

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

Complaint no. : 1082 of 2021
First date of hearing : 16.04.2021
Date of decision : 12.10.2021

1. Rajeev Ranjan Roy
2. Vandana Roy
Both RR/o: Bhadwari, Nonihat,
Post Bhadwari, Thanna- Hansdiha,
Butbari, Dumka, Jharkhand-814145.

Complainants

Versus

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

Respondent

CORAM:

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

**Chairman
Member
Member**

APPEARANCE:

Shri Rit Arora
Shri J.K. Dang

Advocate for the complainants
Advocate for the respondent

ORDER

1. The present complaint dated 05.03.2021 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.

A. Project and unit related details

2. 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 Gardens, Sector 83, Gurugram
2.	Project area	21.90 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no. and validity status	108 of 2010 dated 18.12.2010 Valid/renewed up to 17.12.2020
5.	HRERA registered/ not registered	Registered vide no. 330 of 2017 dated 24.10.2017 for towers 1, 2, 6, 8 to 12 and other facilities and amenities
	HRERA registration valid up to	31.12.2018
	Extension of HRERA registration certificate vide no.	02 of 2019 dated 02.08.2019
	Extension valid up to	31.12.2019
6.	Occupation certificate granted on	17.10.2019 [Page 126 of reply]



7.	Date of provisional allotment letter	14.11.2011 [Page 44 of reply]
8.	Unit no.	PGN-11-0501, 5 th floor, building no. 11 [Page 30 of complaint]
9.	Unit measuring	1720 sq. ft.
10.	Date of execution of buyer's agreement	31.12.2011 [Page 29 of complaint]
11.	Payment plan	Construction linked payment plan [Page 31 of complaint]
12.	Total consideration as per statement of account dated 26.04.2021 at page 123 of reply	Rs.91,31,415/-
13.	Total amount paid by the complainants as per statement of account dated 26.01.2021 at page 124 of reply	Rs.87,42,580/-
14.	Date of start of construction as per statement of account dated 26.04.2021 at page 123 of reply	11.03.2013
15.	Due date of delivery of possession as per clause 10(a) of the said agreement i.e. 36 months from the date of start of construction along with grace period of 3 months, for applying and obtaining the CC/OC in respect of the unit and/or the project. [Page 59 of reply]	11.03.2016 [Grace period not included]
16.	Date of offer of possession to the complainants	19.10.2019 [Page 42 of complaint]

17.	Delay in handing over possession w.e.f. 11.03.2016 till 19.12.2019 i.e., date of offer possession (19.10.2019) + 2 months	3 years 9 months 8 days
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B. Facts of the complaint

3. The complainants have made followings submissions in the complaint:

- i. That the complainants were impressed by the highlights of the project and representations made by the agents of the respondent and decided to book an apartment in the aforesaid project. On 07.10.2011, the complainants booked a residential apartment in the aforesaid project of the respondent through one of the agents of the respondent namely, AllCheckDeals India Pvt. Ltd. (allcheckdeals.com). The complainants also paid a sum of Rs.1,00,001/- on 05.10.2011. Subsequent to booking of the apartment, the respondent through its agent AllCheckDeals India Pvt. Ltd. issued a note dated 17.11.2011 and offered discount and allotted the following unit to the complainants: Unit no. 501, tower 11, having area of 1720 sq. ft. for basic sale price of Rs. 4400/- sq. ft. under Subvention Payment Plan and gave case back discount of 0.75% of BSP.
- ii. That on 31.12.2011, a buyer's agreement was executed between the complainants and respondent. The total consideration of the unit as per the agreement was Rs. 90,00,341/- including the service

taxes. The total consideration included EDC/IDC, car parking, IFMS, club membership; PLC & additional charges - green view. The agreement was totally one sided wherein all the provisions were favourable to the opposite party only and the buyers/allottees were denied fair scope of compensation in case of delay of possession.

- iii. That as per the clause 10(a) of the agreement dated 31.12.2011, the delivery of possession of the unit was to be handed over to the complainants within 36 months from the date of start of construction (and in addition to 36 months, 3 months grace period for applying and obtaining OC). It is submitted construction started in the month of February 2012, therefore, the possession of the unit was supposed to be handed over by August 2015 (i.e. 36 months from date of start of construction).
- iv. That the respondent miserably failed to complete the project and the deliver the possession of the apartment to the complainants by the promised date of August 2015 as per the agreement. The respondent not only failed to complete the project but even failed to keep the pace of the project as per the schedule of payment. However, the respondent continued to demand instalments illegally as per the payment plan from the complainants without actually reaching the landmark/ milestones in the actual site of construction.

- v. That from 05.10.2011 to 03.05.2017, the complainants paid a total sum of Rs. 85,87,086/- against the total sale consideration of Rs.90,00,341/- as per the buyer's agreement. The respondent miserably failed to complete the project and the deliver the possession of the apartment to the complainants by the promised date of August 2015 as per the agreement. The respondent not only failed to complete the project but even failed to keep the pace of the project as per the schedule of payment. However, the respondent continued to demand instalments illegally as per the payment plan from the complainants without actually reaching the landmark/ milestones in the actual site of construction. However, they fraudulently demanded and received money in advance for stages for which the constructions were not even started and collected more than 95% of the total consideration under false representation and claims. Throughout since the booking, the respondent has misrepresented facts about the project and the progress of the constructions at the site.
- vi. That after a delay of three and half years, the respondent sent a letter of offer of possession dated 19.10.2019 to the complainants whereby it was informed that the occupation certificate for unit bearing no. PGN-11-0501 has been received and the apartment booked by the complainants is now ready for possession. Vide the said letter, the respondent demanded a sum of Rs. 14,57,392/-

from the complainants against delayed payment charges, registration fees, e-stamping fees etc. from the complainants for taking the possession of the apartment.

- vii. That the actual date for offering possession was August 2015 as per the clause 10(a) of the buyer's agreement, however the letter of offer of possession, and not the actual possession, was offered to the complainants on 19.10.2019 i.e. after a delay of three and half years. It is interesting to note that even after an inordinate and unexplained delay of more than three and half years, no delay compensation was paid to the complainants. However, they were charged an exorbitant amount of Rs. 2,77,356/- as delay payment interest. It is pertinent to mention that those delay payment interest were illegal as the respondent made those demands without completing or reaching actual construction milestone at the site. Those demands were being made as per their whims and fancies.
- viii. That at the time of sending the letter of offer of possession, the complainants were in Dubai and upon receiving such letter, the complainants requested some of the similarly situated apartment buyers to visit the actual project site to get the real picture of the project site and to check if the project is really complete and whether the apartment is actually complete in all aspects and is in habitable condition or not. During the visit, the buyers were

surprised to see that the project was not complete, and the construction was ongoing at the site. The apartment of the complainants was not complete, and a lot of work needed to be done to make it complete and habitable. It was also found that there was lot of dump in the project site and apart from these there were many other problems which made the project inhabitable. Looking at the progress at the project site, it is clear that the said letter of offer of possession was sent with a malafide intention and was sent to extract more money from the complainants. Further, the letter was sent in haste only to avoid delay penalty.

C. Relief sought by the complainants

4. The complainants are seeking the following relief:

- i. Direct the respondent to deliver the immediate peaceful possession of the flat after completing it in all aspects with promised amenities and as per the specifications in terms of the buyer agreement and in habitable condition.
- ii. Direct the respondent to pay compensation for the delay in the form of interest @24% p.a. on the amount paid by the complainants from the promised date of delivery (August 2015) till the date of filing the complaint.
- iii. Direct the respondent to cancel/waive off the delay payment interest on the outstanding amount to be paid for possession on account of default on the part of the respondent.



- iv. Direct the respondent to not to levy any other charges which are not part of the buyer's agreement in final demand letter.
 - v. Direct the respondent to issue a fresh statement of account/final demand letter after adjustment of the delay compensation and other compensation as directed by the hon'ble authority.
 - vi. Pass any other order(s) as this hon'ble authority may deem fit and proper under the fact and circumstances of the present case.
5. 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 filed by the respondent

6. The respondent has contested the complaint on the following grounds:
- i. That the complainants have filed the present complaint seeking, inter alia, compensation and interest for alleged delay in delivery of possession of the unit booked by the complainants. It is respectfully submitted that complaints pertaining to refund, interest, compensation 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.
 - 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 31.12.2011. The 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 refund or interest cannot be called in to aid, in derogation and in negation of the provisions of the buyer's agreement. The interest or refund sought by the complainants is beyond the scope of the buyer's agreement. The complainants cannot demand any interest or refund beyond the terms and conditions incorporated in the buyer's agreement.

- iii. That the complainants, in pursuance of the application form, were allotted unit bearing no. PGN-11-0501, in the project vide provisional allotment letter dated 14.11.2011. The complainants consciously and willingly opted for a construction linked plan for remittance of the sale consideration for the unit in question. The complainants further undertook to be bound by the terms and conditions of the application form. Thereafter, the buyer's agreement was executed between the complainants and the respondent on 31.12.2011. The buyer's agreement was consciously and voluntarily executed by the complainants after reading and understanding the contents thereof to their full satisfaction. It is submitted that the rights and obligations of complainants 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.

- iv. That clause 10(a) of the buyer's agreement provides that subject to the allottee having complied with all the terms and conditions of the agreement, and not being in default of the same, possession of the apartment would be handed over within 36 months from the date of start of construction. It has further been specified in the same clause that the respondent will be entitled to a grace period of 3 months. Clause 10 (b) of the buyer's agreement provides that the time period for delivery of possession shall stand extended on the occurrence of delay for reasons beyond the control of the respondent. In terms of clause 10(b)(iv) of the buyer's agreement that in the event of default in payment of amounts demanded by the respondent as per the schedule of payment under the buyer's agreement, the time for delivery of possession shall also stand extended.
- v. That the complainants have consciously defaulted in timely remittance of the instalments. The respondent had issued notices and reminders calling upon the complainants to pay the amounts as per the payment plan. However, the complainants willfully chose to ignore the payment request letters, reminders etc. sent by the respondent and continued defaulting in timely remittance of the instalments. Payment request letters, reminders, notices etc. had been got sent to the complainants by the respondent clearly mentioning the amount that was outstanding and the due date for remittance of the respective amounts as per the schedule of

payments, requesting the complainants to timely discharge their outstanding financial liability but to no avail. Statement of account dated 26.04.2021 as maintained by the respondent in due course of its business depicts delay in remittance of various payments by the complainants.

- vi. That clause 12(c) 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. Therefore, the complainants being defaulters, are not entitled to any compensation from the respondent.
- vii. That clause 12(d) of the buyer's agreement provides that 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 respondent completed construction and had submitted an application on 11.02.2019 for grant of occupation certificate before the concerned statutory authority. The occupation certificate has been granted by the concerned department vide memo bearing no. ZP-692/AD(RA)/2019/25824 dated 17.10.2019. It is respectfully submitted that once an application for grant of occupation certificate is submitted to 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, and the respondent does not exercise any influence over the same. Therefore, it is respectfully submitted that the time period utilized by the concerned statutory authority for granting the occupation certificate is liable to be excluded from the time period utilized for implementation of the project. It is pertinent to mention that the respondent has credited a sum of Rs. 14,841/- as benefit on account of Anti-Profiting and Rs. 28,955/- 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.

- viii. That the project was registered under the provisions of the Act. Registration certificate was granted by the Haryana Real Estate Regulatory Authority vide memo no. HRERA-142/2017/1712 dated 24.10.2017. Furthermore, the registration has been extended by the hon'ble authority vide certificate dated 02.08.2019. Without admitting or acknowledging in any manner the truth or legality of the allegations levelled by the complainants and without prejudice to the contentions of the respondent, it is respectfully submitted that the complaint preferred by the complainants is devoid of any cause of action. It is submitted that the registration of the project was valid till 31.12.2019 and the respondent had offered possession of the unit in question to the

complainants in October 2019, i.e. within the original period of registration under the Act. Therefore, no cause of action has accrued in favor of the complainants in the facts and circumstances of the case.

- ix. That upon receipt of the occupation certificate, the complainants were offered possession of the unit in question vide letter dated 19.10.2019. The complainants were called upon to remit balance payment and to complete the formalities/documentation necessary for handover of the unit in question to him. However, the complainants willfully refrained from obtaining possession of the unit in question. It is submitted that it appears that the complainants do not have adequate funds to remit the balance payments requisite for obtaining possession in terms of the buyer's agreement and consequently in order to avoid their contractual obligations and needlessly linger on the matter, the complainants refrained from obtaining possession of the unit in question.
- x. That several allottees, including the complainants 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. Thus, it is most respectfully submitted that the present complaint deserves to be dismissed at the very threshold.

7. 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

8. 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

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



12. One of the contentions of the respondent is that the authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the buyer's agreement executed between the parties and no agreement for sale as referred to under the provisions of the Act or the 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 hon'ble Bombay High Court in *Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)* which provides as under:

"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the

agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter.....

122. *We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."*

14. Also, in appeal no. 173 of 2019 titled as ***Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya*** dated 17.12.2019, the Haryana Real Estate Appellate Tribunal has observed-

"34. *Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."*

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 buyer's agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable



under various heads shall be payable as per the agreed terms and conditions of the buyer's agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of the Act and are not unreasonable or exorbitant in nature.

F.II Objection regarding offer of possession within the time period of extension of the registration

16. The counsel of the respondent submitted that the project in question is registered vide no. 330 of 2017 and the same was initially valid till 31.12.2018. However, the same was extended till 31.12.2019 vide extension no. 2 of 2019. The occupation certificate was granted by the competent authority on 17.10.2019 and the possession was offered on 02.11.2019, therefore, there is no delay in offering possession in so far as respondent is concerned.
17. The authority is of the view that the promoter is obliged under the proviso to section 3 of the Act to get the on-going project registered, for a certain time period, where the completion certificate has not been issued. At the time of filing application for registration, promoter must disclose the end date [under section 4(2)(I)(C)] within which he shall be able to complete the development of the project. It is worthwhile to note that, as mentioned in the application, the development of the real estate project should be completed in all means within the stipulated

end date but if the promoter fails to complete the development of the project within the end date, then as per section 6 of the Act, the promoter can apply for extension of the end date for a further period of 1 (one) year. Furthermore, the extension of registration certificate is without prejudice to the rights of allottees as per proviso to section 18(1) of the Act regarding delay possession charges from the due date of possession till the actual handing over of possession.

18. Section 4(2)(1)(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)(I)(C) is now the new timeline as indicated by him for the completion of the project. Although, penal proceedings shall not be initiated against the builder for not meeting the committed due date of possession but now, if the promoter fails to complete the project in declared timeline, then he is liable for penal proceedings. The due date of possession as per the agreement remains unchanged and promoter is liable for the consequences and obligations arising out of failure in handing over possession by the due date as committed by him in the apartment buyer agreement and he is liable for the delayed possession charges as provided in proviso to section 18(1) of the Act. The same issue has been dealt by hon'ble Bombay High Court in case titled as *Neelkamal Realtors Suburban Pvt. Ltd. and anr. vs Union of India and ors.* and has observed as under:

"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter..."

G. Findings of the authority

G.I Delay possession charges

20. **Relief sought by the complainants:** The below-mentioned reliefs sought by the complainants are being taken together as the findings in

one relief will definitely affect the result of the other relief and these reliefs are interconnected:

- i. Direct the respondent to deliver the immediate peaceful possession of the flat after completing it in all aspects with promised amenities and as per the specifications in terms of the buyer agreement and in habitable condition.
 - ii. Direct the respondent to pay compensation for the delay in the form of interest @24% p.a. on the amount paid by the complainants from the promised date of delivery (August 2015) till the date of filing the complaint.
 - iii. Direct the respondent to cancel/waive off the delay payment interest on the outstanding amount to be paid for possession on account of default on the part of the respondent.
 - iv. Direct the respondent to not to levy any other charges which are not part of the buyer's agreement in final demand letter.
 - v. Direct the respondent to issue a fresh statement of account/final demand letter after adjustment of the delay compensation and other compensation as directed by the hon'ble authority
21. 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."

22. Clause 10(a) of the buyer's agreement dated 31.12.2011 provides time period for handing over the possession and the same is reproduced below:

"10. POSSESSION

(a) Time of handing over the Possession

Subject to terms of this clause and subject to 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 (Thirty Six) 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 (three) months, for applying and obtaining the completion certificate/occupation certificate in respect of the Unit and/or the Project."

23. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement, and the 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.

24. **Due date of possession and admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within 36 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 and/or the project. The date of start of construction is 11.03.2013 as per statement of account dated 26.04.2021. The period of 36 months expired on 11.03.2016. 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.

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

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

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

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

26. The legislature in its wisdom in the subordinate legislation under rule 15 of the rules has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.

27. Taking the case from another angle, the 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 12(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 till the date on which such instalment is paid by the allottee to

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

28. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., 12.10.2021 is 7.30%. Accordingly, the prescribed rate of interest will be MCLR +2% i.e., 9.30%.
29. **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, they are liable to pay interest on the outstanding payments.

30. 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;"*

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

32. On consideration of the documents available on record and submissions made by both the parties, 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 10(a) of the buyer's agreement executed between the parties on 31.12.2011, possession of the booked unit was to be delivered within

36 months from the date of start of construction i.e. 11.03.2013 and it was further provided in agreement that promoter shall be entitled to a grace period of 3 months for applying and obtaining occupation certificate in respect of said unit. 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 11.03.2013. Occupation Certificate has been received by the respondent on 17.10.2019 and the possession of the subject unit was offered to the complainants on 19.10.2019. Copies of the same have been placed on record. 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 31.12.2011 executed between the parties. It is the failure on part of the promoter to fulfil its obligations and responsibilities as per the buyer's agreement dated 31.12.2011 to hand over the possession within the stipulated period.

33. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 17.10.2019. The respondent offered the possession of the unit in question to the complainants only on 19.10.2019. 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, the complainants 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. 11.03.2016 till the expiry of 2 months from the date of offer of possession (19.10.2019) which comes out to be 19.12.2019.

34. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainants are entitled to delay possession at prescribed rate of interest i.e. 9.30% p.a. w.e.f. 11.03.2016 till 19.12.2019 as per provisions of section 18(1) of the Act read with rule 15 of the rules.
35. The complainants-allottees requested for fresh statement of account of the unit based on the above determinations of the authority.

H. Direction of the authority

36. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of

obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

- i. The respondent is directed to pay the interest at the prescribed rate i.e. 9.30% per annum for every month of delay on the amount paid by the complainants from due date of possession i.e. 11.03.2016 till 19.12.2019 i.e., expiry of 2 months from the date of offer of possession (19.10.2019). 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. 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 complainants /allottees 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 delay possession charges as per section 2(za) of the Act.
- iii. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period. The promoter may credit delay possession charges in the accounts ledger of the unit of the allottee. The promoter is directed to furnish to the complainants-allottees statement of account within one month of issue of this order.



iv. The respondent shall not charge anything from the complainants which is not the part of the buyer's agreement. The respondent shall not demand/claim holding charges from the complainants/allottees at any point of time even after being part of the builder buyer's agreement as per law settled by Hon'ble Supreme Court in civil appeal nos. 3864-3889/2020 decided on 14.12.2020.

37. Complaint stands disposed of.

38. File be consigned to registry.

(Samir Kumar)
Member

(Vijay Kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 12.10.2021

Judgement uploaded on 16.12.2021.