BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**:**	**4821 of 2020**
First date of hearing	**:**	**12.03.2021**
Date of decision	**:**	**12.10.2021**

Seema Koshal Bhatnagar
R/o: H.no. 4, Road no.46, Punjabi Bagh,
West Delhi, Delhi-110026. **Complainant**

Versus

M/s Emaar MGF Land Ltd.
Office: Emaar MGF Business Park, M.G. Road,
Sector 28, Gurugram, Haryana. **Respondent**

CORAM:

Dr. K.K. Khandelwal	**Chairman**
Shri Samir Kumar	**Member**
Shri Vijay Kumar Goyal	**Member**

APPEARANCE:

Shri Varun Chugh	Advocate for the complainant
Shri J.K. Dang	Advocate for the respondent

ORDER

1. The present complaint dated 13.01.2021 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.

A. Project and unit related details

2. 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 Floors Premier III at Emerald Estate, Sector 65, Gurugram
2.	Project area	25.499 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no. and validity status	06 of 2008 dated 17.01.2008 Valid/renewed up to 16.01.2025
5.	Name of licensee	Active Promoters Pvt. Ltd. and 2 others C/o Emaar MGF Land Ltd.
6.	HRERA registered/ not registered	**Registered vide no. 104 of 2017 dated 24.08.2017 for 82768 sq. mtrs.**
7.	HRERA registration valid up to	**23.08.2022**
8.	Occupation certificate granted on	11.11.2020 [Page 140 of reply]
9.	Date of provisional allotment letter	18.06.2010 [Page 37 of reply]
10.	Unit no.	EFP-II-35-0502, 5th floor, building no. 35 [Page 14 of complaint]
11.	Unit measuring	1650 sq. ft.
12.	Date of execution of buyer's agreement	20.12.2010 [Page 11 of complaint]

13.	Payment plan	Construction linked payment plan [Page 100 of reply]
14.	Total consideration as per statement of account dated 23.12.2020 at page 59 of reply	Rs.96,44,582/-
15.	Total amount paid by the complainant as per statement of account dated 23.12.2020 at page 60 of reply	Rs.98,68,495/-
16.	Due date of delivery of possession as per clause 11(a) of the said agreement i.e. 36 months from the date of execution of buyer's agreement along with grace period of 3 months, for applying and obtaining the occupation certificate in respect of the unit and/or the project. [Page 27 of complaint]	**20.12.2013** [Grace period not included]
17.	**Date of offer of possession to the complainant**	18.11.2020 [Page 47 of complaint]
18.	Delay in handing over possession w.e.f. 20.12.2013 till 18.01.2021 i.e., date of offer possession (18.11.2020) + 2 months	7 years 29 days

B. Facts of the complaint

3. The complainant has made followings submissions in the complaint:

i. That the property in question i.e., floor bearing no. EFP-II-35-0502 (fifth floor) admeasuring 1650 sq. ft., in the project of the respondent known as "Emaar Floors Premier-II" situated at Sector-

65, Gurugram, Haryana, was booked by the complainant in the year 2010 and was allotted vide provisional allotment letter dated 18.06.2010. The total cost of the floor was Rs.96,44,582/- and since it was a construction linked plan, hence the payment was to be made on the basis of schedule of payment, provided by the respondent. The complainant had already paid the entire amount towards the cost of the property and in fact a sum of Rs.1,02,039/- is lying in the credit balance of the complainant, which is due and payable by the respondent.

ii. That thereafter, on 20.12.2010, the complainant entered into a buyer's agreement with the respondent, by virtue of which the respondent allotted apartment no. EFP-II-35-0502, having super area 1650 sq. ft. located on the fifth floor, along-with car parking space in the said project. The complainant was greatly influenced by the fancy brochure which depicted that the project will be developed and constructed as state of the art and one of its kinds with all modern amenities and facilities, which led to the purchase of the property in question, by the complainant.

iii. That in the said buyer's agreement dated 20.12.2010, the respondent had categorically stated that the possession of the said apartment would be handed over to the complainant within 36

months from the date of signing of the buyer's agreement, with a further grace period of another 3 months.

iv. That the said buyer's agreement is totally one sided, which impose completely biased terms and conditions upon the complainant, thereby tilting the balance of power in favour of the respondent, which is further manifest from the fact that the delay in handing over the possession by the respondent would attract only a meagre penalty of Rs.5/- per sq. ft., on the super area of the flat, on monthly basis, whereas the penalty for failure to take possession would attract holding charges of Rs.50/- per sq. ft. and 24% penal interest on the unpaid amount of instalment due to the respondent.

v. That in all these years, the complainant also visited at the site and observed that there are serious qualities issues with respect to the construction carried out by respondent. The apartments/floors were sold by representing that the same will be luxurious apartment however all such representations seem to have been made in order to lure complainant to purchase the floor at extremely high prices. The respondent has compromised with levels of quality and is guilty of mis-selling. There are various deviations from the initial representations. The respondent marketed luxury high end floors, but, they have compromised even with the basic features, designs and quality to save costs. The

structure, which has been constructed, on face of it is of extremely poor quality. The construction is totally unplanned, with sub-standard low grade defective and despicable construction quality.

vi. That the respondent has breached the fundamental term of the contract by inordinately delaying in delivery of the possession by 80 months. The complainant was made to make advance deposit on the basis of information contained in the brochure, which is false on the face of it as is evident from the construction done at site so far.

vii. That the respondent has also charged a sum of Rs 2.50 Lacs from the complainant towards car parking space in contravention of the provisions of the Haryana Apartments Ownership Act, 1983 according to which parking forms the part of apartment and comes under the definition of common area, hence the developer could not have charged separately for the carking parking but the respondent company, in gross violation of the law of the land and the Apex Court's judgment, had charged parking charges to the tune of Rs 2.50 Lacs which on the face of it is illegal as the developer cannot sell car parking, as it forms the part of the common area of the project. The Real Estate (Regulation and Development) Act, 2016 clearly defines the term "Garage" which can only be sold by the developer and no other area except a garage can be sold by a

developer but the respondent in violation of the provisions of the Act has sold car parking space to the complainant and charged a hefty sum of Rs 2.50 Lacs.

viii. That the complainant, vide email addressed to the respondent had asked to indemnify her, for the delay in handing over the possession of the floor but the respondent company had indemnified the complainant as per the buyer's agreement and had only offered a meagre sum of Rs 5,85,321/-. In fact, the complainant through her email had demanded compensation as per the Act but the respondent had miserably failed to accede to her legitimate request and has turned a deaf ear.

ix. That the respondent had promised to complete the project by March 2014, including a grace period of three months. The buyer's agreement was executed on 20.12.2010 and possession was finally offered on 18.11.2020 which is resulted in extreme kind of mental distress, pain and agony to the complainant. The respondent has breached the fundamental term of the contract by inordinately delaying in delivery of the possession. The complainant has lost faith in respondent who has taken the complainant and other home buyers for a ride by not completing the project on time. The respondent had committed gross violation of the provisions of section 18 (1) of the Act by not handing over the timely possession

of the flat in question and not giving the interest and compensation to the buyer.

C. Relief sought by the complainant

4. The complainant is seeking the following relief:

   i. Direct the respondent to pay interest @ 18% p.a. as interest towards delay in handing over the property in question as per provisions of the Act and the rules.

   ii. Direct the respondent to return/adjust Rs.2.50 lacs charged towards car parking space along with interest.

   iii. Pass such order or further order as this hon'ble authority may deem fit and proper in the facts and circumstances of the present case.

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 complainant has filed the present complaint seeking refund of car parking charges and interest for alleged delay in delivering possession of the unit booked by the complainant. It is respectfully submitted that complaints pertaining to penalty, 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 statute 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 20.12.2010. 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 is compensatory in nature and cannot be granted in derogation and ignorance of the provisions of the buyer's agreement. The interest demanded by the complainant for the alleged delay is beyond the scope of the buyer's agreement. The complainant cannot demand any interest beyond the terms and conditions incorporated in the buyer's agreement.

iii. That the complainant, in pursuance of the application form dated 06.05.2010, was allotted unit bearing no. EFP-II-35-0502, located on the 5th floor, in the project vide provisional allotment letter

dated 18.06.2010. The complainant consciously and willfully opted for a construction linked plan for remittance of the sale consideration for the unit in question and further represented to the respondent that the complainant shall remit every installment on time as per the payment schedule. The respondent had no reason to suspect the bona fide of the complainant at the relevant time. The complainant was irregular regarding the remittance of installments on time. The respondent was compelled to issue demand notices, reminders etc. calling upon the complainant to make payment of outstanding amounts due and payable by her under the payment plan/instalment plan opted by him. Statement of account dated 23.12.2020 as maintained by respondent in due course of its business reflects the delay in remittance of various instalments on the part of the complainant.

iv. That the rights and obligations of the complainant as well as respondent are completely and entirely determined by the covenants incorporated in the buyer's agreement. As per clause 11 of the buyer's agreement dated 20.12.2010, the time period for delivery of possession was 36 months from the date of execution of the buyer's agreement alongwith grace period of 3 months subject to the allottee(s) having strictly complied with all terms and conditions of the buyer's agreement and not being in default of any provision of the buyer's agreement including remittance of all amounts due and payable by the allottee(s) under the agreement as per the schedule of payment incorporated in the buyer's agreement. The complainant has completely misconstrued,

misinterpreted and miscalculated the time period as determined in the buyer's agreement.

v. That it was categorically provided in 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. Furthermore, it has been categorically provided in the agreement that the time period for delivery of project shall also stand extended on occurrence of facts and circumstances which are beyond the power and control of the respondent. Since, the complainant has defaulted in timely remittance of payments as per schedule of payment, the date of delivery of possession is not liable to be determined in the manner sought to be done in the present case by the complainant.

vi. That 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 complainant, having defaulted in payment of

instalment, is thus not entitled to any compensation or any amount towards interest under the buyer's agreement.

vii. That an amount of Rs.3,80,865/- is pending as on date towards holding charges apart from stamp duty and e-challan charges. In any event, the respondent has credited an amount of Rs. 5,85,321/- to the account of the complainant as a gesture of goodwill. The same has been duly accepted by the complainant in full and final satisfaction of her alleged grievances. Furthermore, the respondent has credited Rs.1,19,862/- on account of EPR, Rs. 33,587/-, Rs. 5,938/- and Rs. 79,334/- on account of Anti Profiting and Rs. 5,85,321/- towards delay compensation. The complainant has also made a payment towards DPC of Rs.2,010/- and Rs.1,19,862/-. Without prejudice to the rights of the respondent, delayed interest if any has to calculated only on the amounts deposited by the allottee/complainant and not on any amount credited by the respondent, or any payment made by the allottees/complainant towards delayed payment charges or any taxes/statutory payments etc.

viii. That the delay, if any, in the project has got delayed on account of the 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. In view of the practical difficulties in constructing a second staircase in a building that already stands constructed

according to duly approved plans, the respondent made several representations to various Government Authorities requesting that the requirement of a second staircase in such cases be dispensed with. 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 had taken a decision to go ahead and construct the second staircase. The respondent has constructed the second staircase as expeditiously as possible. Thereafter, upon completion of the second staircase, the respondent had obtained the occupation certificate in respect of the tower in which the unit is located and has already offered possession of the unit in question to the complainant. The complainant on the other hand has needlessly avoided the completion of the transaction for reasons best known to her. *Secondly*, the defaults on the part of the contractor M/s B L Kashyap and Sons (BLK/Contractor). The progress of work at the project site was extremely slow on account of various defaults on the part of the contractor, such as failure to deploy adequate manpower, shortage of materials etc. in this regard, the respondent made several requests to the contractor to expedite progress of the work at the project site. However, the contractor did not adhere to the said requests and the work at the site came to a standstill. The arbitration proceedings titled as B L Kashyap and Sons Vs Emaar MGF Land Ltd (arbitration case number 1 of 2018) before Justice A P Shah (Retd), Sole Arbitrator have been initiated. Hon'ble

arbitrator vide order dated 27.04.2019 gave liberty to the respondent to appoint another contractor w.e.f. 15.05.2019.

ix. That the respondent had applied to the statutory authority for grant of occupation certificate in respect of the tower in which the unit in question is located on 16.07.2020 and the same was granted on 11.11.2020. That once an application for issuance of occupation certificate is submitted before the concerned competent 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 control over the matter. Therefore, the time period utilised by the concerned statutory authority for granting the occupation certificate needs to be necessarily excluded from computation of the time period utilised in the implementation of the project in terms of the buyer's agreement. As far as the respondent is concerned, it has diligently and sincerely pursued the development and completion of the project in question.

x. That the complainant was offered possession of the unit in question through letter of offer of possession dated 18.11.2020. The complainant was called upon to remit balance payment including delayed payment charges and to complete the necessary formalities/documentation necessary for handover of the unit in question to them. However, the complainant has consciously refrained from obtaining possession of the unit in question. The complainant did not/do not have adequate funds to remit the balance payments requisite for obtaining possession in terms of

the buyer's agreement and thus the complainant has refrained from obtaining possession of the unit in question. The present complaint is nothing but a gross abuse of process of law.

xi. 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. Registration certificate was granted by the Haryana Real Estate Regulatory Authority vide memo no. HRERA-482/2017/829 dated 24.08.2017. Without admitting or acknowledging in any manner the truth or legality of the allegations levelled by the complainant and without prejudice to the contentions of the respondent, it is respectfully submitted that the complaint preferred by the complainant is devoid of any cause of action. It is submitted that the registration of the project is valid till 23.08.2022 and therefore cause of action, if any, would accrue in favour of the complainant to prefer a complaint if the respondent fails to deliver possession of the unit in question within the aforesaid period.

xii. That the quantum of amount remitted by the complainant towards right to use an exclusive space for car parking is a matter of record. However, it is wrong and denied that the levy of the aforesaid charge has contravened any provision of the Haryana Apartments Ownership Act. However, it is submitted that the complainant has completely misconceived and misinterpreted the provisions incorporated in the said act. It is wrong and denied that the charges towards right to use an exclusive space for car parking have been levied illegally and the same has violated any judgement rendered

by the Apex Court. It is submitted that the car parking charges have been levied strictly in accordance with the terms and conditions incorporated in the buyer's agreement. The complainant has consciously and voluntarily executed the buyer's agreement after reading and understanding the terms and conditions incorporated therein to her full satisfaction. Furthermore, the complainant has wilfully remitted the amount towards car parking charges and did not raise any objection at that time. Consequently, the complainant has waived of her right to question the validity of the car parking charges.

xiii. That several allottees 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 construction of the tower in which the unit in question is situated has been completed by the respondent. The respondent has already delivered possession of the unit in question to the complainant. Therefore, there is no default or lapse on the part of the respondent and there in no

equity in favour of the complainant. It is evident from the entire sequence of events, that no illegality can be attributed to the respondent. 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 complainant 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 handing over possession as per declaration given under section 4(2)(l)(C) of the Act

16. The counsel for the respondent has stated that the entitlement to claim possession or refund would arise once the possession has not been handed over as per declaration given by the promoter under section 4(2)(l)(C) i.e., 23.08.2022. Therefore, next question of determination is whether the respondent is entitled to avail the time given to him by the authority at the time of registering the project under section 3 & 4 of the Act.

17. It is now settled law that the provisions of the Act and the rules are also applicable to ongoing project and the term ongoing project has been defined in rule 2(1)(o) of the rules. The new as well as the ongoing project are required to be registered under section 3 and section 4 of the Act.

18. Section 4(2)(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...."

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)(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..."*

F.III Objection regarding exclusion of time taken by the competent authority in processing the application and issuance of occupation certificate

20. As far as contention of the respondent with respect to the exclusion of time taken by the competent authority in processing the application and issuance of occupation certificate is concerned, the authority observed that the respondent had applied for grant of occupation certificate on 21.07.2020 and thereafter vide memo no. ZP-441-Vol.-II/AD(RA)/2020/20094 dated 11.11.2020, the occupation certificate has been granted by the competent authority under the prevailing law. The authority cannot be a silent spectator to the deficiencies in the application submitted by the promoter for issuance of occupancy certificate. It is evident from the occupation certificate dated 11.11.2020 that an incomplete application for grant of OC was applied on 21.07.2020 as fire NOC from the competent authority was granted

only on 25.09.2020 which is subsequent to the filing of application for occupation certificate. Also, the Chief Engineer-I, HSVP, Panchkula has submitted his requisite report in respect of the said project on 22.09.2020 and 24.09.2020. The District Town Planner, Gurugram and Senior Town Planner, Gurugram has submitted requisite reports' about this project on 21.09.2020 and 23.09.2020 respectively. As such, the application submitted on 21.07.2020 was incomplete and an incomplete application is no application in the eyes of law.

21. The application for issuance of occupancy certificate shall be moved in the prescribed forms and accompanied by the documents mentioned in sub-code 4.10.1 of the Haryana Building Code, 2017. As per sub-code 4.10.4 of the said Code, after receipt of application for grant of occupation certificate, the competent authority shall communicate in writing within 60 days, its decision for grant/ refusal of such permission for occupation of the building in Form BR-VII. In the present case, the respondent has completed its application for occupation certificate only on 25.09.2020 and consequently the concerned authority has granted occupation certificate on 11.11.2020. Therefore, in view of the deficiency in the said application dated 21.07.2020 and aforesaid reasons, no delay in granting occupation certificate can be attributed to the concerned statutory authority.

G. Findings of the authority

G.I Delay possession charges

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

23. 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. 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."*

24. Clause 11(a) of the buyer's agreement dated 20.12.2010 provides time period for handing over the possession and the same is reproduced below:

> *"11. 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 months from the date of execution of Buyer's Agreement. The Allottee(s) agrees and understands that the Company shall be entitled to a grace period of three months, for applying*

and obtaining the completion certificate/occupation certificate in respect of the Unit and/or the Project."

25. 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 complainant 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.

26. **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 execution of buyer's agreement

dated 20.12.2010 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. The period of 36 months expired on 20.12.2013. 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.

27. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges at the \ rate of 18% 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.*

28. 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.

29. Consequently, as per website of the State Bank of India i.e., https://sbi.co.in, the marginal cost of lending rate (in short, MCLR) as on date i.e., 12.10.2021 is 7.30%. Accordingly, the prescribed rate of interest will be MCLR +2% i.e., 9.30%.

30. **Rate of interest to be paid by complainant for delay in making payments:** The respondent contended that the complainant has defaulted in making timely payments of the instalments as per the payment plan, therefore, she is liable to pay interest on the outstanding payments.

31. 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;"

32. 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 delay possession charges.

33. 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 11(a) of the buyer's agreement executed between the parties on 20.12.2010, possession of the booked unit was to be delivered within 36 months from the date of execution of buyer's agreement 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 20.12.2013. Occupation certificate has been received by the respondent on 11.11.2020 and the possession of the subject unit was offered to the complainant on 18.11.2020. 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 complainant as per the terms and conditions of the buyer's agreement dated 20.12.2010 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 20.12.2010 to hand over the possession within the stipulated period.

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 occupation certificate was granted by the competent authority on 11.11.2020. The respondent offered the possession of the unit in question to the complainant only on 18.11.2020. So, it can be said that the complainant came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the complainant 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 she 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.

20.12.2013 till the expiry of 2 months from the date of offer of possession (18.11.2020) which comes out to be 18.01.2021. The complainant is also directed to take possession of the unit in question within 2 months from the date of this order.

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 at prescribed rate of interest i.e. 9.30% p.a. w.e.f. 20.12.2013 till 18.01.2021 as per provisions of section 18(1) of the Act read with rule 15 of the rules.

36. Also, the amount of Rs.5,85,321/- (as per statement of account dated 23.12.2020) 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.

G.II Car parking charges

37. As far as issue regarding parking is concerned, the authority is of the opinion that open parking spaces cannot be sold/charged by the promoter both before and after coming into force of the Act. However as far as issue regarding covered car parking is concerned where the said agreements have been entered into before coming into force the Act, the matter is to be dealt with as per the provisions of the builder

buyer's agreement subject to that the allotted parking area is not included in super area.

38. In the present complaint, the respondent has charged Rs.2,50,000/- towards covered car park as per clause 1.2(a) and 1.3 and the same are reproduced below:

> *"1.2 Sale Price for Sale of Unit*
>
> *(a) Sale Price*
>
> *(i) The sale price of the Unit ("Total Consideration") payable by the Allottee(s) to the Company includes the basic sale price ("Basic Sale Price/BSP") of Rs.7313625.04/-, cost towards covered car park of Rs.2,50,000/-, External Development Charges ("EDC") of Rs.250/- per sq. ft.....*
>
> *1.3 Parking Space*
>
> *a) The Allottee(s) agrees and understands that the exclusively reserved car parking space assigned to the Allottee(s) shall be understood to be together with the Unit and the same shall not have any independent legal entity detached or independent from the said Unit. The Allottee(s) undertakes not to sell/ transfer/deal with such exclusive reserved car parking space independent of the said Unit. In case the Allottee(s) has/have applied for and has been allotted an additional parking space, subject to availability, the same shall also be subject to this condition. However, such additional parking space can only be transferred to any other allottee in the Building/Project."*

39. In the instant matter, the subject unit was allotted to the complainant vide allotment letter dated 18.06.2010 and as per the said allotment letter, the respondent had charged a sum of Rs.2,50,000/- on account of car parking charges. As per clause 1.2(a)(i) and Annexure 3 of the buyer's agreement 20.12.2010, the allottee had agreed to pay the cost of covered car parking charges over and above the basic sale price. The

cost of parking of Rs.2,50,000/- has been charged exclusive to the basic price of the unit as per the terms of the agreement. The cost of parking of Rs.2,50,000/- has already been included in the total sale consideration and the same is charged as per the buyer's agreement. Accordingly, the promoter is justified in charging the same.

H. Direction of the authority

40. 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. 20.12.2013 till 18.01.2021 i.e., expiry of 2 months from the date of offer of possession (18.11.2020). 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.5,85,321/- so paid by the respondent 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 complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period. The rate of interest chargeable from the complainant /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 delay possession charges as per section 2(za) of the Act.

iv. The complainant is directed to take possession of the unit in question within 2 months from the date of this order.

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

41. Complaint stands disposed of.

42. 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.