BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	:	**745 of 2021**
Complaint filed on	:	**23.02.2021**
First date of hearing	:	**15.03.2021**
Date of decision	:	**21.12.2021**

1. Pankaj Sarin
2. Kanika Sarin

Both RR/o: Flat no.1502, Tower A, Pioneer Presidia, CRPF Road, Sector 62, Gurugram, Haryana-122201. **Complainants**

Versus

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

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

APPEARANCE:
Shri Aashi Sharma Advocate for the complainants
Shri J.K. Dang alongwith Shri Ishaan Dang Advocates for the respondent

ORDER

1. The present complaint dated 23.02.2021 has been filed by the complainants/allottees in Form CRA under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible

for all obligations, responsibilities and functions to the allottee as per the agreement for sale executed inter se them.

A. Project and unit related details

2. The particulars of the project, the details of sale consideration, the amount paid by the complainants, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S. No.	Heads	Information
1.	Project name and location	The Palm Terraces Select, Sector 66, Gurugram, Haryana
2.	Project area	45.373 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no. and validity status	a. 228 of 2007 dated 27.09.2007 Valid/renewed up to 26.09.2019 b. 93 of 2008 dated 12.05.2008 Valid/renewed up to 11.05.2020 c. 50 of 2010 dated 24.06.2010 Valid/renewed up to 23.06.2020
5.	HRERA registered/ not registered	**Registered "The Palm Terraces Select" vide no. 19 of 2018 dated 01.02.2018 for the unit in question**
	HRERA registration valid up to	W.e.f. 01.02.2018 till 30.04.2018
6.	Occupation certificate granted on	08.08.2019 [annexure R11, page 154 of reply]
7.	Provisional allotment letter in favour of original allottees dated	20.09.2010 [annexure C1, page 22 of complaint]
8.	Unit no. and measuring	PTS-12-0501, 5th floor, tower 12 measuring 2410 sq. ft. [annexure C3, page 30 of complaint]
9.	Date of execution of buyer's agreement	08.11.2010

		[annexure C3, page 28 of complaint]
10.	Payment plan	Construction linked payment plan [Page 64 of complaint]
11.	Total consideration as per statement of account dated 18.03.2021 at page 146 of reply	Rs.1,81,83,056/-
12.	Total amount paid by the complainants as per statement of account dated 18.03.2021 at page 148 of reply	Rs.1,81,33,056/-
13.	Complainants are subsequent allottees	The respondent acknowledged the complainants as allottees vide nomination letter dated 27.08.2012 (annexure C2, page 24 of complaint) in pursuance of agreement to sell dated 06.06.2012 (annexure R5, page 100 of reply) executed between the complainants and the original allottee (Nitish Raj Gupta).
14.	Date of start of excavation as per statement of account dated 18.03.2021 at page 146 of reply	13.08.2012
15.	Due date of delivery of possession as per clause 14(a) of the said agreement i.e. the Company proposes to hand over the possession for the Unit (which falls within ground plus thirteen floors tower/building) within a period of thirty six (36) months from the commencement of construction + grace period of 3 months, for applying and obtaining the occupation certificate in respect of the Unit and/or the Project. [Page 46 of complaint]	13.08.2015 [**Note:** Grace period is not included]
16.	**Date of offer of possession to the complainants**	16.08.2019 [annexure R12, page 156 of reply]
17.	Unit handover dated	29.11.2019 [annexure R15, page 168 of reply]

18.	Conveyance deed executed on	25.11.2020 [annexure R16, page 169 of reply]
19.	Delay in handing over possession w.e.f. 13.08.2015 till 16.10.2019 i.e. date of offer of possession (16.08.2019) + 2 months	4 years 2 months 3 days
20.	Delay compensation already paid by the respondent in terms of the buyer's agreement as per statement of account dated 18.03.2021 at page 146 of reply	Rs. 8,68,788/-

B. Facts of the complaint

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

i. That the project came to the knowledge of the complainants by the shrewd marketing gimmick of the respondent. The complainants were given assurances, representations and warranties of the highest-class aesthetic apartment and timely delivery of the unit and completion of the development activities of the project. The complainants being simple people imposed their confidence on the respondent due to its dominant position, market value, assurances, representations and warranties. Thereafter, the complainants purchased the unit in the project which was earlier allotted to one Mr Nitish Rai Gupta ("original allottee") vide provisional allotment letter dated 07.09.2010. The same was endorsed in favour of the complainants vide nomination letter dated 27.08.2012.

ii. That at the time of nomination of the unit to the complainants, the respondent had already received a sum of Rs.5762270/-. The

nomination letter intimated the complainants that the next instalment would of Rs. 1161680/- on the start of the concreting slab. The buyer's agreement dated 08.11.2010 was endorsed in the name of the complainants on 09.08.2012 according to which the complainants were to receive the possession of the unit within 36 months from the date of the start of the construction.

iii. That the delivery of the possession of the unit was delayed by the respondent. According to the buyer's agreement and the schedule for payment provided, the construction started on 13.08.2012, hence the possession was to be handed over within 36 months which comes out to be 15.08.2015. The complainants' desire to own a house kept them committed to the project and so they were consistent in making payment of the EMI. Had the respondent completed project on time and handed over the possession of the unit timely, the complainants would have been residing in the unit purchased.

iv. That in spite of making a substantial part of the payment (evident through the statement of account), the respondent has failed to complete the project timely, as promised, causing grave mental agony and mental harassment to the complainants.

v. That the complainants should be compensated with the three promised parking spots. The complainants were offered to select three parking spaces and the complainants chose B1-049B, B1-

049A, B1-049B which were right beside the lift of the tower 12 in basement 1, however, at the time of possession, only two parking spots were allocated to the complainants, and the two parking spots that were allocated, were not in the promised spot i.e., basement 1, beside the lift of the tower 12, rather they were in the basement 2. The respondent, when confronted about the third parking space for which the complainants have made the payment for, denied that there was any "separate payment for additional parking" and used the above payment as advance instalment. The complainants had no choice but to accept the two parking in the basement 2. The email between the complainants and respondent confirming such request of additional parking space is annexed with the complaint as annexure C9 along with handover advice letter (Intimation of Possession) confirming the allotment of the said parking space.

vi. That the compensation should be granted on service tax as the respondent are also levying the service tax on the complainants after the Service Tax Notification dated 01.03.2016 which stated that uniform abatement rate is now being prescribed for services for construction of complex, building, civil structure (residential or commercial). The complainants have to bear new Service tax because of the delay caused by the respondent in delivering the possession of the unit. However, this is totally unjustified.

vii. That the letter of offer of possession was given on 16.08.2019 and in the same it was mentioned that the occupation certificate of the unit bearing no. PTS-12-0501 at Palm Terraces Select has been received and the unit was ready for possession. The respondent further requested, through the letter of possession, to make payments towards the final dues before 16.09.2019 to initiate the process of physically handing over the unit to the complainants. The complainants in their desire to own a house paid the final dues to the respondent.

viii. That the handover advice letter was issued on 29.08.2019 for intimating the complainants that the unit was ready for the physical possession, however the said letter of possession was merely an offer of possession on paper from the respondent to evade responsibility and deceive the authorities that the unit was habitable and ready for possession which, upon inspection, was not the case at all. The unit was under construction and was uninhabitable without all the basic amenities.

ix. That the respondent has substantially failed to discharge its obligation imposed on him under the Act. Though the letter of offer of possession is dated 16.08.2019, however this possession was only an offer of possession and not actual possession, as after visiting the unit on 05.10.2019, it was obvious to the complainants that the unit was not ready for possession as the same was un-

inhabitable with a lot of snags. The intimation of possession was only there to evade the responsibility and to deceive the authorities, it wasn't even after the delay of 3 additional months and 15 days, that the actual physical possession was given. Hence the respondent is liable to pay the interest for every month of delay as per section 18 of the Act.

C. Relief sought by the complainants

4. The complainants are seeking the following relief:

   i. Direct the respondent to pay the complainants prescribed interest as per the terms of the Act on delay in handing over the possession of the apartment.

   ii. To provide the complainants with the 3-parking space that were promised along with compensation and to re-allocate the parking in the promised space in basement 1.

   iii. Direct the respondent to refund/waive off service tax that is levied on the complainants.

D. Reply filed by the respondent

5. The respondent had contested the complaint on the following grounds:

   i. That the complainants have filed the present complaint seeking interest on account of alleged delay in delivering possession of the apartment purchased by the complainants. It is respectfully submitted that complaints pertaining to refund, interest, compensation etc. are to be decided by the adjudicating authority under section 71 of the Act read with rule 29 of the rules and not

by this hon'ble authority. The present complaint is liable to be dismissed on this ground alone. Moreover, it is respectfully submitted that the adjudicating officer derives his jurisdiction from the central act which cannot be negated by the rules made thereunder.

ii. That the complainants have got no locus standi or cause of action to file the present complaint. 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 08.11.2010. 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 cannot be called in to aid in derogation and ignorance of the provisions of the buyer's agreement. The interest is compensatory in nature and cannot be granted in derogation and ignorance of the provisions of the buyer's agreement. The interest for the alleged delay demanded by the complainants is beyond the scope of the buyer's agreement. The complainants cannot demand any interest or compensation beyond the terms and conditions incorporated in the buyer's agreement.

iii. That the original allottees, Nitish Rai Gupta and Anita Gupta, have approached the respondent sometime in the year 2010 for

purchase of an independent unit in the said project. The original allottees vide application form dated 29.08.2010 applied to respondent for provisional allotment of a unit in the project. The original allottees, in pursuance of the aforesaid application form, were allotted an independent unit bearing no. PTS-12-0501, in the project vide provisional allotment letter dated 20.09.2010. The original allottees consciously and willingly opted for subvention plan for remittance of the sale consideration for the unit in question and further represented to the respondent that they shall remit every installment on time as per the payment schedule. The respondent had no reason to suspect bonafide of the original allottees.

iv. That the original allottees and the complainants approached the respondent and jointly requested the respondent to transfer the allotment of the said unit in favour of the complainants. The original allottees as well as the complainants executed transfer documents copies on the basis of which the respondent transferred the allotment in favour of the complainants. The agreement to sell dated 06.06.2012 executed by the original allottees and the complainants. Letter dated 27.08.2012 confirmed the transfer of nomination in favour of the complainants. Statement of account dated 18.03.2021 reflects the payments made by the original allottees/complainants. The complainants executed an affidavit and indemnity cum undertaking whereby the complainants have admitted and undertaken that they shall not be entitled to any compensation for any delay in possession.

v. That clause 16 of the buyer's agreement provides that compensation for any delay in delivery of possession shall only be given to such allottees who are not in default of their obligations envisaged under the agreement and who have not defaulted in payment of instalments as per the payment plan incorporated in the agreement. In case of delay caused due to non- receipt of occupation certificate, completion certificate or any other permission/sanction from the competent authorities, no compensation or any other amount shall be payable to the allottees. Clause 14(b)(vi) 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. As delineated hereinabove, the complainants, having executed the affidavit, were not entitled to any compensation or any amount towards interest as an indemnification for delay, if any, under the buyer's agreement. Nevertheless, the respondent has paid compensation amounting to Rs.8,68,788/- as delay compensation and early payment rebate (EPR) amounting to Rs.81,384/-. Thus, the complainants are not entitled to any further interest from the respondent.

vi. That the project was initially registered under the Act till 30.04.2018. Subsequently, the period of validity of registration was extended up till 30.04.2019. The respondent completed construction of the unit/tower and made an application for issuance of the occupation certificate on 11.01.2018, i.e. within the

initial period of registration under the Act to the concerned statutory authority for grant of occupation certificate in respect of the project in question. The occupation certificate was thereafter granted by the concerned statutory authority on 08.08.2019. It is respectfully submitted that the grant of occupation certificate is the prerogative of the concerned statutory authority, and the respondent does not exercise any control or influence over the same. Therefore, time period utilized by the concerned statutory authority in granting the occupation certificate to the respondent is necessarily required to be excluded from computation of time period utilized for implementation of the project.

vii. That upon receipt of the occupation certificate, possession of the unit was offered to the complainants vide offer of possession letter dated 16.08.2019. After receipt of balance payment and completion of requisite documentation/formalities, the possession of the unit was delivered to the complainants on 29.11.2019. The complainants took possession by executing the unit handover letter dated 29.11.2019 after the complainants have duly acknowledged that they do not have any claim of any nature whatsoever qua the respondent and that the respondent has duly discharged its obligations under the buyer's agreement upon delivery of possession. The conveyance deed has also been registered in favour of the complainants on 25.11.2020.

viii. That the building plans for the unit/tower in question had been approved by the competent authority under the then applicable National Building Code in terms of which buildings having height

of 15mtrs. or above but having area of less than 500 sq. mtrs. on each floor, were being approved by the competent authorities with a single staircase and construction was being carried out accordingly. Subsequently, the National Building Code (NBC) was revised in the year 2016 and in terms of the same, all high-rise buildings (i.e., buildings having height of 15 mtrs. and above), irrespective of the area of each floor, are now required to have two staircases. Furthermore, it was notified vide Gazette published on 15.03.2017 that the provisions of NBC 2016 superseded those of NBC 2005.

ix. That in order to prevent any further delay in the project and so as to avoid jeopardising the safety of the occupants of the buildings in question including the building in which the unit in question is situated, the respondent had taken a decision to go ahead and construct the second staircase. Be that as it may be, it is submitted that the respondent had completed the construction of the second staircase and had offered possession of the unit to the complainants on 16.08.2019. Furthermore, the unit has been handed over on 29.11.2019 and conveyance deed dated 25.11.2020 has also been executed in favour of the complainants. Therefore, the instant complaint is nothing but a gross misuse of process of law. The complainants are not entitled to claim any interest or compensation in the facts and circumstances of the case.

x. That several allottees, had defaulted in timely remittance of payment of instalments which was an essential, crucial and an indispensable requirement for conceptualisation and development of the project in question. Furthermore, when the proposed allottees default in their payments as per schedule agreed upon, the failure has a cascading effect on the operations and the cost for proper execution of the project increases exponentially whereas enormous business losses befall upon the respondent. The respondent, despite default of several allottees, has diligently and earnestly pursued the development of the project in question and has constructed the project in question as expeditiously as possible.

E. Jurisdiction of the authority

6. The preliminary objection raised by the respondent regarding jurisdiction of the authority to entertain the present complaint stands rejected. The authority observed that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I Territorial jurisdiction

7. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram

District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram District, therefore this authority has complete territorial jurisdiction to deal with the present complaint.

E.II Subject-matter jurisdiction

8. Section 11(4)(a) of the Act provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

> ***Section 11***
> .....
> *(4) The promoter shall-*
> *(a) be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;*
>
> ***Section 34-Functions of the Authority:***
>
> *34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.*

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

by the adjudicating officer if pursued by the complainants at a later stage.

F. Findings on the objections raised by the respondent

F.I 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

10. The respondent 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."

11. 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."

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

13. The respondent submitted that complainants in question are subsequent allottees and complainants had executed an affidavit and an indemnity cum undertaking 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 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. 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 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?

14. 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".*

15. 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.

16. 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.

17. 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....."

18. 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.

19. 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 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. 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 have been endorsed on the same buyer's agreement which was executed between the original allottees and the promoter. Therefore, the rights and obligation of the 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?**

20. 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 lump sum 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.

21. 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**.

22. 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)?

23. The respondent/promoter argued that the complainants/subsequent allottees shall not be entitled to any compensation/delayed possession charges since at the time of the execution of transfer documents/agreement for sale, they were well aware of the due date of possession and have knowingly waived off their right to claim any compensation for delay in handing over possession or any rebate under a scheme or otherwise or any other discount. The respondent/ promoter had spoken about the disentitlement of compensation/delayed possession charges to the 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 entered into the agreement for sell and/or indemnity-cum-undertaking knowingly waiving off their right of compensation.

24. The authority place reliance on the recent case titled as ***M/s Laureate Buildwell Pvt. Ltd. Vs. Charanjeet Singh, civil appeal no. 7042 of 2019 dated 22.07.2021*** wherein the Apex Court has held that relief of interest on refund, enunciated by the decision in ***HUDA Vs. Raje Ram*** (2008) which was applied in ***Wg. Commander Arifur Rehman*** (Wg. Cdr. Arifur Rahman Khan and Aleya Sultana and Ors. V. 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) cannot be considered good law and has held that the subsequent purchaser/respondent had stepped into the shoes of the original allottee, and intimated Laureate (builder) about this fact in April 2016, the interest of justice demand that the interest at least from that date should be granted, in favour of the respondent. The relevant paras of the said judgment are being reproduced as follows:

> *"31. In view of these considerations, this court is of the opinion that the per se bar to the relief of interest on refund, enunciated by the decision in Raje Ram (supra) which was applied in Wg. Commander Arifur Rehman (supra) cannot be considered good law. The nature and extent of relief, to which a subsequent purchaser can be entitled to, would be fact dependent. However, it cannot be said that a subsequent purchaser who steps into the shoes of an original allottee of a housing project in which the builder has not honoured its commitment to deliver the flat within a stipulated time, cannot expect any – even reasonable time, for the performance of the builder's obligation. Such a conclusion would be arbitrary, given that there may be a large number- possibly thousands of flat buyers, waiting for their promised flats or residences; they surely would be entitled to all reliefs under the Act. In such case, a purchaser who no doubt enters the picture later surely belongs to the same class. Further, the purchaser agrees to buy the flat with a reasonable expectation that delivery of possession would be in accordance within the bounds of the delayed timeline that he has knowledge of, at the time of purchase of the flat. Therefore, in the event the purchaser claims refund, on an assessment that he too can (like the original allottee) no longer wait, and face intolerable burdens, the equities would have to be moulded. It would no doubt be fair to assume that the purchaser had knowledge of the delay. However, to attribute knowledge that such delay would continue indefinitely, based on an a priori assumption, would not be justified. The equities, in the opinion of this court, can properly be moulded by directing refund of the principal amounts, with interest @ 9% per annum from the date the builder acquired knowledge of the transfer, or acknowledged it.*
>
> *32. In the present case, there is material on the record suggestive of the circumstance that even as on the date of presentation of the present appeal, the occupancy certificate was not forthcoming. In these circumstances,*

given that the purchaser/respondent had stepped into the shoes of the original allottee, and intimated Laureate about this fact in April 2016, the interests of justice demand that interest at least from that date should be granted, in favour of the respondent. The directions of the NCDRC are accordingly modified in the above terms." .....*(Emphasis supplied)*

25. In the present case, the complainants/subsequent allottees had been acknowledged as allottees by the respondent vide nomination letter dated 27.08.2012. The authority observes that the promoter has confirmed the transfer of allotment in favour of subsequent allottees (complainants) and the instalments paid by the original allottees were adjusted in the name of the subsequent allottees and the next instalments were payable/due as per the original allotment letter. Also, we have also perused the buyer's agreement which was originally entered into between the original allottees and the promoter. The same buyer's agreement has been endorsed in favour of the subsequent allottees/complainants. All the terms of buyer's agreement remain the same, so it is quite clear that the subsequent allottees have stepped into the shoes of the original allottees.

26. Though the promised date of delivery was 13.08.2015 and the complainants/subsequent allottees have been acknowledged as allottees by the respondent vide nomination letter dated 27.08.2012 i.e. prior to the lapse of due date of possession. The construction of the tower in question was not completed by the said date and it was offered by the respondent only on 16.08.2019. If these facts are taken into consideration, the complainants/ subsequent allottees have agreed to

buy the unit in question with the expectation that the respondent/promoter would abide by the terms of the buyer's agreement and would deliver the subject unit by the said due date. At this juncture, the subsequent purchasers cannot be expected to have knowledge, by any stretch of imagination, that the project will be delayed, and the possession would not be handed over within the stipulated period. So, the authority is of the view that in cases where the subsequent allottees has stepped into the shoes of original allottees before the due date of handing over possession, the delayed possession charges shall be granted w.e.f. due date of handing over possession. In the present complaint, the respondent had acknowledged the complainants as allottees before the expiry of due date of handing over possession, therefore, the complainants are entitled for delay possession charges w.e.f. due date of handing over possession as per the buyer's agreement.

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?

27. 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. In the instant matter in dispute, it is not the case of the

respondent that the re-allotment of the unit was made in the name of the complainants/ subsequent purchasers after the expiry of the due date of delivery of possession of the unit. Thus, so far as the due date of delivery of possession had not come yet and before that the unit had been re-allotted in the name of the subsequent allottees, the subsequent-allottees will be bound by all the terms and conditions of the buyer's agreement including the rights and liabilities. 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 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."*

28. 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.

29. 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.** (Civil appeal no. 5785 of 2019) 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."*

30. The same analogy can easily be applied in the case of execution of an affidavit or indemnity-cum-undertaking which got executed from the

complainants/subsequent-allottees before getting the unit transferred in their name in the record of the promoter as allottee in place of the original allottees.

31. 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 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.

The authority holds that irrespective of the execution of the affidavit/undertaking by the complainants/subsequent allottees at the time of transfer of the unit in their name as allottee 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 execution of an indemnity-cum-undertaking.

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

32. The respondent contended that at the time of taking possession of the subject flat vide unit hand over letter dated 29.11.2019, the complainants had certified themselves to be fully satisfied with regard to the measurements, location, direction, developments et cetera of the unit and also admitted and acknowledge that they do not have any claim of any nature whatsoever against the respondent and that upon acceptance of possession, the liabilities and obligations of the respondent as enumerated in the allotment letter/buyer's agreement, stand fully satisfied. The relevant para of the unit handover letter relied upon reads as under:

> *"The Allottee, hereby, certifies that he / she has taken over the peaceful and vacant physical possession of the aforesaid Unit after fully satisfying himself / herself with regard to its measurements, location, dimension and development etc. and hereafter the Allottee has no claim of any nature whatsoever against the Company with regard to the size, dimension, area, location and legal status of the aforesaid Home.*
>
> *Upon acceptance of possession, the liabilities and obligations of the Company as enumerated in the allotment letter/Agreement executed in favour of the Allottee stand satisfied."*

33. At times, the allottee is asked to give the indemnity-cum-undertaking before taking possession. The complainants have waited long for their cherished dream home and now when it is ready for possession, they either have to sign the indemnity-cum-undertaking and take possession or to keep struggling with the promoter if indemnity-cum-undertaking is not signed by them. Such an undertaking/ indemnity bond given by a

person thereby giving up their valuable rights must be shown to have been executed in a free atmosphere and should not give rise to any suspicion. If a slightest of doubt arises in the mind of the adjudicator that such an agreement was not executed in an atmosphere free of doubts and suspicions, the same would be deemed to be against public policy and would also amount to unfair trade practices. No reliance can be placed on any such indemnity-cum-undertaking and the same is liable to be discarded and ignored in its totality. Therefore, this authority does not place reliance on such indemnity-cum-undertaking. To fortify this view, the authority place reliance on the NCDRC order dated 03.01.2020 in case titled as **Capital Greens Flat Buyer Association and Ors. Vs. DLF Universal Ltd., Consumer case no. 351 of 2015**, wherein it was held that the execution of indemnity-cum-undertaking would defeat the provisions of sections 23 and 28 of the Indian Contract Act, 1872 and therefore would be against public policy, besides being an unfair trade practice. The relevant portion of the said judgment is reproduced herein below.

> *"Indemnity-cum-undertaking*
>
> *30. The developer, while offering possession of the allotted flats insisted upon execution of the indemnity-cum-undertaking before it would give possession of the allotted flats to the concerned allottee.*
>
> *Clause 13 of the said indemnity-cum-undertaking required the allottee to confirm and acknowledge that by accepting the offer of possession, he would have no further demands/claims against the company of any nature, whatsoever. It is an admitted position that the execution of the undertaking in the format prescribed by the developer was a pre- requisite condition, for the delivery of the*

possession. The opposite party, in my opinion, could not have insisted upon clause 13 of the Indemnity-cum-undertaking. The obvious purpose behind such an undertaking was to deter the allottee from making any claim against the developer, including the claim on account of the delay in delivery of possession and the claim on account of any latent defect which the allottee may find in the apartment. The execution of such an undertaking would defeat the provisions of Section 23 and 28 of the Indian Contract Act, 1872 and therefore would be against public policy, besides being an unfair trade practice. Any delay solely on account of the allottee not executing such an undertaking would be attributable to the developer and would entitle the allottee to compensation for the period the possession is delayed solely on account of his having not executed the said undertaking-cum-indemnity."

34. The said judgment of NCDRC was also upheld by the Hon'ble Supreme Court vide its judgement dated 14.12.2020 passed in civil appeal nos. 3864-3889 of 2020 against the order of NCDRC.

35. It is noteworthy that section 18 of the Act stipulates for the statutory right of the allottee against the obligation of the promoter to deliver the possession within stipulated timeframe. Therefore, the liability of the promoter continues even after the execution of indemnity-cum-undertaking at the time of possession. Further, the reliance placed by the respondent counsel on the language of the handover letter that the allottees had waived off their right by signing the said unit handover letter is superficial. In this context, it is appropriate to refer case titled as **Mr. Beatty Tony Vs. Prestige Estate Projects Pvt, Ltd. (Revision petition no.3135 of 2014 dated 18.11.2014**), wherein the Hon'ble NCDRC while rejecting the arguments of the promoter that the possession has since been accepted without protest vide letter dated 23.12.2011 and builder stands discharged of its liabilities under

agreement, the allottee cannot be allowed to claim interest at a later date on account of delay in handing over of the possession of the apartment to him, held as under:

> *"The learned counsel for the opposite parties submits that the complainant accepted possession of the apartment on 23/24.12.2011 without any protest and therefore cannot be permitted to claim interest at a later date on account of the alleged delay in handing over the possession of the apartment to him. We, however, find no merit in the contention. A perusal of the letter dated 23.12.2011, issued by the opposite parties to the complainant would show that the opposite parties unilaterally stated in the said letter that they had discharged all their obligations under the agreement. Even if we assume on the basis of the said printed statement that having accepted possession, the complainant cannot claim that the opposite parties had not discharged all their obligations under the agreement, the said discharge in our opinion would not extend to payment of interest for the delay period, though it would cover handing over of possession of the apartment in terms of the agreement between the parties. In fact, the case of the complainant, as articulated by his counsel is that the complainant had no option but to accept the possession on the terms contained in the letter dated 23.12.2011, since any protest by him or refusal to accept possession would have further delayed the receiving of the possession despite payment having been already made to the opposite parties except to the extent of Rs. 8,86,736/-. Therefore, in our view the aforesaid letter dated 23.12.2011 does not preclude the complainant from exercising his right to claim compensation for the deficiency on the part of the opposite parties in rendering services to him by delaying possession of the apartment, without any justification condonable under the agreement between the parties."*

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

> *"7. It would thus be seen that the complainants while taking possession in terms of the above referred printed handover letter of the OP, can, at best, be said to have discharged the OP of its liabilities and obligations as enumerated in the agreement. However, this hand over letter, in my opinion, does not come in the way of the complainants seeking compensation from this Commission under section 14(1)(d) of the Consumer Protection Act for the delay in delivery of possession. The said delay amounting to a deficiency in*

the services offered by the OP to the complainants. The right to seek compensation for the deficiency in the service was never given up by the complainants. Moreover, the Consumer Complaint was also pending before this Commission at the time the unit was handed over to the complainants. Therefore, the complainants, in my view, cannot be said to have relinquished their legal right to claim compensation from the OP merely because the basis of the unit has been taken by them in terms of printed hand over letter and the Sale Deed has also been got executed by them in their favour."

37. Therefore, the authority is of the view that the aforesaid unit handover letter dated 29.11.2019 does not preclude the complainants from exercising their right to claim delay possession charges as per the provisions of the Act.

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

38. The respondent submitted that the complainants have executed the conveyance deed on 25.11.2020 and therefore, the transaction between the complainants and the respondent have been concluded and no right or liability can be asserted by respondent or the complainants against the other. Therefore, the complainants are estopped from claiming any interest in the facts and circumstances of the case. The present complaint is nothing but a gross misuse of process of law.

39. It is important to look at the definition of the term 'deed' itself in order to understand the extent of the relationship between an allottee and promoter. A deed is a written document or an instrument that is sealed, signed and delivered by all the parties to the contract (buyer and seller). It is a contractual document that includes legally valid terms and is

enforceable in a court of law. It is mandatory that a deed should be in writing, and both the parties involved must sign the document. Thus, a conveyance deed is essentially one wherein the seller transfers all rights to legally own, keep and enjoy a particular asset, immovable or movable. In this case, the asset under consideration is immovable property. On signing a conveyance deed, the original owner transfers all legal rights over the property in question to the buyer, against a valid consideration (usually monetary). Therefore, a 'conveyance deed' or 'sale deed' implies that the seller signs a document stating that all authority and ownership of the property in question has been transferred to the buyer.

40. From the above, it is clear that on execution of a sale/ conveyance deed, only the title and interests in the said immovable property (herein the allotted unit) is transferred. However, the conveyance deed does not mark an end to the liabilities of a promoter since various sections of the Act provide for continuing liability and obligations of a promoter who may not under the garb of such contentions be able to avoid its responsibility. The relevant sections are reproduced hereunder:

> *"**11. Functions and duties of promoter***
>
> *(1) XXX*
> *(2) XXX*
> *(3) XXX*
> *(4) The promoter shall—*
>
> *(a) be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the*

agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be.

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

(b) XXX

(c) XXX

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

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

(1) XXX

(2) XXX

(3) In case any structural defect or any other defect in workmanship, quality or provision of services or any other obligations of the promoter as per the agreement for sale relating to such development is brought to the notice of the promoter within a period of five years by the allottee from the date of handing over possession, it shall be the duty of the promoter to rectify such defects without further charge, within thirty days, and in the event of promoter's failure to rectify such defects within such time, the aggrieved allottees shall be entitled to receive appropriate compensation in the manner as provided under this Act....." *(emphasis supplied)*

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

"7. It would thus be seen that the complainants while taking possession in terms of the above referred printed handover letter of the OP, can, at best, be said to have discharged the OP of its liabilities and obligations as enumerated in the agreement. However, this hand over letter, in my opinion, does not come in the way of the

complainants seeking compensation from this Commission under section 14(1)(d) of the Consumer Protection Act for the delay in delivery of possession. The said delay amounting to a deficiency in the services offered by the OP to the complainants. The right to seek compensation for the deficiency in the service was never given up by the complainants. Moreover, the Consumer Complaint was also pending before this Commission at the time the unit was handed over to the complainants. Therefore, the complainants, in my view, cannot be said to have relinquished their legal right to claim compensation from the OP merely because the basis of the unit has been taken by them in terms of printed hand over letter and the Sale Deed has also been got executed by them in their favour.

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

42. From above, it can be said that taking over the possession and thereafter execution of the conveyance deed can best be termed as respondent having discharged its liabilities as per the buyer's agreement and upon taking possession, and/or executing conveyance deed, the complainants never gave up their statutory right to seek delayed possession charges as per the provisions of the said Act. Also, the same view has been upheld by the Hon'ble Supreme Court in case titled as **Wg. Cdr. Arifur Rahman Khan and Aleya Sultana and Ors. Vs. DLF Southern Homes Pvt. Ltd. (now Known as BEGUR OMR Homes Pvt. Ltd.) and Ors. (Civil appeal no. 6239 of 2019) dated 24.08.2020,** the relevant paras are reproduced herein below:

"34 The developer has not disputed these communications. Though these are four communications issued by the developer, the appellants submitted that they are not isolated aberrations but fit into a pattern. The developer does not state that it was willing to offer the flat purchasers possession of their flats and the right to execute conveyance of the flats while reserving their claim for compensation for delay. On the contrary, the tenor of the communications indicates

that while executing the Deeds of Conveyance, the flat buyers were informed that no form of protest or reservation would be acceptable. The flat buyers were essentially presented with an unfair choice of either retaining their right to pursue their claims (in which event they would not get possession or title in the meantime) or to forsake the claims in order to perfect their title to the flats for which they had paid valuable consideration. In this backdrop, the simple question which we need to address is whether a flat buyer who seeks to espouse a claim against the developer for delayed possession can as a consequence of doing so be compelled to defer the right to obtain a conveyance to perfect their title. It would, in our view, be manifestly unreasonable to expect that in order to pursue a claim for compensation for delayed handing over of possession, the purchaser must indefinitely defer obtaining a conveyance of the premises purchased or, if they seek to obtain a Deed of Conveyance to forsake the right to claim compensation. This basically is a position which the NCDRC has espoused. We cannot countenance that view.

35. The flat purchasers invested hard earned money. It is only reasonable to presume that the next logical step is for the purchaser to perfect the title to the premises which have been allotted under the terms of the ABA. But the submission of the developer is that the purchaser forsakes the remedy before the consumer forum by seeking a Deed of Conveyance. To accept such a construction would lead to an absurd consequence of requiring the purchaser either to abandon a just claim as a condition for obtaining the conveyance or to indefinitely delay the execution of the Deed of Conveyance pending protracted consumer litigation."

43. It is observed that all the agreements/ documents signed by the allottee reveals stark incongruities between the remedies available to both the parties. In most of the cases, these documents and contracts are ex-facie one sided, unfair and unreasonable whether the plea has been taken by the allottee while filing its complaint that the documents were signed under duress or not. The right of the allottee to claim delayed possession charges shall not be abrogated simply for the said reason.

44. The allottees have invested their hard-earned money which there is no doubt that the promoter has been enjoying benefits of and the next step

is to get their title perfected by executing a conveyance deed which is the statutory right of the allottee. Also, the obligation of the developer – promoter does not end with the execution of a conveyance deed. The essence and purpose of the Act was to curb the menace created by the developer/promoter and safeguard the interests of the allottees by protecting them from being exploited by the dominant position of the developer which he thrusts on the innocent allottees. Therefore, in furtherance to the Hon'ble Apex Court judgement and the law laid down in the **Wg. Cdr. Arifur Rahman (supra)**, this authority holds that even after execution of the conveyance deed, the complainants cannot be precluded from their right to seek delay possession charges from the respondent-promoter.

G. Findings of the authority

G.I Delay possession charges

45. **Relief sought by the complainants:** Direct the respondent to pay the complainants prescribed interest as per the terms of the Act on delay in handing over the possession of the apartment.

46. In the present complaint, the complainants intend to continue with the project and are seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under.

> ***"Section 18: - Return of amount and compensation***

18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building, —

.....

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."

47. Clause 14(a) of the buyer's agreement provides time period for handing over the possession and the same is reproduced below:

"14. POSSESSION

*(a) **Time of handing over the Possession***

*Subject to terms of this clause and 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 upon complying with all provisions, formalities, documentation etc. as prescribed by the Developer, the Developer shall make all efforts to handover possession of the Unit (which falls within ground plus four floors tower/building) within a period of thirty (30) months from the date of commencement of construction, and **for the Unit (which falls within ground plus thirteen floors tower/building) within a period of thirty six (36) months from the commencement of construction**, subject to certain limitations as may be provided in this Agreement and timely compliance of the provisions of this Agreement by the Allottee(s). The Allottee(s) agrees and understands that the Developer shall be entitled to a **grace period of three (3) months, for applying and obtaining the occupation certificate in respect of the Unit and/or the Project."*** *(Emphasis supplied)*

48. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement, and the complainants not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in

favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment time period for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottees of their right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

49. **Due date of handing over possession and admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within 36 (thirty-six) months from the date of commencement of construction and further provided in agreement that promoter shall be entitled to a grace period of 3 months for applying and obtaining occupation certificate in respect of said unit. The date of start of construction is 13.08.2012 as per statement of account dated 18.03.2021. The period of 36 months expired on 13.08.2015. As a matter of fact, the promoter has not applied to the concerned authority for obtaining occupation certificate within the time limit (36 months) prescribed by the promoter in the buyer's agreement. The promoter has moved the application for issuance of occupation certificate only on

07.06.2019 when the period of 36 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 3 months cannot be allowed to the promoter at this stage.

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

> ***Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]***
> *(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.:*
> *Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.*

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

52. Consequently, as per website of the State Bank of India i.e., https://sbi.co.in, the marginal cost of lending rate (in short, MCLR) as on date i.e., 21.12.2021 is 7.30%. Accordingly, the prescribed rate of interest will be MCLR +2% i.e., 9.30%.

53. **Rate of interest to be paid by the complainants in case of delay in making payments-** The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

> *"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.*
> *Explanation. —For the purpose of this clause—*
> *(i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*
> *(ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"*

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

55. On consideration of the documents available on record and submissions made by the parties regarding contravention as per provisions of the

Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 14(a) of the buyer's agreement executed between the parties on 08.11.2010, the possession of the subject flat was to be delivered within a period of 36 months from the date of commencement of construction plus 3 months grace period for applying and obtaining the occupation certificate in respect of the unit and/or the project. The construction was started on 13.08.2012. 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 13.08.2015. Occupation certificate was granted by the concerned authority on 08.08.2019 and thereafter, the possession of the subject flat was offered to the complainants on 16.08.2019. Copies of the same have been placed on record. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the subject flat to the complainants as per the terms and conditions of the buyer's agreement dated 08.11.2010 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 08.11.2010 to hand over the possession within the stipulated period.

56. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation

certificate. In the present complaint, the occupation certificate was granted by the competent authority on 08.08.2019. The respondent offered the possession of the unit in question to the complainants only on 16.08.2019, so it can be said that the complainants came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the complainants should be given 2 months' time from the date of offer of possession. These 2 months' of reasonable time is being given to the complainants keeping in mind that even after intimation of possession practically they have to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e. 13.08.2015 till the expiry of 2 months from the date of offer of possession (16.08.2019) which comes out to be 16.10.2019.

57. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainants are entitled to delayed possession at prescribed rate of interest i.e. 9.30% p.a. w.e.f. 13.08.2015 till 16.10.2019 as per provisions of section 18(1) of the Act read with rule 15 of the rules.

58. Also, the amount of Rs.8,68,788/- (as per statement of account dated 18.03.2021) so paid by the respondent to the complainants towards compensation for delay in handing over possession shall be adjusted towards the delay possession charges to be paid by the respondent in terms of proviso to section 18(1) of the Act.

G.II Car parking

59. **Relief sought by the complainants:** To provide the complainants with the 3-parking space that were promised along with compensation and to re-allocate the parking in the promised space in basement 1.

60. The authority observes that clause 1.3 of the buyer's agreement executed between the original allottees and the respondent which was further endorsed in favour of the complainants mentions that two parking spaces will be allotted to the complainants. There has been no mention of a third car parking space. Also, it was not specified where the allotted parking spaces would be located.

61. However, vide email dated 16.07.2018, the complainants have requested the respondent to provide additional car park and the said request was acceded by the respondent vide email dated 19.07.2018 whereby the respondent has offered additional car park and shifting of existing car park subject to subsequent payment of Rs.4,72,000/-. As per statement of account dated 18.03.2021, the complainants have made payment of Rs.4,72,000/- towards the same.

62. Therefore, in light of the above, the complainants are entitled for refund of Rs.4,72,000/- paid for allotment of third car parking space on account of failure of the respondent to make available third parking as per the requirement of the complainants.

G.III Service tax and GST

63. **Relief sought by the complainants:** Direct the respondent to refund/waive off service tax that is levied on the complainants.

64. The authority in complaint titled as ***Varun Gupta Versus Emaar MGF Land Ltd. (CR/4031/2019)***, has decided the issue of service tax wherein it was held that with respect to the relief of service tax, advice of service tax expert should be taken about the quantum of service tax payable in given circumstances of the allottee up to the due date of offering of possession of the apartments. Accordingly, whatever service tax is payable up to the due date of offer of possession shall be demanded by the promoter and will be paid by the allottees.

65. In the present case, the due date of possession is 13.08.2015 and the incidence of GST came into operation thereafter on 01.07.2017. So, the complainants cannot be burdened to discharge a liability which had accrued solely due to respondents' own fault in delivering timely possession of the subject unit. So, the respondent/promoter is not entitled to charge GST from the complainants/allottees as the liability of GST had not become due up to the due date of possession as per the

said agreement. The service tax/GST up to the due date of offer of possession shall be demanded by the promoter and will be paid by the allottees and not thereafter.

H. Directions of the authority

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

i. The respondent is directed to pay the interest at the prescribed rate i.e. 9.30% per annum for every month of delay on the amount paid by the complainants from due date of possession i.e. 13.08.2015 till 16.10.2019 i.e. expiry of 2 months from the date of offer of possession (16.08.2019). The arrears of interest accrued so far shall be paid to the complainants within 90 days from the date of this order as per rule 16(2) of the rules.

ii. Also, the amount of Rs.8,68,788/- so paid by the respondent towards compensation for delay in handing over possession shall be adjusted towards the delay possession charges to be paid by the respondent in terms of proviso to section 18(1) of the Act.

iii. The complainants are entitled for refund of Rs.4,72,000/- paid for allotment of third car parking space on account of failure of the

respondent to make available third parking as per the requirement of the complainants.

iv. The service tax/GST up to the due date of offer of possession shall be demanded by the promoter and will be paid by the complainants and not thereafter.

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

67. Complaint stands disposed of.

68. File 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.