

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

Complaint no. : 276 of 2021
First date of hearing : 03.03.2021
Date of decision : 01.10.2021

1. R K Kachroo
2. Nirmala Kachroo
Residence Address: D-145, Upkar
Apartment, Mayur Vihar Phase-1 Extn.,
Chilla Saroda Khadar, East Delhi-110091

Complainants

Versus

M/s Emaar MGF Land Ltd.
Address: Emaar MFG Business Park,
M.G. Road, Sector 28, Sikandarpur Chowk,
Gurugram, Haryana-122002

Respondent

CORAM:

Shri Samir Kumar
Shri Vijay Kumar Goyal

Member
Member

APPEARANCE:

Shri Varun Chugh
Shri J.K. Dang

Advocate for the complainants
Advocate for the respondent

ORDER

1. The present complaint dated 18.01.2021 have 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 14.01.2010 i.e. prior to the commencement of the Act ibid, therefore, the penal proceedings cannot be initiated retrospectively. Hence, the authority has decided to treat the present complaint as an application for non-compliance of statutory obligation on part of the promoter/respondent in terms of section 34(f) of the Act ibid.

A. Project and unit related details

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

S.No.	Heads	Information
1.	Project name and location	Emerald Estate Apartments, Sector 65, Maidawas, Gurgaon.
2.	Project area	25.499 acres
3.	Nature of the Project	Group housing colony
4.	DTCP license no. and validity status	06 of 2008 dated 17.01.2008 valid/renewed up to 16.01.2025
5.	Name of licensee	Active Promoters Pvt. Ltd. and others with Emaar MGF Land Ltd.
6.	HRERA registered/ not registered	"Emerald Estate Apartments" Registered vide no. 104 of 2017 dated 24.08.2017 for 82768 sq. mtrs.
	HRERA registration valid up to	23.08.2022
7.	Occupation certificate granted on	11.11.2020 [Page 154 of reply]

8.	Provisional allotment letter dated	06.10.2009 [Page 40 of reply]
9.	Unit no.	EEA-K-F08-02,8 th floor, block K [Page 53 of complaint]
10.	Unit measuring	1310 sq. ft.
11.	Date of execution of buyer's agreement	14.01.2010 [Page 17 of complaint]
12.	Payment plan	Construction linked payment plan [Page 48 of complaint]
13.	Total consideration as per statement of account dated 17.02.2021 at page 115 of reply	Rs.54,76,070/-
14.	Total amount paid by the complainants as per statement of account dated 17.02.2021 at page 116 of reply	Rs.57,24,405/-
15.	Date of start of construction as per statement of account dated 17.02.2021 at page 115 of reply	26.08.2010
16.	Due date of delivery of possession as per clause 11(a) of the said agreement i.e. 36 months from the date of start of commencement of construction and development of the Unit (26.08.2010) + grace period of 6 months, for applying and obtaining completion certificate/ occupation certificate in respect of the unit and/or the Project. [Page 32 of complaint]	26.08.2013 [Note: Grace period is not included]
17.	Date of offer of possession	25.11.2020 [Page 57 of complaint]
18.	Delay in handing over possession till 25.01.2021(i.e. date of offer of possession (25.11.2020) + 2 months)	7 year 4 months 30 days

B. Facts of the complaint

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

- i. That property in question was booked by the complainants, in the year 2009 and was subsequently allotted vide allotment letter dated 06.10.2009 and soon after on 14.01.2010, the complainants entered into a builder buyer's agreement. The complainants have paid total sale consideration, in fact sum of Rs. 6,04,124/- is lying in the credit balance of the complainants, which is due and payable by the respondent. The respondent had categorically stated that the possession of the said apartment would be handed over to the complainants within 36 months from the date of commencement of the construction and development of the unit i.e. 26.08.2010, with a further grace period of another 6 months. Moreover, on the pretext of making false promises of handing over the possession of the apartment, on 04.04.2018, the complainants were further trapped and coerced by the respondent to sign a one-sided settlement agreement, in favour of the respondent wherein the complainants were required to undertake, not to claim or raise any compensation for delay in handing over possession of the property.
- ii. That the respondent has miserably failed to honour its part of commitment to hand over the possession of the apartment, as per the schedule provided by it and has breached the very terms of the said agreement and after a considerable delay of more than 7 years has finally offered the possession on 25.11.2020 to the complainants' in non-habitable and unsafe condition as construction

work is still going on. The fact that the delay in handing over the possession by the respondent would attract only a meagre penalty of Rs 5/- per sq. ft, on the super area of the flat, on monthly basis, whereas the penalty for failure to take possession would attract holding charges of Rs 50/- per sq. ft. and 24% p.a. penal interest on the unpaid amount of installments due to the respondent. The respondent company had indemnified the complainants as per the settlement agreement and had only offered a meagre sum of Rs 9,82,824/-

- iii. That the apartments were sold by representing as luxurious apartments however all such representations seem to have been made to lure complainants to purchase the floor at extremely high prices. The respondent has compromised with levels of quality and is guilty of mis-selling. There are various deviations from the initial representations. The respondent marketed luxury high end floors, simply they have compromised even with the basic features, designs and quality to save costs. The construction is totally unplanned, with sub-standard, defective and despicable construction quality.
- iv. The respondent had committed gross violation of the provisions of section 18 (1) of the act by not handing over the timely possession of the flat in question and not giving the interest and compensation to the buyer as per the provisions of the Act.

C. Relief sought by the complainants

5. The complainants have filed the present complaint for seeking following relief:
- i. Direct the respondent to handover the possession of the apartment to the complainants, in a time bound manner.
 - ii. Direct the respondent to pay interest @ 18% towards delay in handing over the apartment in question as per provisions of the Act.
6. On the date of hearing, the authority explained to the respondent/promoter about the contravention as alleged to have been committed in relation to section 11(4)(a) of the Act and to plead guilty or not to plead guilty.

D. Reply by the respondent

7. The respondent has raised certain preliminary objections and has contested the present complaint on the following grounds:
- i. It is wrong and denied that the subject matter of the claim falls within the jurisdiction of this learned authority. It be decided by the adjudicating officer under section 71 of the Act read with rule 29 of the Rules and not by this learned authority. The present complaint is not maintainable in law or on facts. The complainants have filed the present complaint seeking interest and compensation for alleged delay in delivering possession of the apartment booked by the complainants.
 - ii. That the complainants have no *locus standi* or cause of action to file the present complaint. That the present complaint is based on an

erroneous interpretation of the provisions of the Act as well as an incorrect understanding of the terms and conditions of the buyer's agreement dated 14.01.2010.

- iii. That the complainants have approached the respondent sometime in the year 2009 for the purpose of the said unit in its upcoming residential project after conducting extensive and independent enquiries. It is only the buyers who were fully satisfied with regard to all aspects of the project, including but not limited to the capacity of the respondent to undertake development of the same, that the buyers took an independent and informed decision to purchase the said unit, uninfluenced in any manner by respondent. Thereafter the buyers vide application form dated 12.09.2009 applied to the respondent for provisional allotment of the said unit in the project, accordingly there were allotted the said unit via provisional allotment letter dated 06.10.2009.
- iv. The buyers consciously and wilfully opted for construction linked plan for remittance of sale of consideration for the unit and further represent to the respondent that the buyers shall remit every installment on time as per the payment schedule, but complainants failed to do so.
- v. The buyer's agreement executed between the respondent and the buyers on 14.01.2010 and complainant number 1 had requested the respondent to incorporate the name of complainant number 2 as co-

allottee. Consequently, the complainant number 2 have been made co-allottee vide letter dated 02.07.2010 issued by the respondent. In view of the tripartite agreement complainants have specifically subrogated all their rights for refund or compensation or interest with respect to the apartment in question in favour of SBI Bank. Ergo the institution of present complaint without having SBI Bank a party is bad in law. The clause 13 buyer's agreement provides for 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 buyer's agreement and who have not defaulted in payments of installments as per the payment plan incorporated in the buyer's agreement. In case 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 needs to be necessarily excluded from computation of the time period for implementation of the project and no amount can be claimed in compensation or interest. The buyers were in default in timely remittance of installments, were thus not entitled to any compensation or any amount towards interest as an indemnification for delay, if any, under the buyer's agreement.

- vi. The clause 11 of the buyer's agreement stipulates the time period for delivery of possession was 36 months along with grace period of 6

- months from the date of commencement of construction and development of the unit subject to the allottee(s) having strictly complied with all the terms and conditions of the buyer's agreement and not being in default of any provision of the buyer's agreement including remittance of all amounts due and payable by the allottee(s) under the agreement as per the schedule of payment incorporated in the buyer's agreement.
- vii. Furthermore, it was specifically mentioned therein that the period for delivery of possession of the unit in question would stand extended on occurrence of the facts and circumstances beyond the power and control of the respondent. The complainants have completely misconstrued, mis-interpreted and miscalculated the time period as determined in the buyer's agreement. It is pertinent to mention that it was categorically provided in clause 11(b)(iv) that in case of any default/delay by the allottees in payment as per schedule of payment incorporated in the buyer's agreement, the date of handing over of possession shall be extended accordingly, solely on the respondent's discretion till the payment of all outstanding amounts to the satisfaction of the respondent. Since the complainants have defaulted in timely remittance of payments as per schedule of payment, the date of delivery of possession is not liable to be determined in the manner sought to be done in the present case by the complainants.

- viii. That it is submitted that the provisions of the Act are not retrospective in nature cannot undo or modify the terms of an agreement duly executed prior to coming into effect of the Act. It is further submitted that merely because the Act applies to ongoing projects which are registered with the authority, the Act cannot be said to be operating retrospectively. The provisions of the Act relied upon by the complainants for seeking interest or compensation cannot be called in to aid, in derogation and ignorance of the provisions of the buyer's agreement. The interest is compensatory in nature and cannot be granted in derogation and ignorance of the provisions of the buyer's agreement.
- ix. A settlement-cum-amendment agreement dated 04.04.2018 was executed by parties inter se, voluntarily and consciously till satisfaction and knowing the repercussions. Consequently, Furthermore, the complainants have agreed to extend the period for handing over of possession of the said unit in lieu of compensation amount to be paid by the respondent to the complainants. The respondent is making payment of additional compensation amounting to Rs. 5/- sq. ft./month over and above as a gesture of goodwill.
- x. It is pertinent to mention that compensation amounting to Rs. 9,82,824/- (Rupees Nine Lakhs Eighty-Two Thousand Eight Hundred and Twenty-Four Only) has already been credited by the

respondent to the account of the complainants. Furthermore, the respondent has also credited Rs. 28,138/- (Rupees Twenty-Eight Thousand One Hundred Thirty-Eight Only) as benefit on account of anti-profiting. Without prejudice to the rights of the respondent, delayed interest if any must be calculated only on the amounts deposited by the complainants and not on any amount credited by the respondent, or any payment made by the complainants towards delayed payment charges or any taxes/statutory payments etc.

- xi. The project has got delayed on account of the following reasons which were beyond the power and control of the respondent: A contract dated 01.11.2010 was executed between the respondent and M/s B L Kashyap and Sons (BLK/contractor) in terms of which the contractor was to construct residential the projects. The start date of the project as mutually determined by the parties was 26.07.2010 and the scheduled date of completion of the project was 25.07.2013. Due to stagnant nature construction caused by contractor, respondent was constrained to issue notice of termination dated 16.01.2015. Therefore, the respondent filed a petition bearing no. O.M.P. No. 100 of 2015 under section 9 of the Arbitration and Conciliation Act, 1996 before this Hon'ble High Court seeking urgent reliefs in the nature of restraining the contractor from interfering with the business activities of the petitioner at the project site, removing any material, equipment,

- tools, plant & machinery from the project site and appointing a local commissioner to inspect the project site and prepare an inventory of material, equipment, tools, plant & machinery.
- xii. The national building code (NBC) was revised in the year 2016 and in terms of the same, all high-rise buildings (i.e buildings having height of 15 mtrs and above), irrespective of the area of each floor, are now required to have two staircases. Furthermore, it was notified vide gazette published on 15.03.2017 that the provisions of NBC 2016 supersede those of NBC 2005. The respondent had accordingly sent representations to various authorities identifying the problems in constructing a second staircase. Eventually, so as to not cause any further delay in the project and so as to avoid jeopardising the safety of the occupants of the buildings in question, the respondent had taken a decision to go ahead and construct the second staircase. However, due to the impending contractor issue of non-performance, the construction of the second staircase could not be started as well.
- xiii. However, the parties settled the disputes during the pendency of the aforesaid proceedings and the contractor assured the respondent that the project shall be completed within the decided timeline. This was considered to be in the interest of the project as well as to mitigate losses, since considerable time would have been spent in re-tendering of the works.

- xiv. That in spite of the aforementioned settlement, nothing goes to decided way. The Honorable High Court appointed Justice A P Shah (Retd.) as the sole arbitrator for adjudication of disputes between the respondent and the contractor. Furthermore, R.I.T.E.S. Ltd (a Government Undertaking) was appointed as the local commissioner to inter alia, inspect and take joint measurement of work done and balance to be done and file its report before the sole arbitrator and also respondent got liberty to award the contract to new agency(s) for completing the remaining work. However, it was directed that the project site shall be handed over to such new agency(s) with the permission of the sole arbitrator. The arbitration proceedings titled as **B L Kashyap and Sons V/s Emaar MGF Land Ltd** (arbitration case number 1 of 2018) before Justice A P Shah (Retd), sole arbitrator vide order dated 27.04.2019 gave liberty to the respondent to appoint another contractor w.e.f. 15.05.2019.
- xv. That the Project of the respondent is an "Ongoing Project" as per the Act and the same has been registered with the Authority accordingly vide memo no. HRERA-482/2017/829 dated 24.08.2017. It is submitted that the registration of the project is valid till 28.08.2022. The present complaint in the facts and circumstances of the case is premature.

xvi. However, the complainants have consciously refrained from obtaining possession of the unit in question offered through letter of offer of possession dated 25.11.2020

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

E. Jurisdiction of the authority

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

E.I Territorial jurisdiction

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

E.II Subject-matter jurisdiction

11. The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as per

provisions of section 11(4)(a) of the Act leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

F. Findings on the objections raised by the respondent

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

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

hon'ble Bombay High Court in **Neelkamal Realtors Suburban Pvt. Ltd.**

Vs. UOI and others. (W.P 2737 of 2017) which provides as under:

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

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

13. Also, in appeal no. 173 of 2019 titled as **Magic Eye Developer Pvt. Ltd.**

Vs. Ishwer Singh Dahiya dated 17.12.2019, the Haryana Real Estate

Appellate Tribunal has observed-

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

14. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the buyer's agreements have been executed in the manner that there is no scope left to the allottees to negotiate any of the clauses contained therein.

Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the buyer's agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of the Act and are not unreasonable or exorbitant in nature.

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

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

Section 4: - Application for registration of real estate projects

(2)The promoter shall enclose the following documents along with the application referred to in sub-section (1), namely: —

(1): -a declaration, supported by an affidavit, which shall be signed by the promoter or any person authorised by the promoter, stating: —

.....

(C) the time period within which he undertakes to complete the project or phase thereof, as the case may be...."

18. The time period for handing over the possession is committed by the builder as per the relevant clause of apartment buyer agreement and the commitment of the promoter regarding handing over of possession of the unit is taken accordingly. The new timeline indicated in respect of ongoing project by the promoter while making an application for registration of the project does not change the commitment of the promoter to hand over the possession by the due date as per the apartment buyer agreement. The new timeline as indicated by the promoter in the declaration under section 4(2)(1)(C) is now the new timeline as indicated by him for the completion of the project. Although, penal proceedings shall not be initiated against the builder for not meeting the committed due date of possession but now, if the promoter fails to complete the project in declared timeline, then he is liable for penal proceedings. The due date of possession as per the agreement remains unchanged and promoter is liable for the consequences and obligations arising out of failure in handing over possession by the due date as committed by him in the apartment buyer agreement and he is liable for the delayed possession charges as provided in proviso to section 18(1) of the Act. The same issue has been dealt by hon'ble

Bombay High Court in case titled as ***Neelkamal Realtors Suburban Pvt. Ltd. and anr. vs Union of India and ors.*** and has observed as under:

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

F.III Objection regarding exclusion of time taken by the competent authority in processing the application/issuance of occupation certificate and settlement agreement

19. As far as contention of the respondent with respect to the exclusion of time taken by the competent authority in processing the application and issuance of occupation certificate is concerned, the authority observed that the respondent had applied for grant of occupation certificate on 21.07.2020 and thereafter vide memo no. ZP-441-Vol.II/AD(RA)/2020/20094 dated 11.11.2020, the occupation certificate has been granted by the competent authority under the prevailing law. The authority cannot be a silent spectator to the deficiency in the application submitted by the promoter for issuance of occupancy certificate.
20. The application for issuance of occupancy certificate shall be moved in the prescribed forms and accompanied by the documents mentioned in sub-code 4.10.1 of the Haryana Building Code, 2017. As per sub-code 4.10.4 of the said Code, after receipt of application for grant of occupation certificate, the competent authority shall communicate in writing within 60 days, its decision for grant/ refusal of such permission for occupation

of the building in Form BR-VII. In the present case, the respondent has completed its application for occupation certificate only on 21.07.2020 and consequently the concerned authority has granted occupation certificate on 11.11.2020. Therefore, in view of the said application dated 21.07.2020 and aforesaid reasons, no delay in granting occupation certificate can be attributed to the concerned statutory authority.

21. The aforesaid settlement agreement between parties on perusal reveals that terms are overwhelmingly one-sided and only in favour of the developer. Such agreement cannot be given effect.

G. Findings on the reliefs sought by the complainants

22. 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."

"Section 2: Definitions

(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) *(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;*

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

"11. POSSESSION

(a) Time of handing over the Possession

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

24. 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 allottees that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment time period for handing

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

25. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within 36 (thirty-six) months from the date of commencement of construction and further provided in agreement that promoter shall be entitled to a grace period of 6 months for applying and obtaining completion certificate/occupation certificate in respect of said unit. The date of start of construction is 26.08.2010 as per statement of account dated 17.02.2021. The period of 36 months expired on 26.08.2013. As a matter of fact, the promoter has not applied to the concerned authority for obtaining completion certificate/ occupation certificate within the grace period prescribed by the promoter in the buyer's agreement. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 6 months cannot be allowed to the promoter at this stage.
26. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges at interest of 18% for the delay caused. The 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. The 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.

27. The legislature in its wisdom in the subordinate legislation under the rule 15 of the Rules has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.
28. Taking the case from another angle, the complainants-allottees are entitled to the delayed possession charges/interest only at the rate of Rs.5/- per sq. ft. per month of the super area till the date of notice of possession under the clause 12(a) provided under clause 13(a), provided allottee(s) have complied with all the terms and conditions of this agreement; whereas, as per clause 1.2(c) of the buyer's agreement, the promoter was entitled to interest @ 24% per annum at the time of every succeeding installment 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.

29. 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., 01.10.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.
30. **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;”*

31. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same as is being granted to the complainants in case of delayed possession charges.
32. On consideration of the documents available on record and submissions made by the parties regarding contravention as per provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 11(a) of the buyer's agreement executed between the parties on 14.01.2010, possession of the said unit was to be delivered (by 26.08.2013) within a period of 36 months from the date of commencement of construction i.e. 26.08.2010. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over possession comes out to be 26.08.2013. In the present case, the complainants were offered

possession by the respondent on 25.11.2020. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the complainants as per the terms and conditions of the buyer's agreement dated 14.01.2010 executed between the parties inter se.

33. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 11.11.2020. However, the respondent offered the possession of the unit in question to the complainants only on 25.11.2020. So, it can be said that the complainants came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the complainants should be given 2 months' time from the date of offer of possession. The reasonable time of 2 months to be 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 handing over possession as per the buyer's agreement i.e. 26.08.2013 till the expiry of

2 months from the date of offer of possession (25.11.2020) which comes out to be 25.01.2021 as per provisions of section 19(10) of the Act.

34. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainants are entitled to delay possession charges at prescribed rate of the interest @ 9.30 % p.a. w.e.f. 26.08.2013 till 25.01.2021 as per provisions of section 18(1) of the Act read with rule 15 of the Rules.

35. Also, the amount of Rs.4,91,412/- (as per statement of account dated 17.02.2021) so paid by the respondent to the complainants towards compensation for delay in handing over possession shall be adjusted towards the delay possession charges to be paid by the respondent in terms of proviso to section 18(1) of the Act. So, the aforesaid amount shall be adjusted accordingly.


H. Directions of the authority

36. 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. 26.08.2013 till 25.01.2021 i.e. expiry of 2 months from the date of offer of

possession (25.11.2020) as per the provisions of the section 19(10) and proviso to section 18(1) of the Act. 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. Also, the amount of Rs. Rs. 4,91,412/- (as per statement of account dated 17.02.2021) paid by the respondent to the complainants towards compensation for delay in handing over possession shall be adjusted towards the delay possession charges to be paid by the respondent in terms of proviso to section 18(1) of the Act.
 - iii. The respondent shall not charge anything from the complainants which is not the part of the buyer's agreement. The respondent is also not entitled to claim holding charges from the complainants/allottees at any point of time even after being part of the builder buyer's agreement as per law settled by Hon'ble Supreme Court in civil appeal nos. 3864-3889/2020 decided on 14.12.2020.
37. Complaint stands disposed of.
38. File be consigned to registry.


(Vijay Kumar Goyal)
Member


(Samir Kumar)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 01.10.2021