

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

Complaint no. : 1013 of 2021
Complaint filed on : 18.02.2021
First date of hearing : 26.03.2021
Date of decision : 21.12.2021

1. Kuldeep Kumar
2. Pooja Garg
Both RR/o: Flat no.1203, Downtown 01,
Uniworld City, Rajahrat, New Town Kolkata-700160.

Complainants

Versus

M/s Emaar MGF Land Ltd.
Office: Emaar Business Park, M.G. Road,
Sikandarpur Chowk, Sector 28, Gurugram-122001.

Respondent

CORAM:

Dr. K.K Khandelwal
Shri Vijay Kumar Goyal

**Chairman
Member**

APPEARANCE:

None
Shri J.K. Dang

On behalf of the complainants
Advocate for the respondent

ORDER

1. The present complaint dated 18.02.2021 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	Palm Hills, Sector 77, Gurugram, Haryana
2.	Project area	24.477 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no. and validity status	a) 56 of 2009 dated 31.08.2009 (For 24.4 acres) Valid/renewed up to 30.08.2024 b) 62 of 2013 dated 05.08.2013 (For 4.87 acres) Valid/renewed up to 04.08.2019
5.	HRERA registered/ not registered	Registered vide no. 256 of 2017 dated 03.10.2017 for 45425.87 sq. mtrs.
	HRERA registration valid up to	02.10.2022
6.	Occupation certificate granted on	24.12.2019 [annexure R15, page 142 of reply]
7.	Allotment letter dated	07.04.2010 [annexure A, page 25 of complaint]
8.	Unit no.	PH3-24-0501, 5 th floor, building no. 24 [annexure A1, page 50 of complaint]
9.	Unit measuring	1450 sq. ft. [Page 50 of complaint]
10.	Date of execution of buyer's agreement	31.08.2010 [annexure B, page 27 of complaint]
11.	Payment plan	Construction linked payment plan
12.	Total consideration as per statement of account dated 18.03.2021 at page 123 of reply	Rs. 59,83,768/-

13.	Total amount paid by the complainants as per statement of account dated 18.03.2021 at page 124 of reply	Rs. 60,28,787/-
14.	Date of start of construction as per statement of account dated 18.03.2021 at page 123 of reply	25.02.2011
15.	Due date of delivery of possession as per clause 11(a) of the said agreement i.e. 33 months from the date of start of construction (25.02.2011) + grace period of 3 months, for applying and obtaining completion certificate/ occupation certificate in respect of the unit and/or the project. [Page 41 of complaint]	25.11.2013 [Note: Grace period is not included]
16.	Date of offer of possession to the complainants	26.01.2020 [annexure R9, page 114 of reply]
17.	Unit handover letter signed by the complainants on	28.08.2020 [annexure R10, page 122 of reply]
18.	Delay in handing over possession w.e.f. 25.11.2013 till 26.03.2020 i.e. date of offer of possession (26.01.2020) + 2 months	6 years 4 months 1 day
19.	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 124 of reply	Rs. 7,72,274

B. Facts of the complaint

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

- i. That pursuant to the elaborate advertisements, assurances, representations and promises made by respondent in the brochure circulated by it about the timely completion of the said project and

believing the same to be correct and true, the complainants considered booking a unit i.e., PH3-24-0501 in the said project. It was represented and assured by the respondent that the Project including the flat of the complainants would be completed within time along with possession of the flat.

- ii. That relying upon the respondent's representations and being assured that the respondent would abide by its commitment, the complainants in good faith booked a unit in the said project on 20.03.2010 by paying a booking amount of Rs.5,00,000/-. Pursuant to the booking of the unit, a buyer's agreement dated 31.08.2010 was executed between the parties which included all the details of the project such as amenities promised, site plan, payment schedule, date of completion etc. Under the said buyer's agreement, the respondent promised, assured, represented and committed to the complainants that this residential project would be completed and will be handed over to the buyer within the above-mentioned stipulated period of time. An allotment letter was issued in favour of the complainants on 17.01.2012 confirming the booking of the abovementioned unit in the said project.
- iii. That the complainants were shocked and appalled when visited the project site in 2013, as they saw meagre construction was undertaken for reasons best known to the respondent and thereby giving the impression that the respondent has delayed the project

grossly. The complainants on multiple occasions had to pursue the respondent for enquiring about the progress of the construction of the project but no reasonable explanation was received from the respondent.

- iv. That the defendant after a horrible delay spanning over 7 years approx., sent a letter of offer of possession dated 26.01.2020 to complainants to complete the remaining formalities and payments before 25.02.2020. It is also pertinent to mention that the complainants acting in conformity to the letter paid up the total amount for the unit and completed remaining formalities within the stipulated time. After submitting all the requisite documents and after paying the balance amount under the stipulated time, the respondent again delayed in handing over the actual possession of the unit for the reasons best known to the respondent. Due to the careless and negligent attitude of the respondent the actual possession of the unit was finally delivered to complainants on 27.08.2020.
- v. That after multiple persuasions and follow-ups regarding the delay penalty charges that is to be paid to the complainants, it is pertinent to mention that the delay penalty charges that was credited in the statement of account of the complainants was only Rs.7,72,274 which is way less than the RERA applicable rates. Moreover, it is also not out of the place to mention that the

respondent only paid the delay penalty charges up to 24.01.2020 whereas the actual possession handover date is 27.08.2020. The respondent is in breach of the agreement and the various provisions of the Act and the rules.

C. Relief sought by the complainants

4. The complainants are seeking the following relief:

- i. Direct the respondent to pay interest at prescribed rate on account of delay in offering possession of the subject unit on the amount paid by the complainants as sale consideration of the said flat.
- ii. Promoter be ordered to pay for harassment caused to the complainants amounting to Rs.10,00,000/- along with cost of litigation to the tune of Rs. 2,00,000/-.

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 the alleged delay in delivering possession of the unit booked by them. It is respectfully submitted that complaints pertaining to compensation and interest are to be decided by the adjudicating officer under section 71 of the Act read with rule 29 of the rules and not by this hon'ble authority. The present complaint is liable to be dismissed on this ground alone. Moreover, the adjudicating officer derives his jurisdiction from the Central Act which cannot be negated by the rules made thereunder.

- ii. That present complaint is based on an erroneous interpretation of the provisions of the Act as well as an incorrect understanding of the terms and conditions of the buyer's agreement dated 31.08.2010. That 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. The provisions of the Act relied upon by the complainants for seeking interest or compensation cannot be called in to aid in derogation and in negation of the provisions of the buyer's agreement. The complainants cannot claim any relief which is not contemplated under the provisions of the buyer's agreement. Assuming, without in any manner admitting any delay on the part of the respondent in delivering possession, it is submitted that 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 or contrary to the agreed terms and conditions between the parties.
- iii. That apartment bearing no. PH3-24-0501 was provisionally allotted to the complainants vide allotment letter dated 07.04.2010. The buyer's agreement dated 31.08.2010 had been executed by the complainant no.1 along with Mr. Jagdish Prasad and the respondent. It is pertinent to mention that the above-mentioned agreement was executed voluntarily by the allottees after reading and understanding the terms and conditions therein. In fact, prior to approaching the respondent, the allottees had made extensive, elaborate and independent enquiries regarding

- the project. Only after being fully satisfied with regard to all aspects of the project, including but not limited to the capacity/capability of the respondent to undertake conceptualization, promotion, development and construction of the same, did the allottees take an independent and informed decision to purchase the apartment.
- iv. That the complainant no.1 had executed an affidavit wherein he stated that the name of Mr. Jagdish Prasad be removed as co-applicant in the records of the company. Moreover, indemnity cum undertaking dated 22.07.2010 had also been executed by Mr. Jagdish Prasad in favour of the respondent with respect to deletion of his name. Furthermore, indemnity cum undertaking dated 09.01.2012 had been executed by complainant no.1 in favour of the respondent wherein it had been stated by the complainant no. 1 that he wished to add the name of complainant no.2 as co-applicant.
- v. That the complainants had agreed and undertaken to make payment of sale consideration in accordance with the payment plan but failed to do so. Consequently, the respondent was constrained to issue demand notices and reminders for payment to the complainants. Statement of account reflects the payments made by the complainants and the delayed payment interest accrued thereon as on 18.03.2021.
- vi. That clause 11(b)(iv) of the buyer's agreement provides that in case of any default/delay by the allottees in payment as per schedule of payment incorporated in the buyer's agreement, the date of handing over of possession shall be extended accordingly,

solely on the respondent's discretion till the payment of all outstanding amounts to the satisfaction of the respondent. Since, the complainants have defaulted in timely remittance of payments as per schedule of payment the date of delivery of possession is not liable to be determined in the manner sought to be done by the complainants.

- vii. That the complainants, having defaulted in payment of instalments, are not entitled to any compensation or any amount towards interest under the buyer's agreement in terms of clause 13 of the buyer's agreement. It is submitted that the complainants by way of instant complaint is demanding interest for alleged delay in delivery of possession. The interest is compensatory in nature and cannot be granted in derogation and ignorance of the provisions of the buyer's agreement. It is pertinent to mention that the respondent has credited a sum of Rs.7,72,274/- in the account of the complainants, which has been duly accepted by the complainants. Without prejudice to the rights of the respondent, interest if any, has to be calculated only on the principal amount deposited by the allottees/complainants and not on any amounts credited by the respondent. Furthermore, the complainants are not liable to be paid any more amount by the respondent besides the amount which has already been credited to the account of complainants.
- viii. That despite there being a number of defaulters in the project, the respondent itself infused funds into the project and has diligently developed the project in question. It is submitted that the

respondent had applied for grant of occupation certificate vide application dated 26.04.2017. Occupation certificate was thereafter granted by the concerned statutory authority vide memo bearing no. ZP-567-Vol-I/JD(RD)/2019/31934 dated 24.12.2019. That once an application for grant of occupation certificate is submitted before the concerned statutory authority, the respondent ceases to have any control over the same. The sanction of the occupation certificate is the prerogative of the concerned statutory authority, and the respondent does not exercise any control over the matter. As far as the respondent is concerned, it has diligently and sincerely pursued the matter before the said statutory authority. Therefore, the time period utilised by the concerned statutory authority for grant of occupation certificate is necessarily required to be excluded from computation of the time utilised by the respondent in implementation and development of the project.

- ix. That vide letter of offer of possession dated 26.01.2020, the respondent has offered possession of the apartment to the complainants and called upon them to make payment of balance sale consideration and complete the requisite formalities to enable the respondent to hand over possession to the complainants. It is submitted that possession of the unit had been delivered to the complainants on 28.08.2020. That there has not been any delay on the part of the respondent in offering possession of the apartment to the complainants in accordance with the buyer's agreement.

- x. That the project of the respondent is an "ongoing project" under the Act and the same has been registered under the Act and the rules. Registration certificate was granted by the Haryana Real Estate Regulatory Authority vide memo no. HRERA-606/2017/1248 dated 03.10.2017. That this hon'ble authority has granted 02.10.2022 as the date of completion of the project and therefore cause of action, if any, would accrue in favour of the complainants to file a complaint for seeking any interest as alleged if and only the respondent fails to offer possession of the unit in question within the aforesaid time. Thus, the complaint is liable to be dismissed on this ground alone.
- xi. That the respondent submitted that the project has got delayed on account of following reasons which were/are beyond the power and control of the respondent. *Firstly*, the National Building Code was revised in the year 2016 and in terms of the same, all high-rise buildings (i.e. buildings having height of 15 mtrs. and above), irrespective of area of each floor, are now required to have two staircases. Eventually, so as to not cause any further delay in the project and so as to avoid jeopardising the safety of the occupants of the buildings in question including the building in which the apartment in question is situated, the respondent has taken a decision to go ahead and construct the second staircase and the respondent has succeeded in completing construction of the apartment in question and the occupation certificate in respect thereof has been received on 24.12.2019. Thereafter, the possession of the apartment has been offered to the complainants

vide offer of possession letter dated 03.01.2020. *Secondly*, the respondent had to engage the services of Mitra Guha, a reputed contractor in real estate, to provide multi-level car parking in the project. The said contractor started raising certain false and frivolous issues with the respondent due to which the contractor slowed down the progress of work at site. Any lack of performance from a reputed cannot be attributed to the respondent as the same was beyond its control.

- xii. That several allottees, including the complainants have defaulted in timely remittance of payment of installments which was an essential, crucial and an indispensable requirement for conceptualization 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. Therefore, there is no default or lapse on the part of the respondent. It is evident from the entire sequence of events, that no illegality can be attributed to the respondent. 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.

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 Objection regarding handing over possession as per declaration given under section 4(2)(1)(C) of the Act

13. The respondent submitted that authority has granted 02.10.2022 as the date of completion of the project and therefore the respondent is required to complete the construction of the apartment in question and offer possession of the same to the complainants on or before 02.10.2022 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 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.

14. 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.

15. Section 4(2)(1)(C) of the Act requires that while applying for registration of the real estate project, the promoter has to file a declaration under section 4(2)(1)(C) of the Act and the same is reproduced as under: -

Section 4: - Application for registration of real estate projects

(2)The promoter shall enclose the following documents along with the application referred to in sub-section (1), namely: —.....

(1): -a declaration, supported by an affidavit, which shall be signed by the promoter or any person authorised by the promoter, stating: —

.....
(C) the time period within which he undertakes to complete the project or phase thereof, as the case may be...."

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

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

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

17. As far as contention of the respondent with respect to the exclusion of time taken by the competent authority in processing the application and

issuance of occupation certificate is concerned, the authority observed that the respondent had applied for grant of occupation certificate on 21.02.2019 and thereafter vide memo no. ZP-567-Vol-1/JD(RD)/2019/31934 dated 24.12.2019, the occupation certificate has been granted by the competent authority under the prevailing law. The authority cannot be a silent spectator to the deficiencies in the application submitted by the promoter for issuance of occupancy certificate. It is evident from the occupation certificate dated 24.12.2019 that an incomplete application for grant of OC was applied on 21.02.2019 as fire NOC from the competent authority was granted only on 12.12.2019 which is subsequent to the filing of application for occupation certificate. Also, the Chief Engineer-1, HSVP, Panchkula has submitted his requisite report in respect of the said project on 06.12.2019. The District Town Planner, Gurugram and Senior Town Planner, Gurugram has submitted requisite report about this project on 29.11.2019 and 02.12.2019 respectively. As such, the application submitted on 21.02.2019 was incomplete and an incomplete application is no application in the eyes of law.

18. The application for issuance of occupancy certificate shall be moved in the prescribed forms and accompanied by the documents mentioned in sub-code 4.10.1 of the Haryana Building Code, 2017. As per sub-code 4.10.4 of the said Code, after receipt of application for grant of occupation certificate, the competent authority shall communicate in

writing within 60 days, its decision for grant/ refusal of such permission for occupation of the building in Form BR-VII. In the present case, the respondent has completed its application for occupation certificate only on 12.12.2019 and consequently the concerned authority has granted occupation certificate on 24.12.2019. Therefore, in view of the deficiency in the said application dated 21.02.2019 and aforesaid reasons, no delay in granting occupation certificate can be attributed to the concerned statutory authority.

G. Findings of the authority

G.1 Delay possession charges

19. **Relief sought by the complainants:** Direct the respondent to pay interest at prescribed rate on account of delay in offering possession of the subject unit on the amount paid by the complainants as sale consideration of the said flat.
20. 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."

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

"11. POSSESSION

(a) Time of handing over the Possession

*Subject to terms of this clause and subject to the Allottee(s) having complied with all the terms and conditions of this Buyer's Agreement, and not being in default under any of the provisions of this Buyer's Agreement and compliance with all provisions, formalities, documentation etc. as prescribed by the Company, the Company proposes to hand over the possession of the Unit within **33 months from the date of start of construction**, subject to timely compliance of the provisions of the Buyer's Agreement by the Allottee. The Allottee(s) agrees and understands that the Company shall be entitled to **a grace period of 3 months, for applying and obtaining the completion certificate/occupation certificate in respect of the Unit and/or the Project.**"* (Emphasis supplied)

22. 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.

23. **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 33 months from the date of start of construction and further provided in agreement that promoter shall be entitled to a grace period of 3 months for applying and obtaining completion certificate/occupation certificate in respect of said unit. The date of start of construction is 25.02.2011 as per statement of account dated 18.03.2021. The period of 33 months expired on 25.11.2013. As a matter of fact, the promoter has not applied to the concerned authority for obtaining completion certificate/ occupation certificate within the time limit (33 months) prescribed by the promoter in the buyer's agreement. The promoter has moved the application for issuance of occupation certificate only on 21.02.2019 when the period of 33 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.
24. **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.

25. 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.
26. Taking the case from another angle, the complainants-allottees were entitled to the delayed possession charges/interest only at the rate of Rs.7.50/- per sq. ft. per month of the super area as per clause 13 of the buyer's agreement for the period of such delay; whereas, as per clause 1.2(b) of the buyer's agreement, the promoter was entitled to interest @ 24% per annum at the time of every succeeding instalment from the due date of instalment till date of payment on account for the delayed

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

27. 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%.
28. **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;"*

29. 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.
30. 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 11(a) of the buyer's agreement executed between the parties on 31.08.2010, the possession of the subject flat was to be delivered within a period of 33 months from the date of start of construction plus 3 months grace period for applying and obtaining the completion certificate/ occupation certificate in

respect of the unit and/or the project. The construction was started on 25.02.2011. 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 25.11.2013. Occupation certificate was granted by the concerned authority on 24.12.2019 and thereafter, the possession of the subject flat was offered to the complainants on 26.01.2020. Copies of the same have been placed on record. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the subject flat to the complainants as per the terms and conditions of the buyer's agreement dated 31.08.2010 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 31.08.2010 to hand over the possession within the stipulated period.

31. 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 24.12.2019. The respondent offered the possession of the unit in question to the complainants only on 26.01.2020, 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 handing over possession i.e. 25.11.2013 till the expiry of 2 months from the date of offer of possession (26.01.2020) which comes out to be 26.03.2020.

32. 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. 25.11.2013 till 26.03.2020 as per provisions of section 18(1) of the Act read with rule 15 of the rules.
33. Also, the amount of Rs. 7,72,274/- (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 Compensation


34. **Relief sought by the complainants:** Promoter be ordered to pay for harassment caused to the complainants amounting to Rs.10,00,000/- along with cost of litigation to the tune of Rs. 2,00,000/-.
35. 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

36. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):
- i. The respondent is directed to pay the interest at the prescribed rate i.e. 9.30% per annum for every month of delay on the amount paid by the complainants from 25.11.2013 till 26.03.2020 i.e. expiry of 2 months from the date of offer of possession (26.01.2020). 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. 7,72,274/- 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 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.
37. Complaint stands disposed of.
38. 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 27.01.2022.