

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

Complaint no. : 2419 of 2018
First date of hearing : 04.09.2019
Date of decision : 22.07.2021

Rahul Bhatia
R/o: Flat no.11C, Tower 3, Belle View,
Central Park II, Sector 48, Sohna Road,
Gurugram-122001, Haryana.

Complainant

M/s Emaar MGF Land Ltd.
Address: 306-308, Square One C-2,
District Centre, Saket, New Delhi-110017.

Respondent

CORAM:

Dr. K.K. Khandelwal
Shri Samir Kumar

**Chairman
Member**

APPEARANCE:

Shri Nithin Chandran
Shri J.K Dang

Advocate for the complainant
Advocate for the respondent

ORDER

1. The present complaint dated 11.01.2019 has been filed by the complainant/allottee in Form CRA under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions to the allottee as per the agreement for sale executed inter se them.

2. Since the buyer's agreement has been executed on 27.03.2012 i.e. prior to the commencement of the Act *ibid*, therefore, the penal proceedings cannot be initiated retrospectively. Hence, the authority has decided to treat the present complaint as an application for non-compliance of statutory obligation on part of the promoter/respondent in terms of section 34(f) of the Act *ibid*.

A. Project and unit related details

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

S.No.	Heads	Information
1.	Project name and location	Emerald Villa-Plots at Emerald Hills, Sector 65, Gurugram.
2.	Project area	102.7412 acres
3.	Nature of the project	Residential plotted colony
4.	DTCP license no. and validity status	10 of 2009 dated 21.05.2009 Valid/renewed up to 20.05.2019
5.	HRERA registered/ not registered	Registered vide no. 162 of 2017 dated 29.08.2017 for 55.962 acres
6.	HRERA registration valid up to	28.08.2022
7.	Unit no.	EVP-A-A-90 in block Amber [Page 79 of complaint]
8.	Unit measuring	442 sq. yds. (369.57 sq.mtr.)
9.	Decrease in area of the unit vide letter of offer of possession dated 12.03.2018	415.85 sq. yds. (347.7 sq.mtr.) [Page 131 of complaint]

10.	Date of execution of plot buyer's agreement	27.03.2012 [Page 62 of complaint]
11.	Amendment agreement to buyer's agreement	22.11.2013 [Page 101 of complaint]
12.	Payment plan	Down payment plan [Page 79 of complaint]
13.	Total consideration as per statement of account dated 09.10.2018 (Page 87 of complaint)	Rs.3,39,59,960/-
14.	Total amount paid by the complainant as per statement of account dated 09.10.2018 (Page 87 of complaint)	Rs.3,65,18,151/-
15.	Due date of delivery of possession as per 1 of the amendment to the buyer's agreement i.e. 18 months from the date of execution of this buyer's agreement (i.e. 27.03.2012) [Page 102 of complaint]	27.09.2013
16.	Date of offer of possession to the complainant	12.03.2018 [Page 131 of complaint]
17.	Delay in handing over possession till 12.05.2018 i.e. date of offer of possession (12.03.2018) + 2 months	4 years 7 months 15 days

B. Facts of the complaint

4. The complainant has made the following submissions in the complaint:
 - i. That in year 2012, he booked a plot in the said project by making a payment of Rs. 30,00,000/- as booking amount. The respondent executed the buyer's agreement dated 27.03.2012 which contained various one sided and arbitrary clauses, yet he could not negotiate on

any of the terms, since the respondent had already collected significant amount of money from him. The respondent via amendment agreement dated 22.11.2013 amended clause 8 of the buyer's agreement, thereby amending the date of delivery of possession from 27 months (inclusive of 3 months grace period) to 21 months (inclusive of 3 months grace period). Thus, the new date of delivery of possession was 27.12.2013.

- ii. That complainant fulfilled all of his obligations by making timely payments, as and when demanded by the respondent. Till 11.04.2018, the complainant has paid Rs.3,42,64,105/- to the respondent. The complainant sent an email dated 02.12.2015 to the respondent enquiring about the timeline of possession handover details of the plot booked by him. The respondent sent reply via email dated 02.12.2015, where they categorically mentioned that the respondent shall most likely apply for occupation certificate in Quarter 04, 2016 which is more than 3 years after the projected date of possession.
- iii. That the respondent sent a letter of possession dated 14.09.2017. The complainant visited the project site on 16.09.2017 and was shocked to see the condition of the project, making it unfit for inhabitation in all respects. Thereafter, the complainant sent an email dated 17.09.2017 regarding the same to the respondent. The respondent vide email dated 25.09.2017 revoked the offer of possession. The respondent sent another letter of possession dated 12.03.2018 to him

and then he sent various emails to the respondent regarding inhabitable state of the plot. That the plot is still not complete in all respects and is not in a liveable condition. In the second letter the respondent unilaterally revised the total area of the plot from original 442 sq. yards to 415 sq. yards. The respondent had promised direct access to 60 m wide road in their presentation but the direct access gate from the 60 m road is blocked, thus defeating the direct access to the plot. Complainant has to, thus, take a longer route through the main entry gate of the said project. The club house is incomplete and still under construction. Despite several communications with the respondent, the respondent has miserably failed to handover the complete possession of the plot complete in all respects. The complainant is not liable to pay any maintenance charges, the holding charges, CAE charges or any other demands that may or have been raised by the respondent since the project is not complete. The respondent is fraudulently raising CAE (common area electricity) charges based on an area 445 sq. yds. That the respondent is not willing to pay the delayed compensation from 31.10.2017 to latest offer of possession (March 2018). The respondent is also forcing and pressuring the complainant to sign an indemnity bond prior to respondent paying the credit amount to the complainant and signing the same will be prejudicial to him. Hence, this complaint.

C. Reliefs sought by the complainant

5. The complainant has filed the present complaint for seeking following reliefs:
- i. Direct the respondent to withdraw the letter of offer of possession dated 12.03.2018 and make a valid offer of possession when the project is complete. Thereafter, handover the possession of the said plot to the complainant complete in all respects.
 - ii. Direct the respondent to pay interest @ 10.75% per annum on the amount deposited by the complainant with the respondent with effect from the promised date of delivery till the date of actual possession.
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 to plead guilty or not to plead guilty.

D. Reply by the respondent

7. The respondent has contested the complaint on the following grounds:
- i. That the project of the respondent is an "ongoing project" under the Act and the same has been registered under the Act and the Rules. The registration certificate was granted by the Haryana Real Estate Regulatory Authority vide memo no. HRERA-612/2017/816 dated 29.08.2017. The hon'ble authority has granted 28.08.2022 as the date of completion of project in the registration certificate and therefore cause of action, if any, would accrue in favour of the complainant to

file a complaint for seeking any interest as alleged if and only the respondent fails to offer possession of the plot in question within the aforesaid time. The respondent has offered possession of the plot in question through letter of offer of possession dated 12.03.2018 to the complainant. Thus, the complaint is liable to be dismissed on this ground alone.

- ii. The respondent submitted that the complainant has filed the present complaint seeking compensation, interest etc. for alleged delay in delivering possession of the plot booked by the complainant. The complaints pertaining to refund, compensation and interest 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.
- iii. That present complaint is based on an erroneous interpretation of the provisions of the Act as well as an incorrect understanding of the terms and conditions of the buyer's agreement dated 27.03.2012. 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. It is further submitted that merely because the Act applies to ongoing projects which are registered with the authority, the Act cannot be said to be operating retrospectively. The provisions of the Act relied upon by the complainant for seeking interest cannot be called in to aid in derogation and ignorance of the provisions of the buyer's agreement.

The interest for the alleged delay demanded by the complainant is beyond the scope of the buyer's agreement. The complainant cannot demand any interest or compensation beyond the terms and conditions incorporated in the buyer's agreement. Furthermore, the interest, if any, cannot be demanded for the period prior to the commencement of the Act. It is submitted that levy of interest being a penal consequence cannot be applied retrospectively.

- iv. The respondent submitted that the complainant, in pursuance of the application form dated 21.02.2012, was allotted an independent plot bearing no.EVP-A-A-90 in the project vide provisional allotment letter dated 15.03.2012. The complainant consciously and wilfully opted for a down payment plan for remittance of the sale consideration for the plot in question and further represented to the respondent he would remit every instalment on time as per the payment schedule.
- v. The buyer's agreement dated 27.03.2012 was executed between the complainant on one hand and the respondent on the other. The rights and obligations of complainant as well as respondent are completely and entirely determined by the covenants incorporated in the buyer's agreement which continue to be binding upon the parties thereto with full force and effect. In terms of clause 8 of the buyer's agreement as amended by the amendment agreement dated 22.11.2013, the time period for delivery of possession of plot in question was 18 months from the date of execution of the buyer's agreement subject to

- occurrence of force majeure events or any other reason beyond the control of the respondent including but not limited to any act, notice, order, rule or notification of the government or any other competent authority. It was further specified that the respondent shall be entitled to such extension of time till the continuation of the force majeure circumstances or the reasons beyond the control of the respondent. The complainant has completely misconstrued, misinterpreted and miscalculated the time period for delivery of possession of the plot in question provided in the buyer's agreement.
- vi. That the respondent had offered possession of the plot in question through letter of offer of possession dated 12.03.2018 to the complainant. The complainant was called upon to remit balance payment and to complete the necessary formalities/documentation necessary for handover of the office space to them. However, the complainant ignored the legitimate and valid requests of the respondent to remit balance payment and complete necessary formalities for delivery of possession of the plot in question. The complainant does not have adequate funds to remit the balance payment requisite for obtaining possession in terms of the buyer's agreement and consequently in order to needlessly linger on the matter, the complainant has preferred the instant complaint.
- vii. That the offer for possession marks termination of the period of delay, if any. The complainant is not entitled to contend that the alleged

period of delay continued even after receipt of offer for possession. The complainant has consciously refrained from obtaining possession of the plot in question. Consequently, the complainant is liable for the consequences including holding charges, as enumerated in the buyer's agreement, for not obtaining possession.

viii. That it is not disputed that the area of the plot in question had been revised from 442 sq. yd. to 415 sq. yd. However, it is pertinent to mention that in terms of clause 1 of the buyer's agreement, it was specifically agreed by the complainant that the area of the plot is tentative and subject to change till the final layout and demarcation of the plots in the project is approved by the competent authority. The complainant is estopped to challenge the revision in the area of the plot in question.

ix. That an indemnity bond is sought by the respondent to safeguard its rights and interests after conveyance of the plot in question to the concerned allottee. It is further submitted that the execution of an indemnity bond is a practice followed invariably in the real estate business. Furthermore, this practice has been adopted and followed for a long time and the same is done to indemnify the concerned developer from the acts, conduct and omissions on the part of the respective allottee after the developer has conveyed the plot to the respective allottee. It is further pertinent to note that the conveyance deed is required to be executed in order to facilitate the transfer of

the plot to the concerned allottee as prior to the execution of conveyance deed in favour of the concerned allottee, the allottee cannot be construed to be owner of the plot, subject matter of the transaction. Therefore, the execution of the conveyance deed and indemnity bond is obligatory on the parties and thus the allegations of the complainant that the respondent is insisting on execution of an indemnity bond and conveyance deed prior to crediting the claimed amount is false and meritless.

- x. That several allottees, including the complainant, have defaulted in timely remittance of payment of installments which was an essential, crucial and an indispensable requirement for conceptualisation and development of the project in question. Furthermore, when the proposed allottees default in their payments as per schedule agreed upon, the failure has a cascading effect on the operations and the cost for proper execution of the project increases exponentially whereas enormous business losses befall upon the respondent. The respondent, despite default of several allottees, has diligently and earnestly pursued the development of the project in question and has constructed the project in question as expeditiously as possible. It is submitted that the respondent has already offered possession of the plot in question to the complainant. Therefore, there is no default or lapse on the part of the respondent and there is no equity in favour of

the complainant. Thus, it is most respectfully submitted that the present complaint deserves to be dismissed at the very threshold.

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

E. Jurisdiction of the authority

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

E.I Territorial jurisdiction

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

E.II Subject-matter jurisdiction

11. The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as per provisions of section 11(4)(a) of the Act leaving aside compensation which is to be

decided by the adjudicating officer if pursued by the complainants at a later stage.

F. Findings on the objections raised by the respondent

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

12. The respondent contended that 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 said 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.
13. 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, rules and 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 *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."
14. Also, in appeal no. 173 of 2019 titled as ***Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya***, in order 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."
15. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no scope

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

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

16. The counsel for the respondent has stated that the registration of the project is valid till 28.08.2022 and hence the date of delivery of the floor stands extended to 28.08.2022 as per declaration given by the promoter under section 4(2)(l)(C). If the respondent is unable to offer possession of the floor by 28.08.2022 then the complainant shall have any legitimate grievance regarding delay in offering possession of the floor.
17. 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.
18. 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. Section 4(2)(l)(C) of the Act requires that while applying for registration

of the real estate project, the promoter has to file a declaration under section 4(2)(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..."

G. Findings on the reliefs sought by the complainant

G.I Delay possession charges

20. **Relief sought by the complainant:** Direct the respondent to pay interest @ 10.75% per annum on the amount deposited by the complainant with the respondent with effect from the promised date of delivery till the date of actual possession.
21. In the present complaint, the complainant intends to continue with the project and is seeking delay possession charges as provided under the proviso to section 18(1) of the Act, section 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."

22. As per clause 1 of the amendment agreement dated 22.11.2013 to the buyer's agreement dated 27.03.2012, the possession was to be handed over within a period of 18 months from the date of execution of this buyer's agreement. Clause 1 of the amendment agreement is reproduced below:

*"1. That **Clause 8** of the Buyer's Agreement is amended as below:
Subject to force majeure conditions and reasons beyond the control of the Company, the Company shall make every endeavor to deliver possession of the Plot to the Allottee(s) within a period of 18 (Eighteen) months from the date of execution of this Buyer's Agreement. In the event that the possession of the Plot is likely to be delayed for reason of any force majeure event or any other reason beyond the control of the Company including government action, strike or due to civil commotion or by reason of war or enemy action or earthquake or any act of God or if non delivery is as a result of any act, notice, order, rule or notification of the Government and any other public or Competent authority or any court order, judgement for any reason beyond the control of the Company, then in any of the aforesaid events, the Company shall upon notice claiming force majeure to the Allottee(s) be entitled to such extension of time till the force majeure event persists or the reason beyond the control of the Company exists. In the event that the Company fails to deliver possession of the Plot without the existence of any force majeure event or reason beyond the control of the Company within 21 (Twenty One) months from the date of execution of this Agreement, the Company shall be liable to pay to the Allottee(s), a penalty of the sum of Rs.100/- (Rupees One Hundred only) per sq. yd. per month for such period of delay beyond 21 months from the date of execution of this Agreement. The Allottee(s) understands and agreed that the penalty mentioned above shall be payable only if the Allottee(s) has not defaulted and/or breached the terms of this Agreement or defaulted in payments as per the payment plan or in other words has complied with all the terms and conditions of this Agreement."*

23. **Due date of handing over possession:** Initially the buyer's agreement was executed on 27.03.2012 and as per clause 8 of the said agreement, the possession was to be delivered within 24 months from the date of execution of agreement. Subsequently, an amendment to the buyer's

agreement was executed on 22.11.2013. As per clause 1 of the amendment agreement, the possession was to be handed over within 18 months from the date of execution of the buyer's agreement. The buyer's agreement was executed on 27.03.2012. The period of 18 months expired on 27.09.2013. As a matter of fact, the promoter has failed to place on record any document which established that the construction has been delayed due to force majeure events. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, the grace period is not allowed to the promoter.

24. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges at the applicable rate. Proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

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

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

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

25. 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.

26. Taking the case from another angle, the complainant-allottee was entitled to a sum of Rs.100/- per sq. yd. per month for such period of delay beyond 21 months from the date of execution of this agreement as per clause 1 of the amendment agreement dated 22.11.2013 for the period of such delay; whereas, as per clause 12 of the buyer's agreement, the promoter was entitled to interest @ 24% per annum computed at the time of every succeeding instalment for the due date of instalment as per the payment plan, till the date of payment. 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

27. 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., 22.07.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

28. 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;"*

29. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same as is being granted to the complainant in case of delayed possession charges.

30. As far as execution of indemnity-cum-undertaking at the time of handing over of the possession is concerned, the NCDRC vide order dated 03.01.2020 in case titled as **Capital Greens Flat Buyer Association and Ors. Vs. DLF Universal Ltd., Consumer case no. 351 of 2015**, wherein it was held that the execution of indemnity-cum-undertaking would defeat the provisions of sections 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 prerequisite 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."



31. The said judgment of NCDRC was also upheld by the Hon'ble Supreme Court vide judgement dated 14.12.2020 passed in civil appeal nos. 3864-3889 of 2020 against the order of NCDRC.
32. The authority is of the view that the allottee has waited for long for his cherished dream home and now when it is ready for possession, he either has to sign the indemnity-cum-undertaking and take possession or to keep struggling with the promoter if indemnity-cum-undertaking is not signed by him. Such an undertaking/ indemnity bond given by a person thereby giving up his valuable rights must be shown to have been executed in a free atmosphere and should not give rise to any suspicion. If a slightest of doubt arises in the mind of the adjudicator that such an agreement was not executed in an atmosphere free of doubts and suspicions, the same would be deemed to be against public policy and would also amount to unfair trade practices. Therefore, keeping in view the discussion above and dictum laid in **Capital Greens Flat Buyer Association** (supra), the authority directs the respondent not to insist the complainant to sign any indemnity-cum-undertaking which is prejudicial to the rights of the complainant.
33. 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 1 of the amendment agreement

dated 22.11.2013 to the buyer's agreement dated 27.03.2012, the possession of the booked plot was to be delivered within a period of 18 months from the date of execution of the agreement. As far as grace period is concerned, the same is disallowed for the reasons stated above. Therefore, the due date of handing over possession comes out to be 27.09.2013. In the present case, the complainant was offered possession by the respondent on 12.03.2018. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted plot to the complainant as per the terms and conditions of the buyer's agreement dated 27.03.2012 executed between the parties and amendment agreement dated 22.11.2013.

34. 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 respondent offered the possession of the unit in question to the complainant only on 12.03.2018. So, it can be said that the complainant came to know about the part completion certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, he should be given 2 months' time from the date of offer of possession. These 2 months' of reasonable time is being given to the complainant keeping in mind that even after intimation of possession practically he has to arrange a lot of logistics and requisite documents for taking possession of the unit. It is further clarified that the delay possession charges shall be payable from the due date of possession

i.e. 27.09.2013 till the expiry of 2 months from the date of offer of possession (12.03.2018) which comes out to be 12.05.2018.

35. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainant is entitled to delay possession charges at prescribed rate of interest i.e. 9.30 % p.a. w.e.f. 27.09.2013 till 12.05.2018 as per provisions of section 18(1) of the Act read with rule 15 of the Rules.

36. As per statement of account dated 09.10.2018, the respondent has paid amount of Rs.12,15,621/- and Rs.8,44,099/- totalling to Rs. 20,59,720/- towards compensation for delay in handing over possession and the same shall be adjusted towards the delay possession charges to be paid by the respondent in terms of proviso to section 18(1) of the Act.

H. Directions of the authority

37. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):


- i. The respondent is directed to pay the interest at the prescribed rate i.e. 9.30 % per annum for every month of delay on the amount paid by the complainant from due date of possession i.e. 27.09.2013 till 12.05.2018 i.e. expiry of 2 months from the date of offer of possession (12.03.2018). The arrears of interest accrued so far shall be paid to

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

- ii. Also, the amount of Rs.12,15,621/- and Rs.8,44,099/- totalling to Rs. 20,59,720/- (as per statement of account dated 09.10.2018) so paid by the respondent to the complainant towards compensation for delay in handing over possession shall be adjusted towards the delay possession charges to be paid by the respondent in terms of proviso to section 18(1) of the Act.
- iii. The respondent shall not charge anything from the complainant which is not the part of the buyer's agreement. The respondent is also not entitled to claim holding charges from the complainant/allottee at any point of time even after being part of the builder buyer's agreement as per law settled by hon'ble Supreme Court in civil appeal nos. 3864-3889/2020 decided on 14.12.2020.
- iv. The complainant is also directed to take possession of the plot within one month from the date of this order and pay outstanding dues, if any, after adjustment of interest for the delayed period.
- v. The respondent shall not insist the complainant to sign any indemnity-cum-undertaking which is prejudicial to the rights of the complainant.
- vi. Interest on the outstanding payments from the complainant shall be charged at the prescribed rate @ 9.30 % by the promoter which is the


same as is being granted to the complainant in case of delay possession charges.

38. Complaint stands disposed of.
39. File be consigned to registry.


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 22.07.2021


(Dr. K.K. Khandelwal)
Chairman

Judgement uploaded on 16.12.2021.