

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

Complaint no. : 1348 of 2021
First date of hearing : 16.04.2021
Date of decision : 12.08.2021

1. Ashish Gupta
2. Deepti Gupta
Both RR/o: H.no. 2287, First Floor, Sector 46,
Gurugram, Haryana-122003.

Complainants

Versus

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

Respondent

CORAM:

Dr. K.K. Khandelwal
Shri Samir Kumar
Shri Vijay Kumar Goyal

**Chairman
Member
Member**

APPEARANCE:

Shri 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 09.03.2021 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 08.04.2010 i.e. prior to the commencement of the Act ibid, therefore, the penal proceedings cannot be initiated retrospectively. Hence, the authority has decided to treat the present complaint as an application for non-compliance of statutory obligation on part of the promoter/respondent in terms of section 34(f) of the Act ibid.

A. Project and unit related details

3. The particulars of the project, the details of sale consideration, the amount paid by the 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 Valid/renewed up to 16.01.2025
5.	Name of licensee	Active Promoters Pvt. Ltd. and 2 others C/o Emaar MGF Land Ltd.
6.	HRERA registered/ not registered	"Emerald Estate" registered vide no. 104 of 2017 dated 24.08.2017 for 82768 sq. mtrs.
	HRERA registration valid up to	23.08.2022
7.	Occupation certificate granted on	11.11.2020 [Page 135 of reply]
8.	Provisional allotment letter dated	11.03.2010 [Page 40 of reply]

9.	Unit no.	EEA-G-F09-02, 9 th floor, building no. G [Page 22 of complaint]
10.	Unit measuring	1310 sq. ft.
11.	Date of execution of buyer's agreement	08.04.2010 [Page 20 of complaint]
12.	Payment plan	Construction linked payment plan [Page 97 of reply]
13.	Total consideration as per statement of account dated 17.05.2021 [Page 53 of reply]	Rs. 52,71,939/-
14.	Total amount paid by the complainants as per statement of account dated 17.05.2021 [Page 54 of reply]	Rs.52,73,974/-
15.	Date of start of construction as per statement of account dated 17.05.2021 [Page 53 of reply]	26.08.2010
16.	Nomination letter in favour of the complainants	18.11.2016 [Page 55 of complaint]
17.	Due date of delivery of possession as per clause 11(a) of the said agreement i.e. 36 months from the date of commencement of construction (26.08.2010) + grace period of 6 months, for applying and obtaining completion certificate/ occupation certificate in respect of the unit and/or the project. [Page 35 of complaint]	26.08.2013 [Note: Grace period is not included]
18.	Date of offer of possession to the complainants	20.11.2020 [Page 64 of complaint]
19.	Delay in handing over possession till 20.01.2021 i.e. date of offer of possession (20.11.2020) + 2 months	7 years 4 months 25 days

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-G-F09-02 (ninth floor) admeasuring 1310 sq. ft., in the said project was booked by Dr. Alok Madan and Ms. Anishya Madan in the year 2010. The total cost of the apartment is Rs.52,71,939/- 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 08.04.2010, Dr. Alok Madan and Ms. Anishya Madan entered into a buyer's agreement with the respondent, by virtue of which the respondent allotted apartment no. EEA-G-F09-02, having super area of 1310 sq. ft. located on the ninth floor, along-with covered car parking space in the said project.
- iii. That subsequent thereto, the complainants entered into an agreement to sell with Dr. Alok Madan and Ms. Anishya Madan, with regard to the said unit and the property was later assigned to the complainants, by the respondent, by virtue of the assignment letter/nomination letter dated 18.11.2016.
- iv. That complainants have made the total payment towards the cost of the apartment and nothing is due and payable by the complainants. In fact, the complainants were slapped with recurring holding charges of Rs.30,492/- as on 25.02.2021, increasing on daily basis, despite making the timely payments to the respondent in

accordance with the offer of possession letter and as reflected in statement of account.

- v. That the complainants were constrained to take up the issue of wrongly levied holding charges with the respondent via emails and personal visits but the respondent had chosen to turn a deaf ear. In fact, the complainants had made all the payments on time, in accordance with the demands raised by the respondent and despite that, the respondent has resorted to this arm twisting method of levying holding charges to set-off the legitimate compensation of the complainants. Moreover, owing to the delay solely attributable to the respondent, the complainants were forced to bear the additional burden of revised stamp duty charges, which was otherwise never payable, had the possession of apartment been given on time by the respondent.
- vi. That as per clause 11(a) of the buyer's agreement dated 08.04.2010, 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, with a further grace period of another 6 months but the respondent never intended to keep its promise and upon the complainants enquiry regarding the project status via emails, the latter used to hoodwink the complainants by giving false deadlines to complete the project. The respondent has miserably

failed to honour its part of commitment to handover the possession of the apartment, as per the schedule provided by it and has breached the very terms of the buyer's agreement.

- vii. 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.
- viii. 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.

- ix. That the respondent has breached the fundamental term of the contract by inordinately delaying in delivery of the possession by 81 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.
- x. That the complainants, without any default, had been paying the instalments towards the property, as and when demanded by the respondent. The balance payment was to be made at the time of offering of possession. 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 08.04.2010 and the possession was finally offered on 20.11.2020 which resulted in extreme kind of mental distress, pain and agony to the complainants.
- xi. That the complainants, through various calls and personal visits, besides emails to the respondent company had asked to indemnify them for considerable delay in handing over the possession of the property, in line with the provisions of the Act, but the respondent company has miserably failed to accede to the genuine and legitimate request of the complainant, turned a deaf ear and agreed

to pay a paltry sum towards compensation as per the buyer's agreement only.

- xii. 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 handover the possession of the property/ apartment to the complainants, in a time bound manner.
 - ii. 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.
 - iii. Direct the respondent to waive/return the entire amount of holding charges levied till date, along with interest, wrongly levied by the respondent, upon the complainants.
 - iv. Direct the respondent to pay the complainants, 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 purchased 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. Moreover, it is respectfully submitted that the adjudicating officer derives his jurisdiction from the central act which cannot be negated by the rules made thereunder.
- ii. That present complaint is based on an erroneous interpretation of the provisions of the Act as well as an incorrect understanding of the terms and conditions of the buyer's agreement dated 08.04.2010.

The provisions of the Act are not retrospective in nature. The provisions of the Act cannot undo or modify the terms of an agreement duly executed prior to coming into effect of the Act. That merely because the Act applies to ongoing projects which are registered with the authority, the Act cannot be said to be operating retrospectively. The provisions of the Act relied upon by the complainants for seeking interest cannot be called in to aid in derogation and ignorance of the provisions of the buyer's agreement. The interest is compensatory in nature and cannot be granted in derogation and ignorance of the provisions of the buyer's agreement. The 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 Dr. Alok Madan and Ms. Anishya Madan (hereinafter "original allottees") vide application form dated 27.08.2009 applied to respondent for provisional allotment of a unit in the project. The original allottees, in pursuance of the aforesaid application, were allotted an independent unit bearing no EEA-G-F09-02, located on the ninth floor, in the project vide provisional allotment letter dated 11.03.2010. The original allottees consciously and willfully opted for a construction linked plan for remittance of the sale consideration for the unit in question and further represented to respondent that

the original allottees shall remit every installment on time as per the payment schedule.

- iv. That the original allottees had defaulted in remittance of installments on time. Respondent was compelled to issue demand notices, reminders etc. calling upon the original allottees to make payment of outstanding amounts payable by the original allottees under the payment plan/instalment plan opted by them. However, the original allottees despite having received the payment request letters, reminders etc. failed to remit the instalments on time to the respondent. Statement of account dated 17.05.2021 correctly maintained by respondent in due course of its business reflects the delay in remittance of various instalments on the part of the original allottees.
- v. That the buyer's agreement dated 08.04.2010 was executed between the original allottees and respondent. It is pertinent to mention that clause 13 of the buyer's agreement provides that compensation for any delay in delivery of possession shall only be given to such allottees who are not in default of their obligations envisaged under the agreement and who have not defaulted in payment of instalments as per the payment plan incorporated in the agreement. In case of delay caused due to non- receipt of occupation certificate, completion certificate or any other permission/sanction from the competent authorities, no compensation or any other

compensation shall be payable to the allottees. As delineated hereinabove, the original allottees, having defaulted in timely remittance of instalment, were thus not entitled to any compensation or any amount towards interest as an indemnification for delay, if any, under the buyer's agreement.

- vi. That thereafter the complainants approached the original allottees for purchasing their rights and title in the unit in question. The original allottees acceded to the request of the complainants and agreed to transfer and convey their rights, entitlement and title in the unit in question and executed an agreement to sell dated 01.10.2016 with the complainants. The complainants had executed an affidavit dated 14.11.2016 and an indemnity cum undertaking dated 09.11.2016 whereby the complainants had consciously and voluntarily declared and affirmed that they would be bound by all the terms and conditions of the provisional allotment in favour of the erstwhile allottee. It was further declared by the complainants that they having been substituted in the place of the erstwhile allottee in respect of the provisional allotment of the unit in question were not entitled to any compensation for delay, if any, in delivery of possession of the unit in question or any rebate under a scheme or otherwise or any other discount, by whatever name called, from respondent.

- vii. That the complainants had stepped into the shoes of the original allottees and therefore all the rights and liabilities of the original allottees were transferred to the complainants. As has been delineated hereinabove, the original allottees were not entitled to any compensation or interest for delay, if any, in offering possession of the unit in terms of the buyer's agreement on account of default of terms and conditions thereof by them. Thus, the complainants are estopped from advancing claims in contradiction and derogation of the rights and liabilities transferred to them from the original allottees.
- viii. That it is categorically provided in clause 11(b)(iv) of the buyer's agreement that in case of any default/delay by the allottees in payment as per schedule of payment incorporated in the buyer's agreement, the date of handing over of possession shall be extended accordingly, solely on respondent's discretion till the payment of all outstanding amounts to the satisfaction of respondent. Since, the original allottees have defaulted in timely remittance of payments as per schedule of payment, the date of delivery of possession is not liable to be determined in the manner sought to be done in the present case by the complainants. Clause 13 of the buyer's agreement provides that compensation for any delay in delivery of possession shall only be given to such allottees who are not in default of their obligations envisaged under the agreement and who

have not defaulted in payment of instalments as per the payment plan incorporated in the agreement. In case of delay caused due to non- receipt of occupation certificate, completion certificate or any other permission/sanction from the competent authorities, no compensation or any other compensation shall be payable to the allottees.

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

respondent needs to be necessarily excluded from computation of the time period for implementation of the project.

- x. 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.
- xi. That the complainants were offered possession of the unit in question through letter of offer of possession dated 20.11.2020. The complainants were called upon to remit balance payment including

delayed payment charges and to complete the necessary formalities/documentation necessary for handover of the unit in question to them. However, the complainants have consciously refrained from obtaining possession of the unit in question. The complainants did not/do not have adequate funds to remit the balance payments requisite for obtaining possession in terms of the buyer's agreement and thus refrained from obtaining possession of the unit in question. The complainants have preferred the instant complaint in order to needlessly linger on the matter.

- xii. That the project of the respondent has been registered under the Act and the rules. Registration certificate was granted by the Haryana Real Estate Regulatory Authority vide memo no. HRERA-482/2017/829 dated 24.08.2017. Without admitting or acknowledging in any manner the truth or legality of the allegations levelled by the complainants and without prejudice to the contentions of the respondent, it is respectfully submitted that the complaint preferred by the complainants is devoid of any cause of action. It is submitted that the registration of the project is valid till 23.08.2022 and therefore cause of action, if any, would accrue in favour of the complainants to prefer a complaint if the respondent fails to deliver possession of the unit in question within the aforesaid period.

- xiii. That the respondent has paid an amount of Rs. 44,715/- as benefit on account of Anti-Profiting and Rs. 5,851/- on account of Early Payment Rebate (EPR). 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 payment charges or any taxes/statutory payments etc.
- xiv. That several allottees have defaulted in timely remittance of payment of installments which was an essential, crucial and an indispensable requirement for conceptualisation and development of the project in question. Furthermore, when the proposed allottees default in their payments as per schedule agreed upon, the failure has a cascading effect on the operations and the cost for proper execution of the project increases exponentially whereas enormous business losses befall upon the respondent. The respondent, despite default of several allottees, has diligently and earnestly pursued the development of the project in question and has constructed the project in question as expeditiously as possible. It is submitted that the construction of the tower in which the unit in question is situated has been completed by the respondent. The respondent has already delivered possession of the unit in question to the complainants.

Therefore, there is no default or lapse on the part of the respondent and there is no equity in favour of the complainants. Thus, it is most respectfully submitted that the present complaint deserves to be dismissed at the very threshold.

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

E. Jurisdiction of the authority

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

E.I Territorial jurisdiction

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

E.II Subject-matter jurisdiction

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

F. Findings on the objections raised by the respondent

F.I Objection regarding jurisdiction of authority w.r.t. buyer's agreement executed prior to coming into force of the Act

12. One of the contentions of the respondent is that the authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the buyer's agreement executed between the parties and no agreement for sale as referred to under the provisions of the Act or the said rules has been executed inter se parties. The respondent further submitted that the provisions of the Act are not retrospective in nature and the provisions of the Act cannot undo or modify the terms of buyer's agreement duly executed prior to coming into effect of the Act. The authority is of the view that the Act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous

provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of hon'ble Bombay High Court in ***Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)*** which provides as under:

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

122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."

13. Also, in appeal no. 173 of 2019 titled as ***Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya*** dated 17.12.2019, the Haryana Real Estate Appellate Tribunal has observed-

"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."

14. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the buyer's agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of the Act and are not unreasonable or exorbitant in nature.

F.II Objection regarding handing over possession as per declaration given under section 4(2)(I)(C) of the Act

15. The counsel for the respondent has stated that the entitlement to claim possession or refund would arise once the possession has not been handed over as per declaration given by the promoter under section 4(2)(I)(C). Therefore, next question of determination is whether the respondent is entitled to avail the time given to him by the authority at the time of registering the project under section 3 & 4 of the Act.
16. It is now settled law that the provisions of the Act and the rules are also applicable to ongoing project and the term ongoing project has been defined in rule 2(1)(o) of the rules. The new as well as the ongoing project are required to be registered under section 3 and section 4 of the Act.

17. Section 4(2)(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 a subsequent allottee who had executed an indemnity cum undertaking with waiver clause is entitled to claim delay possession charges?

21. The respondent submitted that complainants are subsequent allottees and the complainants had executed an indemnity cum undertaking dated 09.11.2016 whereby the complainants had consciously and voluntarily declared and affirmed that they would be bound by all the terms and conditions of the provisional allotment in favour of the original allottees. It was further declared by the complainants that they, having been substituted in the place of the original allottees in respect of the provisional allotment of the unit in question, were not entitled to any compensation for delay. Therefore, the complainants are not entitled to any compensation. With regard to the above contentions raised by the promoter/developer, it is worthwhile to examine following four sub-issues:

- (i) Whether subsequent allottee is also allottee as per provisions of the Act?
- (ii) Whether the subsequent allottee is entitled to delayed possession charges w.e.f. due date of handing over possession or w.e.f. the date of nomination letter/endorsement (i.e. date on which he became allottee)?
- (iii) Whether delay possession charges are in the nature of statutory legal obligation of the promoter other than compensation?
- (iv) Whether indemnity-cum-undertaking with waiver clause at the time of transfer of unit is arbitrary and whether statutory rights can be waived of by such one sided and unreasonable undertaking?
 - i. **Whether subsequent allottee is also an allottee as per provisions of the Act?**

22. The term "allottee" as defined in the Act also includes and means the subsequent allottee, hence is entitled to the same relief as that of the

original allottee. The definition of the allottee as provided in the Act is reproduced as under:

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

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

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

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

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

24. From a bare perusal of the definition, it is clear that the transferee of an apartment, plot or building who acquires it by any mode is an allottee. This may include (i) allotment; (ii) sale; (iii) transfer; (iv) as consideration of services; (v) by exchange of development rights; or (vi) by any other similar means. It can be safely reached to the only logical conclusion that no difference has been made between the original allottee and the subsequent allottee and once the unit, plot, apartment or building, as the case may be, has been re-allotted in the name of the subsequent purchaser by the promoter, the subsequent allottee enters into the shoes of the original allottee for all intents and purposes and he

shall be bound by all the terms and conditions contained in the buyer's agreement including the rights and liabilities of the original allottee. Thus, as soon as the unit is re-allotted in his name, he will become the allottee and nomenclature "subsequent allottee" shall only remain for identification for use by the promoter. Therefore, the authority does not draw any difference between the allottee and subsequent allottee per se.

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

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

26. The authority concurs with the Hon'ble NCDRC's decision dated 26.11.2019 in **Rajnish Bhardwaj vs. M/s CHD Developers Ltd.** (supra) and observes that it is irrespective of the status of the allottee whether it is original or subsequent, an amount has been paid towards the consideration for a unit and the endorsement by the developer on the transfer documents clearly implies his acceptance of the complainants as allottees.
27. Therefore, taking the above facts into account, the authority is of the view that the term subsequent allottee has been used synonymously with the term allottee in the Act. The complainants/subsequent allottees at the time of buying the said unit takes on the rights as well as obligations of

the original allottees vis-a-viz the same terms and conditions of the buyer's agreement entered into by the original allottees. Moreover, the amount if any paid by the subsequent or original allottees is adjusted against the unit in question and not against any individual. Furthermore, the name of the complainants/subsequent allottees has been endorsed on the same builder buyer's agreement which was executed between the original allottees and the promoter. Therefore, the rights and obligation of the subsequent allottees and the promoter will also be governed by the said buyer's agreement.

ii. Whether the subsequent allottee is entitled to delayed possession charges w.e.f. due date of handing over possession or w.e.f. the date of nomination letter (i.e. date on which he became allottee)?

28. The respondent/promoter contended that the complainants/subsequent allottees shall not be entitled to any compensation/delayed possession charges since at the time of the execution of transfer documents/agreement for sale, they were well aware of the due date of possession and have knowingly waived off their right to claim any compensation for delay in handing over possession or any rebate under a scheme or otherwise or any other discount. The respondent/ promoter had spoken about the disentitlement of compensation/delayed possession charges to the subsequent allottees who had clear knowledge of the fact w.r.t. the due date of possession and whether the project was already delayed. But despite that they entered into the agreement for sell and/or indemnity-cum-undertaking knowingly waiving off their right of compensation.

29. The authority placed reliance on the recent case titled as *M/s Laureate Buildwell Pvt. Ltd. Vs. Charanjeet Singh, civil appeal no. 7042 of 2019 dated 22.07.2021*, the Apex Court has held that relief of interest on refund, enunciated by the decision in *HUDA Vs. Raje Ram (2008)* which was applied in *Wg. Commander Arifur Rehman* (Wg. Cdr. Arifur Rahman Khan and Aleya Sultana and Ors. V. DLF Southern Homes Pvt. Ltd. (now Known as BEGUR OMR Homes Pvt. Ltd.) and Ors. (Civil appeal no. 6239 of 2019) dated 24.08.2020) cannot be considered good law and has held that the subsequent purchaser/respondent had stepped into the shoes of the original allottee, and intimated Laureate (builder) about this fact in April 2016, the interest of justice demand that the interest at least from that date should be granted, in favour of the respondent. The relevant paras of the said judgment are being reproduced as follows:

"31. In view of these considerations, this court is of the opinion that the per se bar to the relief of interest on refund, enunciated by the decision in Raje Ram (supra) which was applied in Wg. Commander Arifur Rehman (supra) cannot be considered good law. The nature and extent of relief, to which a subsequent purchaser can be entitled to, would be fact dependent. However, it cannot be said that a subsequent purchaser who steps into the shoes of an original allottee of a housing project in which the builder has not honoured its commitment to deliver the flat within a stipulated time, cannot expect any – even reasonable time, for the performance of the builder's obligation. Such a conclusion would be arbitrary, given that there may be a large number – possibly thousands of flat buyers, waiting for their promised flats or residences; they surely would be entitled to all reliefs under the Act. In such case, a purchaser who no doubt enters the picture later surely belongs to the same class. Further, the purchaser agrees to buy the flat with a reasonable expectation that delivery of possession would be in accordance within the bounds of the delayed timeline that he has knowledge of, at the time of purchase of the flat. Therefore, in the event the purchaser claims refund, on an assessment that he too can (like the original allottee) no longer wait, and face intolerable burdens, the equities would have to be moulded. It would no doubt be fair to assume that the purchaser had knowledge of the delay. However, to attribute knowledge that such delay would continue indefinitely,

based on an a priori assumption, would not be justified. The equities, in the opinion of this court, can properly be moulded by directing refund of the principal amounts, with interest @ 9% per annum from the date the builder acquired knowledge of the transfer, or acknowledged it.

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

30. In the present case, the complainants/subsequent allottees have been acknowledged as an allottee by the respondent vide nomination letter dated 18.11.2016. The authority has observed that the promoter has confirmed the transfer of allotment in favour of subsequent allottees (complainants) and the installments paid by the original allottees were adjusted in the name of the subsequent allottees and the next installments were payable/due as per the original allotment letter. Also, we have also perused the buyer's agreement which was originally entered into between the original allottees and the promoter. The same buyer's agreement has been endorsed in favour of the subsequent allottees/complainants. All the terms of buyer's agreement remain the same, so it is quite clear that the subsequent allottees has stepped into the shoes of the original allottees. Though the promised date of delivery was 26.08.2013 but the construction of the tower in question was not completed by the said date and it was offered by the respondent only on 20.11.2020.

31. In the present complaint, the complainants/subsequent allottees had purchased the unit after expiry of the due date of handing over possession, the authority is of the view that the subsequent allottee cannot be expected to wait for any uncertain length of time to take possession. Even the complainants have been waiting for their promised flats and surely, they would be entitled to all the reliefs under this Act. It would no doubt be fair to assume that the subsequent allottees/complainants had knowledge of delay, however, to attribute knowledge that such delay would continue indefinitely, based on priori assumption, would not be justified. Therefore, in light of *Laureate Buildwell judgment (supra)*, the authority holds that in cases where subsequent allottees have stepped into the shoes of original allottees after the expiry of due date of handing over possession and before the coming into force of the Act, the subsequent allottees shall be entitled to delayed possession charges w.e.f. the date of entering into the shoes of original allottees i.e. nomination letter. In the present complaint, the nomination letter was issued by the respondent in the favour of the complainants on 18.11.2016, therefore, the complainants would be entitled to delay possession charges w.e.f. 18.11.2016.

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

32. It is important to understand that the Act has clearly provided interest and compensation as separate entitlement/right which the allottee can claim. An allottee is entitled to claim compensation under sections 12, 14,

18 and section 19, to be decided by the adjudicating officer as per section 71 and the quantum of compensation shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The interest is payable to the allottee by the promoter in case where there is refund or payment of delay possession charges i.e., interest at the prescribed rate for every month of delay. The interest to be paid to the allottee is fixed and as prescribed in the rules which an allottee is legally entitled to get and the promoter is obligated to pay. The compensation is to be adjudged by the adjudicating officer and may be expressed either lump sum or as interest on the deposited amount after adjudgment of compensation. This compensation expressed as interest needs to be distinguished with the interest at the prescribed rate payable by the promoter to the allottee in case of delay in handing over of possession or interest at the prescribed rate payable by the allottee to the promoter in case of default in due payments. Here, the interest is pre-determined, and no adjudication is involved. Accordingly, the distinction has to be made between the interest payable at the prescribed rate under section 18 or 19 and adjudgment of compensation under sections 12, 14, 18 and section 19. The compensation shall mean an amount paid to the flat purchasers who have suffered agony and harassment, as a result of the default of the developer including but not limited to delay in handing over of the possession.

33. In addition, the quantum of compensation to be awarded shall be subject to the extent of loss and injury suffered by the negligence of the opposite party and is not a definitive term. It may be in the form of interest or punitive in nature. However, the Act clearly differentiates between the interest payable for delayed possession charges and compensation. Section 18 of the Act provides for two separate remedies which are as under:
- i. In the event, the allottee wishes to withdraw from the project, he/she shall be entitled without prejudice to any other remedy refund of the amount paid along with interest at such rate as may be prescribed in this behalf **including compensation** in the manner as provided under this Act;
 - ii. In the event, the allottee does not intend to withdraw from the project, he/she shall be paid by the promoter **interest for every month of delay till the handing over of the possession, at such rate as may be prescribed.**
34. The rate of interest in both the scenarios is fixed as per rule 15 of the rules which shall be the State Bank of India's highest marginal cost of lending rate +2%. However, for adjudging compensation or interest under sections 12,14,18 and section 19, the adjudicating officer has to take into account the various factors as provided under section 72 of the Act.
- iv. **Whether indemnity-cum-undertaking with waiver clause at the time of transfer of unit is arbitrary and whether statutory rights can be waived of by such one sided and unreasonable undertaking?**
35. The authority further is unable to gather any reason or has not been exposed to any reasonable justification as to why a need arose for the

complainants to sign any such indemnity-cum-undertaking and as to why the complainants had agreed to surrender their legal rights which were available or had accrued in favour of the original allottees. Thus, no sane person would ever execute such an affidavit or indemnity-cum-undertaking unless and until some arduous and/or compelling conditions are put before him with a condition that unless and until, these arduous and/or compelling conditions are performed by him, he will not be given any relief and he is thus left with no other option but to obey these conditions. Exactly same situation has been demonstratively happened here, when the complainants/subsequent-allottees have been asked to give the indemnity-cum-undertaking in question before transferring the unit in their name otherwise such transfer may not be allowed by the promoter. 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. No reliance can be placed on any such affidavit/ indemnity-cum-undertaking and the same is liable to be discarded and ignored in its totality. Therefore, this authority does not place reliance on the said affidavit/indemnity cum undertaking. To fortify this view, we place reliance on the order dated 03.01.2020 passed by hon'ble NCDRC in case titled as **Capital Greens Flat Buyer Association and Ors. Vs. DLF Universal Ltd., Consumer case no. 351 of 2015**, wherein it was held that the execution of indemnity-cum-undertaking would defeat the

provisions of section 23 and 28 of the Indian Contract Act, 1872 and therefore, would be against public policy, besides being an unfair trade practice. The relevant portion of the said judgment is reproduced herein below:

"Indemnity-cum-undertaking

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

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

36. The said judgment of NCDRC was also upheld by the Hon'ble Supreme Court vide its judgement dated 14.12.2020 passed in civil appeal nos. 3864-3889 of 2020 against the order of NCDRC
37. Hon'ble Supreme Court and various High Courts in a plethora of judgments have held that the terms of a contract shall not be binding if it is shown that the same were one sided and unfair and the person signing did not have any other option but to sign the same. Reference can also be

placed on the directions rendered by the Hon'ble Apex Court in civil appeal no. 12238 of 2018 titled as **Pioneer Urban Land and Infrastructure Limited Vs. Govindan Raghavan** (decided on 02.04.2019) as well as by the Hon'ble Bombay High Court in the **Neelkamal Realtors Suburban Pvt. Ltd.** (supra). A similar view has also been taken by the Apex court in **IREO Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Ors.** in civil appeal no. 5785 of 2019 and the same is reproduced as under:

".....that the incorporation of such one-sided and unreasonable clauses in the Apartment Buyer's Agreement constitutes an unfair trade practice under Section 2(1)(r) of the Consumer Protection Act. Even under the 1986 Act, the powers of the consumer fora were in no manner constrained to declare a contractual term as unfair or one-sided as an incident of the power to discontinue unfair or restrictive trade practices. An "unfair contract" has been defined under the 2019 Act, and powers have been conferred on the State Consumer Fora and the National Commission to declare contractual terms which are unfair, as null and void. This is a statutory recognition of a power which was implicit under the 1986 Act.

In view of the above, we hold that the Developer cannot compel the apartment buyers to be bound by the one-sided contractual terms contained in the Apartment Buyer's Agreement it."

38. The same analogy can easily be applied in the case of execution of an affidavit or indemnity-cum-undertaking which got executed from the subsequent-allottees before getting the unit transferred in their name in the record of the promoter as an allottee in place of the original allottees.
39. The authority may deal with this point from yet another aspect. By executing an affidavit/undertaking, the complainants/subsequent allottees cuts their hands from claiming delay possession charges in case of delay in giving possession of the unit beyond the stipulated time or the

due date of possession. But the question which arises before the authority is that what does allottee got in return from the promoter by giving such a mischievous and unprecedented undertaking. However, the answer would be "nothing". If it is so, then why did the complainants executed such an affidavit/undertaking is beyond the comprehension and understanding of this authority.

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

G. Findings on the reliefs sought by the complainants

G.1 Delay possession charges

41. 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."

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

"11. POSSESSION

(a) Time of handing over the Possession

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

43. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement, and the 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.

44. Admissibility of grace period: The promoter has proposed to hand over the possession of the said unit within 36 (thirty-six) months from the date of commencement of construction and further provided in agreement that promoter shall be entitled to a grace period of 6 months for applying and obtaining completion certificate/occupation certificate in respect of said unit. The date of start of construction is 26.08.2010 as per statement of account dated 17.05.2021. The period of 36 months expired on 26.08.2013. As a matter of fact, the promoter has not applied to the concerned authority for obtaining completion certificate/ occupation certificate within the grace period prescribed by the promoter in the buyer's agreement. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 6 months cannot be allowed to the promoter at this stage.

45. Admissibility of delay possession charges at prescribed rate of interest: The 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.

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

48. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., 12.08.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.
49. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.

Explanation. —For the purpose of this clause—

- (i) *the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*
- (ii) *the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the*

date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"

50. Therefore, interest on the delay payments from the 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.
51. On consideration of the documents available on record and submissions made by the parties regarding contravention as per provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 11(a) of the buyer's agreement executed between the parties on 08.04.2010, possession of the said unit was to be delivered within a period of 36 months from the date of commencement of construction i.e. 26.08.2010. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over possession comes out to be 26.08.2013. In the present case, the complainants were offered possession by the respondent on 20.11.2020. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the complainants as per the terms and conditions of the buyer's agreement dated 08.04.2010 executed between the parties.

52. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 11.11.2020. However, the respondent offered the possession of the unit in question to the complainants only on 20.11.2020. 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 date of entering into the shoes of original allottee i.e. nomination letter (18.11.2016) till the expiry of 2 months from the date of offer of possession (20.11.2020) which comes out to be 20.01.2021.
53. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainants are entitled to delay possession charges at prescribed rate of the interest @ 9.30 % p.a. w.e.f. 18.11.2016

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

G.II Holding charges

54. In the present complaint, the 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. As a result, the complainants are liable to make payment of holding charges to the respondent.

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

"12. PROCEDURE FOR TAKING POSSESSION:

(a)

(b) *Upon intimation in writing from the Company, the Allottee(s) shall within thirty (30) days take possession of the said Unit..... If the Allottee(s) fails to take possession of the Unit as aforesaid with the time limit prescribed by the Company in its notice, then the said Unit shall lie at risk, responsibility and cost of the Allottee(s) in relation to all the outgoing cess, taxes, levies etc and the Company shall have no*

liability or concern thereof and further that the Company shall also be entitled to holding charges as provided under clause 14.1.

14. FAILURE TO TAKE POSSESSION

14.1

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

56. It is interesting to note that the term holding charges has not been clearly defined in the builder buyer's agreement and or any other relevant document submitted by the respondent promoter. Therefore, it is firstly important to understand the meaning of holding charges which is generally used in common parlance. The term holding charges or also synonymously referred to as non-occupancy charges become payable or applicable to be paid if the possession has been offered by the builder to the owner/allottee and physical possession of the unit not taken over by allottee but the flat/unit is lying vacant even when it is in a ready-to-move condition. Therefore, it can be inferred that holding charges is something which an allottee has to pay for his own unit for which he has already paid the consideration just because he has not physically occupied or moved in the said unit. The next thing that pops up for consideration is as to what are then maintenance charges being taken by the developer/RWA. Maintenance charges are the charges, either annually or monthly, applicable to be paid by the owner/allottee once he/she has taken possession of the property/unit. These charges are paid for the general maintenance and upkeep of the building and/or society. A person purchases a flat for his own residential usage/or for letting it out further

as per his own discretion and requirement. He is bound as per law to pay the maintenance charges for his flat/unit whether he is personally residing or even if the flat is kept locked and being unused. The member has to pay the full maintenance charges without any concessions and in most cases, pays advance maintenance charges as well. Maintenance charges are applicable right from the time possession of a flat/unit is taken over by any prospective buyer/allottee. However, payment of maintenance charges is carried out on a monthly basis for the upkeep of the entire building and project. Therefore, simply understood, the flat closed/locked/vacant/not occupied for any period is equal to self-occupied, which is further equal to regular full maintenance charges and non-occupancy charges/holding charges should not be levied.

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

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

58. The said judgment of Hon'ble NCDRC was also upheld by the Hon'ble Supreme Court vide its judgement dated 14.12.2020 passed in the civil appeal nos. 3864-3889/2020 filed by DLF against the order of Hon'ble NCDRC (supra). In the light of the recent judgement of the Hon'ble NCDRC and Hon'ble Apex Court (supra), the authority concurring with the view taken therein decides that a respondent/promoter cannot levy holding charges on a homebuyer/ allottee as it does not suffer any loss on account of the allottee taking possession, at a later date even due to an ongoing court case.
59. As far as holding charges are concerned, the respondent having received the sale consideration has nothing to lose by holding possession of the allotted flat except that it would be required to maintain the apartment. Therefore, the holding charges will not be payable to the respondent. Even in a case where the possession has been delayed on account of the allottee having not paid the entire sale consideration, the developer shall not be entitled to any holding charges though it would be entitled to interest for the period the payment is delayed by the allottees.

G.III Stamp Duty Charges

60. With respect to the relief of stamp duty charges, it is observed that clause 5 of the buyer's agreement dated 08.04.2010 provides for execution of sale deed in favor of an allottee within 6 months from the date of receipt of occupation certificate. The relevant clause of the buyer's agreement reads under:

"5. SALE DEED

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

61. 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

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

- i. The respondent is directed to pay the interest at the prescribed rate i.e. 9.30 % per annum for every month of delay on the amount paid by the complainants from the date of entering into the shoes of original allottee i.e. nomination letter dated 18.11.2016 till 20.01.2021 i.e. expiry of 2 months from the date of offer of possession (20.11.2020). The arrears of interest accrued so far shall be paid to the complainants within 90 days from the date of this order as per rule 16(2) of the rules.
- ii. The complainants are directed to pay stamp duty as per the norms of the State Government existing at the time of execution of sale/conveyance deed.
- iii. 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.

63. Complaint stands disposed of.

64. 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 26.05.2021.