

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

Complaint no. : 3029 of 2020
First date of hearing : 19.03.2021
Date of decision : 19.10.2021

1. Anuranjan Patney
 2. Shilpa Patney
- R/o: Flat no.334, Green View Apartments,
Sector 19, Pocket 2, SFS Flats, Dwarka.

Complainants

Versus

M/s Emaar MGF Land Ltd.
Corporate Office: Emaar MGF Business Park,
MG Road, Sikanderpur Chowk, Sector-28
Gurugram, Haryana -122002

Respondent

CORAM:

Dr. K.K. Khandelwal
Shri Samir Kumar
Shri Vijay Kumar Goyal

**Chairman
Member
Member**

APPEARANCE:

Shri Anuranjan Patney
Shri J.K. Dang

Complainant in person
Advocate for the respondent

ORDER

1. The present complaint dated 05.10.2020 has 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 21.07.2010 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	Palm Hills, Sector 77, Gurugram.
2.	Project area	29.34 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no. and validity status	a) 56 of 2009 dated 31.08.2009 (For 24.4 acres) Valid/renewed up to 30.08.2024 b) 62 of 2013 dated 05.08.2013 (For 4.87 acres) Valid/renewed up to 04.08.2019
5.	HRERA registered/ not registered	Registered vide no. 256 of 2017 dated 03.10.2017 for 45425.87 sq. mtrs.
6.	HRERA registration valid up to	02.10.2022
7.	Occupation certificate received on	24.12.2019 [Page 120 of reply]



8.	Provisional allotment letter dated	29.03.2010 [Page 40 of reply]
9.	Unit no.	PH3-12-0602, 6 th floor, building no. 12 [Page 23 of complaint]
10.	Unit measuring	1450 sq. ft.
11.	Date of execution of buyer's agreement	21.07.2010 [Page 21 of complaint]
12.	Payment plan	Construction linked payment plan [Page 51 of complaint]
13.	Total consideration as per statement of account dated 04.08.2021 at page 113 of reply	Rs.58,13,508/-
14.	Total amount paid by the complainants as per statement of account dated 04.08.2021 at page 114 of reply	Rs.61,91,912/-
15.	Date of start of construction as per statement of account dated 04.08.2021 at page 113 of reply	25.02.2011
16.	Due date of delivery of possession as per clause 11(a) of the said agreement i.e. 33 months from the date of start of construction plus grace period of 3 months for applying and obtaining the CC/OC in respect of the unit and/or the project. [Page 34 of complaint]	25.11.2013 [Note: Grace period is not included]
17.	Date of offer of possession to the complainants	26.12.2019 [Page 72 of complaint]
18.	Delay in handing over possession w.e.f. 25.11.2013 till 26.02.2020 i.e. date of offer of possession (26.12.2019) + 2 months	6 years 3 months 1 day

B. Facts of the complaint

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

- i. That the respondent claim itself as reputed builder and big real estate player. The respondent gave advertisement in various

leading newspapers about their forthcoming project named "Palm Hills" in Sector 77 Gurgaon promising various advantages, like world class amenities and timely completion/execution of the project etc. Relying on the promise and undertakings given by the respondent, the complainants booked a unit measuring super area 1450 sq. ft. in aforesaid project of the respondent. Thereafter, the buyer's agreement was executed on 21.07.2010 between the complainant & Ms. Shilpa Patney as co-applicant and the respondent. The total sales consideration being Rs54,75,829.02/- including covered car park, club membership, EDC etc

- ii. That as per clause 11(a) of the buyer's agreement, the possession of the booked flat/unit shall be given within 33 months plus 3 months grace period from the date of start of construction. The construction started on 25.02.2011 as per statement of account provided by the respondent.
- iii. That out of the total sales consideration of Rs.54,75,829.02/-, the complainants have paid an amount of Rs.53,41,772/- i.e., over 97% of the total sales consideration excluding other charges in accordance with statement of account dated 07.01.2020. As per clause 13(a) of the buyer's agreement dated 21.07.2010, in the event of failure of the respondent to deliver the possession of the said unit within the stipulated time period, then compensation at

- the rate of Rs.7.50 per sq. ft. per month of the super area of the unit (1450 sq. ft.) till the date of possession was to be paid.
- iv. That there is a huge delay in completion of the above-mentioned project by the respondent which amounts to breach of the terms and conditions of the buyer's agreement dated 21.07.2010. The respondent has committed a grave deficiency on its part and adopted serious unfair trade practice by failing to deliver the possession of the booked unit within the prescribed time frame of 33 months from the date of construction. The letter of possession of the unit PH3-12-0602 was finally sent vide letter ref. no. PH3/708229-PR-/20191226205401071 dated 26.12.2019.
- v. That since the compensation amount was considered grossly inadequate, a letter for enhanced compensation was forwarded to the respondent via email on 28.01.2020. The respondent telephonically informed that an increase of Rs.2.50 per sq. ft. on the compensation around 10.02.2020. The same was not considered adequate to compensate for the financial loss (interest on borrowed capital, tax rebate on housing loan, loss of interest etc. considering over 53 lakhs was paid to the respondent and the delay is of over 6 years) that has been incurred by the complainants for the delayed possession of the unit.
- vi. That on the ground of parity and equity, the respondents also be subjected to pay the same rate of interest, hence the respondents

pay interest on the amount paid by the complainants @ 24% per annum from the promised date of the possession till the apartment/flat is actually delivered to the complainants. It is however pertinent to mention here that the respondent is charging interest @ 24 % on the delayed payment which is totally unfair trade practice and this shows the respondent's malafide and dishonest motives and intention to cheat and defraud the complainants.

C. Relief sought by the complainants

5. The complainants have filed the present compliant for seeking following reliefs:
- Direct the respondents to handover the possession of unit along with delay possession charges as on prescribed rate of interest per annum.
 - Any other relief which this hon'ble authority deems fit and proper may also be granted in favour the complainants.
6. On the date of hearing, the authority explained to the respondent/promoter about the contravention as alleged to have been committed in relation to section 11(4)(a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent

7. The respondent has raised certain preliminary objections and has contested the present complaint on the following grounds:

- i. That the complainants have filed the present complaint seeking interest on account of the alleged delay in delivering possession of the unit booked by the complainants. 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. The present complaint is liable to be dismissed on this ground alone. Moreover, it is respectfully submitted that the adjudicating officer derives his jurisdiction from the Central Act which cannot be negated by the rules made thereunder.
- ii. That the present complaint is based on an erroneous interpretation of the provisions of the Act as well as an incorrect understanding of the terms and conditions of the buyer's agreement dated 20.07.2010. That the provisions of the Act are not retrospective in nature. The provisions of the Act cannot undo or modify the terms of an agreement duly executed prior to coming into effect of the Act. It is further submitted that merely because the Act applies to ongoing projects which are registered with the authority, the Act cannot be said to be operating retrospectively. The provisions of the Act relied upon by the complainants for seeking interest 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 complainants is beyond the

scope of the buyer's agreement. The complainants cannot demand any interest or compensation beyond the terms and conditions incorporated in the buyer's agreement.

iii. That the complaint is bad for non-joinder of necessary party. The co-allottee of the unit in question, Mrs. Shilpa Patney has not been impleaded as a party to the present complaint. The complaint is liable to be dismissed on this ground alone.

iv. That apartment bearing no. PH3-12-0602, admeasuring 1450 sq. ft. approx. of super area, was provisionally allotted to the complainant and co allottee vide provisional allotment letter dated 29.03.2010. Thereafter, the buyer's agreement was willingly and voluntarily executed by the parties on 20.07.2010. The complainant and co allottee had agreed and undertaken to make payment of sale consideration in accordance with the payment plan but failed to do so. Consequently, the respondent was constrained to issue demand notices and reminders for payment to the complainant and co-allottee. Statement of account dated 04.08.2021 reflects the payments made by the complainants and the delayed payment interest accrued thereon.

v. That the construction of the apartment/tower was completed in the month of April 2017 and application for issuance of occupation certificate was made on 26.04.2017. Occupation certificate has been issued by the competent authority on 24.12.2019. Thereafter,

vide offer of possession letter dated 26.12.2019, the respondent has offered possession of the apartment to the complainant and co allottee and called upon them to make payment of balance sale consideration and complete the requisite formalities to enable the respondent to hand over possession to the complainant and co allottee.

vi. That as a gesture of goodwill, the respondent has proceeded to credit compensation amounting to Rs.7,61,905/- to the complainants which has been duly accepted by them. There is no equity in favour of the complainants and the instant complaint is liable to be dismissed at the threshold. The respondent has credited a sum of Rs.18,026/- towards credit on account of Anti-profiting adjusted in the account of the complainants, which has been duly accepted by the complainants and Rs.9,510/- on account of Early Payment Rebate (EPR). Without prejudice to the rights of the respondent, delayed interest if any has to be calculated only on the amounts deposited by the allottees/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.

vii. That the contractual relationship between the complainants and the respondent is governed by the buyer's agreement dated

20.07.2010. Clause 13 of the buyer's agreement provides that compensation for any delay in delivery of possession shall only be given to such allottees who are not in default of their obligations envisaged under the agreement and who have not defaulted in payment of instalments as per the payment plan incorporated in the agreement. In case of delay caused due to non- receipt of occupation certificate, completion certificate or any other permission/sanction from the competent authorities, no compensation or any other compensation shall be payable to the allottees. The complainants having defaulted in timely payment of instalments, is/was thus not entitled to any compensation or penalty or any amount towards interest under the buyer's agreement.

- viii. That clause 11(b)(iv) of the buyer's agreement that in case of any default/delay by the allottees in payment as per schedule of payment incorporated in the buyer's agreement, the date of handing over of possession shall be extended accordingly, solely on the respondent's discretion till the payment of all outstanding amounts to the satisfaction of the respondent. Since, the complainants have defaulted in timely remittance of payments as per schedule of payment the date of delivery of possession is not liable to be determined in the manner sought to be done by the complainants.

ix. That despite there being a number of defaulters in the project, the respondent itself infused funds into the project and has diligently developed the project in question. The respondent submitted an application dated 26.04.2017 to the competent authority for issuance of the occupation certificate. The occupation certificate was thereafter granted on 24.12.2019 vide memo bearing no. ZP-567-Vol-I/JD(RD)/2019/31934. It is pertinent to note that once an application for grant of occupation certificate is submitted for approval in the office of the concerned statutory authority, the respondent ceases to have any control over the same. The grant of occupation certificate is the prerogative of the concerned statutory authority over which the respondent cannot exercise any influence. As far as respondent is concerned, it has diligently and sincerely pursued the matter with the concerned statutory authority for obtaining of the occupation certificate. Therefore, the time period utilised by the concerned statutory authority for grant of occupation certificate is necessarily required to be excluded from the computation of time period utilised by the respondent for implementation and development of the project.

x. That the respondent submitted that the project has got delayed on account of following reasons which were/are beyond the power and control of the respondent. *Firstly*, the National Building Code was revised in the year 2016 and in terms of the same, all high-rise

buildings (i.e. buildings having area of less than 500 sq. mtrs. and above), irrespective of area of each floor, are now required to have two staircases. Eventually, so as not to cause any further delay in the project and so as to avoid jeopardising the safety of the occupants of the buildings in question including the building in which the unit in question is situated, the respondent took a decision to go ahead and construct the second staircase. It is expected that the construction of the second staircase will be completed in a year's time. Thereafter, upon issuance of the occupation certificate and subject to force majeure conditions, possession of the apartment shall be offered to the complainants. *Secondly*, the respondent had to engage the services of Mitra Guha, a reputed contractor in real estate, to provide multi-level car parking in the project. The said contractor started raising certain false and frivolous issues with the respondent due to which the contractor slowed down the progress of work at site. Any lack of performance from a reputed cannot be attributed to the respondent as the same was beyond its control.

- xi. That the respondent has duly fulfilled its obligations under the buyer's agreement by completing construction and had offered possession of duly completed the unit in question through the letter of offer of possession dated 26.12.2019 to the complainants. The complainants were called upon to make balance payment and



complete the formalities/documentation necessary for handover of the office space to them. However, the complainants intentionally refrained from doing the needful. The complainants do 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 complainants have preferred the instant complaint.

- xii. That the project of the respondent has been registered under the Act and the rules. Registration certificate was granted by the Haryana Real Estate Regulatory Authority vide memo no. HRERA-606/2017/1248 dated 03.10.2017. It is submitted that this hon'ble authority has granted 02.10.2022 as the date of completion of the project and therefore cause of action, if any, would accrue in favour of the complainants to file a complaint for seeking any interest as alleged if and only the respondent fails to offer possession of the unit in question within the aforesaid time. In any case, it needs to be taken into reckoning that the respondent has already completed the construction of the unit in question and has offered possession thereof to the complainants. Therefore, no cause of action can be construed to have arisen in favor of the complainants in the facts and circumstances of the case. 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. 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.

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

13. 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.

14. 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."

15. 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."

16. 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 non-joinder of necessary party

17. The respondent submitted that the complaint is bad for non-joinder of necessary party. The co-allottee of the unit in question, Mrs Shilpa

Patney, has not been impleaded as a party to the present complaint. The complaint is liable to be dismissed on this ground alone.

18. The counsel for the complainants has moved an application dated 05.08.2021 for impleadment of necessary party and has filed amended memo of parties to this effect. Also, the authority observed that the entire complaint has been signed by the co-allottee as well. The application filed on behalf of the complainants is hereby allowed as the co-applicant i.e. Mrs. Shilpa Patney, is a necessary party and has real interest in the decision of the present complaint. Accordingly, the name of Mrs. Shilpa Patney be added to the memo of parties of the present matter.

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

19. The respondent submitted that authority has granted 02.10.2022 as the date of completion of the project and therefore cause of action, if any, would accrue in favour of the complainants to file a complaint for seeking any interest as alleged if and only the respondent fails to offer possession of the unit in question within the aforesaid time. Thus, the complaint is liable to be dismissed on this ground alone. 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.
20. 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.

21. Section 4(2)(l)(C) of the Act requires that while applying for registration of the real estate project, the promoter has to file a declaration under section 4(2)(l)(C) of the Act and the same is reproduced as under: -

Section 4: - Application for registration of real estate projects

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

(l): -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....”

22. The time period for handing over the possession is committed by the builder as per the relevant clause of 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)(l)(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 relief sought by the complainants

G.I Delay possession charges

23. **Relief sought by the complainants:** Direct the respondents to handover the possession of unit along with delay possession charges as on prescribed rate of interest per annum.
24. 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."

25. As per clause 11(a) of the agreement provided 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 33 months from the date of start of construction, subject to timely compliance of the provisions of the Buyer's Agreement by the Allottee. The Allottee(s) agrees and understands that the Company shall be entitled to a grace period of 3 months, for applying and obtaining the completion certificate/occupation certificate in respect of the Unit and/or the Project."

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

27. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within 33 (thirty-three) months from the date of start of construction and further provided in agreement that promoter shall be entitled to a grace period of 3 months for applying and obtaining completion certificate/occupation certificate in respect of said unit. The date of start of construction is 25.02.2011 as per statement of account dated 04.08.2021. The period of 33 months expired on 25.11.2013. 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 3 months cannot be allowed to the promoter at this stage.
28. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges at the

prescribed 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.

29. 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
30. Taking the case from another angle, the complainants-allottees were entitled to the delayed possession charges/interest only at the rate of Rs.7.50/- per sq. ft. per month as per clause 13(a) of the buyer's agreement for the period of such delay; whereas, as per clause 1.2(b) of the buyer's agreement, the promoter was entitled to interest @ 24% per annum compounded at the time of every succeeding instalment for the delayed payments. The functions of the authority are to safeguard the interest of the aggrieved person, may be the allottee or the promoter.

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

31. 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., 19.10.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

32. **Rate of interest to be paid by complainants for delay in making payments:** The respondent contended that the complainants have defaulted in making timely payments of the instalments as per the payment plan, therefore, the complainants are liable to pay interest on the outstanding payments.

33. The authority observed that 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;"*

34. 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

35. 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 21.07.2010, possession of the booked unit was to be delivered within a period of 33 months from the date of start of construction i.e. 25.02.2011. 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 25.11.2013. The respondent has offered possession of the subject unit on 26.12.2019 after receipt of occupation certificate dated 24.12.2019. 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 21.07.2010 executed between the parties.

36. 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 24.12.2019. However, the respondent offered the possession of the unit in question to the complainants only on 26.12.2019, 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, 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 complainants keeping in mind that even after intimation of possession practically he has 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. 25.11.2013 till the expiry of 2 months from the date of offer of possession (26.12.2019) which comes out to be 26.02.2020.
37. 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 delayed possession charges at rate of the prescribed interest i.e. 9.30% p.a. w.e.f. due date of delivery of possession 25.11.2013 till 26.02.2020 as per provisions of section 18(1) of the Act read with rule 15 of the Rules.
38. It is evident from the statement of account dated 04.08.2021 (at page 113 of reply filed by the respondent) that the respondent has already given compensation amounting to Rs.7,61,905/- to the complainants on account of delay in handing over possession as per terms of the buyer's agreement. Therefore, the amount so paid by the respondent towards compensation for delay 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**
39. 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. 25.11.2013 till 26.02.2020 i.e. expiry of 2 months from the date of offer of possession (26.12.2019). 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. However, the respondent has already paid a sum of Rs.7,61,905/- towards delay in handing over possession at the time of offer of possession, therefore, the said amount shall be adjusted towards the amount to be paid by the respondent/promoter as delay possession charges under proviso to section 18(1) read with rule 15 of the rules.
- iii. The respondent shall not charge anything from the complainants which is not the part of the buyer's agreement. The respondent is not entitled to claim holding charges from the complainants/allottees at any point of time even after being part of the builder buyer's agreement as per law settled by hon'ble Supreme Court in civil appeal nos. 3864-3889/2020 decided on 14.12.2020.
- iv. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period. The rate of interest chargeable from the allottee by the promoter, in case of default

shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

40. Complaint stands disposed of.
41. File be consigned to registry.


(Samir Kumar)
Member


(Vijay Kumar Goyal)
Member


(Dr. KK Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 19.10.2021

Judgement uploaded on 16.12.2021.

HARERA
GURUGRAM