

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

Complaint no. : 2492 of 2021
First date of hearing : 22.07.2021
Date of decision : 26.08.2021

Nand Lal
R/o: H.No. 2025, Ground Floor,
Sector 4, Gurugram, Haryana-122001.

Complainant

Versus

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

Respondent

CORAM:

Shri Samir Kumar
Shri Vijay Kumar Goyal

**Member
Member**

APPEARANCE:

Shri Gaurav Bhardwaj Advocate for the complainant
Shri J.K. Dang along with Shri Ishaan Dang Advocates for the respondent

ORDER

1. The present complaint dated 25.06.2021 has been filed by the complainant/allottee in Form CRA under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions to the allottee as per the agreement for sale executed inter se them.

2. Since, the buyer's agreement has been executed on 09.04.2013 i.e. prior to the commencement of the Act *ibid*, therefore, the penal proceedings cannot be initiated retrospectively. Hence, the authority has decided to treat the present complaint as an application for non-compliance of statutory obligation on part of the promoter/respondent in terms of section 34(f) of the Act *ibid*.

A. Project and unit related details

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

S.No.	Heads	Information
1.	Project name and location	Gurgaon Greens, Sector 102, Gurugram.
2.	Project area	13.531 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no. and validity status	75 of 2012 dated 31.07.2012 Valid/renewed up to 30.07.2020
5.	Name of licensee	Kamdhenu Projects Pvt. Ltd. and another C/o Emaar MGF Land Ltd.
6.	HRERA registered/ not registered	Registered vide no. 36(a) of 2017 dated 05.12.2017 for 95829.92 sq. mtrs.
	HRERA registration valid up to	31.12.2018
7.	HRERA extension of registration vide	01 of 2019 dated 02.08.2019
	Extension valid up to	31.12.2019
8.	Occupation certificate granted on	05.12.2018 [Page 134 of reply]

9.	Provisional allotment letter dated	25.01.2013 [Page 25 of complaint]
10.	Unit no.	GGN-05-0802, 8 th floor, tower 05 [Page 41 of complaint]
11.	Unit measuring	1650 sq. ft.
12.	Date of execution of buyer's agreement	09.04.2013 [Page 38 of complaint]
13.	Payment plan	Construction linked payment plan [Page 69 of complaint]
14.	Total consideration as per statement of account dated 09.07.2021 at page 69 of the reply	Rs.99,28,597/-
15.	Total amount paid by the complainant as per statement of account dated 09.07.2021 at page 70 of reply	Rs.99,36,801/-
16.	Date of start of construction as per statement of account dated 09.07.2021 at page 69 of the reply	14.06.2013
17.	Due date of delivery of possession as per clause 14(a) of the said agreement i.e. 36 months from the date of start of construction (14.06.2013) + grace period of 5 months, for applying and obtaining completion certificate/ occupation certificate in respect of the unit and/or the project. [Page 54 of complaint]	14.06.2016 [Note: Grace period is not included]
18.	Date of offer of possession to the complainant	11.12.2018 [Page 92 of complaint]
19.	Delay in handing over possession till 11.02.2019 i.e. date of offer of possession (11.12.2018) + 2 months	2 years 7 month 29 days

B. Facts of the complaint

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

- i. That somewhere around 2011- 2012, the respondent advertised about its new group housing project namely "Gurgaon Greens" located in Sector-102, Dwarka Expressway, District Gurugram. The respondent painted a rosy picture of the project in their advertisement making tall claims and representing that the project aims at providing luxury residential apartments, nestled in a posh residential area of Gurugram, located just across Dwarka expressway. Believing the representations of the respondent and on the lookout for an abode for himself and his family, the complainant booked an apartment in the said project of the respondent by submitting an application form and paying an amount of Rs.7,50,000/- vide instrument bearing no.612457 dated 30-01-2012 towards booking of said unit.
- ii. That after almost 1 year from the date of booking on 25.01.2013, the respondent had issued a welcome letter dated 25.01.2013 enclosing a provisional allotment letter dated 25.01.2013 for unit no. GGN-05-0802. After almost 1.3 years from the date of booking, finally, on 09.04.2013, the buyer's agreement was executed between the complainant and the respondent.
- iii. That the complainant had already made a payment amounting to Rs.18,50,526/- from the date of booking till execution of

agreement in accordance with the demands of the respondent. This conduct on the part of respondent in demanding and taking a deposit of more than 10% of the amount without first executing the agreement is a clear violation of section 13 of the Act and the respondent must be heavily penalised for the same.

- iv. That as per clause 14 (a) of the buyer's agreement dated 09.04.2013, the respondent had undertaken to complete the project and handover possession of the unit within a period of 36 months along with grace period of 6 months from the date of start of construction (14.06.2013 date of start of PCC for the foundation) i.e. by **14.12.2016**. However, the respondent miserably failed in handing over possession of the unit till said date.
- v. That till date the complainant has paid a total sum of Rs. 99,36,801/- towards the unit in question, as and when demanded by the respondent as against a total sale consideration of Rs. 99,28,597/-. When the respondent failed in handing over the possession on the due date, i.e. 14.12.2016, the complainant visited the project site and was stunned to see that the project was nowhere nearing completion. Rather, snail paced construction was going on the project site. Thereafter, the complainant immediately rushed to the respondent's office in order to inquire about the exact date of handing over possession, but to no avail, as the

respondent assured that the possession shall be handed over soon and construction shall progress in full swing in coming months.

- vi. That the complainant booked the flat with high hopes and dreams that he will be able to live in the same along with his family and give them a safe and comfortable environment to live in. However, the respondent simply refrained from adhering to his commitments, though the respondent never failed in raising payment demands irrespective of the pace of construction, but when it came to completing construction and handing over possession, they failed miserably.
- vii. That when the complainant had asked the respondent to clarify about the interest being charged by the respondent on the delayed payments upon which the latter replied that the interest is being charged on the basis of the buyer's agreement. It is pertinent to mention that while under clause 13 (i) of buyer agreement, the respondent had been charging 24% interest on the account of delayed payments of the instalments and further under clause 20.2, sub-clause(a)(i) of the buyer's agreement, upon noncompliance of terms and condition of buyer agreement by the allottee, the respondent has the absolute right to retain the entire amount of the "earnest money" along with the non-refundable amounts. However, on account of delay in handing over possession by the respondent, they are liable to pay merely Rs. 7.50/-per sq.

ft. per month of the super area of unit for the period of delay, as per clause 16(a) of the said agreement. It is submitted that the above-mentioned clauses are not equitable and arbitrary in nature and nowhere fall in the line of laws enforceable as on today to regulate the real estate sector.

- viii. That finally, after a delay of almost 2 years, the complainant was offered possession of the unit vide letter of offer of possession dated **11.12.2018**, with specific instruction in regard to the final payment as per **Annexure-1** of the said letter, annexed with the said letter within 60 days from the date of letter. The net due payment amounted to a sum of Rs.15,09,601. Where, as per the payment plan annexed with provisional allotment letter, the due payment had to be Rs.5,10,297.42 (Sr.no.13). The amount demanded and the amount mentioned in Sr.no.13 of the schedule payment plan had a huge gap i.e. Rs.10,00,000. Such demand of respondent was unacceptable and arbitrary in nature and held no ground of justification.
- ix. That as per section 11 (4) of the Act, the promoter is liable to pay delayed possession interest to the allottee of an apartment, building or project for a delay or failure in handing over of such possession and to adhere to the terms and condition of the agreement to sale. As per section 18 of the Act, the promoter is liable to pay interest to the allottees of an apartment, building or

project for a delay or failure in handing over of such possession as per the terms and agreement of the sale. Accordingly, the complainant herein is entitled to get interest on the paid amount at the rate as prescribed by the Rules from due date of possession till the date of actual handing over of possession.

C. Relief sought by the complainant

5. The complainant has filed the present complaint for seeking following reliefs:

- i. Direct the respondent to pay delay interest at the prescribed rate for every month of delay on the principle amount paid, from the due date of possession, i.e. 14.12.2016 till actual handing over of possession.
- ii. Direct the respondent to charge delay payments, if any, at the prescribed rate in accordance with the rules.
- iii. Direct the respondent to not charge anything outside the clauses mentioned in buyer's agreement.
- iv. Direct the respondent to not charge, levy any holding charges from the complainant.
- v. Pass such order or further order as this hon'ble authority may deem fit and proper in the facts and circumstances of the present case.

6. On the date of hearing, the authority explained to the respondent/promoter about the contravention as alleged to have been

committed in relation to section 11(4)(a) of the Act and to plead guilty or not to plead guilty.

D. Reply by the respondent

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

- i. That the complainant has filed the present complaint seeking interest for alleged delay in delivering possession of the unit booked by the complainant. It is respectfully submitted that such complaints are to be decided by the adjudicating officer under section 71 of the Act read with rule 29 of the rules and not by this hon'ble authority. The present complaint is liable to be dismissed on this ground alone. Moreover, the adjudicating officer derives his jurisdiction from the central act and the same cannot be negated by the rules made thereunder.
- ii. That the present complaint is based on an erroneous interpretation of the provisions of the Act as well as an incorrect understanding of the terms and conditions of the buyer's agreement dated 09.04.2013.
- iii. That the complainant vide an application form dated 30.01.2012 applied to the respondent for provisional allotment of a unit in the project. The complainant, in pursuance of the aforesaid application form, was allotted an independent unit bearing no. GGN-05-0802, located on the 8th floor, in the project vide provisional allotment

- letter dated 25.01.2013. Thereafter, the buyer's agreement was executed between the parties on 09.04.2013. The complainant consciously and willfully opted for a time linked plan for remittance of the sale consideration for the unit in question and further represented to the respondent that the complainant would remit every instalment on time as per the payment schedule. The respondent had no reason to suspect bona fide of the complainant.
- iv. That the complainant had persistently and regularly defaulted in remittance of installments on time. The respondent was compelled to issue demand notices, reminders etc. calling upon the complainant to make payment of outstanding amounts payable by the complainant under the payment plan/instalment plan opted by him. However, the complainant despite having received the payment request letters, reminders etc. failed to remit the instalments on time to the respondent. Statement of account dated 9.07.2021 as maintained by respondent in due course of its business reflects the delay in remittance of various instalments on the part of the complainant.
- v. That clause 16(c) of the buyer's agreement provides that compensation for any delay in delivery of possession shall only be given to such allottees who are not in default of their obligations envisaged under the agreement and who have not defaulted in payment of instalments as per the payment plan incorporated in

the agreement. In case of delay caused due to non- receipt of occupation certificate, completion certificate or any other permission/sanction from the competent authorities, no compensation or any other compensation shall be payable to the allottees. As delineated hereinabove, the complainant, having defaulted in timely remittance of instalment, was/is 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 as per clause 14(a) of the buyer's agreement, the possession of the unit in question was liable to be delivered within 36 months along with a grace period of 5 months from the date of start of construction subject to the allottee(s) having strictly complied with all terms and conditions of the buyer's agreement. It has also been provided therein that the date for delivery of possession of the unit would stand extended in the event of occurrence of the force majeure circumstances. The complainant has completely misconstrued, misinterpreted and miscalculated the time period as determined in the buyer's agreement. In the case of delay by the allottee in making payment or delay on account of reasons beyond the control of the respondent, the time for delivery of possession stands extended automatically. In the present case, the complainant is a defaulter who has failed to make timely payment of sale consideration as per the payment plan and are thus in

breach of the buyer's agreement. Therefore, on account of delay and defaults by the complainant, the due date for delivery of possession stands extended in accordance with clause 14(b)(iv) of the buyer's agreement, till payment of all outstanding amounts to the satisfaction of the respondent.

vii. That the project of the respondent had been registered under the Act. The registration certificate granted by the Haryana Real Estate Regulatory Authority vide memo no. HRERA-139/2017/2294_ dated 05.12.2017. It is pertinent to mention that the respondent has applied for extension of the registration and the hon'ble authority has already extended the validity of registration vide memo bearing no. RC/REP/HARERA/GGM/201736(a) dated 02.08.2019. The registration had been extended till 31.12.2019 and the respondent had already offered possession of the unit in question to the complainant vide letter of offer of possession dated 11.12.2018. Therefore, there is no delay in delivery of possession of the unit in question.

viii. That the complainant was offered possession of the unit in question through the letter of offer of possession dated 11.12.2018. The complainant was called upon to remit balance payment including delayed payment charges and to complete the necessary formalities/documentation necessary for handover of the unit in question to them. However, the complainant

intentionally refrained from completing their duties and obligations as enumerated in the buyer's agreement as well as under the Act. It is submitted that the complainant has intentionally and wilfully delayed obtaining of possession of the unit in question in order to obtain wrongful gain at the expense of the respondent.

- ix. That the complainant has wilfully refrained from obtaining possession of the unit in question. It appears that the complainant did not/does not have adequate funds to remit the balance payments requisite for obtaining possession in terms of the buyer's agreement and consequently in order to needlessly linger on the matter, the complainant has preferred the instant complaint in order to needlessly blackmail and vex the respondent. Therefore, there is no equity in favour of the complainant. It needs to be highlighted that an amount of Rs. 12,64,626/- is due and payable by the complainant. The complainant has intentionally refrained from remitting the aforesaid amount to the respondent. It is submitted that the complainant has consciously defaulted in his obligations as enumerated in the buyer's agreement as well as under the Act. The complainant cannot be permitted to take advantage of his own wrongs.
- x. That the holding charges have been levied strictly in accordance with the terms and conditions incorporated in the buyer's

agreement duly executed between the parties prior to the coming into force of the Act. Moreover, the complainant has consciously refrained from obtaining possession of the unit in question without any justification or reason. Consequently, the complainant cannot be allowed to take undue advantage of his own illegal acts. The relief sought in the corresponding paragraph of the complaint is illegitimate, unwarranted and meritless.

- xi. That the respondent has paid an amount of Rs. 57,840/- on account of anti-profiting to the complainant. Furthermore, an amount of Rs. 3,07,171/- has been credited by the respondent to the account of the complainant as a gesture of goodwill towards compensation. The aforesaid amounts have been accepted by the complainant in full and final satisfaction of his alleged grievances. The instant complaint is nothing but a gross misuse of process of law. Without prejudice to the rights of the respondent, delayed interest if any has to be calculated only on the amounts deposited by the allottee/complainant towards the basic principal amount of the unit in question and not on any amount credited by the respondent, or any payment made by the allottees/complainant towards delayed payment charges or any taxes/statutory payments etc. The complaint is devoid of any cause of action. The instant complaint is liable to be dismissed at the 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 complainant at a later stage.

F. Findings on the objections raised by the respondent

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

12. 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 13.04.2018 and thereafter vide memo no. ZP-835-AD(RA)/2018/33193 dated 05.12.2018, 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 05.12.2018 that an incomplete application for grant of OC was applied on 13.04.2018 as fire NOC from the competent authority was granted only on 21.11.2018 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 11.10.2018. The District Town Planner, Gurugram and Senior Town Planner, Gurugram has submitted requisite report about this project on 31.10.2018 and 02.11.2018 respectively. As such, the application submitted on 13.04.2018 was incomplete and an incomplete application is no application in the eyes of law.

13. 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 21.11.2018 and consequently the concerned authority has granted occupation certificate on 05.12.2018. Therefore, in view of the deficiency in the said application dated 13.04.2018 and aforesaid reasons, no delay in granting occupation certificate can be attributed to the concerned statutory authority.

G. Findings on the reliefs sought by the complainant

G.I Delay possession charges

14. **Relief sought by the complainant:** Direct the respondent to pay interest at the prescribed rate for every month of delay on the principle amount paid, from the due date of possession i.e. 14.12.2016 till actual handing over of possession.

15. In the present complaint, the complainant intends to continue with the project and is seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under.

"Section 18: - Return of amount and compensation

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

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

16. Clause 14(a) of the buyer's agreement provides for time period for handing over of possession and is reproduced below:

"14. POSSESSION

(a) Time of handing over the possession

Subject to terms of this clause and barring force majeure conditions, and subject to the Allottee having complied with all the terms and conditions of this Agreement, and not being in default under any of the provisions of this 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 (Thirty Six) months from the date of start of construction, subject to timely compliance of the provisions of the Agreement by the Allottee. The Allottee agrees and understands that the Company shall be entitled to a grace period of 5 (five) months, for applying and obtaining the completion certificate/occupation certificate in respect of the Unit and/or the Project."

17. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement, and the complainant not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant

for the purpose of allottee and the commitment time period for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

18. **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 start of construction and further provided in agreement that promoter shall be entitled to a grace period of 5 months for applying and obtaining completion certificate/occupation certificate in respect of said unit. The date of start of construction is 14.06.2013 as per statement of account dated 09.07.2021. The period of 36 months expired on 14.06.2016. As a matter of fact, the promoter has not applied to the concerned authority for obtaining completion certificate/occupation certificate within the time limit 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 5 months cannot be allowed to the promoter at this stage.
19. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges at the

prescribed rate. 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.

20. 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.
21. Taking the case from another angle, the complainant-allottee was entitled to the delayed possession charges/interest only at the rate of Rs.7.50/- per sq. ft. per month as per clause 16 of the buyer's agreement for the period of such delay; whereas, as per clause 13 of the buyer's agreement, the promoter was entitled to interest @ 24% per annum compounded 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

22. 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., 26.08.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.
23. **Rate of interest to be paid by the complainant in case of delay in making payments:** The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to

the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

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

Explanation. — For the purpose of this clause—

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

24. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same as is being granted to the complainant in case of delayed possession charges.

G.II Holding charges

25. In the present complaint, the complainant has disputed the demand raised by the respondent developer on account of holding charges. On the other hand, the respondent argued that the complainant had been called upon to take possession of the said unit after making payment of the outstanding amount and complete the documentation formalities. However, the complainant never came forward to do the same and as a result, the complainant is liable to make payment of holding charges to the respondent.

26. With regards to the same, it has been observed that as per sub-clause (b) of clause 15 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 17 of the buyer's agreement prescribes the amount of holding charges. The relevant clauses from the buyer's agreement are reproduced hereunder:

"15. PROCEDURE FOR TAKING POSSESSION:

- (a)
- (b) *Upon intimation in writing from the Company, the Allottee) shall within thirty (30) days take possession of the said Unit..... If the Allottee 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 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 17.1(a).*

17. FAILURE TO TAKE POSSESSION

17.1

- (a) *holding charges @ 7.50/- per sq. ft. of the Super Area of the said Unit per month for the entire period of such delay."*

27. 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.

28. 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)

29. 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.

30. 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.
31. 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 14(a) of the buyer's agreement executed between the parties on 09.04.2013, possession of the said unit was to be delivered within a period of 36 months from the date of start of construction i.e. 14.06.2013. 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 14.06.2016. In the present case, the complainant was offered possession by the respondent on 11.12.2018 after receipt of occupation certificate dated 05.12.2018. The authority is of the considered view that there is delay on the part of the respondent to offer physical

possession of the allotted unit to the complainant as per the terms and conditions of the buyer's agreement dated 09.04.2013 executed between the parties.

32. 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 05.12.2018. However, the respondent offered the possession of the unit in question to the complainant on 11.12.2018, so it can be said that the complainant came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, he should be given 2 months' time from the date of offer of possession. These 2 months' of reasonable time is being given to the complainant keeping in mind that even after intimation of possession practically he has to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e. 14.06.2016 till the expiry of 2 months from the date of offer of possession (11.12.2018) which comes out to be 11.02.2019.

33. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent

is established. As such the complainant is entitled to delay possession charges at prescribed rate of the interest @ 9.30 % p.a. w.e.f. 14.06.2016 till 11.02.2019 as per provisions of section 18(1) of the Act read with rule 15 of the Rules.

34. Also, the amount of Rs.3,07,171/- (as per statement of account dated 09.07.2021) so paid by the respondent to the complainant towards compensation for delay in handing over possession shall be adjusted towards the delay possession charges to be paid by the respondent in terms of proviso to section 18(1) of the Act.

H. Directions of the authority

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


- i. The respondent is directed to pay the interest at the prescribed rate i.e. 9.30 % per annum for every month of delay on the amount paid by the complainant from due date of possession i.e. 14.06.2016 till 11.02.2019 i.e. expiry of 2 months from the date of offer of possession (11.12.2018). The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order as per rule 16(2) of the rules.
- ii. Also, the amount of Rs.3,07,171/- so paid by the respondent to the complainant towards compensation for delay in handing over

possession shall be adjusted towards the delay possession charges to be paid by the respondent in terms of proviso to section 18(1) of the Act.

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


36. Complaint stands disposed of.

37. File be consigned to registry.


(Vijay Kumar Goyal)

Member

Haryana Real Estate Regulatory Authority, Gurugram


(Samir Kumar)

Member

Dated: 26.08.2021

Judgement uploaded on 27.10.2021.