

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

Complaint no. : 3668 of 2021  
First date of hearing : 01.10.2021  
Date of decision : 18.11.2021

1. Dhiraj Anand Khatri  
2. Shweta Khatri  
Both RR/o: Apartment no. EEA-H-F12-05,  
Block H, Emerald Estate Apartments,  
Sector 65, Gurugram, Haryana-122001.

**Complainants**

Versus

M/s Emaar India Ltd.  
Address: Emaar MGF Business Park,  
Mehrauli Gurgaon Road, Sikandarpur Chowk,  
Sector-28, Gurugram-122002, Haryana.

**Respondent**

**Coram:**

Dr. K.K. Khandelwal  
Shri Vijay Kumar Goyal

**Chairman  
Member**

**Appearance:**

Shri Varun Chugh  
Shri Harshit Batra

Advocate for the complainants  
Advocate for the respondent

**ORDER**

1. The present complaint dated 10.09.2021 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 20.02.2010 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" in Sector 65, Gurugram, Haryana.
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, C/o Emaar MGF Land Ltd.
6.	HRERA registered/ not registered	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 [annexure R5, page 200 of reply]

8.	Provisional allotment letter dated	29.09.2009 [annexure R2, page 94 of reply]
9.	Unit no.	EEA-H-F12-05, 12 <sup>th</sup> floor, building no. H [annexure A, page 23 of complaint]
10.	Unit measuring	1310 sq. ft.
11.	Date of execution of buyer's agreement	20.02.2010 [annexure A, page 21 of complaint]
12.	Payment plan	Construction linked payment plan [annexure A, page 56 of complaint]
13.	Total consideration as per statement of account dated 29.09.2021 at page 196 of reply	Rs.56,18,939/-
14.	Total amount paid by the complainants as per statement of account dated 29.09.2021 at page 197 of reply	Rs.56,22,100/-
15.	Date of commencement of construction as per statement of account dated 29.09.2021	26.08.2010
16.	Complainants are subsequent allottees	The respondent acknowledged the complainants as allottees in respect of the subject unit vide nomination letter dated 20.10.2018 in pursuance of agreement to sell dated 03.09.2018 executed between the complainants and the previous allottee.
17.	Due date of delivery of possession as per clause 11(a) of the said agreement i.e. 36 months from the date of commencement of construction (26.08.2010) + grace period of 6 months, for applying and obtaining the completion certificate/ occupation certificate in respect of the unit and/or the project. [Page 36 of complaint]	26.08.2013  [Note: Grace period is not included]

18.	<b>Date of offer of possession to the complainants</b>	<b>21.11.2020</b> [annexure C, page 59 of complaint]
19.	Delay in handing over possession w.e.f. 26.08.2013 till 21.01.2021 i.e. date of offer of possession (21.11.2020) + 2 months	7 year 4 months 26 days
20.	Unit handover letter	27.02.2021 [annexure R1, page 34 of reply]
21.	Conveyance deed executed on	13.08.2021 [annexure R1, page 37 of reply]

**B. Facts of the complaint**

4. The complainants have made the following submissions in the complaint:
- i. That the property in question i.e. apartment bearing no. EEA-H-F12-05 (twelfth floor) admeasuring 1310 sq. ft. in the project of the respondent known as "Emerald Estate Apartment" situated at Sector-65, Gurugram, Haryana, was booked by Ms. Smitha Menon. Thereafter, on 20.02.2010, Ms. Smitha Menon entered into a buyer's agreement with the respondent, by virtue of which the respondent allotted apartment no. EEA-H-F12-05, having super area 1310 sq. ft. along with car parking space in the said project.
  - ii. That subsequent thereto, the complainants herein entered into an agreement with Ms. Smitha Menon to purchase the said property and the subject unit was later assigned to the complainant and his wife as co-applicant by the respondent by virtue of assignment letter/nomination letter dated 20.10.2018.
  - iii. That as per the clause 11(a) of the said buyer's agreement dated 20.02.2010, the respondent had categorically stated that the

possession of the said apartment would be handed over to the complainants within 36 months from the date of commencement of construction and development of the unit i.e. 26.08.2010, with a further grace period of another 6 months. Moreover, at the time of transferring the apartment in question, the complainants were further coerced by the respondent to sign affidavits/indemnity cum undertaking, in favour of the respondent wherein the complainants were required to undertake, not to claim or raise any compensation for delay in handing over possession of the property.

- iv. That the said buyer's agreement is totally one sided, which impose completely biased terms and conditions upon the complainants, thereby tilting the balance of power in favour of the respondent, which is further manifest from the fact that the delay in handing over the possession by the respondent would attract only a meagre penalty of Rs.5/- per sq. ft., on the super area of the flat, on monthly basis, whereas the penalty for failure to take possession would attract holding charges of Rs.50/- per sq. ft. and 24% penal interest on the unpaid amount of instalment due to the respondent.
- v. That the respondent had breached the fundamental term of the contract by inordinately delaying in delivery of possession by 81 months. The possession of the subject unit was finally offered by the respondent on 21.11.2020. The respondent has committed various acts of omission and commission by making incorrect and false

statement in the advertisement material as well as by committing other serious acts.

- vi. That the complainants, without any default, had been timely paying the instalments towards the property, as and when demanded by the respondent towards the subject unit and after making the balance payment which was to be made at the time of offer of possession, got the property transferred by executing conveyance deed in their name on 13.08.2021.
- vii. That the respondent had promised to complete the project by February 2014 including the grace period of six months. The buyer's agreement was executed on 20.02.2010 and the possession of the apartment was finally offered on 21.11.2020 resulting into considerable delay of 81 months in handing over the possession of the property.
- viii. That the respondent has breached the fundamental term of the contract by inordinately delaying in delivery of possession and not providing adequate compensation as per the provisions of the Act. In fact, the respondent has even failed to provide the compensation as per the terms of the buyer's agreement and has flatly refused to indemnify the complainants who sought compensation for the entire period of delay in handing over the possession of the unit. The respondent has not acknowledged the requests of the complainants in regard to the delayed compensation. The respondent had

committed gross violation of the provisions of section 18(1) of the Act by not handing over the timely possession of the flat in question and not giving the delayed possession interest to the complainants as per provisions of the Act.

**C. Relief sought by the complainants**

5. The complainants have filed the present complaint for seeking following reliefs:

- i. Direct the respondent to pay interest @18% p.a. as interest towards delay in handing over the property in question as per the provisions of the Act and the rules.
- ii. Pass such order or further order as this hon'ble authority may deem fit and proper in the facts and circumstances of the present case.

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 contested the present complaint on the following grounds:

- i. That the complainants being interested in the project in question entered into an agreement to sell dated 03.09.2018 with Smitha Memon ("original allottee") who was originally allotted unit no. EEA-H-F-12-05 on 12<sup>th</sup> floor, in Building H with super area 1310 sq. ft. vide

- provisional allotment letter dated 29.09.2009. Initially, the buyer's agreement was executed between the original allottee and the complainants on 20.02.2010. After such agreement to sell dated 03.09.2018, the nomination of the complainants was confirmed vide nomination letter dated 20.10.2018 upon submission and execution of transfer documents by the complainants.
- ii. That the timeline for the delivery of possession had been amended as per transfer docket document no. 17, according to which the due date of delivery comes out to be January 2019. That as per the agreement, the due date of delivery was subject to the allottee(s) having strictly complied with all terms and conditions of the agreement and not being in default of any provision of the agreement including remittance of all amounts due and payable by the allottee(s) under the agreement as per the schedule of payment incorporated in the agreement. It has also been provided therein that the date for delivery of possession of the unit would stand extended in the event of occurrence of the facts/reasons beyond the power and control of the respondent. The complainants have completely misconstrued, misinterpreted and miscalculated the time period as determined in the agreement.
- iii. That it was categorically provided in clause 11(b)(iv) that in case of any default/delay by the allottees in payment as per schedule of payment incorporated in the 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 original allottee 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 by the complainants.

- iv. That the respondent was adversely affected by various construction bans, lack of availability of building material, regulation of the construction and development activities by the judicial authorities including NGT in NCR on account of the environmental conditions, restrictions on usage of ground water by the High Court of Punjab & Haryana, etc. and other force majeure circumstances, yet, the respondent completed the construction of the project diligently and timely, without imposing any cost implications of the aforementioned circumstances on the complainants and demanding the prices only as and when the construction was being done, as is evident from the statement of accounts dated 29.09.2021. The respondent had the right to suspend the construction of the project upon happening of circumstances beyond the control of the respondent as per clause 11(b)(i), however, despite all the hardships faced by the respondent, the respondent did not suspend the construction and managed to keep the project afloat through all the adversities.

- v. That despite the innumerable hardships being faced by the respondent, the respondent completed the construction of the project by applying for the application for occupation certificate dated 20.03.2020 before the concerned authority and successfully attained the occupation certificate dated 11.11.2020. Thereafter, only after obtaining the requisite permissions, the respondent legally offered the possession of the unit on 21.11.2020 vide the letter of offer of possession after which the physical possession was taken by the complainants and the conveyance deed was executed.
- vi. That the complainants, after having executed the conveyance deed and taking peaceful possession of the unit, and having enjoyed such possession since then should not be entitled to claim the interest on the delayed possession. The complaint should be liable to be dismissed with heavy costs. Thus, the present complaint is devoid of any cause of action and is nothing but an abuse process of Law. It is submitted that the agreement is deemed to be concluded after execution of conveyance deed. It is also submitted that the complainants have willingly taken the possession by executing the unit hand over letter which states that the complainants upon acceptance of possession, the liabilities and obligations of the respondent as enumerated in the allotment letter/buyer's agreement stands satisfied.

vii. That such prior knowledge and willing and self-initiated endorsement of the complainants, without any protest, amounts to acceptance of the circumstances and the complainants cannot be allowed to reap benefits by extracting monies from the respondent and forgoing their complete satisfaction against the unit. That having known about the same, the complainants cannot, under no circumstance whatsoever, be allowed to take benefit of their own wrong. Hence, the complaint is liable to be dismissed with costs against the complainants. The Hon'ble Supreme Court has held in *Laureate Buildwell Pvt. Ltd vs. Charanjeet Singh 2021 SCC OnLine SC 479* that: 31...The nature and extent of relief, to which a subsequent purchaser can be entitled to, would be fact dependent. However, it cannot be said that a subsequent purchaser who steps into the shoes of an original allottee of a housing project in which the builder has not honoured its commitment to deliver the flat within a stipulated time, cannot expect any - even reasonable time, for the performance of the builder's obligation. Such a conclusion would be arbitrary, given that there may be a large number-possibly thousands of flat buyers, waiting for their promised flats or residences; they surely would be entitled to all reliefs under the Act. In such case, a purchaser who no doubt enters the picture later surely belongs to the same class. Further, the purchaser agrees to buy the flat with a reasonable expectation that delivery of possession would be in accordance within the

*bounds of the delayed timeline that he has knowledge of, at the time of purchase of the flat.*

- viii. That the respondent has had utmost bona fide since the very beginning. The respondent has also issued various credit memos on account of anti-profiting, total amounting to Rs.28,855/-. Without prejudice to the rights of the respondent, delayed interest if any has to be calculated only on the amounts deposited by the allottee/complainants towards the basic principle amount of the unit in question and not on any amount credited by the respondent, or any payment made by the allottees/complainants towards delayed payment charges or any taxes/statutory payments etc.
- ix. That the project got delayed on account of various reasons which were/are beyond the power and control of the respondent and hence, the respondent cannot be held responsible for the same. There were defaults on the part of the contractor (M/s B L Kashyap and Sons). The contractor was not able to meet the agreed timelines for construction of the project. The progress of the 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 material etc. and hence, the respondent cannot be held responsible for the same. 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 document.

- x. 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. Therefore, the respondent filed petition bearing no. O.M.P. no. 100 of 2015 under section 9 of the Arbitration and Conciliation Act, 1996 before hon'ble High Court seeking relief in nature of restraining the contractor from interfering with the business activities of the respondent and appointing local commissioner to inspect project site and prepare an inventory of material, equipment, tools, plant and machinery. 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 as this considered to be in the interest of justice and to mitigate losses. Further, the contractor had also undertaken to complete the project within the agreed timelines i.e., within 18 months. Despite the aforementioned settlement, the contractor did not amend its ways and persistently defaulted in meeting the agreed timelines for completion of the project.
- xi. That in the meanwhile, the National Building Code (NBC) was revised in the year 2016 and in terms of the same, all high rise buildings (i.e

buildings having height of 15 mtrs and above), irrespective of the area of each floor, are now required to have two stair cases. Furthermore, it was notified vide Gazette published on 15.03.2017 that the provisions of NBC 2016 supersedes those of NBC 2005. The respondent had accordingly sent representations to various authorities identifying the problems in constructing a second staircase. Eventually, so as to not cause any further delay in the project and so as to avoid jeopardising the safety of the occupants of the buildings in question, the respondent had taken a decision to go ahead and construct the second staircase. However, due to the impending BL Kashyap (contractor) issue of non-performance, the construction of the second staircase could not be started as well.

- xii. That in view of the above, the respondent was constrained to terminate the contract with the contractor vide termination notice dated 30.08.2018. After termination of 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.
- xiii. That the aforesaid two petitions, along with two other petitions pertaining to a different contract came up for hearing on 06.09.2018. The hon'ble High Court by order dated 06.09.2018 disposed of the

said cases and issued several directions. The hon'ble 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(ies) for completing the remaining work. However, it was directed that the project site shall be handed over to such new agency(ies) with the permission of the sole arbitrator. 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 Hon'ble Arbitrator vide order dated 27.04.2019 gave liberty to the respondent to appoint another contractor w.e.f. 15.05.2019.

- xiv. That an amount of Rs. 2,53,060 (Rs. 2,28,060 for Stamp Duty and Rs. 25,000 for E-Challan) is due and payable by the complainants. The complainants have intentionally refrained from remitting the aforesaid amount to the respondent. It is submitted that the complainants have consciously defaulted in his obligations as enumerated in the agreement as well as under the Act. The complainants cannot be permitted to take advantage of his own

wrongs. The instant complaint constitutes a gross misuse of process of law.

**E. Jurisdiction of the authority**

8. 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**

9. 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**

10. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

**Section 11(4)(a)**

*Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;*

*The provision of assured returns is part of the builder buyer's agreement, as per clause 15 of the BBA dated..... Accordingly, the promoter is responsible for*



*all obligations/responsibilities and functions including payment of assured returns as provided in Builder Buyer's Agreement.*

**Section 34-Functions of the Authority:**

*34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.*

11. So, in view of the provisions of the Act quoted above, 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 Whether the subsequent allottee who had executed an indemnity-cum-undertaking with waiver clause is entitled to claim delay possession charge.**

12. The respondent submitted that complainants in question are subsequent allottees and complainants have executed an affidavit dated 15.10.2018 and an indemnity cum undertaking dated 15.10.2018 whereby the complainants have consciously and voluntarily declared and affirmed that they would be bound by all the terms and conditions of the provisional allotment in favour of the original allottees. It was further declared by the complainants that they, having been substituted in the place of the original allottees in respect of the provisional allotment of the unit in question, were not entitled to any compensation for delay. Also, as per affidavit dated 15.10.2018, the due date of delivery comes out to be January 2019. Therefore, the complainants are not entitled to any compensation. The authority has heard the arguments of both the parties at length. With

regard to the above contentions raised by the promoter/developer, it is worthwhile to examine following four sub-issues:

- i. Whether subsequent allottee is also an allottee as per provisions of the Act?
  - ii. Whether delay possession charges are in the nature of statutory legal obligation of the promoter other than compensation?
  - iii. Whether the subsequent allottee is entitled to delayed possession charges w.e.f. due date of handing over possession or w.e.f. the date of nomination letter/endorsement (i.e. date on which he became allottee)?
  - iv. Whether indemnity-cum-undertaking with waiver clause at the time of transfer of unit is arbitrary and whether statutory rights can be waived of by such one sided and unreasonable undertaking?
- i. **Whether subsequent allottee is also an allottee as per provisions of the Act?**
13. The term "allottee" as defined in the Act also includes and means the subsequent allottee, hence is entitled to the same relief as that of the original allottee. The definition of the allottee as provided in the Act is reproduced as under:

"2 In this Act, unless the context otherwise requires-

(d) "allottee" in relation to a real estate project, means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent".

14. Accordingly, following are allottees as per this definition:

- (a) **Original allottee:** A person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter.
- (b) **Allottees after subsequent transfer from the original allottee:** A person who acquires the said allotment through sale, transfer or otherwise. However, an allottee would not be a person to whom any plot, apartment or building is given on rent.
15. From a bare perusal of the definition, it is clear that the transferee of an apartment, plot or building who acquires it by any mode is an allottee. This may include (i) allotment; (ii) sale; (iii) transfer; (iv) as consideration of services; (v) by exchange of development rights; or (vi) by any other similar means. It can be safely reached to the only logical conclusion that no difference has been made between the original allottee and the subsequent allottee and once the unit, plot, apartment or building, as the case may be, has been re-allotted in the name of the subsequent purchaser by the promoter, the subsequent allottee enters into the shoes of the original allottee for all intents and purposes and he shall be bound by all the terms and conditions contained in the buyer's agreement including the rights and liabilities of the original allottee. Thus, as soon as the unit is re-allotted in his name, he will become the allottee and nomenclature "subsequent allottee" shall only remain for identification for use by the promoter. Therefore, the authority does not draw any difference between the allottee and subsequent allottee per se.

16. Reliance is placed on the judgment dated 26.11.2019 passed in consumer complaint no. 3775 of 2017 titled as **Rajnish Bhardwaj Vs. M/s CHD Developers Ltd.** by NCDRC wherein it was held as under:

*"15. So far as the issue raised by the Opposite Party that the Complainants are not the original allottees of the flat and resale of flat does not come within the purview of this Act, is concerned, in our view, having issued the Re-allotment letters on transfer of the allotted Unit and endorsing the Apartment Buyers Agreement in favour of the Complainants, this plea does not hold any water....."*

17. The authority concurs with the Hon'ble NCDRC's decision dated 26.11.2019 in **Rajnish Bhardwaj vs. M/s CHD Developers Ltd.** (supra) and observes that it is irrespective of the status of the allottee whether it is original or subsequent, an amount has been paid towards the consideration for a unit and the endorsement by the developer on the transfer documents clearly implies his acceptance of the complainants as allottees.

18. Therefore, taking the above facts into account, the authority is of the view that the term subsequent allottee has been used synonymously with the term allottee in the Act. The subsequent allottee at the time of buying a unit/plot takes on the rights as well as obligations of the original allottee vis-a-viz the same terms and conditions of the buyer's agreement entered into by the original allottee. Moreover, the amount if any paid by the subsequent or original allottee is adjusted against the unit in question and not against any individual. Furthermore, the name of the complainants/subsequent allottees has been endorsed on the same buyer's agreement which was executed between the original allottees and

the promoter and no fresh buyer's agreement has been executed till date. Therefore, the rights and obligation of the complainants/ subsequent allottees and the promoter will also be governed by the said buyer's agreement.

ii. **Whether delay possession charges are in the nature of statutory legal obligation of the promoter other than compensation?**

19. It is important to understand that the Act has clearly provided interest and compensation as separate entitlement/right which the allottee can claim. An allottee is entitled to claim compensation under sections 12, 14, 18 and section 19, to be decided by the adjudicating officer as per section 71 and the quantum of compensation shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The interest is payable to the allottee by the promoter in case where there is refund or payment of delay possession charges i.e., interest at the prescribed rate for every month of delay. The interest to be paid to the allottee is fixed and as prescribed in the rules which an allottee is legally entitled to get and the promoter is obligated to pay. The compensation is to be adjudged by the adjudicating officer and may be expressed either lumpsum or as interest on the deposited amount after adjudgment of compensation. This compensation expressed as interest needs to be distinguished with the interest at the prescribed rate payable by the promoter to the allottee in case of delay in handing over of possession or interest at the prescribed rate payable by the allottee to the promoter in case of default in due payments. Here, the interest is pre-determined, and no adjudication is

involved. Accordingly, the distinction has to be made between the interest payable at the prescribed rate under section 18 or 19 and adjudgment of compensation under sections 12, 14, 18 and section 19. The compensation shall mean an amount paid to the flat purchasers who have suffered agony and harassment, as a result of the default of the developer including but not limited to delay in handing over of the possession.

20. In addition, the quantum of compensation to be awarded shall be subject to the extent of loss and injury suffered by the negligence of the opposite party and is not a definitive term. It may be in the form of interest or punitive in nature. However, the Act clearly differentiates between the interest payable for delayed possession charges and compensation. Section 18 of the Act provides for two separate remedies which are as under:

- i. In the event, the allottee wishes to withdraw from the project, he/she shall be entitled without prejudice to any other remedy refund of the amount paid along with interest at such rate as may be prescribed in this behalf **including compensation** in the manner as provided under this Act;
- ii. In the event, the allottee does not intend to withdraw from the project, he/she 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.**

21. The rate of interest in both the scenarios is fixed as per rule 15 of the rules which shall be the State Bank of India's highest marginal cost of lending rate +2%. However, for adjudging compensation or interest under sections



12,14,18 and section 19, the adjudicating officer has to take into account the various factors as provided under section 72 of the Act

iii. **Whether the subsequent allottee is entitled to delayed possession charges w.e.f. due date of handing over possession or w.e.f. the date of nomination letter (i.e. date on which he became allottee)?**

22. The respondent/promoter contended that the complainants/subsequent allottees shall not be entitled to any compensation/delayed possession charges since at the time of the execution of transfer documents/agreement for sale, they were well aware of the due date of possession and have knowingly waived off their right to claim any compensation for delay in handing over possession or any rebate under a scheme or otherwise or any other discount. The respondent/ promoter had spoken about the disentitlement of compensation/delayed possession charges to the complainants/subsequent allottees who had clear knowledge of the fact w.r.t. the due date of possession and whether the project was already delayed. But despite that they have signed an affidavit extending the due date of possession as January 2019 and have executed indemnity-cum-undertaking knowingly waiving off their right of compensation.

23. Furthermore, the respondent argued that the previous allottee had transferred the unit in favour of complainants/subsequent allottees after the Act came into force and where the project has been registered under the Act by the respondent. It was argued by the promoter that in cases where the subsequent allottee came into picture after the registration of the project under the provisions of the Act with the authority, then the date

of completion of the project and handing over the possession shall be the date declared by the promoter under section 4(2)(1)(C) of the Act. The counsel of the respondent further argued that the while purchasing the unit, it is presumed that the allottee very well knew that the project would be completed by that specific declared date, therefore, the delayed possession charges shall not be allowed.

24. The authority is of the view that the time period for handing over the possession is committed by the builder as per the relevant clause of the buyer's 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 buyer's 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, earlier, penal proceedings cannot 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 for possession as per the buyer's agreement remains unchanged and the 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 buyer's agreement and is liable for the



delayed possession charges as provided in proviso to section 18(1) 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. The same issue has been dealt by Hon'ble Bombay High Court in case titled as *Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)* wherein it was held that the RERA Act does not contemplate rewriting of contract between the allottee and the promoter. The relevant para of the judgement is reproduced below:

*"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..."*

25. Moreover, as delineated hereinabove, the Act does not distinguish between the original allottee and the subsequent allottee. The Act, by virtue of section 18, has created statutory right of delay possession charges in favour of the allottees. No doubt, the subsequent allottees knew the new date of completion as declared by the promoter but that does not abrogate the statutory rights of the subsequent allottees.
26. In the case in hand also, though the buyer's agreement dated 20.02.2010 was executed prior to the Act coming into force but the endorsement was made in favour of the complainants/subsequent allottees on 20.10.2018 when the Act became applicable. The subsequent allottees at the time of buying the said unit takes on the rights as well as obligations of the original allottees vis-a-viz the same terms and conditions of the buyer's agreement

entered into by the original allottees. Although at the time of endorsement of their name in the buyer's agreement, the due date of possession had already lapsed but the subsequent allottees as well as the promoter had the knowledge of the statutory right of delay possession charges being accrued in his favour after coming into force of the Act. Thus, the concept of quasi-retroactivity will make the provisions of the Act and the rules applicable to the subsequent allottees. Moreover, the authority cannot ignore the settled principle of law that the waiver of statutory rights is subject to the public policy and interest vested in the right sought to be waived as reiterated by Hon'ble Supreme Court of India in *Waman Shrinivas Kini Vs. Ratilal Bhagwandas and Co.* (AIR 1959 SC 689). In the present situation, there is nothing which can prove that such right was waived off by the complainants/subsequent allottees for either of the two reasons quoted above. In simple words, neither they have got any private benefit by waiving of their right nor does it involve any element of public interest. Therefore, the authority is of the view that in cases where the subsequent allottees have stepped into the shoes of original allottee after coming into force of the Act and after the registration of the project in question, the delayed possession charges shall be granted w.e.f. due date of handing over possession as per the buyer's agreement.

- iv. **Whether indemnity-cum-undertaking and affidavit with waiver clause at the time of transfer of unit is arbitrary and whether statutory rights can be waived of by such one sided and unreasonable undertaking?**

27. The authority further is unable to gather any reason or has not been exposed to any reasonable justification as to why a need arose for the complainants to sign any such affidavit or indemnity-cum-undertaking and as to why the complainants have agreed to surrender their legal rights which were available or had accrued in favour of the original allottee. Thus, no sane person would ever execute such an affidavit or indemnity-cum-undertaking unless and until some arduous and/or compelling conditions are put before him with a condition that unless and until, these arduous and/or compelling conditions are performed by him, he will not be given any relief and he is thus left with no other option but to obey these conditions. Exactly same situation has been demonstratively happened here, when the complainants/subsequent allottees have been asked to give the affidavit or indemnity-cum-undertaking in question before transferring the unit in their name otherwise such transfer may not be allowed by the promoter. Such an affidavit/undertaking/ indemnity bond given by a person thereby giving up their valuable rights must be shown to have been executed in a free atmosphere and should not give rise to any suspicion. No reliance can be placed on any such affidavit/ indemnity-cum-undertaking and the same is liable to be discarded and ignored in its totality. Therefore, this authority does not place reliance on the said affidavit/indemnity cum undertaking. To fortify this view, we place reliance on the order dated 03.01.2020 passed by Hon'ble NCDRC in case titled as **Capital Greens Flat Buyer Association and Ors. Vs. DLF**

**Universal Ltd., Consumer case no. 351 of 2015**, wherein it was held that the execution of indemnity-cum-undertaking would defeat the provisions of section 23 and 28 of the Indian Contract Act, 1872 and therefore, would be against public policy, besides being an unfair trade practice. The relevant portion of the said judgment is reproduced herein below:

*"Indemnity-cum-undertaking*

30. *The developer, while offering possession of the allotted flats insisted upon execution of the indemnity-cum-undertaking before it would give possession of the allotted flats to the concerned allottee.*

*Clause 13 of the said indemnity-cum-undertaking required the allottee to confirm and acknowledge that by accepting the offer of possession, he would have no further demands/claims against the company of any nature, whatsoever. It is an admitted position that the execution of the undertaking in the format prescribed by the developer was a pre-requisite condition, for the delivery of the possession. The opposite party, in my opinion, could not have insisted upon clause 13 of the Indemnity-cum-undertaking. The obvious purpose behind such an undertaking was to deter the allottee from making any claim against the developer, including the claim on account of the delay in delivery of possession and the claim on account of any latent defect which the allottee may find in the apartment. The execution of such an undertaking would defeat the provisions of Section 23 and 28 of the Indian Contract Act, 1872 and therefore would be against public policy, besides being an unfair trade practice. Any delay solely on account of the allottee not executing such an undertaking would be attributable to the developer and would entitle the allottee to compensation for the period the possession is delayed solely on account of his having not executed the said undertaking-cum-indemnity."*

28. The said judgment of NCDRC was also upheld by the Hon'ble Supreme Court vide its judgement dated 14.12.2020 passed in civil appeal nos. 3864-3889 of 2020 against the order of NCDRC.
29. Hon'ble Supreme Court and various High Courts in a plethora of judgments have held that the terms of a contract shall not be binding if it is shown that the same were one sided and unfair and the person signing did not

have any other option but to sign the same. Reference can also be placed on the directions rendered by the Hon'ble Apex Court in civil appeal no. 12238 of 2018 titled as **Pioneer Urban Land and Infrastructure Limited Vs. Govindan Raghavan** (decided on 02.04.2019) as well as by the Hon'ble Bombay High Court in the **Neelkamal Realtors Suburban Pvt. Ltd.** (supra). A similar view has also been taken by the Apex court in **IREO Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Ors.** as under:

*".....that the incorporation of such one-sided and unreasonable clauses in the Apartment Buyer's Agreement constitutes an unfair trade practice under Section 2(1)(r) of the Consumer Protection Act. Even under the 1986 Act, the powers of the consumer fora were in no manner constrained to declare a contractual term as unfair or one-sided as an incident of the power to discontinue unfair or restrictive trade practices. An "unfair contract" has been defined under the 2019 Act, and powers have been conferred on the State Consumer Fora and the National Commission to declare contractual terms which are unfair, as null and void. This is a statutory recognition of a power which was implicit under the 1986 Act.*

*In view of the above, we hold that the Developer cannot compel the apartment buyers to be bound by the one-sided contractual terms contained in the Apartment Buyer's Agreement."*

30. The same analogy can easily be applied in the case of execution of an affidavit or indemnity-cum-undertaking which got executed from the subsequent allottees before getting the unit transferred in their name in the record of the promoter as allottees in place of the original allottee.
31. The authority may deal with this point from yet another aspect. By executing an affidavit/undertaking, the complainants/subsequent allottees cuts their hands from claiming delay possession charges in case there occurs any delay in giving possession of the unit to them beyond the stipulated time or the due date of possession. But the question which

arises before the authority is that what does allottee got in return from the promoter by giving such a mischievous and unprecedented undertaking. However, the answer would be "nothing". If it is so, then why did the complainants executed such an affidavit/undertaking is beyond the comprehension and understanding of this authority.

32. Moreover, the counsel of the complainants drew attention of the authority towards clause 02 of the affidavit dated 15.10.2018 whereby the complainants have waived of their right with regard to the delay compensation and also undertook to execute fresh buyer's agreement as and when desired by the respondent company. This contention of the complainants came to the utter shock to the authority and the authority observes that it is a wrong practice followed by the promoters to get a bunch of documents signed by the naïve subsequent allottees while transferring the unit in question in their names. It is pertinent to mention over here that the promoters use the signing of these one-sided documents as a pre-requisite for the transfer of the subject unit and the subsequent allottees are left with no other option but to sign on these pre-printed documents as produced by the promoters. In an eventuality where the subsequent allottee refuses to sign these documents then the said transfer is not allowed by the promoters. It is a very wrong trend and practice which is being followed by the promoters and the authority is of the considered view that the arbitrary clauses of such documents favouring the promoter who is already in a very dominant position needs to be

struck down so as to send a strong message to the complete lobby. In the present matter, clause 02 deserves to be discussed in this regard. In this clause two things are mentioned: *one*, extends the timeline of delivery of possession and *the other*, waives of the right of the complainants allottees with regard to the delay compensation. It doesn't even stop here; it further talks about execution of a fresh buyer's agreement with amended terms as and when desired by the company. It is interesting to note that anything of this sort of extending the timeline of handing over possession by January 2019 and executing a fresh BBA in this regard is nowhere mentioned in the whole bunch of transfer documents or any other document. These two aspects are only accommodated very conveniently in a deceitful manner only in clause 2 of the affidavit dated 15.10.2018 and the naïve subsequent allottees without even knowing that they are being cheated and what will be the consequences signed the said documents. The authority holds that such clauses cannot be relied upon while adjudicating on such issues where these clauses play an important role.

33. The authority holds that irrespective of the execution of the affidavit/undertaking by the subsequent allottees at the time of transfer of their name as allottees in place of the original allottee in the record of the promoter does not disentitle them from claiming the delay possession charges in case there occurs any delay in delivering the possession of the unit beyond the due date of delivery of possession as promised even after executing an indemnity-cum-undertaking.

**F.II Whether the execution of the conveyance deed extinguishes the right of the allottee to claim delay possession charges?**

34. The respondent submitted that the complainants have executed a conveyance deed on 13.08.2021 and therefore, the transaction between the complainants and the respondent has been concluded and no right or liability can be asserted by respondent or the complainants against the other. Therefore, the complainants are estopped from claiming any interest in the facts and circumstances of the case. The present complaint is nothing but a gross misuse of process of law.
35. It is important to look at the definition of the term 'deed' itself in order to understand the extent of the relationship between an allottee and promoter. A deed is a written document or an instrument that is sealed, signed and delivered by all the parties to the contract (buyer and seller). It is a contractual document that includes legally valid terms and is enforceable in a court of law. It is mandatory that a deed should be in writing, and both the parties involved must sign the document. Thus, a conveyance deed is essentially one wherein the seller transfers all rights to legally own, keep and enjoy a particular asset, immovable or movable. In this case, the asset under consideration is immovable property. On signing a conveyance deed, the original owner transfers all legal rights over the property in question to the buyer, against a valid consideration (usually monetary). Therefore, a 'conveyance deed' or 'sale deed' implies that the seller signs a document stating that all authority and ownership of the property in question has been transferred to the buyer.



36. From the above, it is clear that on execution of a sale/ conveyance deed, only the title and interests in the said immovable property (herein the allotted unit) is transferred. However, the conveyance deed does not mark an end to the liabilities of a promoter since various sections of the Act provide for continuing liability and obligations of a promoter who may not under the garb of such contentions be able to avoid its responsibility. The relevant sections are reproduced hereunder:

**"11. Functions and duties of promoter**

(1) XXX

(2) XXX

(3) XXX

(4) The promoter shall—

(a) *be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be.*

*Provided that the responsibility of the promoter, with respect to the structural defect or any other defect for such period as is referred to in sub-section (3) of section 14, shall continue even after the conveyance deed of all the apartments, plots or buildings, as the case may be, to the allottees are executed.*

(b) XXX

(c) XXX

(d) *be responsible for providing and maintaining the essential services, on reasonable charges, till the taking over of the maintenance of the project by the association of the allottees;* (emphasis supplied)

**"14. Adherence to sanctioned plans and project specifications by the promoter-**

(1) XXX

(2) XXX

*(3) In case any structural defect or any other defect in workmanship, quality or provision of services or any other obligations of the promoter as per the agreement for sale relating to such development is brought to the notice of the promoter within a period of five years by the allottee from the date of handing over possession, it shall be the duty of the promoter to rectify such defects without further charge, within thirty days, and in the event of promoter's failure to rectify such defects within such time, the aggrieved allottees shall be entitled to receive appropriate compensation in the manner as provided under this Act....."*  
*(emphasis supplied)*

37. This view is affirmed by the Hon'ble NCDRC in case titled as **Vivek Maheshwari Vs. Emaar MGF Land Ltd. (Consumer case no. 1039 of 2016 dated 26.04.2019)** wherein it was observed as under:

*"7. It would thus be seen that the complainants while taking possession in terms of the above referred printed handover letter of the OP, can, at best, be said to have discharged the OP of its liabilities and obligations as enumerated in the agreement. However, this hand over letter, in my opinion, does not come in the way of the complainants seeking compensation from this Commission under section 14(1)(d) of the Consumer Protection Act for the delay in delivery of possession. The said delay amounting to a deficiency in the services offered by the OP to the complainants. The right to seek compensation for the deficiency in the service was never given up by the complainants. Moreover, the Consumer Complaint was also pending before this Commission at the time the unit was handed over to the complainants. Therefore, the complainants, in my view, cannot be said to have relinquished their legal right to claim compensation from the OP merely because the basis of the unit has been taken by them in terms of printed hand over letter and the Sale Deed has also been got executed by them in their favour.*

*8. ....The relationship of consumer and service provider does not come to an end on execution of the Sale Deed in favour of the complainants.*  
*(emphasis supplied)*

38. From above, it can be said that taking over the possession and thereafter execution of the conveyance deed can best be termed as respondent having discharged its liabilities as per the buyer's agreement and upon taking possession, and/or executing conveyance deed, the complainants never gave up their statutory right to seek delayed possession charges as

per the provisions of the said Act. Also, the same view has been upheld by the Hon'ble Supreme Court in case titled as **Wg. Cdr. Arifur Rahman Khan and Aleya Sultana and Ors. Vs. DLF Southern Homes Pvt. Ltd. (now Known as BEGUR OMR Homes Pvt. Ltd.) and Ors. (Civil appeal no. 6239 of 2019) dated 24.08.2020**, the relevant paras are reproduced herein below:

- "34 The developer has not disputed these communications. Though these are four communications issued by the developer, the appellants submitted that they are not isolated aberrations but fit into a pattern. The developer does not state that it was willing to offer the flat purchasers possession of their flats and the right to execute conveyance of the flats while reserving their claim for compensation for delay. On the contrary, the tenor of the communications indicates that while executing the Deeds of Conveyance, the flat buyers were informed that no form of protest or reservation would be acceptable. The flat buyers were essentially presented with an unfair choice of either retaining their right to pursue their claims (in which event they would not get possession or title in the meantime) or to forsake the claims in order to perfect their title to the flats for which they had paid valuable consideration. In this backdrop, the simple question which we need to address is whether a flat buyer who seeks to espouse a claim against the developer for delayed possession can as a consequence of doing so be compelled to defer the right to obtain a conveyance to perfect their title. It would, in our view, be manifestly unreasonable to expect that in order to pursue a claim for compensation for delayed handing over of possession, the purchaser must indefinitely defer obtaining a conveyance of the premises purchased or, if they seek to obtain a Deed of Conveyance to forsake the right to claim compensation. This basically is a position which the NCDRC has espoused. We cannot countenance that view.*
35. *The flat purchasers invested hard earned money. It is only reasonable to presume that the next logical step is for the purchaser to perfect the title to the premises which have been allotted under the terms of the ABA. But the submission of the developer is that the purchaser forsakes the remedy before the consumer forum by seeking a Deed of Conveyance. To accept such a construction would lead to an absurd consequence of requiring the purchaser either to abandon a just claim as a condition for obtaining the conveyance or to indefinitely delay the execution of the Deed of Conveyance pending protracted consumer litigation."*

39. The complainants have invested their hard-earned money and there is no doubt that the promoter has been enjoying benefits of and the next step is to get their title perfected by executing a conveyance deed which is the statutory right of the allottee. Also, the obligation of the developer - promoter does not end with the execution of a conveyance deed. The essence and purpose of the Act was to curb the menace created by the developer/promoter and safeguard the interests of the allottees by protecting them from being exploited by the dominant position of the developer which he thrusts on the innocent allottees. Therefore, in furtherance to the Hon'ble Apex Court judgement and the law laid down in the **Wg. Cdr. Arifur Rahman (supra)**, this authority holds that even after execution of the conveyance deed, the complainants cannot be precluded from their right to seek delay possession charges from the respondent-promoter.

**G. Findings on the reliefs sought by the complainants**

**G.I Delay possession charges**

40. **Relief sought by the complainants:** Direct the respondent to pay interest @18% p.a. as interest towards delay in handing over the property in question as per the provisions of the Act and the rules.
41. 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."*

42. 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."*

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

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

44. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within 36 months from the date of commencement of construction and it is further provided in agreement that promoter shall be entitled to a grace period of six months for applying and obtaining completion certificate/occupation certificate in respect of said floor. The construction commenced on 26.08.2010 as per statement of account dated 29.09.2021. 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 time limit 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 six months cannot be allowed to the promoter at this stage.
45. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges at the rate of 18% p.a. However, proviso to section 18 provides that where an

allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

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

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

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

46. 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.
47. Taking the case from another angle, the complainants-allottees were entitled to the delayed possession charges/interest only at the rate of Rs.5/- per sq. ft. per month as per clause 13(a) of the buyer's agreement for the period of such delay; whereas, the promoter was entitled to interest @ 24% per annum at the time of every succeeding instalment from the due date of instalment till the date of payment as per clause 1.2(c) of the buyer's agreement. The functions of the authority are to safeguard the interest of the aggrieved person, may be the allottee or the promoter. The rights of the parties are to be balanced and must be equitable. The

promoter cannot be allowed to take undue advantage of his dominate position and to exploit the needs of the home buyers. This authority is duty bound to take into consideration the legislative intent i.e., to protect the interest of the consumers/allottees in the real estate sector. The clauses of the buyer's agreement entered into between the parties are one-sided, unfair and unreasonable with respect to the grant of interest for delayed possession. There are various other clauses in the buyer's agreement which give sweeping powers to the promoter to cancel the allotment and forfeit the amount paid. Thus, the terms and conditions of the buyer's agreement are ex-facie one-sided, unfair and unreasonable, and the same shall constitute the unfair trade practice on the part of the promoter. These types of discriminatory terms and conditions of the buyer's agreement will not be final and binding.

48. 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., 18.11.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.
49. **Rate of interest to be paid by complainants/allottees for 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;"*

50. 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.
51. 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 20.02.2010, possession of the said unit was to be delivered within a period of 36 months from the date of commencement of construction and it is further provided in agreement that promoter shall be entitled to a grace period of six months for applying and obtaining completion certificate/occupation certificate in respect of said floor. 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 after obtaining occupation certificate dated 11.11.2020 from the competent authority. 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 20.02.2010 executed between the parties.

52. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 11.11.2020. However, the respondent offered the possession of the unit in question to the complainants only on 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, they should be given 2 months' time from the date of offer of possession. These 2 months' of reasonable time is being given to the complainants keeping in mind that even after intimation of possession practically they have to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e. 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. Also, the complainants are directed to take possession of the unit in question within 2 months from the date of this order as per section 19(10) of the Act.

53. 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.

**H. Directions of the authority**

54. 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). The arrears of interest accrued so far shall be paid to the complainants within 90 days from the date of this order as per rule 16(2) of the rules.
  - ii. The 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 buyer's agreement as per law settled by hon'ble Supreme Court in civil appeal nos. 3864-3889/2020 decided on 14.12.2020.

55. Complaint stands disposed of.

56. File be consigned to registry.

  
**(Vijay Kumar Goyal)**

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 18.11.2021

Judgement uploaded on 16.12.2021.

  
**(Dr. K.K. Khandelwal)**

Chairman

  
**HARERA**  
**GURUGRAM**