

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

Complaint no. : 931 of 2019
First date of hearing : 09.05.2019
Date of decision : 26.08.2021

Ms. Pramila Gahlot
R/o 685, 1st floor, Princeton Floors,
Mayfield Gardens, M Block, Sector 51, Gurugram.

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 Kuldeep Kumar Kohli
Shri J.K. Dang

Advocate for the complainant
Advocate for the respondent

ORDER

1. The present complaint dated 12.03.2019 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 27.07.2010 i.e. prior to the commencement of the Act *ibid*, therefore, the penal proceedings cannot be initiated retrospectively. Hence, the authority has decided to treat the present complaint as an application for non-compliance of statutory obligation on part of the promoter/respondent in terms of section 34(f) of the Act *ibid*.

A. Project and unit related details

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

S.No.	Heads	Information
1.	Project name and location	Emerald Hills-Floors, Sector 65, Gurugram.
2.	Project area	102.7412 acres
3.	Nature of the project	Residential gated colony
4.	DTCP license no. and validity status	10 of 2009 dated 21.05.2009 Valid/renewed up to 20.05.2019
5.	Name of licensee	Active Promoters Pvt. Ltd. & others C/o Emaar MGF Land Ltd.
6.	HRERA registered/ not registered	Registered vide no. 162 of 2017 dated 29.08.2017 for 55.962 acres
	HRERA registration valid up to	28.08.2022
7.	Occupation certificate granted on	30.05.2018 [Page 141 of reply]
8.	Provisional allotment letter dated	13.07.2009 [Page 39 of reply]
9.	Unit no.	EHF-267-A-FF-005, first floor, block/building no. Amber [Page 38 of complaint]

10.	Unit measuring	1380 sq. ft.
11.	Date of execution of buyer's agreement	27.07.2010 [Page 36 of complaint]
12.	Payment plan	Construction linked payment plan [Page 73 of complaint]
13.	Total consideration as per statement of account dated 13.03.2019 [Page 41 of reply]	Rs. 56,31,194/-
14.	Total amount paid by the complainant as per statement of account dated 13.03.2019 [Page 42 of reply]	Rs.56,80,273 /-
15.	Nomination letter in favour of the complainant	11.08.2012 [Page 98 of complaint]
16.	Due date of delivery of possession as per clause 13(i) of the said agreement i.e. 27 months from the date of execution of the agreement (27.07.2010) + grace period of 6 months, for applying and obtaining the occupation certificate in respect of the floor and/or the project. [Page 51 of complaint]	27.10.2012 [Note: Grace period is not included]
17.	Date of offer of possession to the complainant	30.07.2018 [Page 131 of complaint]
18.	Delay in handing over possession w.e.f. 27.10.2012 till 30.09.2018 i.e. date of offer of possession (30.07.2018) + 2 months	5 years 11 months 3 days

B. Facts of the complaint

4. The complainant has made the following submissions in the complaint:
 - i. That the complainant purchased the said unit from the first buyer Mr. Satish Sethi in the hope that the respondent will deliver the said unit within months. The allotment letter was issued to the previous buyer with respect to the unit no. EHF-267-A-AFF-005. Thereafter, a

buyer's agreement was executed between the previous buyer and the respondent on 27.07.2010. Thereafter, an agreement to sell was executed between the previous buyer and the second buyer i.e. Mr. Veeresh Kumar Gahlot (husband of the complainant) and the endorsement with respect to the said unit was made in favour Mr. Veeresh Kumar Gahlot by the respondent. Thereafter, a nomination letter dated 11.08.2012 was issued in favour of Mr. Veeresh Kumar Gahlot and the complainant by the respondent with the confirmation of the total amount paid by the 1st buyer. Due to untimely death of 2nd buyer i.e. Mr. Veeresh Kumar Gahlot, a request for transfer of the property was made by the complainant as she was the co-applicant and it was accepted by the respondent vide nomination confirmation letter dated 28.07.2017. As per clause 13.1 of the buyer's agreement, respondent assured that the possession of the unit shall be handed over by 27.10.2012.

- ii. That a letter of possession dated 30.07.2018 with the payment schedule of the last instalment was issued by the respondent after the delay of more than 5 years as per the buyer's agreement with the increased tax. After visiting the project site to check the status of the construction, the complainant was shocked to see that the construction was still incomplete after even 6 years of the actual date of possession and the respondent were still making demands of the remaining amount without completing the construction of the

project. The complainant had fairly bought the said unit in the year 2012 and till 2019, the complainant has no idea about the fate and future of the project while losing a major chunk of her lifelong savings.

- iii. That the complainant has suffered a loss and damage in as much as they had deposited the money in hope of getting the said unit for residential purpose. With the delay in receiving possession, the complainant suffered huge monetary loss. That with each passing day, the financial occurring to the complainant is increasing and causing them mental agony and harassment.

C. Relief sought by the complainant

5. The complainant has filed the present compliant for seeking following relief:
 - i. Direct the respondent to handover the possession of the said apartment with the best amenities and specification as promised in all completeness without any further delay.
 - ii. Direct the respondent to pay delay possession charges on the total amount paid by the complainant along with interest calculated at the rate of 24% from 21.05.2016 till date of realisation.
 - iii. Direct the respondent to pay compensation for the rent paid by the complainant due to the delay in possession by the respondent amounting to Rs.15,00,000/- and total interest on loan amounting to Rs.1,44,000/-.

iv. Pass such other order or further order(s) 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 and compensation for alleged delay in delivery of possession of the unit booked by the complainant. The complaints pertaining to refund, compensation and interest are to be decided by the adjudicating officer under section 71 of the Act read with rule 29 of the rules and not by this hon'ble authority. The present complaint is liable to be dismissed on this ground alone.

ii. That Mr. Satish Sethi (hereinafter "original allottee") had approached the respondent sometime in the year 2009 for purchase of an independent unit in the said project. The original allottee, in pursuance of the application form dated 07.06.2009, was allotted unit bearing no. EHF-267-A-FF-005 located on 1st floor in the said project vide provisional allotment letter dated 13.07.2009. The

original allottee consciously and wilfully opted for a construction linked plan for remittance of the sale consideration for the unit in question and further represented to the respondent that the original allottee shall remit every instalment on time as per the payment schedule.

- iii. That the original allottee was irregular regarding the remittance of instalments on time. The respondent was compelled to issue demand notices, reminders etc. calling upon the original allottees under the payment plan opted by him. The original allottee defaulted in timely remittance of few the instalments. The complainant and Mr. Vareesh Gahlot too were irregular in remittance of the instalments as per the schedule of payment incorporated in the buyer's agreement. The statement of account dated 13.03.2019 as maintained by the respondent in its due course of business reflects the delay in remittance of the instalments by the original allottee and the complainant.
- iv. That respondent submitted that the buyer's agreement dated 27.07.2010 was executed between the original allottee and the respondent. Clause 15 of the buyer' agreement provides that compensation for 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.

The original allottee and the complainant, having defaulted in timely remittance of instalment, was thus not entitled to any compensation or any amount towards interest as an indemnification for delay, if any, under the buyer's agreement.

- v. That the complainant and Mr. Veeresh Gahlot approached the original allottee for purchasing his rights and title in the unit in question. The original allottee acceded to their request and agreed to transfer and convey his rights and title in the unit in question vide agreement to sell dated 09.07.2012. The buyer's agreement, thereafter, was endorsed in the name of the complainant and Mr. Veeresh Gahlot. The complainant and Mr. Veeresh Gahlot on executing the aforesaid agreement to sell had approached the respondent requesting it to endorse the provisional allotment of the unit in question in their name. They had further executed an affidavit dated 06.08.2012 and an indemnity cum undertaking dated 06.08.2012 whereby the complainant and Mr. Veeresh Gahlot had consciously and voluntarily declared that they would be bound by all the terms and conditions of the provisional allotment in the favour of the original allottee. It was further declared that they having been substituted in the place of the original allottee were not entitled to any compensation for delay, if any, in delivery of possession of the unit in question and further undertook to not raise any claim towards the same. Furthermore, they were stepping into

the shoes of the original allottee and therefore all the rights and liabilities of the original allottee were transferred to them. The original allottee was not entitled to any compensation or any 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.

- vi. That as per clause 13(v), in case of any default or 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 the respondent's discretion till the payment of all outstanding amounts to the satisfaction of the respondent. Since, the original allottee as well as the complainant had 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 complainant.
- vii. That the respondent had offered possession of the unit in question through letter of offer of possession dated 30.07.2018 to the complainant. The complainant was called upon to remit balance payment and to complete the necessary formalities/documentation necessary for handover of the said unit to her. However, the complainant ignored the legitimate and valid requests of the

- respondent to remit balance payment and complete necessary formalities for delivery of possession of the unit in question.
- viii. That respondent submitted that in order to avoid any unwarranted controversy, proceeded to settle the wantonly instigated frivolous dispute with the complainant by crediting an amount of Rs.4,35,834/- as a gesture of goodwill. The said payment was made to the complainant in full and final settlement of her alleged claims or grievances or demands against the respondent. The said amount has been duly accepted by the complainant. That after acceptance of the aforesaid amount by the complainant, she was/is left with no claim, whatsoever, against the respondent.
- ix. That 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. 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 complainant for seeking interest or compensation cannot be called in to aid in derogation and ignorance of the provisions of the buyer's agreement. The 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 complainant is beyond the scope of the buyer's agreement. The

complainant cannot demand any interest or compensation beyond the terms and conditions incorporated in the buyer's agreement. Moreover, the complainant cannot demand any amount for the period during which no association subsisted between the complainant and the respondent.

- x. That several allottees having defaulted in timely remittance of payment of installments which was an essential, crucial and an indispensable requirement for conceptualization and development of the project in question. Furthermore, when the proposed allottees default in their payments as per schedule agreed upon, the failure has a cascading effect on the operations and the cost for proper execution of the project increases exponentially whereas enormous business losses befall upon the respondent. The respondent, despite default of several allottees, has diligently and earnestly pursued the development of the project in question and has constructed the project in question as expeditiously as possible. Therefore, there is no default or lapse on the part of the respondent and there is no equity in favour of the complainant. It is evident from the entire sequence of events, that no illegality can be attributed to the respondent. Thus, it is most respectfully submitted that the present complaint deserves to be dismissed at the very threshold.

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

E. Jurisdiction of the authority

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

E.I Territorial jurisdiction

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

E.II Subject-matter jurisdiction

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

F. Findings on the objections raised by the respondent

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

12. One of the contentions of the respondent is that the authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the buyer's agreement executed between the parties and no agreement for sale as referred to under the provisions of the Act or the said rules has been executed inter se parties. The respondent further submitted that the provisions of the Act are not retrospective in nature and the provisions of the Act cannot undo or modify the terms of buyer's agreement duly executed prior to coming into effect of the Act.
13. 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."

14. 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."

15. 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 not in contravention of the Act and are not unreasonable or exorbitant in nature.

F.II Whether a subsequent allottee is entitled to claim delay possession charges

16. The respondent submitted that the respondent, at the time of endorsement of the unit in question in favour of the complainant, had specifically indicated to the complainant that being the assignee of the original allottee she would not be entitled to any compensation for delay, if any. The said position was duly accepted and acknowledged by the complainant. The complainant is conscious and aware of the fact that she is not entitled to any right or claim against respondent. Therefore, the complainant is not entitled to any compensation. With regard to the above contentions raised by the promoter/developer, it is worthwhile to examine following four sub-issues:

- (i) Whether subsequent allottee is also allottee as per provisions of the Act?
- (ii) Whether delay possession charges are in the nature of statutory legal obligation of the promoter other than compensation?
- (iii) 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)?

(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?

17. 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".

18. 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.

19. 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.

20. 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....."

21. The authority concurs with the Hon'ble NCDRC's decision dated 26.11.2019 in **Rajnish Bhardwaj vs. M/s CHD Developers Ltd.** (supra) and observes that it is irrespective of the status of the allottee whether it is original or subsequent, an amount has been paid towards the

consideration for a unit and the endorsement by the developer on the transfer documents clearly implies his acceptance of the complainant as an allottee.

22. Therefore, taking the above facts into account, the authority is of the view that the term subsequent allottee has been used synonymously with the term allottee in the Act. The subsequent allottee at the time of buying the said unit takes on the rights as well as obligations of the original allottee vis-a-viz the same terms and conditions of the buyer's agreement entered into by the original allottee. Moreover, the amount if any paid by the subsequent or original allottee is adjusted against the unit in question and not against any individual. Furthermore, the name of the complainant/subsequent allottee has been endorsed on the same builder buyer's agreement which was executed between the original allottee and the promoter. Therefore, the rights and obligation of the subsequent allottee and the promoter will also be governed by the said buyer's agreement.

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

23. 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.
24. 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.**
25. 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.
- iii. **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 she became allottee)?**
26. The respondent/promoter argued that the subsequent allottee shall not be entitled to any compensation/delayed possession charges since at the time of the execution of transfer documents/agreement for sale, she was well aware of the due date of possession and has knowingly waived off her right to claim any compensation for delay in handing over possession or any rebate under a scheme or otherwise or any other discount. The

respondent/ promoter had spoken about the disentitlement of compensation/delayed possession charges to the subsequent allottee who had clear knowledge of the fact w.r.t. the due date of possession. But despite that she entered into the agreement for sell and/or indemnity-cum-undertaking knowingly waiving off her right of compensation.

27. The authority place 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* wherein 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)

28. In the present case, the complainant/subsequent allottee had been acknowledged as an allottee by the respondent vide nomination letter dated 11.08.2012. The authority has observed that the promoter has confirmed the transfer of allotment in favour of subsequent allottee (complainant) and the installments paid by the original allottee were adjusted in the name of the subsequent allottee and the next installments were payable/due as per the original allotment letter. Also, we have also perused the buyer's agreement which was originally entered into between the original allottee and the promoter. The same buyer's agreement has been endorsed in favour of the subsequent allottee/complainant. All the terms of buyer's agreement remain the

same, so it is quite clear that the subsequent allottee has stepped into the shoes of the original allottee.

29. Though the promised date of delivery was 27.10.2012 and the complainant/subsequent allottee had been acknowledged as an allottee by the respondent vide nomination letter dated 11.08.2012 i.e. prior to the lapse of due date of possession. The construction of the tower in question was not completed by the said date and it was offered by the respondent only on 30.07.2018. If these facts are taken into consideration, the complainant/ subsequent allottee had agreed to buy the unit in question with the expectation that the respondent/promoter would abide by the terms of the buyer's agreement and would deliver the subject unit by the said due date. At this juncture, the subsequent purchaser cannot be expected to have knowledge, by any stretch of imagination, that the project will be delayed, and the possession would not be handed over within the stipulated period. So, the authority is of the view that in cases where the subsequent allottee has stepped into the shoes of original allottee before the due date of handing over possession, the delayed possession charges shall be granted w.e.f. due date of handing over possession. In the present complaint, the respondent had acknowledged the complainant as an allottee before the expiry of due date of handing over possession, therefore, the complainant is entitled for delay possession charges w.e.f. due date of handing over possession as per the buyer's agreement.

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?**

30. The authority further is unable to gather any reason or has not been exposed to any reasonable justification as to why a need arose for the complainant to sign any such affidavit or indemnity-cum-undertaking and as to why the complainant has agreed to surrender her legal rights which were available or had accrued in favour of the original allottee. In the instant matter in dispute, it is not the case of the respondent that the re-allotment of the unit was made in the name of the complainant/subsequent purchaser after the expiry of the due date of delivery of possession of the unit. Thus, so far as the due date of delivery of possession had not come yet and before that the unit had been re-allotted in the name of the subsequent allottee, the subsequent-allottee will be bound by all the terms and conditions of the buyer's agreement including the rights and liabilities. Thus, no sane person would ever execute such an affidavit or indemnity-cum-undertaking unless and until some arduous and/or compelling conditions are put before him with a condition that unless and until, these arduous and/or compelling conditions are performed by him, he will not be given any relief and he is thus left with no other option but to obey these conditions. Exactly same situation has been demonstratively happened here, when the complainant/ subsequent-allottee has been asked to give the affidavit or indemnity-cum-undertaking in question before transferring the unit in



her name otherwise such transfer may not be allowed by the promoter. Such an undertaking/ indemnity bond given by the complainant thereby giving up her 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."

31. 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
32. 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.** (Civil appeal no. 5785 of 2019) 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."

33. The same analogy can easily be applied in the case of execution of an affidavit or indemnity-cum-undertaking which got executed from the complainant/subsequent-allottee before getting the unit transferred in her name in the record of the promoter as allottees in place of the original allottee.
34. The authority may deal with this point from yet another aspect. By executing an affidavit/undertaking, the complainant/subsequent-allottee cuts her hands from claiming delay possession charges in case there occurs any delay in giving possession of the unit beyond the stipulated time or the due date of possession. But the question which arises before the authority is that what does allottee got in return from the promoter by giving such a mischievous and unprecedented undertaking. However, the answer would be "nothing". If it is so, then why did the complainant executed such an affidavit/undertaking is beyond the comprehension and understanding of this authority.
35. The authority holds that irrespective of the execution of the affidavit/undertaking by the complainant/subsequent allottee at the time of transfer of her name as allottees in place of the original allottee in the record of the promoter does not disentitle her from claiming the delay possession charges in case there occurs any delay in delivering the

possession of the unit beyond the due date of delivery of possession as promised even after executing an indemnity-cum-undertaking.

G. Findings on the reliefs sought by the complainant

G.1 Possession and delay possession charges

36. 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."

37. Clause 13(i) of the buyer's agreement provides for time period for handing over of possession and is reproduced below:

"13. POSSESSION

(i) 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 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 floor within 27 months from the date of execution of this Agreement. The Allottee(s) agrees and understands that the company shall be entitled to a grace period of 6 months, for applying and obtaining the occupation certificate in respect of the Floor and/or the Project."

38. 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.

39. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within 27 months from the date of execution of the buyer's agreement and further provided in agreement that promoter shall be entitled to a grace period of 6 months for applying and obtaining occupation certificate in respect of said unit. The Buyer's agreement was executed on 27.07.2010. The period of 27 months expired on 27.10.2012. As a matter of fact, the promoter has not applied to the concerned authority for obtaining 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 6 months cannot be allowed to the promoter at this stage.

40. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges at the rate of 24% pa. 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.

41. 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.
42. Taking the case from another angle, the complainant-allottee was entitled to the delayed possession charges/interest only at the rate of Rs.10/- per

sq. ft. per month of the super area as per clause 15 of the buyer's agreement for the period of such delay; whereas, as per clause 12 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.

43. 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%.

44. **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;"*

45. 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.

46. 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 13(i) of the buyer's

agreement executed between the parties on 27.07.2010, possession of the said unit was to be delivered within a period of 27 months from the date of execution of the buyer's agreement i.e. 27.07.2010. 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 27.10.2012. In the present case, the complainant was offered possession by the respondent on 30.07.2018 after receipt of occupation certificate 30.05.2018. 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 27.07.2010 executed between the parties.

47. 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 30.05.2018. However, the respondent offered the possession of the unit in question to the complainant only on 30.07.2018. 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, the complainant should be given 2 months' time from the date of offer of possession. These 2 months' of reasonable time is being given to the complainant keeping in mind that even after intimation of possession practically she 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. 27.10.2012 till the expiry of 2 months from the date of offer of possession (30.07.2018) which comes out to be 30.09.2018.

48. 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. 27.10.2012 till 30.09.2018 as per provisions of section 18(1) of the Act read with rule 15 of the rules.
49. Also, the amount of Rs.4,35,834/- (as per statement of account dated 13.03.2019) 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.

G.II Compensation

50. The complainant is also seeking compensation for mental agony and harassment. An allottee is entitled for claiming 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. Therefore, the complainant is advised to approach the adjudicating officer for seeking compensation.

H. Directions of the authority

51. 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. 27.10.2012 till 30.09.2018 i.e. expiry of 2 months from the date of offer of possession (30.07.2018). 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.4,35,834/- 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. Interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 9.30% by the respondent which is the same as is being granted to the complainant in case of delayed possession charges.

iv. 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.


52. Complaint stands disposed of.

53. File be consigned to registry.


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 26.08.2021


(Samir Kumar)
Member

Judgement uploaded on 27.10.2021.

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