BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : **2906 of 2020**
4830 of 2020
Date of decision : **21.12.2021**

1. Kajal Pandey
2. Amit Malhotra
   Both RR/o: Emerald Hills Floors, Amber Block,
   First Floor, Building no.9, unit no. 009,
   Sector-65, Gurugram, Haryana. **Complainants**

Versus

1. M/s Emaar MGF Land Ltd.
   Office: Emaar Business Park, M.G. Road,
   Sector 28, Sikanderpur Chowk,
   Gurugram, Haryana-122001.
2. Meena Sinha
   Address: Emerald Hills Floors, Amber Block,
   1st Floor, Building no.10, unit no. 010,
   Sector-65, Gurugram, Haryana.
3. Arunima Sinha
   Address: Emerald Hills Floors, Amber Block,
   1st Floor, Building no.10, unit no. 010,
   Sector-65, Gurugram, Haryana. **Respondents**

CORAM:
Dr. K.K Khandelwal **Chairman**
Shri Vijay Kumar Goyal **Member**

APPEARANCE:
Shri Varun Chugh Advocate for the complainants
Shri J.K. Dang alongwith Shri Ishaan Dang Advocates for the respondent no.1

ORDER

1. The complaint bearing no. 4830 of 2020 has been received on 13.01.2021 and the complaint bearing no. 2906/2020 has been

received on 01.10.2020. As both the complaints are filed by the same complainants w.r.t. the same unit, therefore both the complaints are hereby, taken up together and the reliefs sought are dealt together. Both the complaints have 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	03.12.2018 [annexure R12, page 136 of reply filed in complaint no. 4830 of 2020]
7.	Provisional allotment letter issued in favour of original allottees dated	17.07.2009 [annexure R3, page 98 of reply filed in complaint no. 2906 of 2020]
8.	Unit no.	EHF-267-A-FF-009 [page 13 of complaint]
9.	Date of execution of buyer's agreement	17.03.2010 [page 12 of complaint]
10.	Payment plan	Construction linked payment plan [Page 95 of reply filed in complaint no. 2906 of 2020]
11.	Total consideration as per statement of account dated 01.09.2020 at page 100 of reply filed in complaint no. 2906 of 2020	Rs. 56,06,193/-
12.	Total amount paid by the complainants as per statement of account dated 01.09.2020 at page 101 of reply filed in complaint no. 2906 of 2020	Rs. 56,06,193/-
13.	Complainants are subsequent allottees	The respondent no.1 acknowledged the complainants as allottees vide nomination letter dated 25.06.2018 (annexure B, page 42 of complaint) in pursuance of agreement to sell dated 03.03.2018 (annexure R7, page 103 of reply filed in complaint no. 2906 of 2020) executed between the complainants and the original allottees (Mr. Sunil Dhawan and Ms. Reema Dhawan).

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 27 of complaint]	17.06.2012 [**Note:** Grace period is not included]
15.	**Date of offer of possession to the complainants**	21.12.2018 [annexure R11, page 132 of reply filed in complaint no. 2906 of 2020]
16.	Delay in handing over possession w.e.f. 17.06.2012 till 21.02.2019 i.e. date of offer of possession (21.12.2018) + 2 months	6 years 8 months 4 days
17.	Unit handover letter dated	15.02.2019 [annexure R12, page 137 of reply filed in complaint no. 2906 of 2020]
18.	Conveyance deed executed by the complainants on	22.02.2019 [annexure R13, page 138 of reply filed in complaint no. 2906 of 2020]

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-FF-009 (first floor) admeasuring 267 sq. yards, in the project of the respondent no.1 known as "Emaar Hills-Floors" situated at Sector-65, Gurugram, Haryana, was booked by Mr. Sunil Dhawan and Ms. Reema Dhawan (hereinafter, original allottees).

Thereafter, on 17.03.2010, the original allottees entered into buyer's agreement with the respondent no.1.

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 no.1 by virtue of the assignment letter/nomination letter dated 25.06.2018.

iii. That in the said buyer's agreement dated 17.03.2010, the respondent no.1 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 no.1 to sign affidavits/indemnity cum undertaking, in favour of the respondent no.1 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 no.1, which is further manifest from the fact that the delay in handing over the possession by the respondent no.1 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 no.1.

v. That the respondent no.1 has breached the fundamental term of the contract by inordinately delaying in delivery of the possession by 72 months. That the possession of the property in question was finally offered on 21.12.2018. The complainants, without any default, had been timely paying the instalments towards the property as and when demanded by the respondent no.1 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 22.02.2019. On 22.02.2019, the respondent no.1 got the conveyance deed of the floor in question executed in favour of the complainants. Thereafter, the complainants along with their parents shifted to the said floor and since required an additional car parking space, hence on 04.06.2019 wrote an email to the respondent no.1 company seeking an additional car parking space.

vi. That as per the said buyer's agreement, there is a provision for allocation of additional car parking space to the allottee which is more particularly shown in clause no. 1.3 of the agreement which states that *"In case the Allottee(s) has/have applied for and has been*

allotted an additional parking space, the same shall be subject to this condition...". Though the request for additional car parking was sought on the ground of medical urgency as the complainant's parents are suffering from serious medical issues and requires immediate medical attention for which a dedicated car is required round the clock as the urgency requires them to visit hospital very frequently, but the same was turned down by the respondent no.1, vide reply dated 05.06.2019 on the ground of not having any such policy whereby additional car parking could be allotted.

vii. That to the utter dismay and shock, it has transpired to the complainants that the respondent no.1, on 28.08.2019 had allotted an additional car parking space to Mrs. Meena Sinha and Arunima Sinha, the respondents no. 2 and 3 herein, in building/plot no. 09 and that too against the floor owned by the complainants whereas the above-named persons are the owners of floor situated in building/plot no. 10. The malafide intention of the respondent no.1 is manifestly clear from the fact that on 05.06.2019 i.e. prior to allocation of the parking in question to respondents no. 2 & 3, the officials of the respondent no.1 refused for accommodation of additional car parking space to the complainants citing unavailability of space. However, subsequently on 20.11.2019, officials of the respondent no.1 company called up the complainants and confirmed an additional car parking space

considering the urgency of the situation but vide email dated 05.12.2019 addressed to the complainants, out rightly refused to provide an additional car parking space. In fact, the actual reason for not providing car parking was that the car parking bay was already allotted to respondent no.2 & 3 due to which reason, the parking could not be allotted to the complainants.

viii. That on 28.08.2019, in gross disregard and to unjustly enrich itself, the respondent no.1 company has illegally and unlawfully allocated the parking reserved for building/plot no. 9, to respondents no.2 & 3, the owners of unit bearing no. EHF-267-A-FF-010 i.e. building/plot no.10. As per the terms and conditions set forth in the buyer's agreement as well as the conveyance deed, it is categorically mentioned that the parking forms an integral part of the floor and cannot be transferred/sold independently as a unit. In terms of the buyer's agreement and the conveyance deed, the complainants owns indivisible and proportionate 1/3 share in the building/plot no.9 and any preference and benefit appurtenant to the said property lies exclusively with the owners of the said building/plot no.9, but the respondent no.1 company, grossly ignoring the legal rights of the complainants, besides other owners of building no. 09, in an unfair and illegitimate manner, allotted an additional car parking to respondents no.2 & 3 in building no. 09 and extended benefit to them, for unjust enrichment.

ix. That the allotment of additional car parking bay bearing no. EHF-267-A-FF-009-03, falling in the building/plot no. 09, belonging to the complainants, besides other two owners, to respondents no.2 & 3 who are the owners of unit no. EHF-267-A-FF-010 i.e. building no. 10, can in no eventuality be done by the respondent no.1 company, as per its whims and fancies and in an arbitrary manner, violating the rule of law.

x. That the respondent no.1 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 no.1 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 no.1 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 no.1 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 no.1 has resorted to misrepresentation. The

complainants, therefore, seek direction to the respondent no.1 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 no.1 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 no.1 to cancel the allotment of parking bearing no. EHF-267-A-FF-009-03 done in favor of respondent no. 2 & 3, in an unjust and wrongful manner and allot the parking to the complainants, on preferential basis.

iii. Direct the respondent no.1 to update its records to this effect and get the necessary rectification done in the conveyance deed registered in favor of respondent no. 2 & 3.

iv. Direct the respondents no. 2 & 3 to remove or not to park their vehicle in the additional car parking bay in question i.e., EHF-267-A-FF-009-03, allotted by respondent no. 1.

v. Direct the respondent no.1 to pay a sum of Rs.50,000/- to the complainants towards the cost of the litigation.

vi. 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. The respondent no.1 has filed the reply to the present complaint. However, despite service of notice, the respondents no. 2 and 3 have failed to file reply to the present complaint, therefore, their defence is struck of.

D. Reply filed by the respondent no.1

6. The respondent no.1 had contested the complaint on the following grounds:

   i. That the complainants have filed the present complaint seeking, inter alia, interest for alleged delay in delivering possession of the apartment purchased by the complainants. It is respectfully submitted that complaints pertaining to compensation are to be decided by the adjudicating officer under section 71 of the Act read with the rules and not by this hon'ble authority. The present complaint is liable to be dismissed on this ground alone. Moreover, it is respectfully submitted that the adjudicating officer derives his jurisdiction from the central act which cannot be negated by the rules made thereunder.

   ii. That the present complaint is based on an erroneous interpretation of the provisions of the Act as well as an incorrect understanding of the terms and conditions of the buyer's agreement dated 17.03.2010. 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 complainants for seeking interest or delayed possession charges cannot be called in to aid in derogation and ignorance of the provisions of the buyer's agreement. The interest for the alleged delay demanded by the complainants is beyond the scope of the buyer's agreement. The complainants cannot demand any interest or delayed possession charges beyond the terms and conditions incorporated in the buyer's agreement. Moreover, the complainants are not entitled to any interest for the period during which no association subsisted between the complainants and the respondent no.1.

iii. That the original allottees, Mr. Sunil Dhawan and Ms. Reema Dhawan, vide application form dated 08.06.2009 applied to the respondent no.1 for provisional allotment of a unit in the project. The original allottees, in pursuance of the aforesaid application form, were allotted the unit bearing no. EHF-267-A-FF-009, located on the first floor, in the project vide provisional allotment letter dated 17.07.2009. The original allottees 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 no.1 that the original allottees shall remit every

installment on time as per the payment schedule. The respondent no.1 had no reason to suspect the bonafide of the original allottees.

iv. That however, right from the beginning, the original allottees defaulted in payment of instalments. The original allottees were irregular regarding the remittance of installments on time. The respondent no.1 was compelled to issue demand notices, reminders etc. calling upon the original allottees to make payment of outstanding amounts payable by the original allottees under the payment plan/instalment plan opted by them. Several letter, reminders etc. had been got sent by the respondent no.1 to the original allottees requesting them to remit the respective amounts mentioned therein before the respective due dates communicated thereby. However, the original allottees miserably failed to adhere to the timelines intimated through the aforesaid letters. Statement of account dated 18.03.2021 as maintained by the respondent no.1 in due course of its business reflects the delays in remittance of various amounts on the part of the original allottees. The original allottees had wilfully and consciously defaulted in remittance of the instalments enumerated in the schedule of payment.

v. That buyer's agreement dated 17.03.2010 was executed between the original allottees and the respondent no.1. Clause 15 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. Further, clause 15 also stipulates that in case of delay caused due to non- receipt of occupation certificate, completion certificate or any other permission/sanction from the competent authorities, no compensation or any other compensation shall be payable to the allottees. The original allottees, having defaulted in timely payment of instalments, were not entitled to any compensation or any amount towards interest as an indemnification for delay, if any, under the buyer's agreement.

vi. That thereafter the complainants approached the original allottees for purchasing their rights and title in the unit in question. Original allottees acceded to the request of the complainants and agreed to transfer and convey their rights, entitlement and title in the unit in question to the complainants for a valuable sale consideration of Rs. 1,02,52,560/-. The complainants on executing the aforesaid agreement to sell had approached the respondent no.1 requesting it to endorse the provisional allotment of the unit in question in their name. The complainants had further executed an affidavit dated 23.05.2018 and an indemnity cum undertaking dated 23.05.2018 whereby the complainants had consciously and voluntarily declared and affirmed that they would be bound by all the terms and conditions of the provisional allotment in favour of

original allottees. It was further declared by the complainants that the complainants having been substituted in the place of original allottees in respect of the provisional allotment of the unit in question were not entitled to any compensation for delay, if any, in delivery of possession of the unit in question or any rebate under a scheme or otherwise or any other discount, by whatever name called, from the respondent no.1.

vii. That the complainants have always been conscious and aware of the fact that only one car parking space has been allotted to the unit in question and the same is evident from the preamble of the agreement to sell executed by the complainants with the original allottees. The complainants are conscious and aware of the fact that they are not entitled to any right or claim against respondent no.1. Moreover, the respondent no. 1 had intimated to the complainants at the time of transfer of the unit in question from the original allottees that only one car parking space is appurtenant to the unit in question. The complainants were categorically informed that allotment of an additional car parking space is subject to availability. The complainants had assured respondent no. 1 that they would not stake any claim in respect of any area other than the property described in the agreement to sell. Respondent no. 1, relying upon the deliberate representations

of the complainants, proceeded to endorse the unit in question in their favor. The complainants have intentionally distorted the real and true facts and have filed the present complaint in order to harass respondent no. 1 and mount undue pressure upon it.

viii. That the allotment of additional car parking space is subject to availability of the same and this fact has been specifically recorded in clause 1.2 (a) of the buyer's agreement. Moreover, the complainants have agreed and acknowledged that the possession of common area of the building shall remain with respondent no. 1 and the same has been duly incorporated in clause 10 (c) of the buyer's agreement. It is submitted that the car parking space is a part of common area, the possession of which is with the respondent no.1 and it is free to deal with it in any manner it deems fit. The allegations advanced by the complainants in the false and frivolous complaint are absolutely misconceived, inherently fallacious and unsustainable both in law and on facts.

ix. That clause 1.3 of the buyer's agreement that the application for allotment of an additional parking space is required to be submitted by the allottee at the time of submitting the application for allotment of a unit in the project in question. The complainants have purchased the unit in question from the original allottees in the year 2018. The complainants at the time of purchasing the unit

in question from the original allottees were conscious and aware of the fact that no additional parking space has been allotted with the unit in question. Consequently, the complainants cannot claim any additional parking space especially since the original allottees have not submitted any application for an additional parking space.

x. That it is wrong and denied that there is any nexus between the additional car parking sought by the complainants and the supposed medical attention purportedly required by the parents of the complainants. Moreover, the entire complaint is silent as to why the car parking space allotted to the complainant is not feasible for dedicating the same for the supposed medical urgency purportedly suffered by the parents of the complainants. That the respondent no. 1 has transparently and fairly conveyed to the complainants that no additional car parking space as requested by them was available owing to non-availability of space. The complainants are conscious and aware of the fact that they are not entitled to any additional car parking space especially when all such spaces have already been sold to the concerned allottees. The complainants have preferred the instant complaint in order to mount undue pressure upon respondent no. 1. The institution and

prosecution of the instant complaint constitutes a gross misuse of process of law.

xi. That the allotment of additional car parking space was made in favor of respondents no. 2 and 3 vide unit handover letter dated 28.08.2019. However, it is pertinent to note that respondents no. 2 and 3 had applied for an additional car parking space in their application dated 08.06.2009. Respondents no. 2 and 3 have been allotted the additional car parking space in accordance with the aforesaid application form. It is submitted that respondent no. 1, even though under no obligation to consider the requests of the complainants, have bona fidely tried to provide an additional parking space to the complainants but was unable to do so owing to the non-availability thereof. It is submitted that the request of the complainants for allotment of an additional parking space cannot be processed on account of unavailability of space and this fact was conveyed to the complainants time and again. Moreover, the respondents no. 2 and 3 had applied for an additional car parking space in their application dated 08.06.2009 and the additional car parking has been provided to them in accordance with the provisions thereof.

xii. That it is submitted that the allegations of the complainants that respondent no. 1 has illegitimately transferred a car parking space

alleged to be exclusive to building no. 9 to respondents no. 2 and 3 are absolutely misconceived and wholly erroneous. It is submitted that car parking spaces in the project are common areas over which no exclusivity by any allottee can be claimed in any manner. It is a matter of common knowledge and a custom in transactions pertaining to real estate that additional car parking spaces in a real-estate residential project are allotted to the customers on first come first serve basis. The said custom has been observed and followed in the real estate sector since the inception of colonization and urban development. The complainants have unduly delayed applying for additional car parking space and cannot claim any preferential right for allotment of any additional car parking space. It is submitted that no additional car parking space is available for the complainants or any other allottee. Moreover, the respondent no. 1 has transparently and fairly conveyed to the complainants that no additional car parking space is available in the residential project in question.

xiii. That clause 13(b)(v) of the buyer's agreement provides that in the event of any default or delay in payment of instalments as per the schedule of payments incorporated in the buyer's agreement, the time for delivery of possession shall also stand extended. That the complainants are conscious and aware of the defaults in timely

remittance of the instalments on their part as well as on the part of the original allottees. The complainants are fully aware of the fact that they are not entitled to any compensation or interest on account of the defaults in terms of the buyer's agreement and have filed the present complaint to harass the respondent no.1 and compel the respondent no.1 to surrender to their illegal demands. It is submitted that the filing of the present complaint is nothing but an abuse of the process of law. Moreover, it is pertinent to mention that the respondent no.1 has also credited a sum of Rs. 1,20,786/- as benefit on account of Anti-Profiting. Without prejudice to the rights of the respondent no.1, delayed interest if any has to 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 no.1, or any payment made by the allottees/complainants towards delayed payment charges or any taxes/statutory payments etc.

xiv. That the respondent no.1 had submitted an application dated 11.09.2018 for issuance of occupation certificate in respect of the project before the concerned statutory authority. The occupation certificate was thereafter granted vide memo bearing no. 13024 dated 03.12.2018. It is respectfully submitted that once an application is submitted before the statutory authority, the

respondent no.1 ceases to have any control over the same. The grant of occupation certificate is the prerogative of the concerned statutory authority and the respondent no.1 does not exercise any influence in any manner whatsoever over the same. Therefore, the time taken by the concerned statutory authority to issue an occupation certificate in respect of the project has to be excluded from computation of the time for implementation and development of the project.

xv. That the respondent no.1 had offered possession of the unit in question through letter of offer of possession dated 21.12.2018 to the complainants. The complainants thereafter had obtained possession of the unit in question and a unit handover letter dated 05.02.2019. It is submitted that prior to execution of the unit handover letter, the complainants had satisfied themselves regarding the measurements, location, dimension, development etc. of the unit in question. The complainants only after satisfying themselves with all the aspects including shape, size, location etc. of the unit in question, executed the unit handover letter stating that all the liabilities and obligations of respondent no. 1 as enumerated in the allotment letter/buyer's agreement stood satisfied.

xvi. That after execution of the unit handover letter dated 15.02.2019 and obtaining of possession of the unit in question, the complainants are left with no right, entitlement or claim against the respondent no.1. It needs to be highlighted that the complainants have further executed an indemnity cum undertaking dated 24.01.2019 whereby the complainants had declared and acknowledged that they have no ownership right, title or interest in any other part of the project except in the unit area of the unit in question. After execution of the unit handover letter dated 15.02.2019 and obtaining of possession of the unit in question, the complainants are left with no right, entitlement or claim against the respondent no.1. The complainants have further executed a conveyance deed dated 22.02.2019 in respect of the unit in question. The transaction between the complainants and the respondent no.1 stands concluded and no right or liability can be asserted by the respondent no.1 or the complainants against the other. Even otherwise, the complainants upon execution of the conveyance deed have waived off any right, title or claim supposedly existing against the respondent no.1.

xvii. That the project of the respondent no.1 is an "ongoing project" under the Act and the same has been registered under the Act and the rules. Registration certificate granted by the Haryana Real

Estate Regulatory Authority vide memo no. HRERA-612/2017/816 dated 29.08.2017. The complaint preferred by the complainants is devoid of any cause of action. It is submitted that this hon'ble authority has granted 28.08.2022 as the date of completion of the project. The respondent no.1 has already delivered possession of the unit in question and therefore no cause of action had accrued in favour of the complainants to file a complaint for seeking any interest as alleged. The complaint is liable to be dismissed on this ground alone.

xviii. That several allottees, including the complainants and the original 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 no.1. The respondent no.1, 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 pertinent to mention that the respondent no.1 has

already delivered possession of the unit in question to the complainants. Therefore, there is no default or lapse on the part of the respondent no.1 and there in no equity in favour of the complainants. It is evident from the entire sequence of events, that no illegality can be attributed to the respondent no.1. The allegations levelled by the complainants are totally baseless. 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 record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submissions made by the parties.

E. Jurisdiction of the authority

8. The plea of the respondent no.1 regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes 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 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.*

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

F. Findings on the objections raised by the respondent no.1

F.I Objection regarding jurisdiction of authority w.r.t. buyer's agreement executed prior to coming into force of the Act and provisions of the Act are not retrospective in nature.

12. The respondent no.1 raised an objection that the provisions of the Act are not retrospective in nature and the provisions of the Act cannot undo or modify the terms of an agreement duly executed prior to coming into force 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. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/ situation in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of ***Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)*** which provides as under:

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

contemplate rewriting of contract between the flat purchaser and the promoter.....

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

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

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

14. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the buyer's agreement subject to the condition that the

same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of the Act, rules and regulations made thereunder 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

15. The respondent no.1 submitted that authority has granted 28.08.2022 as the date of completion of the project and therefore the respondent no.1 is required to complete the construction of the apartment in question and offer possession of the same to the complainants on or before 28.08.2022 or within the extended period of registration, if any. Thus, the complaint is liable to be dismissed on this ground alone. Therefore, next question of determination is whether the respondent no.1 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.

16. 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.

17. 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...."

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

arising out of failure in handing over possession by the due date as committed by him in the apartment buyer agreement and he is liable for the delayed possession charges as provided in proviso to section 18(1) of the Act. The same issue has been dealt by hon'ble Bombay High Court in case titled as ***Neelkamal Realtors Suburban Pvt. Ltd. and anr. vs Union of India and ors.*** and has observed as under:

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

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

19. The respondent no.1 submitted that complainants in question are subsequent allottees and complainants have executed an affidavit dated 23.05.2018 and an indemnity cum undertaking dated 23.05.2018 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. 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?

20. 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".*

21. 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.

22. 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.

23. 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....."*

24. 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.

25. 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?**

26. 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 adjudgment 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.

27. 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**.

28. 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)?**

29. The respondent no.1 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 no.1/ 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 and have executed indemnity-cum-undertaking knowingly waiving off their right of compensation.

30. Furthermore, the respondent no.1 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 no.1. 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)(l)(C) of the Act. The counsel of the respondent no.1 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.

31. 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)(l)(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..."*

32. 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.

33. In the case in hand also, though the buyer's agreement dated 17.03.2010 was executed prior to the Act coming into force but the endorsement was made in favour of the complainants/subsequent allottees on 25.06.2018 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 Shriniwas***

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?**

34. 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."

35. 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.

36. 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."

37. 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.

38. 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.

39. 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.IV 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.

40. The respondent no.1 contended that at the time of taking possession of the subject floor vide unit hand over letter dated 15.02.2019, 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 no.1 and that upon acceptance of possession, the liabilities and obligations of the respondent no.1 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."

41. 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."*

42. 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.

43. 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 counsel of the respondent no.1 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."

44. 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."*

45. Therefore, the authority is of the view that the aforesaid unit handover letter dated 15.02.2019 does not preclude the complainants from exercising their right to claim delay possession charges as per the provisions of the Act.

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

46. The respondent no.1 submitted that the complainants have executed the conveyance deed on 22.02.2019 and therefore, the transaction between the complainants and the respondent no.1 have been concluded and no right or liability can be asserted by respondent no.1

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.

47. 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.

48. 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)*

49. 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)*

50. From above, it can be said that taking over the possession and thereafter execution of the conveyance deed can best be termed as respondent no.1 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."

51. 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.

52. 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 no.1.

G. Findings of the authority

G.I Delay possession charges

53. **Relief sought by the complainants:** Direct the respondent no.1 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.

54. 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."*

55. 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)*

56. 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.

57. **Due date of handing over possession and admissibility of grace period:** The respondent no.1 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 17.03.2010. The period of 27 months expired on 17.06.2012. 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 respondent no.1 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.

58. **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.

59. 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.

60. 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%.

61. **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;"

62. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 9.30% by the respondent no.1 which is the same as is being granted to the complainants in case of delay possession charges.

63. 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 no.1 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 17.03.2010, 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 17.06.2012. Occupation certificate was granted by the concerned authority on 03.12.2018 and thereafter, the possession of the subject floor was offered to the complainants on 21.12.2018. 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 no.1

to offer physical possession of the subject floor to the complainants as per the terms and conditions of the buyer's agreement dated 17.03.2010 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 17.03.2010 to hand over the possession within the stipulated period.

64. 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 03.12.2018. The respondent no.1 offered the possession of the unit in question to the complainants only on 21.12.2018, 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. 17.06.2012 till the expiry of 2 months from the date of offer of possession (21.12.2018) which comes out to be 21.02.2019.

65. 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 no.1 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. 17.06.2012 till 21.02.2019 as per provisions of section 18(1) of the Act read with rule 15 of the rules.

G.II Car parking

66. **Relief sought by the complainants:** The below-mentioned reliefs sought by the complainants are being taken together as the findings in one relief will definitely affect the result of the other relief and these reliefs are interconnected:

i. Direct the respondent no.1 to cancel the allotment of parking bearing no. EHF-267-A-FF-009-03 done in favor of respondent no. 2 & 3, in an unjust and wrongful manner and allot the parking to the complainants, on preferential basis.

ii. Direct the respondent no.1 to update its records to this effect and get the necessary rectification done in the conveyance deed registered in favor of respondent no. 2 & 3.

iii. Direct the respondents no. 2 & 3 to remove or not to park their vehicle in the additional car parking bay in question i.e., EHF-267-A-FF-009-03, allotted by respondent no. 1.

67. In respect of the above reliefs, the complainants in its complaint have contended that they requested for an additional car parking space from the respondent no.1 as their parents are not well and they are taken to hospital frequently vide email dated 04.06.2019 as per the provision of clause 1.3 of the buyer's agreement. But the respondent no.1 vide reply dated 05.06.2019 refused for the same. Moreover, in terms of buyers' agreement and conveyance deed, the complainants owns indivisible and proportionate 1/3rd share in the building and any preference and benefit appurtenant to the said property lies exclusively with the owners of the said building, the respondent no.1 grossly ignoring the legal rights of the complainants, and allotted an additional car parking to respondent no. 2 & 3 in building 09 and extended benefit to respondent no. 2 & 3 who are owners of a floor in building no. 10.

68. The respondent no.1 in its reply has objected that the allotment of the additional car parking space is subject to availability of the same and this fact is specifically recorded in clause 1.2(a) of the buyer's agreement. Also, the car parking space is a part of common area, possession of which is with respondent no.1 and is free to deal with it in any manner it deems fit. Moreover, upon perusal of clause 1.3 it is

evident that the application for allotment of an additional parking space is required to be submitted by the allottee at the time of submitting the application for allotment of a unit in project. It was conveyed to the complainants that no additional car parking space as requested by the complainants was available owing to non-availability of space as respondent no. 2& 3 had applied for an additional car parking space in their application dated 08.06.2009 and the said space was allotted to them with respect to that. And as of now there is no additional space available with the respondent no.1 company for the complainants and any other allottee.

69. Considering the above-mentioned facts and documents placed on record, the authority is of the view that as per the version of the respondent no.1, no car parking space is available with them which can be allotted to the complainants on chargeable basis. As far as common areas parking is concerned, the same is not chargeable and the request of the complainants cannot be acceded that the car parking of the respondent no. 2 and 3 be cancelled and allotted to the complainants. The authority views are very clear about regulation and management of common areas which is to be done either by the association of the allottee or by the competent authority. The complainants may approach the association of allottees with a request

for allotment of open car parking if regulations/by-laws of the association permits.

G.III Compensation

70. **Relief sought by the complainants:** Direct the respondent no.1 to pay a sum of Rs. 50,000/- to the complainants towards the cost of the litigation.

71. 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

72. 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 no.1 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. 17.06.2012 till 21.02.2019 i.e. expiry of 2 months from the date of offer of possession (21.12.2018). 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 no.1 shall not charge anything from the complainants which is not the part of the buyer's agreement. The respondent no.1 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.

73. Complaints stands disposed of. Copy of this order be placed in file bearing no. 4830 of 2020.

74. Files be consigned to registry.

(Vijay Kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 21.12.2021

Judgement uploaded on 25.01.2022.