

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

**Complaint no.** : 1284 of 2019  
**First date of hearing** : 28.08.2019  
**Date of decision** : 01.10.2021

Ripul Handa  
Residence address: RA-101, Inder Puri,  
New Delhi-110012

**Complainant**

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 Arvind Chaudhary  
Shri J.K. Dang

Advocate for the complainant  
Advocate for the respondent

**ORDER**

1. The present complaint dated 04.04.2019 has been filed by the complainant/allottee in Form CRA under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions to the allottee as per the agreement for sale executed inter se them.

2. Since, the buyer's agreement has been executed on 01.04.2013 i.e. prior to the commencement of the Act *ibid*, therefore, the penal proceedings cannot be initiated retrospectively. Hence, the authority has decided to treat the present complaint as an application for non-compliance of statutory obligation on part of the promoter/respondent in terms of section 34(f) of the Act *ibid*.

**A. Project and unit related details**

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

S.No.	Heads	Information
1.	Project name and location	Emerald Estate Apartments at emerald hills, 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	<b>Registered vide no. 104 of 2017 dated 24.08.2017 for 82768 sq. mtrs.</b>
	HRERA registration valid up to	<b>23.08.2022</b>
7.	Occupation certificate granted on	11.11.2020 [Placed on record]
8.	Provisional allotment letter dated	20.10.2009 [Page 33 of reply]
9.	Unit no.	EEA-K-F06-03, 6 <sup>th</sup> floor, block K [Page 24 of complaint]

10.	Unit measuring	1310 sq. ft.
11.	Date of execution of buyer's agreement	09.02.2010 [Page 22 of complaint]
12.	Payment plan	Construction linked payment plan [placed on record]
13.	Total consideration as per statement of account dated 25.11.2020 placed on record	Rs.55,23,693/-
14.	Total amount paid by the Complainant as per statement of account dated 25.11.2020 placed on record	Rs.61,29,846/-
15.	Date of start of construction as per statement of account dated 25.11.2020 placed on record	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 37 of complaint]	26.08.2013  <b>[Note: Grace period is not included]</b>
17.	Date of offer of possession	25.11.2020 [placed on record]
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 complainant has made the following submissions in the complaint:
  - i. That the present complaint is being filed by the complainant through his father and the duly constituted attorney. The project was launched in 2009, the application form of the complainant for the

said apartment was accepted on 09.09.2009 under the project name of Emerald Estate Apartments, Sector-65, Maidawas, Gurugram, Haryana (in short, the project) of Emaar MGF Land Ltd (in short, the respondent/builder). The project is located in Sector-65, Maidawas, Gurugram, Haryana and was widely advertised by the respondent in all leading newspapers. The project was also referred to as one of the luxury state of the art premium residential project in the Gurugram, near the Indra Gandhi International Airport in all the project brochures and advertisements circulated by the respondent. The respondent claimed to be involved in developing various residential projects and had strong presence in the NCR region.

- ii. That the project was also supposed to have 660+ apartments and the complainant booked one apartment in the project after site visit in September 2009. At the time of booking, the complainant was informed that the project will be completed in 36 months plus additional 6 months and the same was also, one of the salient terms in the application form dated 09.09.2009 was duly signed to the respondent and the complainant does not have the same in his possession as the application form was meant to be submitted and handed over to the respondent and the complainant had made a part payment of Rs. 5,00,000/- (Rupees five lakhs only) to the respondent thereof.

iii. That the respondent, however, executed the Builder Buyer Agreement (in short, the buyer's agreement) dated 09.02.2010 with the complainant. The buyer's agreement was executed by the respondent after the receipt of over 25% payment from the complainant. With the astonishment and surprise of the complainant, all the terms in the buyer's agreement were found one sided and the other terms and conditions were heavily loaded in favour of the respondent and against the complainant. The term of handing over of the said apartment as mentioned in the buyer's agreement was 36 months and additional 6 months as a grace period, from the date of commencement of construction and development of the Unit. The respondent never informed any firm date of commencement of construction or development of the unit to the complainant. Once the complainant received the buyer's agreement, was left with no option but to sign the buyer's agreement on dotted line and continue making payment as per the agreed plan on terms of the buyer's agreement since the buyer's agreement reads that if allottee fails to execute and deliver the agreement within thirty days from the date of dispatch by the company, then the allottee authorizes the company to cancel the allotment and on such cancellation, the allottee consented and authorized the company to forfeit the earnest money along with non-refundable amounts. Thus, the company has now taken over nine years and

- above to hand over the possession from the date of application/date of booking.
- iv. That further to surprise, the respondent had mentioned the super area in the buyer's agreement is 1310 sq. ft., whereas the actual carpet area being constructed and sold to the complainant is less than 50% of promised carpet area. Therefore, the super area mentioned in the buyer's agreement is double the carpet area which would be delivered to the complainant despite being charged on super area. Additionally, the respondent is charging the complainant for preferential location charges, car parking, club furnishing charges, external development charges, internal development charges, fire-fighting charges, interest free maintenance charges based on super area and not on basis of the carpet area.
- v. Since the possession of the apartment was delayed for a long period therefore the complainant approached the respondent in the year 2017. The complainant was informed that since there had been a slump in the real estate market, therefore, the project got delayed. The respondent applied for registration of the said project with Haryana Real Estate Authority, Haryana. A copy of form REP-III dated 24.08.2017 issued by the competent authority under the Act and the project's license along with occupation certificate issued by the Department of Town & Country Planning, Government of Haryana.

vi. That on enquiries and persistent follow ups, the complainant came to know that the respondent was delivering possession of the apartment to only those persons who are willing to enter into a settlement-cum-amendment agreement with the respondent. When the complainant enquired the contents of the said settlement-cum-amendment agreement, was asked to come to the office of the respondent. On 10.04.2018, the complainant through his father, the duly constituted attorney, visited the office of the respondent. The father of the complainant i.e. duly authorised attorney was ushered to a room and was provided a copy of the agreement and was asked to sign the same, in case the complainant was intending to take possession of the apartment. Again, the complainant had no option but to sign the dotted line as the complainant was keen to take possession, after having waited for over years. The said settlement-cum-amendment agreement was pre-drafted and contained clauses were unconscionable and inapplicable to the complainant. In the said settlement-cum-amendment agreement the respondent admitted and acknowledged that there has been an inordinate delay in delivery of possession of the apartment. The respondent further agreed to pay an additional compensation of Rs. 5/- sq. ft./month over and above the rate mentioned in the buyer's agreement. At the time of the execution of the settlement-cum-amendment agreement, the respondent had informed the father of the complainant that the

possession shall be delivered by August 2018. The said settlement-cum-amendment agreement is in gross violation and contrary to the Act and the registration granted to the respondent. Thus, an appropriate punitive action is liable to be initiated against the respondent and its principal officers involved.

- vii. That the respondent deliberately, malafidely, and mischievously omits to mention the date of delivery of possession in the settlement-cum-amendment agreement and stated that the *"Unit is ready for use/will be ready for occupation and use shortly"*. The complainant was thus allured and enticed by the respondent by making false and lofty promises, which were incorrect even to the knowledge of the respondent.
- viii. Since the respondent has failed to complete the project as per stipulated timelines and the extended timelines. It is despite the fact that the respondent got the settlement-cum-amendment agreement executed from the complainant stating that in lieu of an additional compensation of Rs. 5/- sq. ft./month over and above the rate mentioned in the buyer's agreement, the complainant forecloses its right to approach this Authority. Such a clause in the settlement-cum-amendment agreement is not only illegal but shows the extend of highhandedness of the respondent. There cannot be any estoppel restricting the rights of any citizen to avail legal remedies, as the



respondent has itself miserably failed to fulfil its contractual obligations, even as per the settlement-cum-amendment agreement.

- ix. The complainant has further advanced his claim for reliefs that the respondent raised demand to commence construction and the respondent is obliged to enter into agreement of sale as per the Act or the Rules, despite such obligation the respondent has illegally and unlawfully entered into a settlement-cum-amendment agreement dated 10.04.2018. wherein the respondent further agreed that the allottee shall not raise any claim against the company towards compensation as provided by the Act or the Rules and such other laws, it is in clear violation of Section 28 of the India Contract Act, 1872, mandated that such restraint of settlement would be void and on the lines of aforesaid mandate, the present settlement-cum-amendment agreement is void and not enforceable. That the complainant submits that the respondent one hand do not recognize the power of attorney and on the other hand wishes to bind the complainant on the basis of the settlement-cum-amendment agreement dated 10.04.2018 which was executed by the so appointed attorney.
- x. That the complainant submits that the on the last hearing the respondent approached to fulfill the formalities for the execution of sale deed and deliver possession, the respondent refused to do the

same, the respondent showing highhandedness and hostile attitude and bent upon to harass the complainant.

- xi. That the complainant submits that the respondent has imposed a pre-condition of withdrawal of legal proceedings to execute conveyance deed. This is in clear violation act and penal action ought to be initiated as per section 7 of the Act.
- xii. The complainant is not liable to pay holding charges as the respondent is not coming forward to get conveyance deed executed in favor of the complainant.
- xiii. That the complainant is thus left with no alternative except to approach this learned authority.

**C. Relief sought by the complainant**

5. The complainant has filed the present compliant for seeking following relief:
  - i. The respondent be directed to hand over actual physical, vacant, peaceful and unencumbered possession of Apartment No. EEA-K-F 06-03 admeasuring 1310 sq. ft. (approx.) in the project to the complainant.
  - ii. The respondent be directed to pay interest on the entire amounts received from the complainant as per rule 15 of the Rules from the date of payment till the possession is delivered to the complainant.
  - iii. To restrain the respondent to not create any third-party liabilities and stop all expenditure (including construction) until settlement of

the pending dues as the applicant apprehend that the respondent may create third party interests or misappropriate funds; and.

- iv. Direct the promoters and directors of the company to surrender their passport with appropriate authority till settlement of the case and place a fixed deposit and/or bank guarantee for the total amount of claim of the applicants with appropriate authority till settlement of the case to ensure that the interest of homebuyers remain protected.
  - v. Any Award compensatory costs to the applicant.
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 hon'ble authority. That the present the complainant is not maintainable in law or on facts. The complainant has filed the present complaint seeking interest and compensation for alleged delay in delivering possession of the apartment booked by the complainant. It is respectfully submitted that such complaints

- are to be decided by the adjudicating officer under section 71 of the Act read with rule 29 of the Rules and not by this hon'ble authority.
- ii. That the complainant has 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 09.02.2010.
  - iii. That the complainant and Ms. Preeti Handa (in short, the buyers) had 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 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 09.09.2009 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 20.10.2009.
  - 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. The respondent did not have any reason to suspect the bonafide of the buyers. The buyers further undertook to be bound by the terms and conditions of the application form.

- v. The said agreement executed between the respondent and the buyers on 09.02.2010, its clause 13 provides for compensation for any delay in delivery of possession shall only be given to such allottee 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 allottee. 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, it is submitted that the interest demanded by the complainant in the instant complaint is compensatory in nature for indemnifying the complainant for the alleged delay and hence complaint preferred by the complainant is barred by the estoppel.
- vi. That it is submitted that the time utilised by the concerned statutory authority to grant occupation certificate to the respondent needs to

be necessarily excluded from computation of the time period for implementation of the project. Furthermore, no compensation or interest or any other amount can be claimed for the period utilised by the concerned statutory authority for issuing occupation certificate in terms of the buyer's agreement.

- vii. That it is submitted that as per Clause 11 of the buyer's agreement the time period for delivery of possession was 36 months along with grace period of 6 months from the date of execution of the buyer's agreement subject to the allottee 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 under the agreement as per the schedule of payment incorporated in the buyer's agreement.
- viii. 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 complainant has 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 allottee 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 complainant has defaulted in timely remittance of payments as per schedule of payment, the date of delivery of possession is not liable to be determined in the manner sought to be done in the present case by the complainant.

- ix. 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 complainant for seeking interest or compensation cannot be called in to aid, in derogation and ignorance of the provisions of the buyer's agreement. The interest is compensatory in nature and cannot be granted in derogation and ignorance of the provisions of the buyer's agreement.
- x. Thereafter the buyers approached the respondent requesting to delete the name of Ms. Preeti Handa from the allotment issued in her name in respect of the unit in question with affidavit dated 04.07.2017 and indemnity cum undertaking dated 05.07.2017, evidencing this fact.

- xi. That in the year 2018 the complainant approached the respondent with request for payment of compensation for the alleged delay in utter disregard of the terms and conditions of the buyer's agreement. The respondent explained to the complainant that he was not entitled to any compensation in terms of the buyer's agreement on account of several defaults in timely remittance of the installments. However, the complainant threatened of unwarranted litigation and maliciously continued with his illegal, invalid and illegitimate demands mounting undue pressure upon the respondent. The respondent, in order to avoid any unwarranted controversy, offered to settle the want only instigated dispute with the complainant.
- xii. Wherefore a settlement-cum-amendment agreement dated 10.04.2018 was executed by parties inter se, voluntarily and consciously till satisfaction and knowing repercussions. Consequently, the timeline for delivering of possession of the unit in question stood extended in terms of the said settlement agreement. Therefore, it is respectfully submitted that the allegations of the complainant regarding the delay in delivery of possession of the unit in question is wholly unwarranted and inherently fallacious in the facts and circumstances of the case.
- xiii. Furthermore, the said settlement agreement was in full and final settlement of the supposed claims or grievances or demands and the



complainant has undertaken not to raise any claim or dispute or issue against the respondent after executing the said settlement agreement referred to above under the Act or any other law for the time being in force. The present complaint preferred by the complainant is barred by the law of estoppel.

- xiv. That the complainant has alleged that there is an alleged delay of 9 years in delivery of possession of the said unit in question and therefore cause of action, if any, accrued in favour of the complainant 9 years back. The complaint seeking compensation and interest as a form of indemnification for the alleged delay is barred by limitation.
- xv. That it is submitted that the project has got delayed on account of the following reasons which were beyond the power and control of the respondent:
- xvi. That 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 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, 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.

- xvii. 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. Further, the contractor had also undertaken to complete the project within the agreed timelines i.e. within eighteen (18) months.
- xviii. That in spite of the aforementioned settlement, nothing goes to decided way and respondent was constrained to terminate the contract with the contractor vide termination notice dated 30.8.2018 and the respondent filed a petition against the contractor before the Hon'ble Delhi High Court seeking interim protection against the contractor and similar petition was also filed by the contractor against the respondent.
- xix. 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 Vs 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.

- xx. 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.
- xxi. That the present complaint is bad for non-joinder of HDFC Bank as a party. The buyers had availed a housing loan from HDFC Bank by mortgaging the said unit in question. The complainant is stopped from claiming any amount from the respondent in view of the Tripartite Agreement dated 05.12.2009 executed between the

buyers, the respondent and HDFC Bank. The complainant had specifically subrogated his rights for refund/compensation/interest with respect to the apartment in question, in favour of HDFC Bank. Therefore, prosecution of the instant complaint without making HDFC Bank a party is bad in law.

- xxii. The respondent denies that the said power of attorney is legitimate and execution date is incorrect. The respondent denies any referral of luxury state of art or premium residential project to the project and brochure or otherwise, are wholly indicative in nature and not binding. The buyer's agreement should not be read in isolation and fragments to interpret and determine rights and duties.
- xxiii. The respondent never informed date of commencement of construction to the complainant of the said unit. The respondent denies that carpet area of the said unit is less than 50%. The complainant visited the respondent in 2017 and submit denial to conduct/statement of the respondent as alleged by the complainant. It is also submitted that the said settlement does not violates and goes contrary to the provisions of the Act.
- xxiv. The respondent has advanced his arguments by stating following facts: The registration of the project is valid till 23.08.2022 and therefore cause of action, if any, would arise in favour of the complainant if the respondent fails to deliver possession of the said unit in question within the aforesaid period and only the

adjudicating officer who is competent to grant the interest at the prescribed rate can deal with the cases where the claim is for refund and compensation.

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

**E. Jurisdiction of the authority**

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

**E.I Territorial jurisdiction**

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

**E.II Subject-matter jurisdiction**

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

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

**F. Findings on the objections raised by the respondent**

**F.I Objection regarding 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 allottee to negotiate any of the clauses contained therein.

Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the buyer's agreement subject to the condition that the same are 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: —.....*



*(I): -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)(I)(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. 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. 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 complainant**

21. In the present complaint, the complainant intends 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;*

22. 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."*

23. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement, and the complainant not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment time period for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards

timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

24. **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 25.11.2020. 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.

25. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges at the prescribed rate of interest. 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.

26. 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.
27. Taking the case from another angle, the complainant-allottee is 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 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 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.

28. 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 rule 15(supra) prescribes, the rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.
29. **Liberty and third-party liability:** The complainant have not placed anything on record as to third party liability if any created by the respondent, so the complainant may come to authority when the respondent causes so or occasion arise. The respondent's liberty cannot be curtailed merely based on an allegation or apprehension. Only the substantial claim can be answered as per the Act and the Rules.
30. **Rate of interest to be paid by the complainant in case of delay in making payments:** The definition of term 'interest' as defined under

section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

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

*Explanation. —For the purpose of this clause—*

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

31. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same as is being granted to the complainant in case of delayed possession charges.
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 09.02.2010, possession of the said unit was to be delivered 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 complainant was 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 complainant as per the terms and conditions of the buyer's agreement dated 09.02.2010 executed between the parties.

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 complainant only on 25.11.2020. So, it can be said that the complainant came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the complainant should be given 2 months' time from the date of offer of possession. These 2 months of reasonable time is being given to the complainant keeping in mind that even after intimation of possession practically they have to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished the said 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.

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 complainant is 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 25.11.2020) so paid by the respondent to the complainant towards compensation for delay in handing over possession shall be adjusted towards the delay possession charges to be paid by the respondent in terms of proviso to section 18(1) of the Act.

#### **H. Directions of the authority**

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 complainant 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 complainant within 90 days from the date of this order as per rule 16(2) of the Rules.

- ii. Also, the amount of Rs.4,91,412/- paid by the respondent to the complainant towards compensation for delay in handing over possession shall be adjusted towards the delay possession charges to be paid by the respondent in terms of proviso to section 18(1) of the Act.
  - iii. The respondent shall not charge anything from the complainant which is not the part of the buyer's agreement. The respondent is also not entitled to claim holding charges from the complainant/allottee at any point of time even after being part of the builder buyer's agreement as per law settled by Hon'ble Supreme Court in civil appeal nos. 3864-3889/2020 decided on 14.12.2020.
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

JUDGEMENT UPLOADED ON 26.11.2021