

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

Complaint no. : 2335 of 2019
First date of hearing : 17.12.2019
Date of decision : 12.10.2021

1. Mr. Amit Arora
2. Mr. Akul Laxminarayan Arora
(SPA in favour of Mr. Amit Arora)
Both RR/o: H.No.75, Jalvayu Vihar, Silver Heights,
Pondha, Prem Nagar, Dehradun.

Complainants

Versus

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

Respondent

CORAM:

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

Chairman
Member
Member

APPEARANCE:

Shri Satinder Kumar Goyal
Shri J.K. Dang

Advocate for the complainants
Advocate for the respondent

ORDER

1. The present complaint dated 25.06.2019 has been filed by the complainants/allottees in Form CRA under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions to the allottee as per the agreement for sale executed inter se them.

2. Since, the buyer's agreement has been executed on 13.05.2013 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 complainants, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S.No.	Heads	Information
1.	Project name and location	"Imperial Gardens", Sector 102, Gurugram.
2.	Project area	12 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no. and validity status	107 of 2012 dated 10.10.2012 Valid till 09.10.2020
5.	Name of licensee	Kamdhenu Projects Pvt. Ltd.
6.	HRERA registered/ not registered	Registered in two phases i. 208 of 2017 dated 15.09.2017 [Valid up to 31.12.2018 for 49637 sq. mtrs. and extension granted vide no.3/2019 dated 02.08.2019 which is extended up to 31.12.2019] ii. 14 of 2019 dated 28.03.2019(Phase II) [Valid up to 17.10.2018 for 4.57 acres]

7.	Occupation certificate granted on	17.10.2018 [Page 168 of reply]
8.	Date of provisional allotment letter	28.02.2013 [Page 32 of reply]
9.	Unit no.	IG-09-0604, 6 th floor, tower no. 9 [Page 34 of complaint]
10.	Unit measuring	2000 sq. ft.
11.	Date of execution of buyer's agreement	13.05.2013 [Page 31 of complaint]
12.	Payment plan	Construction linked payment plan [Page 66 of complaint]
13.	Total consideration as per statement of account dated 10.07.2019	Rs.1,45,00,591/- [Page 152 of reply]
14.	Total amount paid by the complainants as per statement of account dated 10.07.2019	Rs.1,04,15,482/- [Page 153 of reply]
15.	Date of start of construction as per statement of account dated 10.07.2019	11.11.2013
16.	Due date of delivery of possession as per clause 14(a) of the said agreement i.e. 42 months from the date of start of construction (11.11.2013) plus grace period of 3 months for applying and obtaining the CC/OC in respect of the unit and/or the project.	11.05.2017 [Note: Grace period is not allowed]
17.	Date of offer of possession to the complainants	31.10.2018 [Page 170 of reply]
18.	Delay in handing over possession till 31.12.2018 i.e. date of offer of possession (31.10.2018) + 2 months	1 year 7 months 20 days

B. Facts of the complaint

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

- i. That they booked the flat in the month of October 2012 by making payment of Rs.7,50,000/- by way of cheque in favour of the respondent. After receiving the amount from the complainants, the respondent duly signed and executed a buyer's agreement dated 13.05.2013 and allotted unit no. IG-09-0604 in favour of complainants with the assurance that the respondent would deliver the unit within time. Thereafter, the complainants started paying the instalments as per the demand of the respondent on time and the respondent received the same from time to time accordingly while assuring the timely delivery of possession which fell due on 13.11.2016 but never delivered the possession of the aforesaid flat on time and even till date the respondent has miserably failed to handover the possession of the aforesaid flat to the complainants despite there being inordinate delay of more than 2 years from the due date. Though the respondent had offered possession on 31.10.2018 but the same was totally hypothetical as the building was not complete and even till date the building is not complete and fit for habitation including all amenities agreed to be provided by the respondent. The complainants even requested many times to the officials of the respondent to visit the site and allow them to inspect their proposed flat, but they never accede to the just request of the complainants and rather threaten to take coercive steps against the complainants. The complainants also sent various mails to the respondent, but they did not adhere to the same nor replied in any manner.

- ii. That they have been punctual in making payment of the instalments in due time, however some payments were got delayed as the complainant no.1 spent huge money in treatment of his wife in the year 2014 as she was diagnosed with cancer due to which the hard-earned money and time of complainant was spent upon the same. However, since the payments were linked with construction therefore, the demands of the respondent were totally unreasonable as the building was not completed on time and they were not legally entitled to ask for the balance amount.
- iii. That after many requests the officials of the respondent on 29.05.2019 provided the statement of account to the complainants without explaining the amount shown to be due. After pursuing the statement of account, the complainant no.1 requested the officials of the respondent to explain the details of the total amount of Rs.67,66,252/- shown to be due against the complainants regarding the aforesaid flat, but the officials of the respondent flatly refused to explain the remaining amount except the amount of Rs.40,85,109/- actually shown to be due towards balance sale consideration. The perusal of the statement of account would reveal that a sum of Rs.23,93,878/- have been shown as delayed payment charges on which a sum of Rs.2,87,265/- has been shown to be paid towards GST upon the said amount, however the said amount is totally illegal, exorbitant and cannot be levied upon the complainants in any manner specially when the respondent itself has failed to deliver the possession within the agreed period. Moreover, the officials of the respondent never gave any

explanation for charging this heavy amount towards delay payment charges which as per the knowledge of the complainants have been charged calculating the interest @ 24 % p.a. The said delay payment charges are totally illegal, exorbitant and liable to be waived off by the orders of the authority and the respondent is liable to pay the interest upon the total payment of Rs.1,04,15,482/- admittedly deposited by the complainants with the respondent and the said amount is liable to be adjusted in total dues to be paid by the complainants.

- iv. That initially they booked another apartment in another project of the respondent known as Gurgaon Greens and a total sum of Rs.39,30,922/- were paid against the said property, however, the complainants lured with the proposals of the respondent to book a property in the present project 'Imperial Gardens' changed their flat from the previous project and a sum of Rs.10,36,816/- was deducted by the respondent while transferring the balance amount of Rs.29,00,106/- against the allotment of present flat. Even the said deduction of Rs.10,36,816/- was totally illegal. That the respondent has charged Rs.1,45,00,591/- from the complainants as the total sale consideration and now the respondent is selling the unit for sale consideration of Rs.1.13 crores which clearly shows that the respondent has cheated the innocent purchasers from the very beginning and the respondent is liable to transfer the proposed unit to the complainants at the same price of Rs.1.13 crores. The respondent after receiving the substantial amount of Rs.1,04,15,482/- till today, the respondent also failed to handover

the possession of the flat in question which is yet not complete to the notice and knowledge of the complainants.

C. Reliefs sought by the complainants

5. The complainants have sought the following reliefs:

- i. The respondent be directed to handover the possession of the unit to the complainants as per allotment along with penalty for delayed possession @18% per annum compounded half yearly (interest rate levied by the respondent) for every year of delayed possession to be calculated proportionately to every day of delay from date of payment till realisation along with all facilities/ fittings/fixtures of ultra-luxury with world class residential property.
- ii. The amount of Rs.23,93,878/- shown as delayed payment charges and the amount of Rs.2,87,265/- shown as GST upon the same may be ordered to be waived off out of the total dues shown against the complainants.
- iii. The respondent may be directed to transfer the allotted unit to the complainants for total sale consideration of Rs.1.13 crores after adjusting the total amount paid by the complainants and the interest upon the same.
- iv. The amount of Rs.10,00,582/- may also be adjusted in the total sale consideration and the excess amount found to be due may be ordered to be refunded to the complainants.

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 to plead guilty or not to plead guilty.

D. Reply filed by the respondent

7. The respondent has contested the complaint on the following grounds:
- i. That the complainants have filed the present complaint seeking, inter alia, possession, compensation and interest for alleged delay in delivering possession of the apartment booked by the complainants. That the complaints pertaining to interest, compensation etc. 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 authority.
 - ii. That the complainants are wilful and persistent defaulters who have failed to make payment of sale consideration as per the payment plan opted by the complainants. The complainants have not come before this hon'ble authority with clean hands and have concealed vital and material facts.
 - iii. That vide provisional allotment letter dated 28.02.2013, the complainants were provisionally allotted unit bearing no. IG-09-0604 located on 6th floor in tower/building no. 09, having approximate area of 2000 sq. ft. The complainants had opted for a payment plan which was partially construction linked. Thereafter, buyer's agreement was executed between the parties on 13.05.2013. That right from the beginning, the complainants had

been extremely irregular with regard to payment. Consequently, the respondent had to issue notices and reminders calling upon the complainants to pay the demanded amounts as per the payment plan. The statement of account dated 10.07.2019 reflects the payments made by the complainants and the delayed payment interest payable by the complainants.

- iv. That as per the terms and conditions of the buyer's agreement dated 13.05.2013, the complainants are under a contractual obligation to make timely payment of all amounts payable under the buyer's agreement, on or before the due dates of payment failing which the respondent is entitled to levy delayed payment charges in accordance with clause 1.2(c) read with clause 12 and 13 of the buyer's agreement dated 13.05.2013. Clause 12 of the buyer's agreement provides that time shall be the essence of the contract in respect of the allottee's obligation to perform/observe all obligations of the allottee including timely payment of the sale consideration as well as other amounts payable by the allottee under the agreement. Clause 13 of the buyer's agreement provides for levy of interest on delayed payments by the allottee. It is matter of record that delayed payment charges amounting to Rs.24,38,992/- are due and payable by the complainants as per the statement of account dated 10.07.2019.
- v. That in the meanwhile, the respondent registered the project under the provisions of the Act. The project had been registered initially till 31.12.2018. However, the respondent has applied for

extension of the validity of the project till 31.12.2019 in respect of few towers that were yet to be completed on 31.12.2018.

- vi. That in so far as tower in which the apartment in question is situated is concerned, the respondent completed construction of the same and applied for occupation certificate in respect thereon on 21.03.2018. The occupation certificate was issued by the competent authority on 17.10.2018. Upon receipt of occupation certificate, the respondent offered possession of the apartment in question to the complainants vide letter dated 31.10.2018. The complainants were called upon to remit the balance amount as per the attached statement and also to complete the necessary formalities and documentation so as to enable the respondent to handover the possession of the apartment to the complainants.
- vii. That since the complainants failed to come forward and make payment of the balance sale consideration and take possession of the apartment in question, reminder for possession dated 11.12.2018, 14.01.2019, 13.02.2019, 15.03.2019, were issued by the respondent to the complainants. However, instead of remitting the balance payment as per the buyer's agreement and taking possession of the apartment in question, the complainants have proceeded to file the present false and frivolous complaint.
- viii. That the construction of the tower in which the apartment in question is situated was commenced on 11.11.2013 and the period of 42 months plus 3 months' grace period expired on 11.08.2017. However, on account of delay and defaults by the complainants, 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. Furthermore, the respondent had completed construction of the apartment/tower by March 2018 and had applied for issuance of OC on 21.03.2018 and was issued on 17.10.2018. The respondent cannot be held liable in any manner for the time taken by the competent authority to process the application and issue the OC. Thus, the said period taken by the competent authority in issuing the OC as well as the time taken by the statutory authorities in according approvals, permissions etc. necessarily have to be excluded while computing the time period for delivery of possession.

- ix. That the complainants, being defaulters, are not entitled to any compensation in terms of clause 16(c) of the buyer's agreement dated 13.05.2013. Furthermore, in terms of clause 16(c) of the buyer's agreement, no compensation is payable due to delay or nonreceipt of the occupation certificate, completion certificate and/or any other permission/sanction from the competent authority. Thus, there is no merit in the complaint filed by the complainants.
- x. The complainants have admittedly purchased the apartment in question as a speculative investment. The complainants are not residents of Gurugram never intended to reside in the said apartment and have booked the same with a view to earn a huge

profit from resale of the same. It is for this reason that the complainants are reluctant to take possession of the same. The complainants are investors who never had any intention to buy the apartment for their personal use and has kept on intentionally avoiding the performance of their contractual obligations of making timely payments and has now filed the present complaint on false and frivolous grounds. This is further evident from the fact that the complainants had also made a booking of a unit in project Gurgaon Greens developed by the respondent. However, due to alleged lack of funds, the complainants later requested the respondent to cancel the allotment in Gurgaon Greens and transfer their deposit towards the present unit in Imperial Garden i.e. the unit in question. Therefore, the complainants are not "allottee" or home buyer under the Act but investors and thus the present complaint is not maintainable at their behest.

- xi. The respondent denied that the complainants were lured by the respondent into change in the allotment from the previous project. In fact, the complainants defaulted in making payment of sale consideration in respect of the apartment situated in "Gurgaon Greens" and consequently, the allotment in favour of the complainants was liable to be cancelled by the respondent. The complainants requested the respondent to transfer their allotment to the present project. Accordingly, the respondent acceded to the request made by the complainants and transferred the payment made by the complainants, after deduction of earnest money and adjusted the balance amount against the apartment in question. It

is absolutely denied that the deduction/ forfeiture of Rs.10,36,816/- by the respondent was illegal and impermissible. On the contrary, the forfeiture of the said amount was rightly carried out by the respondent as per the terms and conditions of allotment and pertinently, the complainants never raised any objection on the same.

- xii. That the respondent has been prevented from timely implementation of the project by reasons beyond its power and control. It is submitted that the respondent had appointed contractor i.e. Capacite Infraprojects Ltd. on 17.09.2013 for construction and implementation of the project in question. However, the said contractor was not able to meet the agreed timeline for construction of the project. The said contractor failed to deploy adequate manpower, shortage of material etc. Therefore, no fault or lapse can be attributed to the respondent of the facts and circumstances of the case.
- xiii. The respondent denied that the respondent is selling apartment apartments in the project for total sale consideration of Rs.1.13 crores. Assuming, without in any manner admitting any truth in the allegations made by the complainants, it is respectfully submitted that the sale consideration for other apartments in the project is of no consequence and is wholly irrelevant insofar as the contractual obligations of the complainants under the buyer's agreement dated 13.05.2013 are concerned. As far as complainants are concerned,

the complainants are under contractual obligation to make payment in accordance with buyer's agreement dated 13.05.2013.

xiv. That no illegality or lapse can be attributed to the respondent. Thus, the allegations levelled by the complainants qua the respondent are totally baseless and do not merit any consideration by the authority. Thus, 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 entitlement of DPC on ground of complainants being investor.

12. The respondent contended that the complainants are the investors and not consumers, therefore, they are not entitled to the protection of the Act. The respondent further submitted that the complainants are investors who never had any intention to buy the apartment for their own personal use. Therefore, the complainants are not "allottee" or home buyer under the Act but investors and thus the present complaint is not maintainable at their behest.
13. The authority observed that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time preamble

cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that under section 31 of the Act, any aggrieved person can file a complaint against the promoter if the promoter contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the buyer's agreement, it is revealed that the complainants are allottees/buyers and they have paid total price of Rs. 1,04,15,482/- to the promoter towards purchase of the said unit in the project of the promoter. At this stage, it is important to stress upon the definition of term 'allottee' under the Act, the same is reproduced below for ready reference:

"2(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;"

14. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the buyer's agreement executed between respondent and complainants, it is crystal clear that the complainants are allottee(s) as the subject unit was allotted to them by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". The



Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled as *M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr.* has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottee being an investor is not entitled to protection of this Act stands rejected.

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

15. 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 has applied for grant of occupation certificate on 21.03.2018 and thereafter vide memo no. ZP-845/SD(BS)/2018/29753 dated 17.10.2018, 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 17.10.2018 that an incomplete application for grant of OC was applied on 21.03.2018 as fire NOC from the competent authority was granted only on 18.09.2018 which is subsequent to the filing of application for occupation certificate. Also, the Chief Engineer-I, HUDA, Panchkula has submitted his requisite

report in respect of the said project on 12.09.2018. The District Town Planner, Gurugram and Senior Town Planner, Gurugram has submitted requisite report about this project on 24.09.2018 and 27.09.2018 respectively. As such, the application submitted on 21.03.2018 was incomplete and an incomplete application is no application in the eyes of law.

16. 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 27.09.2019 and consequently the concerned authority has granted occupation certificate on 17.10.2018. Therefore, in view of the deficiency in the said application dated 21.03.2018 and aforesaid reasons, no delay in granting occupation certificate can be attributed to the concerned statutory authority.

G. Findings on the relief sought by the complainants

G.I Delay possession charges and rate of interest on delay payments by the complainants

17. **Relief sought by the complainants:** The below-mentioned reliefs sought by the complainants are being taken together as the findings in one relief will definitely affect the result of the other relief and these reliefs are interconnected.

- i. The respondent be directed to handover the possession of the unit to the complainants as per allotment along with penalty for delayed possession @18% per annum compounded half yearly (interest rate levied by the respondent) for every year of delayed possession to be calculated proportionately to every day of delay from date of payment till realisation along with all facilities/ fittings/fixtures of ultra-luxury with world class residential property.
- ii. The amount of Rs.23,93,878/- shown as delayed payment charges and the amount of Rs.2,87,265/- shown as GST upon the same may be ordered to be waived off out of the total dues shown against the complainants.

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

"Section 18: - Return of amount and compensation

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

.....

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

19. Clause 14(a) of the buyer's agreement dated 13.05.2013 provides time period for handing over the possession and the same 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 42 (Forty Two) 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 3 (three) months after the expiry of the said period of 42 months, for applying and obtaining the completion certificate/ occupation certificate in respect of the Unit and/or the Project."

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



prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment time period for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottees of their 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.

21. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within 42 months from the date of start of construction and it is further provided in agreement that promoter shall be entitled to a grace period of 3 months after expiry of the said period of 42 months, for applying and obtaining completion certificate/occupation certificate in respect of said unit. The date of start of construction is 11.11.2013 as per statement of account dated 10.07.2019. The period of 42 months expired on 11.05.2017. As a matter of fact, the promoter has not applied to the concerned authority for obtaining completion certificate/ occupation certificate within the time limit (42 months) prescribed by the promoter in the buyer's agreement. The promoter has moved the application for issuance of occupation certificate only on 21.03.2018 when the period of 42 months

has already expired. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, the benefit of grace period of 3 months cannot be allowed to the promoter at this stage.

22. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges at the rate of 18% p.a. 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.

23. The legislature in its wisdom in the subordinate legislation under 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.

24. Taking the case from another angle, the complainants-allottees were entitled to the delayed possession charges/interest only at the rate of Rs.7.50/- per sq. ft. per month of the super area 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 at the time of every succeeding instalments 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 dominant 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.

25. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., 12.10.2021 is 7.30%. Accordingly, the prescribed rate of interest will be MCLR +2% i.e., 9.30%.

26. **Rate of interest to be paid by the complainants 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;"*

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

28. On consideration of the documents available on record and submissions made by both the parties and based on the findings of the authority

regarding contravention as per provisions of rule 28(2), 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 13.05.2013, possession of the booked unit was to be delivered within a period of 42 months from the date of start of construction plus 3 months grace period for applying and obtaining the completion certificate/ occupation certificate in respect of the unit and/or the project. The construction was started on 11.11.2013. 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 11.05.2017. Occupation Certificate has been received by the respondent on 17.10.2018 and the possession of the subject unit was offered to the complainants on 31.10.2018. Copies of the same have been placed on record. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the complainants as per the terms and conditions of the buyer's agreement dated 13.05.2013 executed between the parties. It is the failure on part of the promoter to fulfil its obligations and responsibilities as per the buyer's agreement dated 13.05.2013 to hand over the possession within the stipulated period.

29. 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 17.10.2018. The respondent offered the possession of the unit in question to the complainants only on 31.10.2018, so it can be said that the complainants came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, they should be given 2 months' time from the date of offer of possession. These 2 months' of reasonable time is being given to the complainants keeping in mind that even after intimation of possession practically they have to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e. 11.05.2017 till the expiry of 2 months from the date of offer of possession (31.10.2018) which comes out to be 31.12.2018. Furthermore, the complainants are directed to take possession of the unit in question within 2 months from the date of this order.
30. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent

is established. As such the complainants are entitled to delayed possession at prescribed rate of interest @ 9.30% p.a. w.e.f. 11.05.2017 till 31.12.2018 as per provisions of section 18(1) of the Act read with rule 15 of the rules.

G.II Total consideration of the unit

31. **Relief sought by the complainants:** The respondent may be directed to transfer the allotted unit to the complainants for total sale consideration of Rs.1.13 crores after adjusting the total amount paid by the complainants and the interest upon the same.
32. The complainants submitted that the respondent has charged Rs.1,45,00,591/- from the complainants and now the respondent is selling the unit for sale consideration of Rs.1.13 crores which clearly shows that the respondent has cheated the innocent purchasers from the very beginning. On the other hand, the respondent denied that the respondent is selling apartments in the project for total sale consideration of Rs.1.13 crores and submitted that assuming, without in any manner admitting any truth in the allegations made by the complainants, it is respectfully submitted that the sale consideration for other apartments in the project is of no consequence and is wholly irrelevant insofar as the contractual obligations of the complainants under the buyer's agreement dated 13.05.2013 are concerned.

33. The authority observed that the unit in question was allotted to the complainants vide allotment letter dated 28.02.2013 and as per "Schedule of Payment" annexed with the allotment letter, the total sale consideration of the said unit was computed as Rs.1,40,82,694.60/-. Thereafter, the complainants and the respondent has executed a buyer's agreement on 13.05.2013 and as per "Schedule of Payment" annexed with the buyer's agreement, the total sale consideration of the said unit was computed as Rs.1,41,62,379.50/- and later on as per statement of account dated 10.07.2019, the total consideration is Rs.1,45,00,591/-. The complainants have signed the said agreement with wide open eyes. 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 *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."

34. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Therefore, the total sale consideration will be as per the buyer's agreement and the complainants are bound to make payment as per the "Schedule of Payment" annexed with the buyer's agreement.

G.III Adjustment of Rs.10,00,582/-

35. **Relief sought by the complainants:** The amount of Rs.10,00,582/- may also be adjusted in the total sale consideration and the excess amount found to be due may be ordered to be refunded to the complainants.

36. With respect to the aforesaid relief, the complainants submitted that initially they booked another apartment in another project of the

respondent known as Gurgaon Greens and a total sum of Rs.39,30,922/- were paid against the said property, however, the complainants lured with the proposals of the respondent to book a property in the present project 'Imperial Gardens' changed their flat from the previous project and a sum of Rs.10,36,816/- was deducted by the respondent while transferring the balance amount of Rs.29,00,106/- against the allotment of present flat. On the other hand, respondent denied that the complainants were lured by the respondent into change in the allotment from the previous project. In fact, the complainants defaulted in making payment of sale consideration in respect of the apartment situated in "Gurgaon Greens" and consequently, the allotment in favour of the complainants was liable to be cancelled by the respondent. The complainants requested the respondent to transfer their allotment to the present project. Accordingly, the respondent acceded to the request made by the complainants and transferred the payment made by the complainants, after deduction of earnest money and adjusted the balance amount against the apartment in question. The respondent denied that the deduction/ forfeiture of Rs.10,36,816/- by the respondent was illegal and impermissible.

37. The authority is of the view that claims raised by both the parties are contradictory and both have failed to place on record relevant



documents to substantiate their claims. Therefore, the said issue cannot be decided.

H. Directions of the authority

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

- i. The respondent is directed to pay the interest at the prescribed rate i.e. 9.30% per annum for every month of delay on the amount paid by the complainants from due date of possession i.e. 11.05.2017 till 31.12.2018 i.e., expiry of 2 months from the date of offer of possession (31.10.2018). The arrears of interest accrued so far shall be paid to the complainants within 90 days from the date of this order as per rule 16(2) of the rules.
- ii. The complainants are directed to take possession of the subject unit within 2 months from the date of this order.
- iii. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period. The rate of interest chargeable from the complainants /allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same rate of interest which

the promoter shall be liable to pay to the allottee, in case of default i.e., the delay possession charges as per section 2(za) of the Act.

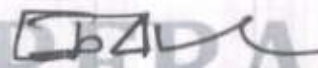
- iv. The respondent shall not charge anything from the complainants which is not the part of the buyer's agreement. The respondent shall not demand/claim holding charges from the complainants/allottees at any point of time even after being part of the builder buyer's agreement as per law settled by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

39. Complaint stands disposed of.

40. File be consigned to registry.


(Samir Kumar)
Member


(Vijay Kumar Goyal)
Member


(Dr. K.K. Khandelwal)

Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 12.10.2021

Judgement uploaded on 24.11.2021.