

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

Complaint no. : 2605 of 2021
Old complaint no. : 2423 of 2021
First date of hearing : 13.07.2021
Date of decision : 12.10.2021

1. Chand Kaur
2. Vijaybir Singh
Both RR/o: H. No. 2025, ground floor, Sector 4,
Gurugram-122001, Haryana.

Complainants

Versus

M/s Emaar MGF Land Ltd.
Office: Emaar MGF business Park,
M.G. Road, Sector 28, Gurugram-122001.

Respondent

CORAM:

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

Chairman
Member
Member

APPEARANCE:

Shri Gaurav Bhardwaj
Shri J.K. dang

Advocate for the complainants
Advocate for the respondent

ORDER

1. The present complaint dated 21.06.2021 has been filed by the complainants/allottees in Form CRA under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible

for all obligations, responsibilities and functions to the allottee as per the agreement for sale executed inter se them.

A. Project and unit related details

2. 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. and Emaar MGF Land 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 157 of reply]
8.	Allotment letter dated	27.02.2013 [Page 34 of reply]
9.	Unit no.	IG-09-0804, 8 th floor, tower no. 9 [Page 25 of complaint]
10.	Unit measuring	2000 sq. ft. [Page 40 of complaint]

11.	Date of execution of buyer's agreement	16.05.2013 [Page 37 of complaint]
12.	Payment plan	Construction linked payment plan [Page 71 of complaint]
13.	Total consideration as per statement of account dated 13.07.2021	Rs.1,45,00,591/- [Page 90 of reply]
14.	Total amount paid by the complainants as per statement of account dated 13.07.2021	Rs.1,36,55,338/- [Page 91 of reply]
15.	Date of start of construction as per statement of account dated 13.07.2021	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. [Page 55 of complaint]	11.05.2017 [Note: Grace period is not allowed]
17.	Date of offer of possession to the complainants	31.10.2018 [Page 109 of complaint]
18.	Delay in handing over possession till 31.12.2018 i.e. date of offer of possession (31.10.2018) + 2 months	1 years 7 months 20 days

B. Facts of the complaint

3. The complainants have made the following submissions in the complaint:
 - i. That somewhere around Mid- 2012, the respondent advertised about its group housing project namely "Imperial Garden" located in Sector-102, Gurugram. The respondent painted a rosy picture of the project in their advertisement making tall claims and representing that the project aims at providing luxury residential

apartments. Believing the representations of the respondent and on the lookout for an adobe for themselves and their family, the complainants booked an apartment in the said project of the respondent by submitting the application form and paid an amount of Rs.10,00,000/- towards the booking of the said unit.

- ii. That thereafter on 27.02.2013, the respondent issued a provisional allotment letter and a welcome letter for unit bearing no. IG-09-0804. After almost 6 months from the date of booking, finally, on 16.05.2013, the buyer's agreement was executed between the complainants and the respondent. The complainants had already made a payment amounting Rs.28,76,602/- from the date of booking till execution of agreement in accordance with the demand of the respondent. This conduct on the part of respondent in demanding and taking deposit of more than 10% of the total consideration without first executing the agreement is in clear violation of section 13 of the Act and the respondent must be heavily penalized for the same.
- iii. That as per clause 14 (a) of the buyer's agreement dated 16.05.2013, the respondent had undertaken to complete the project and handover possession of the unit within a period of 42 months from the date of start of construction (11.11.2013) along with a grace period of 3 months, i.e., by 11.08.2017. However, the respondent miserably failed in handing over possession of the unit. That the complainants have paid a total sum of Rs.1,22,10,733/- towards the unit in the project from 2012 till the date, as and when

demanded by the respondent as against a total consideration of Rs.1,41,62,376/-.

- iv. That when the respondent failed in handing over the possession on the due date, i.e. 11.08.2017, the complainants visited the site and were stunned to see that the project was incomplete. Rather, almost negligible construction activity was going on at the project site. Thereafter, the complainants immediately rushed to the respondent's office in order to inquire about the exact date of handing over possession, but to no avail. No concrete date of completion and handover was committed by the respondents, thereby shaking the complainants' faith completely.
- v. That when the complainants had asked the respondent to clarify about the interest being charged by the respondent on the delayed payments upon which the latter replied that the interest is being charged on the basis of the buyer's agreement. It is pertinent to mention that while under clause 13 (i) of buyer's agreement dated 16.05.2013, the respondent had been charging 24% interest on the account of delayed payments of the instalments and further under clause 20.2, sub -clause (a) (i) of the buyer's agreement, upon noncompliance of terms and condition of buyer agreement by the allottee, which make respondent enable to hand over the possession of unit then the respondent retained absolute right to retain the entire amount of the "earnest money" along with the non-refundable amounts, however, on account of delay in handing over possession by the respondent, they were liable to pay merely Rs.7.50/-per sq. ft. per month of the super area of unit for the

period of delay beyond 45 months as per clause 16(a) of the said agreement. It is submitted that the above-mentioned clauses are not equitable, arbitrary in nature, completely one sided and nowhere fall in the line of laws enforceable as on today to regulate the real estate sector.

- vi. That finally, after a long delay, the complainants were offered possession of the unit via a letter dated 31.10.2018, with specific instruction in regard to the final payment within 60 days from the date of letter. The net due payment sought amounted to Rs.27,34,663. Whereas per the payment plan annexed with the agreement the amount due on the intimation of possession was supposed to be Rs.7,50,456. The amount demanded and the amount mentioned in sr.no.14 of the schedule payment plan had a huge gap i.e. Rs.19,84,207/-. Such demand of respondent was unacceptable and arbitrary in nature and holds no ground of justification.
- vii. That accordingly the complainants approached the respondents and objected to said arbitrary demand and sought justification upon the same. However, the respondents simply refrained from giving any substantial explanation. Rather, they justified the said demand on one pretext or the other. This was followed by series of discussion and meeting upon said price escalation, but no result could be drawn out of them. Moreover, the respondents simply refused to hand over the possession till said payment was made. To this, the complainant sought payment of delayed possession charges on the account of delay in handling of possession but the

respondent bluntly refused to pay the same. Rather, the respondent threatened to levy holding charges.

- viii. That as per section 11 (4) of the Act, the promoter is liable to pay delayed possession interest to the allottee of an apartment, building or project for a delay or failure in handing over of such possession and to adhere to the terms and condition of the agreement to sale. As per section 18 of the Act, the promoter is liable to pay interest to the allottees of an apartment, building or project for a delay or failure in handing over of such possession as per the terms and agreement of the sale. Accordingly, the complainants herein are entitled to get interest on the paid amount at the rate as prescribed by the rules from due date of possession till the date of actual handing over of possession.

C. Relief sought by the complainants

4. The complainants are seeking the following relief:
- i. Direct the respondent to pay interest at the prescribed rate for every month of delay, from the due date of possession, i.e. 11.08.2017 till actual handing over of possession.
 - ii. Direct the respondent to charge delay payments, if any, at the prescribed rate in accordance with the rules.
 - iii. Direct the respondent to not charge anything outside the clauses mentioned in buyer's agreement.
 - iv. Direct the respondent to handover possession of the unit in the question to the complainants.

- v. Direct the respondent to not levy any holding charges from the complainants.
- vi. Pass such order or further order as this hon'ble authority may deem fit and proper in the facts and circumstances of the present case.

D. Reply filed by the respondent

5. The respondent had contested the complaint on the following grounds:

- i. That the complainants have filed the present complaint seeking, inter alia, interest for alleged delay in delivering possession of the unit booked by the complainants. It is respectfully submitted that complaints pertaining to refund, 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 hon'ble authority. Moreover, the adjudicating officer derives his jurisdiction from the central act and the same cannot be negated by the rules made thereunder. The present complaint is liable to be dismissed on this ground alone.
- ii. That the complainants, in pursuance of the application form, were allotted an independent unit bearing no. IG-09-0804, located on the 8th floor, in the project vide provisional allotment letter dated 27.02.2013. The complainants consciously and wilfully opted for a time linked plan for remittance of the sale consideration for the unit in question and further represented to the respondent that the complainants would remit every instalment on time as per the payment schedule. The respondent had no reason to suspect bona fide of the complainants.

- iii. That the complainants had persistently and regularly defaulted in remittance of installments on time. The respondent was compelled to issue demand notices, reminders etc. calling upon the complainants to make payment of outstanding amounts payable by the complainants under the payment plan/instalment plan opted by them. However, the complainants despite having received the payment request letters, reminders etc. failed to remit the instalments on time to the respondent. The statement of account dated 13.07.2021 as maintained by respondent in due course of its business reflects the delay in remittance of various instalments on the part of the complainants.
- iv. That since the complainants were not forthcoming with the outstanding amounts, the respondent was constrained to issue a notice dated 12.02.2016 to the complainants. The respondent had categorically notified the complainants that they had defaulted in remittance of the amounts due and payable by them. It was further conveyed by the respondent to the complainants that in the event of failure to remit the amounts mentioned in the said notice, the respondent would be constrained to cancel the provisional allotment of the unit in question issued in their favour. Upon receipt of the aforesaid notice issued by the respondent, the complainants approached the respondent requesting it to not give effect to the said notice and further promised the respondent that they would remit the remaining instalments on time. The complainants further promised that they would not stake any claim against the respondent on account of delay, if any. The respondent did not have any reason to suspect the bona fide of the

complainants and consequently desisted from cancellation of the provisional allotment issued in their favour. It needs to be taken into reckoning that the respondent has refrained from cancellation of the allotment issued in favour of the complainants relying upon their deliberate representations. Therefore, the instant complaint is barred by estoppel.

- v. That the clause 16(c) of the buyer's agreement provides that compensation for any delay in delivery of possession shall only be given to such allottees who are not in default of their obligations envisaged under the agreement and who have not defaulted in payment of instalments as per the payment plan incorporated in the agreement. In case of delay caused due to non- receipt of occupation certificate, completion certificate or any other permission/sanction from the competent authorities, no compensation or any other compensation shall be payable to the allottees. As delineated hereinabove, the complainants, having defaulted in timely remittance of instalment, were/are thus not entitled to any compensation or any amount towards interest as an indemnification for delay, if any, under the buyer's agreement.
- vi. That in the case of delay by the allottee in making payment or delay on account of reasons beyond the control of the respondent, the time for delivery of possession stands extended automatically. In the present case, the complainants are defaulters who have failed to make timely payment of sale consideration as per the payment plan and are thus in breach of the buyer's agreement. Therefore, on account of delay and defaults by the 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.

- vii. That the project of the respondent had been registered under the Act and the rules. The registration certificate was granted by the Haryana Real Estate Regulatory Authority vide memo no. HRERA-140/2017/1083 dated 15.09.2017. It is pertinent to mention that the respondent has applied for extension of the registration and the hon'ble authority has already extended the validity of registration vide memo bearing no. RC/REP/HARERA/GGM/2017/208 dated 02.08.2019. The registration had been extended till 31.12.2019 and the respondent had already offered possession of the unit in question to the complainants vide letter of offer of possession dated 31.10.2018. Therefore, there is no delay in delivery of possession of the unit in question. The complaint is devoid of any cause of action. The instant complaint is liable to be dismissed at the threshold.
- viii. That the clause 16 of the buyer's agreement further provides that no compensation for any delay in delivery of possession caused on account of delay or non-receipt of the occupation certificate, completion certificate or any other permission/sanction from the competent authority shall be provided to the allottees. The respondent had submitted an application on 21.03.2018 for grant of occupation certificate to the concerned statutory authority. The occupation certificate thereafter was granted on 17.10.2018. It is submitted that once an application for issuance of occupation

certificate is submitted before the concerned competent authority the respondent ceases to have any control over the same. The grant of occupation certificate is the prerogative of the concerned statutory authority and the respondent does not exercise any control over the matter. Therefore, the time period utilised by the concerned statutory authority for granting the occupation certificate needs to be necessarily excluded from the computation of the time period utilised in the implementation of the project in terms of the buyer's agreement. As far as respondent is concerned, it has diligently and sincerely pursued the development and completion of the project in question.

- ix. That the complainants were offered possession of the unit in question through the letter of offer of possession dated 31.10.2018. The complainants were called upon to remit balance payment including delayed payment charges and to complete the necessary formalities/documentation necessary for handover of the unit in question to them. However, the complainants intentionally refrained from completing their duties and obligations as enumerated in the buyer's agreement. The complainants wilfully refrained from obtaining possession of the unit in question. It is submitted that it appears that the complainants did not/do not have adequate funds to remit the balance payments requisite for obtaining possession in terms of the buyer's agreement. An amount of Rs.31,25,349/- is due and payable by the complainants. The complainants have intentionally refrained from remitting the aforesaid amount to the respondent. Therefore, there is no equity in favour of the complainants.

- x. That the respondent has paid an amount of Rs.9,917/- on account of early payment rebate and Rs.12,294/- on account of anti-profiting to the complainants. The aforesaid amounts have been accepted by the complainants in full and final satisfaction of their alleged grievances. The instant complaint is nothing but a gross misuse of process of law. Without prejudice to the rights of the respondent, delayed interest if any has to be calculated only on the amounts deposited by the allottees/complainants towards the basic principal amount of the unit in question and not on any amount credited by the respondent, or any payment made by the allottees/complainants towards delayed payment charges or any taxes/statutory payments etc.
- xi. 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. 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.
- xii. That all the demands raised by the respondent are strictly in accordance with the terms and conditions of the buyer's agreement duly executed between the parties. There is no default or lapse on the part of the respondent. Thus, it is most respectfully

submitted that the present application deserves to be dismissed at the very threshold.

6. 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

7. 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

8. 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

9. 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 exclusion of time taken by the competent authority in processing the application and issuance of occupation certificate

10. 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.

11. 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 of the authority

G.1 Delay possession charges

12. **Relief sought by the complainants:** The below-mentioned reliefs sought by the complainant 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. Direct the respondent to interest at prescribed rate for every month of delay, from the due date of possession i.e. 11.08.2017 till actual handing over of possession.
 - ii. Direct the respondent to charge delay payments, if any, at the prescribed rate in accordance with the rules.
 - iii. Direct the respondent to not charge anything outside the clauses mentioned in buyer's agreement.
 - iv. Direct the respondent to handover possession of the unit in the question to the complainants
13. 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."

14. Clause 14(a) of the buyer's agreement dated 16.05.2013 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."

15. 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.

16. **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 13.07.2021. 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.

17. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges at the prescribed rate. Proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of

possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]

(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.

Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.

18. 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.
19. 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 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.

20. 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%.

21. **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;"*

22. 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.

23. On consideration of the documents available on record and submissions made by the parties regarding contravention as per provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 14(a) of the buyer's agreement executed between the parties on 16.05.2013, the 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 was granted by the concerned authority on 17.10.2018 and



thereafter, 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 16.05.2013 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 16.05.2013 to hand over the possession within the stipulated period.

24. 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, the complainants should be given 2 months' time from the date of offer of possession. These 2 months' of reasonable time is being given to the complainants keeping in mind that even after intimation of possession practically they have to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the

time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e. 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.

25. 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 i.e. 9.30% p.a. w.e.f. 11.05.2017 till 30.12.2018 as per provisions of section 18(1) of the Act read with rule 15 of the rules.

G.II Holding charges

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



27. With regards to the same, it has been observed that as per sub-clause (b) of clause 15 of the buyer's agreement, in the event the allottee fails to take the possession of the unit within the time limit prescribed by the company in its intimation/offer of possession, then the promoter shall be entitled to charge holding charges. Clause 17 of the buyer's agreement prescribes the amount of holding charges. The relevant clauses from the buyer's agreement are reproduced hereunder:

"15. PROCEDURE FOR TAKING POSSESSION

- (a)
- (b) *Upon receiving intimation in writing from the Company, the Allottee shall within thirty (30) days take possession of the said Unit..... If the Allottee fails to take possession of the Unit as aforesaid with the time limit prescribed by the Company in its notice, then the said Unit shall lie at the risk, responsibility and cost of the Allottee in relation to all the outgoing cesses, taxes, levies etc. and the Company shall have no liability or concern thereof and further that the Company shall also be entitled to holding charges as provided under clause 17.1 hereinbelow.*

17. FAILURE TO TAKE POSSESSION

17.1

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

28. It is interesting to note that the term holding charges has not been clearly defined in the builder buyer's agreement and or any other relevant document submitted by the respondent promoter. Therefore, it is firstly important to understand the meaning of holding charges which is generally used in common parlance. The term holding charges or also synonymously referred to as non-occupancy charges become payable or applicable to be paid if the possession has been offered by

the builder to the owner/allottee and physical possession of the unit not taken over by allottee but the flat/unit is lying vacant even when it is in a ready-to-move condition. Therefore, it can be inferred that holding charges is something which an allottee has to pay for his own unit for which he has already paid the consideration just because he has not physically occupied or moved in the said unit. The next thing that pops up for consideration is as to what are then maintenance charges being taken by the developer/RWA. Maintenance charges are the charges, either annually or monthly, applicable to be paid by the owner/allottee once he/she has taken possession of the property/unit. These charges are paid for the general maintenance and upkeep of the building and/or society. A person purchases a flat for his own residential usage/or for letting it out further as per his own discretion and requirement. He is bound as per law to pay the maintenance charges for his flat/unit whether he is personally residing or even if the flat is kept locked and being unused. The member has to pay the full maintenance charges without any concessions and in most cases, pays advance maintenance charges as well. Maintenance charges are applicable right from the time possession of a flat/unit is taken over by any prospective buyer/allottee. However, payment of maintenance charges is carried out on a monthly basis for the upkeep of the entire building and project. Therefore, simply understood, the flat closed/locked/vacant/not occupied for any period is equal to self-occupied, which is further equal



to regular full maintenance charges and non-occupancy charges/holding charges should not be levied.

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

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

30. The said judgment of Hon'ble NCDRC was also upheld by the Hon'ble Supreme Court vide its judgement dated 14.12.2020 passed in the civil appeal nos. 3864-3889/2020 filed by DLF against the order of Hon'ble NCDRC (supra). In the light of the recent judgement of the Hon'ble NCDRC and Hon'ble Apex Court (supra), the authority concurring with the view taken therein decides that a respondent/promoter cannot levy holding charges on a homebuyer/ allottee as it does not suffer any loss on account of the allottee taking possession at a later date even due to an ongoing court case.

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

H. Directions of the authority

32. 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 30.12.2018 i.e. expiry of 2 months from the date of offer of possession (30.10.2018). 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.
33. Complaint stands disposed of.
34. File be consigned to registry.


(Samir Kumar)
Member


(Dr. K.K. Khandelwal)
Chairman


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 12.10.2021