(1) of the Act.

**G.II Holding charges**

41. In the present complaint, the complainants have disputed the demand raised by the respondent developer on account of holding charges. On

the other hand, the respondent argued that the complainants 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 complainants never came forward to do the same. And as a result, the complainants are liable to make payment of holding charges to the respondent.

42. With regards to the same, it has been observed that as per sub-clause (b) of clause 12 of the builder 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 <u>further that the Company shall also be entitled to holding charges as provided under clause 14.1.</u>*
>
> ***14. FAILURE TO TAKE POSSESSION***
>
> *14.1 .....*
>
> *(a) holding charges @ 50/- per sq. ft. of the Super Area of the said Unit per month for the entire period of such delay."*

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

most cases, pays advance maintenance charges as well. Maintenance charges are applicable right from the time possession of a flat/unit is taken over by any prospective buyer/allottee. However, payment of maintenance charges is carried out on a monthly basis for the upkeep of the entire building and project. Therefore, simply understood, the flat closed/locked/vacant/not occupied for any period is equal to self-occupied, which is further equal to regular full maintenance charges and non-occupancy charges/holding charges should not be levied.

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

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

45. The said judgment of Hon'ble NCDRC was also upheld by the Hon'ble Supreme Court vide its judgement dated 14.12.2020 passed in the civil appeal nos. 3864-3889/2020 filed by DLF against the order of Hon'ble

NCDRC (supra). In the light of the recent judgement of the Hon'ble NCDRC and Hon'ble Apex Court (supra), the authority concurring with the view taken therein decides that a respondent/promoter cannot levy holding charges on a homebuyer/ allottee as it does not suffer any loss on account of the allottee taking possession at a later date even due to an ongoing court case.

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

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

47. The complainants are contending that they have been additionally burdened to pay HVAT (Post February 2014) amounting to Rs.16,296/. 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.

48. 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."*

49. 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".

50. 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.

51. 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.

52. 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%**

53. 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.

54. 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 complainants with the dues payable by him or refund the amount if no dues are payable by them.

**G.IV Return of GST amount**

55. The complainants submitted that due to the delay and lapses on the part of the respondent in handing over the possession of the property, the complainants have been additionally burdened to pay the GST which was introduced much lately and ought not to be paid by the complainants, 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.

56. 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) ....."*

57. 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 complainants 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.

58. 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 21.11.2020. Had the unit been delivered within the due date or even with some justified delay, the incidence of GST would not have fallen on the allottee. Therefore, an additional tax burden with respect to GST was enforced upon the buyer for no fault of her since and is due to the wrongful act of the promoter in not delivering the unit within due date of possession; also, the tax liability would have been very less as compared with the GST, if levied.

59. 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."*

60. 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."*

61. Therefore, the delay in delivery of possession is the default on the part of the respondent/promoter and the possession was offered on 21.11.2020

and by that time the GST had become applicable. But it is settled principle of law that a person cannot take the benefit of his own wrong/default. So, the respondent/promoter is not entitled to charge GST from the complainants/allottees 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**

62. The complainants pleaded that as per buyer's agreement dated 20.02.2010, 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 complainants on 21.11.2020 i.e after delay of more than 7 years. So, besides the amount of delayed possession charges, the complainants are also entitled to the difference in the stamp duty charges to the tune of Rs. 98,420 which was increased w.e.f. 24.12.2020. It is also pleaded that the Government of Haryana included Village Maidawas within municipal limits of Gurugram. If the possession of the allotted unit had been offered within the stipulated period as per buyer's agreement, then the allottees would not have been burdened with additional liability as mentioned above.

63. 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 complainants. With effect from 24.12.2020, the Revenue Estate of Maidawas stands included in the Municipal Limits and the complainants are 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 complainants on 21.11.2020. However, the complainants never came forward for registration of conveyance deed. Therefore, the respondent cannot be held liable for the defaults committed by the complainants.

64. It is observed that clause 5 of the buyer's agreement dated 20.02.2010 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)*

65. 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 complainants-allottees are 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

66. 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. 26.08.2013 till 21.01.2021 i.e. expiry of 2 months from the date of offer of possession (21.11.2020). 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. Also, the amount of Rs.5,22,609/- so paid by the respondent to the complainants towards compensation for delay in handing over possession shall be adjusted towards the delay possession charges to be paid by the respondent in terms of proviso to section 18(1) of the Act.

iii. The respondent/promoter is not entitled to charge any amount towards GST from the complainants/allottees as the liability of GST had not become due up to the due date of possession as per the buyer's agreement.

iv. 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 complainants with the dues payable by him or refund the amount if no dues are payable by them.

v. The complainants are directed to pay stamp duty as per the norms of the State Government existing at the time of execution of sale deed/conveyance deed.

vi. The respondent shall not charge anything from the complainants which is not the part of the buyer's agreement. The respondent is also not entitled to claim holding charges from the complainants/allottees at any point of time even after being part of the builder buyer's agreement as per law settled by hon'ble Supreme Court in civil appeal nos. 3864-3889/2020 decided on 14.12.2020.

67. Complaint stands disposed of.

68. 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.