

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

Complaint no. : 3807 of 2021
Complaint filed on : 24.09.2021
First date of hearing : 19.10.2021
Date of decision : 21.12.2021

1. Swati Vishwakarma
2. Pramod Kumar Vishwakarma
Both RR/o: EHF-267-A-SF-062, Amber Block,
Emerald Hills Floors, Sector-65, Gurugram, Haryana.

Complainants

Versus

M/s Emaar MGF Land Ltd.
Office: Emaar Business Park, Sikanderpur Chowk,
Sector 28, Gurugram, Haryana-122001.

Respondent

CORAM:

Dr. K.K Khandelwal
Shri Vijay Kumar Goyal

**Chairman
Member**

APPEARANCE:

Shri Varun Chugh
Shri Harshit Batra

Advocate for the complainants
Advocate for the respondent

ORDER

1. The present complaint dated 24.09.2021 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	Emerald Hills-Floors, Sector 65, Gurugram, Haryana
2.	Project area	102.7412 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no. and validity status	a. 10 of 2009 dated 21.05.2009 Valid/renewed up to 20.05.2019 b. 113 of 2011 dated 22.12.2011 Valid/renewed up to 21.12.2024
5.	HRERA registered/ not registered	Registered "Emerald Hills" vide no. 162 of 2017 dated 29.08.2017 for 55.962 acres
	HRERA registration valid up to	W.e.f. 29.08.2017 till 28.08.2022
6.	Occupation certificate granted on	09.05.2019 [annexure R3, page 94 of reply]
7.	Provisional allotment letter in favour of original allottee dated	03.07.2009 [annexure R1, page 21 of reply]
8.	Unit no.	EHF-267-A-SF-062, 2 nd floor [page 14 of complaint]
9.	Date of execution of buyer's agreement	26.02.2010 [page 14 of complaint]
10.	Payment plan	Construction linked payment plan [Page 63 of reply]
11.	Total consideration as per statement of account dated 11.10.2021 at page 193 of reply	Rs.50,22,718/-

12.	Total amount paid by the complainants as per statement of account dated 11.10.2021 at page 194 of reply	Rs. 50,25,409/-
13.	Complainants are subsequent allottees	The respondent acknowledged the complainants as allottees vide nomination letter dated 20.12.2018 (annexure B, page 44 of complaint) in pursuance of agreement to sell dated 18.10.2018 (annexure R2, page 85 of reply) executed between the complainants and the original allottees (Priyanka Puri and Anish Vishwanathan Nair).
14.	Due date of delivery of possession as per clause 13(a) of the said agreement i.e. the Company proposes to hand over the possession within a 27 months from the date of execution of buyer's agreement + grace period of 6 months, for applying and obtaining the occupation certificate in respect of the floor and/or the project. [Page 29 of complaint]	26.05.2012 [Note: Grace period is not included]
15.	Date of offer of possession to the complainants	11.05.2019 [annexure R3, page 96 of reply]
16.	Unit handover dated	23.05.2019 [annexure R3, page 100 of reply]
17.	Conveyance deed executed on	04.06.2019 [annexure R3, page 107 of reply]
18.	Delay in handing over possession w.e.f. 26.05.2012 till 11.07.2019 i.e. date of offer of possession (11.05.2019) + 2 months	7 years 1 month 15 days

B. Facts of the complaint

3. The complainants made the following submissions in the complaint:

- i. That initially, the property in question i.e., floor bearing no. EHF-267-A-SF-062 (second floor) admeasuring 267 sq. yards, in the project of the respondent known as "Emaar Hills-Floors" situated at Sector-65, Gurugram, Haryana, was booked by Ms. Priyanka Puri and Mr. Anish Nair (hereinafter, original allottees). Thereafter, on 26.02.2010, the original allottees entered into buyer's agreement with the respondent.
- ii. That subsequent thereto, the complainants herein, entered into an agreement with the original allottees to purchase the subject unit. The subject unit was later assigned to the complainants by the respondent by virtue of the assignment letter/nomination letter dated 20.12.2018.
- iii. That in the said buyer's agreement dated 26.02.2010, the respondent had categorically stated that the possession of the said floor would be handed over within 27 months from the date of signing of the buyer's agreement, with a further grace period of another 6 months. Moreover, at the time of transferring the floor in question, the complainants were further coerced by the respondent to sign affidavits/indemnity cum undertaking, in favour of the respondent wherein the complainants were required

to undertake, not to claim or raise any compensation for delay in handing over possession of the property.

- iv. That the said buyer's agreement and the indemnity cum undertaking are totally one sided, which impose completely biased terms and conditions upon the complainants, thereby tilting the balance of power in favour of the respondent, which is further manifest from the fact that the delay in handing over the possession by the respondent would attract only a meagre penalty of Rs.10/- per sq. ft., on the super area of the floor, on monthly basis, whereas the penalty for failure to take possession would attract holding charges of Rs.10/- per sq. ft. and 15% penal interest per annum compounded quarterly on the unpaid amount of instalment due to the respondent.
- v. That the respondent has breached the fundamental term of the contract by inordinately delaying in delivery of the possession by 77 months. That the possession of the property in question was finally offered on 11.05.2019. The complainants, without any default, had been timely paying the instalments towards the property as and when demanded by the respondent and after making the balance payment which was to be made at the time of offering of possession, got the property transferred in their name on 04.06.2019.

- vi. That the respondent has breached the fundamental term of the contract by inordinately delaying in delivery of the possession and not providing adequate compensation in line with the provisions of the Act. In fact, the respondent has even failed to provide the compensation as per the terms of the buyer's agreement and has flatly refused to indemnify the complainants, who sought compensation for the entire period of delay in handing over the possession of the unit. The respondent had committed gross violation of the provisions of section 18(1) of the Act by not handing over the timely possession of the floor in question and not giving the interest and compensation to the buyers. The respondent has committed various acts of omission and commission by making incorrect and false statement in the advertisement material as well as by committing other serious acts. The project has been inordinately delayed. The respondent has resorted to misrepresentation. The complainants, therefore, seek direction to the respondent to pay interest @ 18% p.a. as payment, towards delay in handing over the property in question.

C. Relief sought by the complainants

4. The complainants are seeking the following relief:
- i. Direct the respondent to pay interest @18 % p.a. as payment, towards delay in handing over the property in question as per the provisions of the Act and the rules.

- ii. Direct the respondent to pay a sum of Rs.50,000/- to the complainants towards the cost of the litigation.
- 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.

D. Reply filed by the respondent

5. The respondent had contested the complaint on the following grounds:
 - i. That the original allottee, Ms. Priyanka Puri and Mr. Anish Nair, being interested in the real estate development of the respondent, where the land is developed into a residential plotted colony of villas, plots, commercial units, independent floors of "Emerald floors at Emerald Hills" situated at Sector 65, Gurugram, Haryana tentatively applied for provisional allotment and were consequently allotted unit no. EHF-267-A-SF-062 on second floor of plot no. A-062 in block A, having a super area of 1380 sq. ft. vide provisional allotment letter dated 03.07.2009 and consequently through the buyer's agreement dated 26.02.2010. Thereafter, the original allottees transferred the unit to the complainants vide an agreement to sell dated 18.10.2018. After having completed all the formalities of the transfer, the complainants' nomination was confirmed on 20.12.2018. So, the complainants being the subsequent allottees were consequently offered the possession of the unit and were handed over the same.
 - ii. That before the nomination of the complainants, in 2018, the project was proposed to be revised and accordingly, the

respondent intimidated the original allottees vide a letter dated 13.08.2017. The original allottees were asked for objections and suggestions in lieu of the same, however, none were given. It is submitted that the letter for objections regarding change in layout plan was sent to the original allottees whereby no objection was raised by the original allottees and the new allottees/complainants during purchasing the unit were well versed regarding change in layout plan and also did not raise any objection to change in lay out plan after purchasing the unit and execution of conveyance deed. Thereafter, in furtherance to the revised plan, the construction of the project was done. That upon the transfer of the unit to complainants, the complainants have entered into the shoes of the original allottee and are bound by the same terms and conditions, as those of the original allottee, unless otherwise categorically agreed to between the parties.

- iii. That the respondent applied for the occupancy certificate on 04.04.2019 vide the application for issuance of the occupation certificate and subsequently received the occupation certificate on 09.05.2019. Further, the respondent offered the unit to the complainants vide the letter for offer of possession dated 11.05.2019, after which the unit was handed over to the complainants vide a unit handover letter dated 23.05.2019, since then the complainants have been enjoying a peaceful possession of the property. Subsequently, the conveyance deed was executed between the parties on 04.06.2019.

- iv. That the possession of the unit was offered and thereafter taken by the respondent and the complainants respectively in five months from the nomination of the complainants. That the development of the project was near completion at that time. The complainants brought the unit with open eyes and only after complete satisfaction with respect to the timelines, development of the unit, the project, amenities, services, etc., the complainants took the possession of the unit. That after more the two years of having peacefully enjoyed the possession of the unit, the present complaint should not be entertained.
- v. That the transfer document no. 15 amends the agreement to the extent of due date of delivery of possession. That the amended due date of delivery stands to be March 2019. That the same is also evident from the affidavit at document no. 17 of the transfer documents annexed herewith. That with great regard to the contractual obligations of the parties, the respondent rightly offered the possession on 11.05.2019. That as per the agreement, the due date of delivery was subject to the allottee(s) having strictly complied with all terms and conditions of the agreement and not being in default of any provision of the agreement including remittance of all amounts due and payable by the allottee(s) under the agreement as per the schedule of payment incorporated in the agreement. It has also been provided therein

that the date for delivery of possession of the unit would stand extended in the event of occurrence of the facts/reasons beyond the power and control of the respondent. The complainants have completely misconstrued, misinterpreted and miscalculated the time period as determined in the agreement. The relevant para of document no. 17 is reiterated as under:

*"2. That we shall be bound by all the terms and condition of the said provisional registration/ registration/ booking/ allotment being the Nominee/ substitute of the Original Applicant/Allottee, **We agree and confirm that the timeline for offering possession of said unit is March 2019, and the buyer's agreement to that extent stands amended** and we further undertake to execute the fresh buyer's agreement with these amended terms, as and when desired by the company, and we also fully understand and confirm that **we shall not entitled to any compensation for delay in handing over possession or any rebate under a scheme or otherwise or any other discount, by whatever name called, from the company, for which the original applicant/ allottee might have been entitled.** We agree and undertake to execute the Buyer's agreement directly with the company and undertakes to abide by all the terms and conditions which the company may implement for the said property."*

- vi. That clause 13(v) of the buyer's agreement provides that in case of any default/delay by the allottees in payment as per schedule of payment incorporated in the agreement, the date of handing over of possession shall be extended accordingly, solely on the respondent's discretion till the payment of all outstanding amounts to the satisfaction of the respondent. Since the original allottees have defaulted in timely remittance of payments as per schedule of payment the date of delivery of possession is not liable to be determined in the manner sought to be done by the

complainants. The payments against the unit have been defaulted and hence the date of delivery of possession of the unit in question is not liable to be determined in the manner sought to be done by the complainants.

- vii. That the complainants received the nomination letter dated 20.12.2018 and in five months from the date of the nomination letter, the complainants received the possession of the unit as reflected in the unit handover letter dated 23.05.2019. Further, the conveyance deed was executed on 04.06.2019. The complainants had taken the possession of the unit without objecting the same and is peacefully residing within the property for more than two years now. The complainants, after having executed the conveyance deed and taking peaceful possession of the unit and having enjoyed such possession for more than two years, should not be entitled to claim the interest on the delayed possession. Thus, the present complaint is devoid of any cause of action and is nothing but an abuse process of Law. It is submitted that the agreement is deemed to be concluded after execution of conveyance deed. It is also submitted that the complainants have willingly taken the possession by executing the unit hand over letter where it is stated that the complainants upon acceptance of possession, the liabilities and obligations of the respondent as

enumerated in the allotment letter/agreement/transfer documents stands satisfied.

- viii. That the respondent has issued various credit memos raised in favour of the complainants as reflected in the statement of account dated 11.10.2021. Further, an amount of Rs.1,82,254 was credited to the account of the complainants on account of anti-profiting. 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.

E. Jurisdiction of the authority

6. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.1 Territorial jurisdiction

7. 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

8. Section 11(4)(a) of the Act 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) The promoter shall-

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

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.

9. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as per provisions of section 11(4)(a) of the Act leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

F. Findings on the objections raised by the respondent

F.I Whether a subsequent allottee who had executed an indemnity cum undertaking with waiver clause is entitled to claim delay possession charges.

10. The respondent submitted that complainants in question are subsequent allottees and complainants have executed an affidavit dated 06.12.2018 and an indemnity cum undertaking dated 06.12.2018 whereby the complainants have consciously and voluntarily declared and affirmed that they would be bound by all the terms and conditions of the provisional allotment in favour of the original allottees. It was further declared by the complainants that they, having been substituted in the place of the original allottees in respect of the provisional allotment of the unit in question, were not entitled to any compensation for delay. Also, as per affidavit dated 06.12.2018, the due date of delivery comes out to be March 2019. Therefore, the complainants are not entitled to any compensation. The authority has heard the arguments of both the parties at length. With regard to the above contentions raised by the promoter/developer, it is worthwhile to examine following four sub-issues:

- i. Whether subsequent allottee is also an allottee as per provisions of the Act?
- ii. Whether delay possession charges are in the nature of statutory legal obligation of the promoter other than compensation?

- iii. Whether the subsequent allottee is entitled to delayed possession charges w.e.f. due date of handing over possession or w.e.f. the date of nomination letter/endorsement (i.e. date on which he became allottee)?
- iv. Whether indemnity-cum-undertaking with waiver clause at the time of transfer of unit is arbitrary and whether statutory rights can be waived of by such one sided and unreasonable undertaking?
- i. **Whether subsequent allottee is also an allottee as per provisions of the Act?**
11. The term "allottee" as defined in the Act also includes and means the subsequent allottee, hence is entitled to the same relief as that of the original allottee. The definition of the allottee as provided in the Act is reproduced as under:
- "2 In this Act, unless the context otherwise requires-*
- (d) "allottee" in relation to a real estate project, means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent".*
12. Accordingly, following are allottees as per this definition:
- (a) **Original allottee:** A person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter.
- (b) **Allottees after subsequent transfer from the original allottee:** A person who acquires the said allotment through sale, transfer or

otherwise. However, an allottee would not be a person to whom any plot, apartment or building is given on rent.

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

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

"15. So far as the issue raised by the Opposite Party that the Complainants are not the original allottees of the flat and resale of flat does not

come within the purview of this Act, is concerned, in our view, having issued the Re-allotment letters on transfer of the allotted Unit and endorsing the Apartment Buyers Agreement in favour of the Complainants, this plea does not hold any water....."

15. The authority concurs with the Hon'ble NCDRC's decision dated 26.11.2019 in **Rajnish Bhardwaj vs. M/s CHD Developers Ltd.** (supra) and observes that it is irrespective of the status of the allottee whether it is original or subsequent, an amount has been paid towards the consideration for a unit and the endorsement by the developer on the transfer documents clearly implies its acceptance of the complainants as allottees.
16. Therefore, taking the above facts into account, the authority is of the view that the term subsequent allottee has been used synonymously with the term allottee in the Act. The subsequent allottee at the time of buying a unit/plot takes on the rights as well as obligations of the original allottee vis-a-viz the same terms and conditions of the buyer's agreement entered into by the original allottee. Moreover, the amount if any paid by the subsequent or original allottee is adjusted against the unit in question and not against any individual. Furthermore, the name of the complainants/subsequent allottees has been endorsed on the same buyer's agreement which was executed between the original allottees and the promoter and no fresh buyer's agreement has been executed till date. Therefore, the rights and obligation of the

complainants/ subsequent allottees and the promoter will also be governed by the said buyer's agreement.

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

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

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

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

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

19. The rate of interest in both the scenarios is fixed as per rule 15 of the rules which shall be the State Bank of India's highest marginal cost of

lending rate +2%. However, for adjudging compensation or interest under sections 12,14,18 and section 19, the adjudicating officer has to take into account the various factors as provided under section 72 of the Act

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

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

21. Furthermore, the respondent argued that the original allottees have transferred the unit in favour of complainants/subsequent allottees after the Act came into force and where the project has been registered



under the Act by the respondent. It was argued by the promoter that in cases where the subsequent allottee came into picture after the registration of the project under the provisions of the Act with the authority, then the date of completion of the project and handing over the possession shall be the date declared by the promoter under section 4(2)(I)(C) of the Act. The counsel of the respondent further argued that the while purchasing the unit, it is presumed that the allottee very well knew that the project would be completed by that specific declared date, therefore, the delayed possession charges shall not be allowed.

22. The authority is of the view that the time period for handing over the possession is committed by the builder as per the relevant clause of the buyer's agreement and the commitment of the promoter regarding handing over of possession of the unit is taken accordingly. The new timeline indicated in respect of ongoing project by the promoter while making an application for registration of the project does not change the commitment of the promoter to hand over the possession by the due date as per the buyer's agreement. The new timeline as indicated by the promoter in the declaration under section 4(2)(I)(C) is now the new timeline as indicated by him for the completion of the project. Although, earlier, penal proceedings cannot be initiated against the builder for not meeting the committed due date of possession but now, if the promoter fails to complete the project in declared timeline, then he is liable for penal proceedings. The due date for possession as per the buyer's

agreement remains unchanged and the promoter is liable for the consequences and obligations arising out of failure in handing over possession by the due date as committed by him in the buyer's agreement and is liable for the delayed possession charges as provided in proviso to section 18(1) of the Act. The authority is of the view that the Act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the Act. The same issue has been dealt by Hon'ble Bombay High Court in case titled as *Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)* wherein it was held that the RERA Act does not contemplate rewriting of contract between the allottee and the promoter. The relevant para of the judgement is reproduced below:

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

23. Moreover, as delineated hereinabove, the Act does not distinguish between the original allottee and the subsequent allottee. The Act, by virtue of section 18, has created statutory right of delay possession charges in favour of the allottees. No doubt, the subsequent allottees knew the new date of completion as declared by the promoter but that does not abrogate the statutory rights of the subsequent allottees.

24. In the case in hand also, though the buyer's agreement dated 26.02.2010 was executed prior to the Act coming into force but the endorsement was made in favour of the complainants/subsequent allottees on 20.12.2018 when the Act became applicable. The subsequent allottees at the time of buying the said unit takes on the rights as well as obligations of the original allottees vis-a-viz the same terms and conditions of the buyer's agreement entered into by the original allottees. Although at the time of endorsement of their name on the buyer's agreement, the due date of possession had already lapsed but the subsequent allottees as well as the promoter had the knowledge of the statutory right of delay possession charges being accrued in their favour after coming into force of the Act. Thus, the concept of quasi-retroactivity will make the provisions of the Act and the rules applicable to the subsequent allottees. Moreover, the authority cannot ignore the settled principle of law that the waiver of statutory rights is subject to the public policy and interest vested in the right sought to be waived as reiterated by Hon'ble Supreme Court of India in *Waman Shrinivas Kini Vs. Ratilal Bhagwandas and Co.* (AIR 1959 SC 689). In the present situation, there is nothing which can prove that such right was waived off by the complainants/subsequent allottees for either of the two reasons quoted above. In simple words, neither they have got any private benefit by waiving of their right nor does it involve any element of public interest. Therefore, the authority is of the view that in cases

where the subsequent allottees have stepped into the shoes of original allottees after coming into force of the Act and after the registration of the project in question, the delayed possession charges shall be granted w.e.f. due date of handing over possession as per the buyer's agreement.

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

25. The authority further is unable to gather any reason or has not been exposed to any reasonable justification as to why a need arose for the complainants to sign any such affidavit or indemnity-cum-undertaking and as to why the complainants have agreed to surrender their legal rights which were available or had accrued in favour of the original allottees. Thus, no sane person would ever execute such an affidavit or indemnity-cum-undertaking unless and until some arduous and/or compelling conditions are put before him with a condition that unless and until, these arduous and/or compelling conditions are performed by him, he will not be given any relief and he is thus left with no other option but to obey these conditions. Exactly same situation has been demonstratively happened here, when the complainants/subsequent allottees have been asked to give the affidavit or indemnity-cum-undertaking in question before transferring the unit in their name otherwise such transfer may not be allowed by the promoter. Such an affidavit/undertaking/ indemnity bond given by a person thereby giving up their valuable rights must be shown to have been executed in

a free atmosphere and should not give rise to any suspicion. No reliance can be placed on any such affidavit/ indemnity-cum-undertaking and the same is liable to be discarded and ignored in its totality. Therefore, this authority does not place reliance on the said affidavit/indemnity cum undertaking. To fortify this view, we place reliance on the order dated 03.01.2020 passed by Hon'ble NCDRC in case titled as **Capital Greens Flat Buyer Association and Ors. Vs. DLF Universal Ltd., Consumer case no. 351 of 2015**, wherein it was held that the execution of indemnity-cum-undertaking would defeat the provisions of section 23 and 28 of the Indian Contract Act, 1872 and therefore, would be against public policy, besides being an unfair trade practice. The relevant portion of the said judgment is reproduced herein below:

"Indemnity-cum-undertaking

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

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

developer and would entitle the allottee to compensation for the period the possession is delayed solely on account of his having not executed the said undertaking-cum-indemnity."

26. The said judgment of NCDRC was also upheld by the Hon'ble Supreme Court vide its judgement dated 14.12.2020 passed in civil appeal nos. 3864-3889 of 2020 against the order of NCDRC.
27. Hon'ble Supreme Court and various High Courts in a plethora of judgments have held that the terms of a contract shall not be binding if it is shown that the same were one sided and unfair and the person signing did not have any other option but to sign the same. Reference can also be placed on the directions rendered by the Hon'ble Apex Court in civil appeal no. 12238 of 2018 titled as **Pioneer Urban Land and Infrastructure Limited Vs. Govindan Raghavan** (decided on 02.04.2019) as well as by the Hon'ble Bombay High Court in the **Neelkamal Realtors Suburban Pvt. Ltd.** (supra). A similar view has also been taken by the Apex court in **IREO Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Ors.** as under:

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

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

28. The same analogy can easily be applied in the case of execution of an affidavit or indemnity-cum-undertaking which got executed from the subsequent allottees before getting the unit transferred in their name in the record of the promoter as allottees in place of the original allottee.
29. The authority may deal with this point from yet another aspect. By executing an affidavit/undertaking, the complainants/subsequent allottees cuts their hands from claiming delay possession charges in case there occurs any delay in giving possession of the unit to them beyond the stipulated time or the due date of possession. But the question which arises before the authority is that what does allottee got in return from the promoter by giving such a mischievous and unprecedented undertaking. However, the answer would be "nothing". If it is so, then why did the complainants executed such an affidavit/undertaking is beyond the comprehension and understanding of this authority.
30. Moreover, the counsel of the complainants drew attention of the authority towards clause 02 of the affidavit dated 06.12.2018 whereby the complainants have waived of their right with regard to the delay compensation and also undertook to execute fresh buyer's agreement as and when desired by the respondent company. This contention of the complainants came to the utter shock to the authority and the authority observes that it is a wrong practice followed by the promoters to get a bunch of documents signed by the naïve subsequent allottees while

transferring the unit in question in their names. It is pertinent to mention over here that the promoters use the signing of these one-sided documents as a pre-requisite for the transfer of the subject unit and the subsequent allottees are left with no other option but to sign on these pre-printed documents as produced by the promoters. In an eventuality where the subsequent allottee refuses to sign these documents then the said transfer is not allowed by the promoters. It is a very wrong trend and practice which is being followed by the promoters and the authority is of the considered view that the arbitrary clauses of such documents favouring the promoter who is already in a very dominant position needs to be struck down so as to send a strong message to the complete lobby. In the present matter, clause 02 deserves to be discussed in this regard. In this clause two things are mentioned: *one*, extends the timeline of delivery of possession and *the other*, waives of the right of the complainants allottees with regard to the delay compensation. It doesn't even stop here; it further talks about execution of a fresh buyer's agreement with amended terms as and when desired by the company. It is interesting to note that anything of this sort of extending the timeline of handing over possession by March 2019 and executing a fresh BBA in this regard is nowhere mentioned in the whole bunch of transfer documents or any other document. These two aspects are only accommodated very conveniently in a deceitful manner only in clause 2 of the affidavit dated 06.12.2018 and the naïve subsequent allottees

without even knowing that they are being cheated and what will be the consequences signed the said documents. The authority holds that such clauses cannot be relied upon while adjudicating on such issues where these clauses play an important role.

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

F.II Whether signing of unit hand over letter or indemnity-cum-undertaking at the time of possession extinguishes the right of the allottee to claim delay possession charges.

32. The respondent contended that at the time of taking possession of the subject floor vide unit hand over letter dated 23.05.2019, the complainants had certified themselves to be fully satisfied with regard to the measurements, location, direction, developments et cetera of the unit and also admitted and acknowledge that they do not have any claim of any nature whatsoever against the respondent and that upon acceptance of possession, the liabilities and obligations of the respondent as enumerated in the allotment letter/buyer's agreement, stand fully satisfied. The relevant para of the unit handover letter relied upon reads as under:

"The Allottee, hereby, certifies that he / she has taken over the peaceful and vacant physical possession of the aforesaid Unit after fully satisfying himself / herself with regard to its measurements, location, dimension and development etc. and hereafter the Allottee has no claim of any nature whatsoever against the Company with regard to the size, dimension, area, location and legal status of the aforesaid Home.

Upon acceptance of possession, the liabilities and obligations of the Company as enumerated in the allotment letter/Agreement executed in favour of the Allottee stand satisfied."

33. At times, the allottee is asked to give the indemnity-cum-undertaking before taking possession. The complainants have waited long for their cherished dream home and now when it is ready for possession, they either have to sign the indemnity-cum-undertaking and take possession or to keep struggling with the promoter if indemnity-cum-undertaking is not signed by them. Such an undertaking/ indemnity bond given by a person thereby giving up their valuable rights must be shown to have been executed in a free atmosphere and should not give rise to any suspicion. If a slightest of doubt arises in the mind of the adjudicator that such an agreement was not executed in an atmosphere free of doubts and suspicions, the same would be deemed to be against public policy and would also amount to unfair trade practices. No reliance can be placed on any such indemnity-cum-undertaking and the same is liable to be discarded and ignored in its totality. Therefore, this authority does not place reliance on such indemnity-cum-undertaking. To fortify this view, the authority place reliance on the NCDRC order dated 03.01.2020 in case titled as **Capital Greens Flat Buyer Association and Ors. Vs. DLF Universal Ltd., Consumer case no. 351**



of 2015, wherein it was held that the execution of indemnity-cum-undertaking would defeat the provisions of sections 23 and 28 of the Indian Contract Act, 1872 and therefore would be against public policy, besides being an unfair trade practice. The relevant portion of the said judgment is reproduced herein below.

"Indemnity-cum-undertaking

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

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

34. The said judgment of NCDRC was also upheld by the Hon'ble Supreme Court vide its judgement dated 14.12.2020 passed in civil appeal nos. 3864-3889 of 2020 against the order of NCDRC.
35. It is noteworthy that section 18 of the Act stipulates for the statutory right of the allottee against the obligation of the promoter to deliver the

possession within stipulated timeframe. Therefore, the liability of the promoter continues even after the execution of indemnity-cum-undertaking at the time of possession. Further, the reliance placed by the respondent counsel on the language of the handover letter that the allottees had waived off their right by signing the said unit handover letter is superficial. In this context, it is appropriate to refer case titled as **Mr. Beatty Tony Vs. Prestige Estate Projects Pvt, Ltd. (Revision petition no.3135 of 2014 dated 18.11.2014)**, wherein the Hon'ble NCDRC while rejecting the arguments of the promoter that the possession has since been accepted without protest vide letter dated 23.12.2011 and builder stands discharged of its liabilities under agreement, the allottee cannot be allowed to claim interest at a later date on account of delay in handing over of the possession of the apartment to him, held as under:

"The learned counsel for the opposite parties submits that the complainant accepted possession of the apartment on 23/24.12.2011 without any protest and therefore cannot be permitted to claim interest at a later date on account of the alleged delay in handing over the possession of the apartment to him. We, however, find no merit in the contention. A perusal of the letter dated 23.12.2011, issued by the opposite parties to the complainant would show that the opposite parties unilaterally stated in the said letter that they had discharged all their obligations under the agreement. Even if we assume on the basis of the said printed statement that having accepted possession, the complainant cannot claim that the opposite parties had not discharged all their obligations under the agreement, the said discharge in our opinion would not extend to payment of interest for the delay period, though it would cover handing over of possession of the apartment in terms of the agreement between the parties. In fact, the case of the complainant, as articulated by his counsel is that the complainant had no option but to accept the possession on the terms contained in the letter dated 23.12.2011, since any protest by him or

refusal to accept possession would have further delayed the receiving of the possession despite payment having been already made to the opposite parties except to the extent of Rs. 8,86,736/-. Therefore, in our view the aforesaid letter dated 23.12.2011 does not preclude the complainant from exercising his right to claim compensation for the deficiency on the part of the opposite parties in rendering services to him by delaying possession of the apartment, without any justification condonable under the agreement between the parties."

36. The said view was later reaffirmed by the Hon'ble NCDRC in case titled as **Vivek Maheshwari Vs. Emaar MGF Land Ltd. (Consumer case no. 1039 of 2016 dated 26.04.2019)** wherein it was observed as under:

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

37. Therefore, the authority is of the view that the aforesaid unit handover letter dated 23.05.2019 does not preclude the complainants from exercising their right to claim delay possession charges as per the provisions of the Act.

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

38. The respondent submitted that the complainants have executed the conveyance deed on 04.06.2019 and therefore, the transaction between

the complainants and the respondent have been concluded and no right or liability can be asserted by respondent or the complainants against the other. Therefore, the complainants are estopped from claiming any interest in the facts and circumstances of the case. The present complaint is nothing but a gross misuse of process of law.

39. It is important to look at the definition of the term 'deed' itself in order to understand the extent of the relationship between an allottee and promoter. A deed is a written document or an instrument that is sealed, signed and delivered by all the parties to the contract (buyer and seller). It is a contractual document that includes legally valid terms and is enforceable in a court of law. It is mandatory that a deed should be in writing, and both the parties involved must sign the document. Thus, a conveyance deed is essentially one wherein the seller transfers all rights to legally own, keep and enjoy a particular asset, immovable or movable. In this case, the asset under consideration is immovable property. On signing a conveyance deed, the original owner transfers all legal rights over the property in question to the buyer, against a valid consideration (usually monetary). Therefore, a 'conveyance deed' or 'sale deed' implies that the seller signs a document stating that all authority and ownership of the property in question has been transferred to the buyer.

40. From the above, it is clear that on execution of a sale/ conveyance deed, only the title and interests in the said immovable property (herein the

allotted unit) is transferred. However, the conveyance deed does not mark an end to the liabilities of a promoter since various sections of the Act provide for continuing liability and obligations of a promoter who may not under the garb of such contentions be able to avoid its responsibility. The relevant sections are reproduced hereunder:

"11. Functions and duties of promoter

(1) XXX

(2) XXX

(3) XXX

(4) The promoter shall—

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

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

(b) XXX

(c) XXX

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

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

(1) XXX

(2) XXX

(3) *In case any structural defect or any other defect in workmanship, quality or provision of services or any other obligations of the promoter as per the agreement for sale relating to such development*

is brought to the notice of the promoter within a period of five years by the allottee from the date of handing over possession, it shall be the duty of the promoter to rectify such defects without further charge, within thirty days, and in the event of promoter's failure to rectify such defects within such time, the aggrieved allottees shall be entitled to receive appropriate compensation in the manner as provided under this Act....." (emphasis supplied)

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

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

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

42. From above, it can be said that taking over the possession and thereafter execution of the conveyance deed can best be termed as respondent having discharged its liabilities as per the buyer's agreement and upon taking possession, and/or executing conveyance



deed, the complainants never gave up their statutory right to seek delayed possession charges as per the provisions of the said Act. Also, the same view has been upheld by the Hon'ble Supreme Court in case titled as **Wg. Cdr. Arifur Rahman Khan and Aleya Sultana and Ors. Vs. DLF Southern Homes Pvt. Ltd. (now Known as BEGUR OMR Homes Pvt. Ltd.) and Ors. (Civil appeal no. 6239 of 2019) dated 24.08.2020**, the relevant paras are reproduced herein below:

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

claim as a condition for obtaining the conveyance or to indefinitely delay the execution of the Deed of Conveyance pending protracted consumer litigation."

43. It is observed that all the agreements/ documents signed by the allottee reveals stark incongruities between the remedies available to both the parties. In most of the cases, these documents and contracts are ex-facie one sided, unfair and unreasonable whether the plea has been taken by the allottee while filing its complaint that the documents were signed under duress or not. The right of the allottee to claim delayed possession charges shall not be abrogated simply for the said reason.
44. The allottees have invested their hard-earned money which there is no doubt that the promoter has been enjoying benefits of and the next step is to get their title perfected by executing a conveyance deed which is the statutory right of the allottee. Also, the obligation of the developer - promoter does not end with the execution of a conveyance deed. The essence and purpose of the Act was to curb the menace created by the developer/promoter and safeguard the interests of the allottees by protecting them from being exploited by the dominant position of the developer which he thrusts on the innocent allottees. Therefore, in furtherance to the Hon'ble Apex Court judgement and the law laid down in the **Wg. Cdr. Arifur Rahman (supra)**, this authority holds that even after execution of the conveyance deed, the complainants cannot be precluded from their right to seek delay possession charges from the respondent-promoter.

G. Findings of the authority

G.I Delay possession charges

45. **Relief sought by the complainants:** Direct the respondent to pay interest @18 % p.a. as payment, towards delay in handing over the property in question as per the provisions of the Act and the rules.
46. 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."

47. Clause 13(a) of the buyer's agreement provides time period for handing over the possession and the same is reproduced below:

"13. POSSESSION

(a) Time of handing over the Possession

Subject to terms of this clause and subject to the Allottee(s) having complied with all the terms and conditions of this Agreement, and not being in default under any of the provisions of this Agreement and compliance with all provisions, formalities, documentation etc., as prescribed by the Company, the Company proposes to hand over the possession of the independent floor within 27 months from the date of execution of this Agreement. The Allottee(s) agrees and understands that the Company shall be entitled to a grace period of 6 months, for applying and obtaining the occupation certificate in respect of the Floor and/or the Project." (Emphasis supplied)

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

49. **Due date of handing over possession and admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within 27 months from the date of execution of the buyer's agreement and further provided in agreement that promoter shall be entitled to a grace period of 6 months for applying and obtaining

occupation certificate in respect of said unit. The buyer's agreement was executed on 26.02.2010. The period of 27 months expired on 26.05.2012. As a matter of fact, the promoter has not applied to the concerned authority for obtaining occupation certificate within the time limit (27 months) prescribed by the promoter in the buyer's agreement. The promoter has moved the application for issuance of occupation certificate when the period of 27 months has already expired. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, the benefit of grace period of 6 months cannot be allowed to the promoter at this stage.

50. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges at the prescribed rate of interest. 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.

51. 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.
52. 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., 21.12.2021 is 7.30%. Accordingly, the prescribed rate of interest will be MCLR +2% i.e., 9.30%.
53. **Rate of interest to be paid by the complainants in case of delay in making payments-** The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.

Explanation. —For the purpose of this clause—

- (i) *the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*
- (ii) *the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"*

54. 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.
55. On consideration of the documents available on record and submissions made by the parties regarding contravention as per provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 13(a) of the buyer's agreement executed between the parties on 26.02.2010, the possession of the subject floor was to be delivered within a period of 27 months from the date of execution of buyer's agreement plus 6 months grace period for applying and obtaining the occupation certificate in respect of the floor and/or the project. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over possession comes out to be 26.05.2012. Occupation certificate was granted by the concerned authority on 09.05.2019 and thereafter, the possession of the subject floor was offered to the complainants on 11.05.2019. 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 subject floor to the complainants as per the terms and conditions of the buyer's agreement dated 26.02.2010 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 26.02.2010 to hand over the possession within the stipulated period.

56. 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 09.05.2019. The respondent offered the possession of the unit in question to the complainants only on 11.05.2019, 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. 26.05.2012 till the expiry of 2 months from the date of offer of possession (11.05.2019) which comes out to be 11.07.2019.

57. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainants are entitled to delayed possession at prescribed rate of interest i.e. 9.30% p.a. w.e.f. 26.05.2012 till 11.07.2019 as per provisions of section 18(1) of the Act read with rule 15 of the rules.

G.II Litigation cost

58. **Relief sought by the complainants:** Direct the respondent to pay a sum of ₹ 50,000/- to the complainants towards the cost of the litigation.

59. The complainants are claiming compensation in the above-mentioned reliefs. The authority is of the view that it is important to understand that the Act has clearly provided interest and compensation as separate entitlement/rights which the allottee can claim. For claiming compensation under sections 12, 14, 18 and section 19 of the Act, the complainants may file a separate complaint before Adjudicating Officer under section 31 read with section 71 of the Act and rule 29 of the rules.


H. Directions of the authority

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

- i. The respondent is directed to pay the interest at the prescribed rate i.e. 9.30% per annum for every month of delay on the amount paid by the complainants from due date of possession i.e. 26.05.2012 till 11.07.2019 i.e. expiry of 2 months from the date of offer of possession (11.05.2019). 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 respondent shall not charge anything from the complainants which is not the part of the buyer's agreement. The respondent is also not entitled to claim holding charges from the complainants/allottees at any point of time even after being part of the buyer's agreement as per law settled by hon'ble Supreme Court in civil appeal nos. 3864-3889/2020 decided on 14.12.2020.

61. Complaint stands disposed of.

62. File be consigned to registry.

V.I. 
(Vijay Kumar Goyal)

Member

Haryana Real Estate Regulatory Authority, Gurugram


(Dr. K.K. Khandelwal)

Chairman

Dated: 21.12.2021

Judgement uploaded on 25.01.2022.