

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

Complaint no. : 582 of 2021
First date of hearing : 16.04.2021
Date of decision : 01.10.2021

(i) Mrs. Jasmine Kurian Paul
(ii) Mrs. Elsie Paul
R/o(both): H-40/4,
DLF City Phase 1,
Gurgaon, Haryana 122002

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 Arvind Chaudhary
Shri J.K. Dang

Advocate for the complainants
Advocate for the respondent

ORDER

1. The present complaint dated 01.02.2021 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 03.05.2010 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 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	"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 171 of reply]
8.	Provisional allotment letter dated	29.09.2009 [Page 133 of complaint]
9.	Unit no.	EEA-j-F11-01, 11 th floor, block J [Page 81 of complaint]
10.	Unit measuring	1395 sq. ft.
11.	Date of execution of buyer's agreement	03.05.2010 [Page 79 of complaint]
12.	Payment plan	Construction linked payment plan [as per buyer's agreement and accounts]
13.	Total consideration as per statement of account dated 24.03.2021 at page 133 of reply	Rs.55,29,619/-
14.	Total amount paid by the Complainants as per statement of account 24.03.2021 at page 134 of reply	Rs.69,42,756/-
15.	Date of start of construction as per statement of account dated 24.03.2021 at page 133 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 94 of complaint]	26.08.2013 [Note: Grace period is not included]
17.	Date of offer of possession	21.11.2020 [Page 137 of complaint]
18.	Delay in handing over possession till 21.01.2021(i.e. date of offer of possession (21.11.2020) + 2 months)	7 year 4 months 26 days

B. Facts of the complaint

4. The complainants have made the following submissions in the complaint:
 1. That the respondent company issued an advertisement announcing a residential apartments project called 'Emerald estate apartments' situated at sector 65, Gurugram, Haryana and thereby invited applications from prospective buyers for the purchase of floors in the said project. The respondent confirmed that the project had got building plan approval from the authority. The initial allottees Leslie Joe Paul and Elsie Paul who were caught in the web of false promises by the agents of the respondent company, paid an initial booking amount of Rs. 5,00,000.00 vide cheque no. 834501 dated 27.08.2009, acknowledged by the respondent vide statement of account as on 21.11.2020. That on 26.09.2009, a provisional allotment letter was made by the respondent in the name of Leslie Joe Paul and Elsie Paul, which was acknowledged by the respondent vide ref. No-EEA/706256-PR-010 and a buyer's agreement was also executed between the allottees and the respondent on 03.05.2010.
 2. The possession of the captioned unit should have been delivered within 36 months from the date of execution of the agreement plus a grace period of six months i.e. by 2013 as per clause 11(a). That in January 2014, the initial Allottees visited the site and were shocked to see the status of the project as no construction was

going on at the site and the status of construction was not at all in consonance with the construction plan based on which the payments were collected.

3. That from January 2015 to May 2015, the initial allottees contacted the respondent on several occasions and were regularly in touch with the respondent through complainant's association called Emerald Hills Owners Welfare Association, office bearers of which were chasing the respondent for construction on very regular basis. The Respondent was never able to give any satisfactory response to the complainants or the governing body of the association regarding the status of the construction and was never definite about the delivery of the possession.
4. That from January 2016 to May 2016, the dharna were held by the initial allottees together with complainant's association. Some or the other excuses were being provided to the complainants as well as the association. In fact, the behaviour of the customer services division towards the complainants was very rude, negative and unfriendly. That in October 2016, after making the payments, the complainants were in hope that he will get possession of their flat soon but the dreams of the complainants were shattered and scattered as the respondent left no stone unturned to cheat the complainants and extract money from their pocket showing that flat is complete and ready to handover possession. It is very

unfortunate that the complainants had become helpless and had to run from pillar to post for the possession of his flat though he had made payment of the agreed amount as per the construction linked plan.

5. That on 11.09.2017, the initial allottees and the respondent signed a settlement agreement. The agreement stated that the allottees shall be given a credit of a lumpsum compensation amount of Rs.15,40,080/- in the statement of account, as a gesture of goodwill to be adjusted in future installments and/or other charges. The allottees had agreed to the revised date of possession 31.03.2018 given by the respondent company. It was further agreed that in case the date of hand over of possession is changed whether prior to the mentioned date or post the same, the amount of compensation shall be increased or decreased on pro-rata basis and the allottees shall make the payment of balance amount after the adjustment of the compensation.
6. The possession of the unit is not handed over therefore according to the terms and conditions of the agreement the respondent is liable to pay the amount of interest to the complainants till date. The initial Allottees received a lump sum compensation by the respondent according to the settlement terms of the settlement agreement executed between the complainants and the respondent as on 11.09.2017 for an amount of Rs. 15,40,080.00 vide receipt no.

774078 dated 05.10.2017. That on 02.02.2018, the respondent made an installment deduction of Rs. 4,03,108/- from the compensation, which was given to the complainants, such an act of the respondent is illegal and unjust. The initial allottees received a lump sum compensation by the respondent according to the settlement terms of the settlement agreement executed between the complainants and the respondent as on 11.09.2017 for an amount of Rs. 1,78,447.00 (on pro-rata basis of the original settlement) vide receipt no. 798532 dated 26.07.2018 and Allottees received a credit on account of anti-profiting of an amount of Rs. 5,950.00 vide cheque no. 810271 dated 18.12.2018, Rs. 20,275.00 vide cheque no. 844862 dated 19.08.2019 and Rs. 4,151.00 vide cheque no. 822338 dated 15.04.2019. Also, the initial allottees received a credit for ERP of an amount of Rs. 16,258.00 vide cheque no. 920191 dated 13.11.2020.

7. Subsequently, the complainants based on their affidavits viz affidavit no. G0282020b1050 dated 28.02.2020, affidavit no. G0282020b1171 dated 28.02.2020 and indemnity no. G0282020b1051 dated 28.02.2020 substituted the name of Leslie Joe Paul with Jasmine Paul on the aforesaid property. It was confirmed by the respondent company vide letter reference number EMGF/707713 dated 11.03.2020. The collection adjustment for an amount of Rs. 7,069.00 vide Cheque no. 920193

and 920871 dated 13.11.2020 and 18.11.2020 respectively was made and the complainants received DPC for an amount of Rs. 7,069.00 vide cheque no. 920868 dated 18.11.2020.

8. The complainants received a letter of offer of possession for the allotted flat EEA-J-F11-01 at emerald estate apartments from the respondent vide reference no. EEA/707713-PR-/20201121123741335 on 21.11.2020. Unfortunately, the IOP received by the complainants also carried certain demands which were not a part of the builder buyer agreement and hence those demands were illegal. Those demands related to asking for final dues and other charges that were not mentioned in the initial agreement. The complainants asked for the interest for the period for which the possession was delayed and also denied the payments which were not according to the builder buyer agreement. The respondent also started threatening through the customer services division that in case you do not sign the settlement agreement, you will not only loose the enhanced compensation from Rs. 5 to Rs.10 being offered by the respondent to all, but you are the initial allottees would not be entitled for even the basic compensation of Rs. 5.00 which is mentioned in the builder buyer agreement.

C. Relief sought by the complainants

5. The complainants have filed the present compliant for seeking following relief:

It is most respectfully prayed that this authority be pleased to direct the respondent to pay interest at the prescribed rate for every month of delay from the due date of possession till the date of actual possession.

i. It is most respectfully prayed that this authority be pleased to order the respondent not to ask for anything which has not been agreed to between the parties in the buyer's agreement as offering possession on the payment of charges which the flat buyer is not contractually bound to pay, cannot be considered to be a valid offer of possession.

ii. It is most respectfully prayed that this authority be pleased to order the respondent to ensure no further demand is raised on the complainants till the time the entire interest due to the complainants has been paid.

iii. It is most respectfully prayed that this authority be pleased to pass any other interim relief(s) which this authority thinks fit in the interest of justice and in favor of the complainants.

6. On the date of hearing, the authority explained to the respondent/promoter about the contravention as alleged to have been committed in relation to section 11(4)(a) of the Act 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 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. 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 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. That the complainants are not "allottees" but investors who have booked the unit in question as a speculative investment in order to earn rental income/profit from its resale. the unit in question has been booked by the complainants as a speculative investment and not for the purpose of self-use as a residence. The complainants have not come before this authority with clean hands and has suppressed vital and material facts from this authority, the original allottees took an independent and informed decision,

uninfluenced in any manner by the respondent, to book the unit in question.

- iii. It is pertinent to mention herein that at the time of application, the building plans of the project had not yet been approved by the competent authority and this fact was clearly and transparently disclosed to the original allottees at the time of booking itself and clearly mentioned in the application form. The original allottees were conscious and aware that the construction would commence only after approval of building plans and as such was fully conscious and aware that time was not the essence of the contract when it came to delivery of possession.
- iv. The provisional allotment letter dated 29.09.2009 and revised allotment letter dated 06.03.2010 in favour of the original allottees and buyer's agreement executed between the original allottees and the respondent dated 03.05.2010.
- v. That the original allottees had filed a false and frivolous complaint before the hon'ble NCDRC being complaint no 1043/2015 against the respondent, and the association of apartment owners in the project had also lodged an FIR bearing no 158 dated 08.06.2016 with the Economic offences Wing, Gurugram. The original allottees were directed by the hon'ble NCRDC to appear before the hon'ble state commission since the hon'ble NCRDC did not have the pecuniary jurisdiction to hear and decide the said complaint.

However, before the matter could be listed before the hon'ble state commission, the original allottees and the respondent arrived at a settlement.

- vi. The original allottees and the respondent executed a settlement agreement dated 11.09.2017 in terms of which, *inter alia*, the original allottees were to receive a lump sum credit of Rs 15,40,080/- (Rupees fifteen lacs forty thousand and eighty only) to be adjusted against future instalments and charges in the manner set out in the settlement agreement referred to above in lieu thereof, the original allottees agreed and undertook to withdraw the said complaint filed by the original allottees and not to institute any claim against the respondent of any nature whatsoever. thus, the present complaint has been filed in violation of the terms and conditions of the settlement agreement referred to above. The letter dated 24.08.2017 addressed to the EOW, Gurugram whereunder the original allottees have conveyed their no objection to the closure of FIR no. 158 dated 08.06.2016 and have specifically stated that they visited the project site and found the work in the project to be on in full swing, the competition schedule has already been shared by the respondent and that the matter of compensation has already been settled between the original allottees and the respondent.

vii. That it is submitted that there have been several defaults on the part of the original allottees in making timely payment of sale consideration as per the payment plan. accordingly, the original allottees /complainants are not entitled to any compensation for any delay in delivery of possession under clause 13 (c) of the buyer's agreement. the contractual relationship between the complainants and the respondent is governed by the terms and conditions of the buyer's agreement which are binding upon the parties with full force and effect. Nevertheless, it is pertinent to mention that the respondent has paid Rs 17,18,527/- as delay compensation in accordance with the buyer's agreement read with the settlement agreement dated 11.09.2017, executed between the original allottees and the respondent. Rs 15,40,080/- was promised to be paid to the original allottees under the settlement agreement referred to above and additional compensation amounting to Rs 1,78,447/- was paid at the time of offer of possession. Furthermore, an amount of Rs. 30,376/- (Rupees thirty thousand three hundred seventy-six only) has been credited as benefit on account of anti-profiting and Rs. 16,258/- (Rupees sixteen thousand two hundred fifty-eight only) on account of early payment rebate. Furthermore, the timelines for delivery of possession are contingent upon various factors such as time taken by the statutory/competent authority in according to approvals, permissions, sanctions,

including but not limited to the issuance of the occupation certificate/competition certificate, timely payment of instalments by the allottees and other factors which are beyond the power and control of the respondent.

- viii. That the respondent was constrained to terminate the contract of one of the contractors of the project which has also contributed to delay in construction activities at the site as follows-
- ix. 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 projects being developed by the respondent in the name and style of "Emerald Estate" and "Emerald Floors Premier", including civil, structure, finishing, MEP, external development, infrastructure, horticulture, EWS, clubhouses, swimming pools, convenience shopping etc. 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.
- x. That the contractor was not able to meet the agreed timelines for construction of the project. The progress of work at the project site was extremely slow on account of various defaults on the part of the contractor, such as failure to deploy adequate manpower, shortage of materials etc. In this regard, the respondent made several requests to the contractor to expedite progress of the work

at the project site. However, the contractor did not adhere to the said requests and the work at the site came to a standstill.

- xi. That in the aforesaid circumstances, the respondent was constrained to issue notice of termination dated 16.01.2015, terminating the contract and calling upon the contractor to remove itself from the project site without removal/ damage to the materials, equipment, tools, plant & machinery, and to hand over the contract documents.
- xii. That the respondent apprehended that the contractor would remove from the project site, material, tools, plant & machinery which would then not be available to the respondent for use for completion of the project in terms of clause 95.1 (GCC) of the contract. 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.
- xiii. That 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. Further, the contractor had also undertaken to complete the project within the agreed timelines i.e. within eighteen (18) months but nothing went as agreed and hence, the respondent was constrained to terminate the contract with the contractor vide termination notice dated 30.8.2018. After termination of the contract, the respondent filed a petition against the contractor before the Hon'ble Delhi High Court seeking interim protection against the contractor so that the contractor does not, inter alia, disturb the possession and work at the site. Similar petition was also filed by the contractor against the respondent.
- xv. That the aforesaid two petitions, along with two other petitions pertaining to a different contract came up for hearing on 06.09.2018 before the Honourable High Court and disposed of the said cases and issued several directions. The Honourable High Court appointed Justice A P Shah (Retd) as the Sole Arbitrator for adjudication of disputes between the respondent and the contractor. Furthermore, RITES 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. The High Court gave liberty to the respondent 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.

- xvi. That 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 have been initiated. The Ld. arbitrator vide order dated 27.04.2019 gave liberty to the respondent to appoint another contractor w.e.f. 15.05.2019. That the original allottees requested the respondent to delete the name of Leslie Joe Paul and to add the name of complainant no 1, Jasmine Kurian Paul in lieu thereof. the original allottees and complainant no 1 executed the requisite documents to effect the change of name in the records of the respondent and possession of the apartment has been offered to the complainants vide offer of possession letter dated 21.11.2020.
- xvii. The allegations advanced by the complainants and without prejudice to the contentions of the respondent, it is respectfully submitted that the provisions of the act are not retrospective in nature. the provisions of the act cannot undo or modify the terms of an agreement duly executed prior to coming into effect of the Act. the provisions of the act relied upon by the complainants for

seeking interest or compensation cannot be called in to aid in derogation and in negation of the provisions of the buyer's agreement. the complainants cannot claim any relief which is not contemplated under the provisions of the buyer's agreement read with the settlement agreement. assuming, without in manner admitting any delay on the part of the respondent in delivering possession, it is submitted that the interest for the alleged delay demanded by the complainants is beyond the scope of the buyer's agreement as amended by the settlement agreement, delay interest in accordance with the buyer's agreement, read with the settlement agreement, amounting to Rs. 17,18,527/- has already been paid to the complainants. The complainants cannot demand any interest or compensation beyond or contrary to the agreed terms and conditions between the parties.

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 and complainant being investor.

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.

15. The respondent plea that complainants being investor cannot demand certain benefits of the Act is outrightly denied and with dismayed it is recoded that nothing is in the Act that describes the investor, what is on fact is that they had paid the consideration against the total sale consideration as required.

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

16. 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)(I)(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.
17. 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.
18. Section 4(2)(I)(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)(1)(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...."

19. 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

20. 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.

21. 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, no delay in granting occupation certificate can be attributed to the concerned statutory authority. Also, 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 which are of repressive nature.

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 allottees in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottees and the commitment time period for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottees of 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 24.03.2021. 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 the prescribed rate of interest. Proviso to section 18 provides that where an allottees did 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.

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 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 allottees 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.

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 rule 15(supra) prescribes, the 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 allottees by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottees, 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 03.05.2010, 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 complainants were offered possession by the respondent on 21.11.2020. 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 03.05.2010 executed between the parties.
33. Section 19(10) of the Act obligates the allottees 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 21.11.2020. 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 is being given to the complainants keeping in mind that even after intimation of possession practically they have to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished 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 (21.11.2020) which comes out to be 21.01.2021.

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 complainants are entitled to delay possession charges at prescribed rate of the interest @ 9.30 % p.a. w.e.f. 26.08.2013 till 21.01.2021 as per provisions of section 18(1) of the Act read with rule 15 of the Rules.

35. Also, the amount credited to complainants paid by the respondent towards compensation for delay in handing over possession shall be adjusted according to statement of accounts of the unit in question 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 complainants from due date of possession i.e. 26.08.2013 till 21.01.2021 i.e. expiry of 2 months from the date of offer of possession (21.11.2020) 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 credited to complainants paid by the respondent towards compensation for delay in handing over possession shall be adjusted according to statement of accounts of the unit in question 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

JUDGEMENT UPLOADED ON 26.11.2021