BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 3191 and 3292 of 2021
Complaints filed on : 13.08.2021
First date of hearing : 01.09.2021
Date of decision : 22.02.2022

NAME OF THE BUILDER		EMAAR INDIA LIMITED (Formerly known as Emaar MGF Land Ltd.)	
PROJECT NAME		COLONNADE	
S.No.	COMPLAINT NO.	COMPLAINT TITLE	APPEARANCE
1.	CR/3191/2021	Nanny Infrastructure Private Limited V/S Emaar India Limited	Sh. Ravinder Singh Sh. J.K. Dang
2.	CR/3192/2021	Nanny Infrastructure Private Limited V/S Emaar India Limited	Sh. Ravinder Singh Sh. J.K. Dang

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

ORDER

1. This order shall dispose off 2 complaints titled as above filed before this authority in Form CRA under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) also 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 parties.

2. The core issues emanating from them are similar in nature and the complainant in the above referred matters are allottees of the project- 'Colonnade' being developed by the same respondent promoter i.e., Emaar MGF Land limited (now known as 'Emaar India Limited' vide Certificate of Incorporation dated 07.10.2020). The terms and conditions of the buyer's agreements that had been executed *inter se* parties are also almost similar with some additions or variation. The fulcrum of the issue involved in all these cases pertains to failure on the part of the respondent/promoter to deliver timely possession of the units in question, seeking award for delayed possession charges. For the above-mentioned reasons, the aforesaid complaints are being dealt with by the common order.

3. The details of the complaints, reply status, unit no., date of allotment letter, date of agreement, date of start of construction, due date of possession, offer of possession and relief sought are given in the table below:

EMAAR INDIA LIMITED **(Formerly known as EMAAR MGF LAND LIMITED)**	
PROJECT NAME	**COLONNADE**
Possession Clause 16(A): Time of Handing over the Possession (i) The Company shall endeavour to offer possession of the Unit to the Allottee **within 42 months from Aug, 2016 from the date of start of construction whichever is earlier**, subject, however, to Force Majeure conditions as stated in clause 34 of this Agreement and further subject to the Allottee having strictly complied with all the terms and conditions of this Agreement and not being in default under any provision of this Agreement and all amounts due and payable by the Allottee under this Agreement having been paid	

in time to the Company. The Company shall give notice to the Allottee, offering in writing, to the Allottee to take possession of the Unit for his occupation and use ("Notice/Intimation of Possession").

(ii) The Allottee agrees and understands that the Company shall be entitled to a **grace period of 4 months** over and above the period more particularly specified here-in-above in clause 16(i)(a), **for applying and obtaining necessary approvals in respect of the Complex**.

Note: Grace period is not included while computing due date of possession.

Sr. No	Complaint No./Title/ Date of filing	Reply status	Unit no.	Date of allotment letter	Date of execution of buyer's agreement	Due date of possession	Offer of possession	Relief sought
1	CR/3191/ 2021 Nanny Infrastructure Private Limited Vs. Emaar India Limited D.O.F- 13.08.2021	05.10. 2021	CHC R-FF-018, First Floor [Page 21 of complaint]	19.07.2016 [Page 71 of complaint]	21.12.2016 [Page 18 of complaint]	01.02.2020	Not offered TC- Rs. 23,58,217 AP- Rs. 12,62,997	1. Possession 2. DPC
2	CR/3192/ 2021 Nanny Infrastructure Private Limited Vs. Emaar India Limited D.O.F- 13.08.2021	05.10. 2021	CHC R-LGF-052, Lower Ground Floor [Page 21 of complaint]	19.07.2016 [Page 71 of complaint]	21.12.2016 [Page 18 of complaint]	01.02.2020	Not offered TC- Rs. 51,07,850 AP- Rs. 27,59,311	1. Possession 2. DPC

Note: In the table referred above certain abbreviations have been used. They are elaborated as follows:

Abbreviation	Full form
D.O.F:	Date of filing of complaint
DPC	Delayed possession charges
TC	Total consideration
AP	Amount paid by the allottee/s

4. The aforesaid complaints dated 13.08.2021 were filed under section 31 of the Act read with rule 28 of the rules by the complainants against the promoter M/s Emaar MGF Land Limited on account of violation of the buyer's agreement executed between the parties in respect of said units for not handing over possession by the due date which is an obligation on the part of the promoter under section 11(4)(a) of the Act ibid apart from the contractual obligation.

5. Since, the buyer's agreements in the aforesaid complaints have been executed prior to the commencement of the Act ibid, therefore, the penal proceedings cannot be initiated retrospectively on account of failure of the promoter to give possession by the due date and violation of provisions of section 11(4)(a) of the Act. Delay possession charges to be paid by the promoter is positive obligation under proviso to section 18 of the Act in case of failure of the promoter to hand over possession by the due date as per builder buyer's agreement.

6. The authority has decided to treat the said complaints as an application for non-compliance of statutory obligations on the part of the promoter/respondent in terms of section 34(f) of the Act which mandates the authority to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under the Act, the rules and the regulations made thereunder.

A. Lead case (CR/3191/2021)

7. The facts of all the complaints filed by the complainants/allottees are almost similar. Out of the above referred matters, the particulars of the lead complaint no. 3191 of 2021 titled as ***Nanny Infrastructure Private Limited Vs. Emaar India Limited (Formerly known as Emaar MGF Land Limited)*** are taken into consideration for determining the right of delayed possession charges of complainant/allottee for deciding the said complaints. The facts of this complaint is considered for disposal of this bunch of matters and the ratio of this complaint shall be applicable in the other complaint also. The requisite particulars of the project, the details of sale consideration, the amount paid by the complainant, date of proposed handing over the possession, delay period, if any, have been detailed in the following table:

S. No.	Heads	Information
1.	Project name and location	Colonnade, Sector 66, Gurugram, Haryana
2.	Project area	2.25 acres
3.	Nature of the project	Commercial complex
4.	DTCP license no. and validity status	163 of 2008 dated 19.08.2008 Valid/renewed up to 18.08.2020
5.	HRERA registered/ not registered	**Registered vide no. 156 of 2017 dated 28.08.2017** **Valid till 30.06.2020**
6.	Occupation certificate granted on	Yet to be applied [As per affidavit dated 06.12.2021 filed by the respondent]
7.	Date of allotment letter	19.07.2016 [Page 71 of complaint]
8.	Unit no.	CHC R-FF-018, First Floor

		[Page 21 of complaint]
9.	Unit measuring	297 sq. ft. [Page 21 of complaint]
10.	Date of execution of buyer's agreement	21.12.2016 [Page no. 18 of complaint]
11.	Payment plan	Construction linked payment plan [Page 46 of complaint]
12.	Total consideration of said unit as per schedule of payment annexed with the buyer's agreement	Rs. 23,58,217/-
13.	Total amount paid by the complainant as alleged at page 7 of complaint	Rs.12,62,997/-
14.	Possession clause	***16. Possession*** ***(a) Time of handing over the Possession*** *(i) The Company shall endeavour to offer possession of the Unit to the Allottee within* ***42 months from Aug, 2016 from the date of start of construction whichever is earlier****, subject, however, to Force Majeure conditions as stated in clause 34 of the Agreement and further subject to the Allottee having strictly complied with all the terms and conditions of this Agreement and not being in default under any provision of this Agreement and all amounts due and payable by the Allottee under this Agreement having been paid in time to the Company. The company shall give notice to the Allottee, offering in writing, to the Allottee to take possession of the Unit for his occupation and use ("Notice/Intimation of Possession")* *(ii) The Allottee agrees and understands that the Company shall be entitled to a* ***grace period of 4 months over and***

		above the period more particularly specified here-in-above in clause 16(i)(a), for applying and obtaining necessary approvals in respect of the Complex.
15.	Date of start of construction	Cannot be ascertained
16.	Due date of delivery of possession as per clause 8 of the said agreement	01.02.2020 (**Note:** Due date of handing over possession is calculated from 01.08.2016)
17.	Date of offer of possession to the complainant	Not offered
18.	Delay in handing over possession w.e.f. 01.02.2020 till date of decision	2 years 21 days

B. Facts of the complaint

8. The complainant made the following submissions in the complaint:

i. That the respondent/developer got a license bearing no. 163 of 2008 dated 19.08.2008, for the commercial complex project developed by the respondent in the name of 'Colonnade' in Sector-66, Gurugram, Haryana. The complainant on 22.08.2016 applied for booking of unit in the commercial complex project namely 'Colonnade' at Sector-66, Gurugram of the respondent and with the booking transferred in the name of the complainant from Mr. Narender Singh Chauhan, the complainant was allotted unit bearing no. **CHC R-FF-018** admeasuring 27.59 sq. meters (297 sq. ft.). The allotment of the said unit is fully paid, and nothing more remains to be paid.

ii. That the complainant formally entered into a buyer's agreement dated 21.12.2016 in respect of the said unit with the respondent. As per clause 16(a)(i) of the buyer's agreement, the possession for the said unit was supposed to be delivered within 42 months from August 2016 i.e. by February 2020. In the month of February 2020, when the possession of the unit as per the buyer's agreement fell due, the complainant approached the respondent for possession of the said unit, but the respondent started dillydallying on the issue of possession of the said unit.

iii. That since then, the complainant has been following up with the respondent through its representatives but the respondent for the reason that it has not completed the unit, is evading to hand over the possession of the said unit to the complainant much less coming forward to execute and register conveyance deed in respect of the said unit in favour of the complainant. This is in spite of the fact that the allotment of the said unit is fully paid. Resultantly, there has been a huge delay in handing over the possession of the unit.

iv. That as the respondent has refused to abide the terms of the buyer's agreement and the prevailing law as per the Act, and its rules and regulations, therefore having no other option, the complainant has approached the authority for adjudication of its claim for possession of the unit and grant of interest for the period

of delay along with other reliefs as prayed herein. Hence, this present complaint.

C. Relief sought by the complainant

9. The complainant is seeking the following relief:

   i. Direct the respondent to provide possession of the unit no. CHC R-FF-018 in the commercial complex project namely 'Colonnade' in Sector-66, Gurugram.

   ii. Direct the respondent company to pay interest on the delay in handing over the possession with effect from February, 2020 till realization of the same in view of the violation of section 18 of the Act.

   iii. Direct the respondent to pay an amount of Rs.2,50,000/- as litigation expenses.

D. Reply filed by the respondent

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

   i. That the complainant has filed the captioned complaint seeking possession, interest on delay of possession and costs in respect of unit no. CHC R-FF-018 admeasuring 297 sq. ft. ("subject unit") allotted by the respondent in favour of the complainant in its project Colonnade located at Sector 66, Gurugram, Haryana.

   ii. That the complainant is not an allottee under the Act. The complainant has no locus standi to maintain the present complaint before this hon'ble authority as it does not fall within the ambit of an "allottee" as defined under section 2(d) of the Act. The provision

clearly provides that an "allottee" does not include any person to whom a unit has been given on rent. In the present case, the terms between the complainant and the respondent in respect of the subject unit clearly provides that the allotment is on a lease basis and apart from the lease premium, an annual lease rent shall also be payable by the complainant after the execution of the lease deed. Thus, since the subject unit has been allotted in consideration of rent to be paid periodically after the execution of lease deed, the complainant cannot be said to be an "allottee" under the Act. Accordingly, the complainant is not entitled to approach this hon'ble authority for any relief.

iii. That the complaint (filed under section 18) is not maintainable since there is no violation of section 18 of the Act. The buyer's agreement dated 21.12.2016 sets out various circumstances in which the date of possession of the subject unit shall be extended. These are circumstances that directly impact the ability of the respondent to develop and deliver the subject unit as per the agreed timeline. On account of the occurrence of multiple such circumstances, the date of possession of the subject unit stands extended in terms of the buyer's agreement. Accordingly, the complaint is incorrect and not maintainable. In any event, the complaint is not maintainable because the complainant has failed to fulfil its duties and obligation under section 19 of the Act, which requires the complainant to make all necessary payments in a timely manner. It is submitted that the buyer's agreement clearly records that a sum of Rs.22,49,626.50/- is payable as lease premium for the subject unit, along with taxes and charges as

applicable. However, as per the complainant's own admission, only an amount of Rs.12,62,997/- has been paid by the Complainant till date. In view of the amount still remaining to be paid, the complainant is not entitled to the possession of the subject unit and its averment that *"the allotment of the said Unit is fully paid. Resultantly, there has been a huge delay in handing over the possession of the Unit"* is entirely untrue. Further, as per rule 28 of the rules, a complaint under section 31 of the Act can be filed for any alleged violation or contravention of the provisions of the Act. In the present case, there is no violation or contravention of the Act and as such, the complaint is liable to be dismissed.

iv. That the complainant has deliberately suppressed material events and facts in a malicious attempt to evade the fulfilment of contractual obligations and the complainant has approached this hon'ble authority with unclean hands and as such no relief, much less the relief prayed for, should be granted to the complainant. The complainant company is a related entity of MGF Developments Limited ("**MGFD**"), which acts as the controlling mind of the complainant. All actions and steps undertaken by the complainant company are at the behest and instruction of MGFD, whose financial statements also disclose and showcase the complainant as an entity over which its holding/ subsidiary exercises *"a significant influence"*. In this regard, it may also be noted that the e-mail address furnished by the complainant while applying for allotment of the subject unit in January 2016 is the same as MGFD's, i.e., 'tax@mgfindia.com'. The respondent and MGFD are currently engaged in disputes across several fora and accordingly, this

complaint is merely a cog in the wheel of MGFD's *mala fide* campaign to browbeat the respondent into conceding to its unlawful and illegal demands in those disputes.

v. That the complainant has also suppressed the fact that between December 2005 and May 2016, it was MGFD and its promoter, Mr. Shravan Gupta who were exercising complete control over the management and day-to-day affairs of the respondent company. In 2011, the respondent (under control of MGFD) collaborated with Green Heights Infrastructure Pvt. Ltd. ("**Green Heights**") for the development of the Colonnade project. However, the collaboration was abruptly terminated in 2012. After the termination, the MGFD-controlled respondent failed to repay various amounts due to Green Heights and also violated various provisions of the termination. Aggrieved, Green Heights also initiated criminal proceedings and filed FIR No. 0404 against *inter alia* the respondent and Mr. Shravan Gupta on 24.12.2015. To avoid further litigation, the respondent entered into a settlement agreement with Green Heights in February 2016. Because of the aforesaid events, the construction and development of the Colonnade project was significantly delayed and impaired. The delay caused on this account, and all other delays arising from the period between 2005 and 2016, i.e., when MGFD controlled the respondent, can only be attributed to MGFD and not to the respondent. As a result, the complainant, which itself is merely another alter ego under the control of MGFD, is not entitled to seek any relief for delay in possession or compensation therefore from the respondent.

vi. That the present complaint is not maintainable in view of proceedings before Hon'ble National Company Law Tribunal, New Delhi. One of the disputes between the respondent and MGFD is in relation to certain fraudulent transactions undertaken by MGFD. One such transaction was carried out by MGFD by using the complainant as a conduit for making unlawful gains. This dispute is pending adjudication before Hon'ble NCLT where the respondent has prayed for an investigation into the affairs of MGFD. It is likely that the complainant may be involved in several other fraudulent transactions, which will be a subject of the investigation directed by Hon'ble NCLT. One of the fraudulent transactions may also include the allotment that is the subject matter of this complaint. Therefore, unless the Hon'ble NCLT's proceedings are not concluded, the present complaint is not maintainable and ought not to be entertained.

vii. That the complainant has filed the present complaint with oblique purposes in manifest abuse of the process of this hon'ble authority. According to the preamble to the Act, this hon'ble authority was constituted *"to protect the interest of consumers in the real estate sector"*. However, the complainant is not a genuine buyer or consumer in the respondent's Colonnade project. It has instituted proceedings before this hon'ble authority merely with a view to misuse the same to induce the settlement of other commercial disputes awaiting adjudication between MGFD and the respondent. Further, the preamble to the Act also provides that the Act was established also for "regulation and promotion of the real estate sector", thus, to strike a balance of convenience in favour of

both the developer/promoter as well as the allottee so that neither can misuse the law. Therefore, for the sake of justice and to safeguard the respondent being prejudiced by the malafide and fraudulent act of the complainant, this complaint ought not to be entertained.

viii. That the respondent was initially incorporated as Emaar MGF Land Limited as a joint venture company pursuant to a Joint Venture Agreement executed between Emaar Properties PJSC, MGFD and one other party on 18.12.2004 ("**Original JVA**"). Under the terms of the Original JVA, and in all practical terms, MGFD (through its promoter Mr. Shravan Gupta, acting as Managing Director) ran and operated the respondent company since its incorporation until 23.05.2016 ("**MGF Control Period**"). In 2016, a decision was taken to restructure the respondent's business through a demerger by filing a scheme of arrangement. Various agreements were also agreed and executed between the respondent, MGFD and Mr. Shravan Gupta (amongst others) on 13.04.2016 to record the terms of restructuring. The parties are currently engaged in proceedings before the Hon'ble National Company Law Tribunal, Principal Bench, New Delhi ("**NCLT**") (*Company Application Nos. 1811 of 2019, 128 of 2020 and 159 of 2020 in Company Petition 689 of 2016*) and in arbitration proceedings (*ICC Case No. 25000/HTG*) for disputes that have arisen in relation to the restructuring of the respondent company.

ix. That as per the terms of restructuring, the management and control of the respondent and its day-to-day affairs were

transferred by MGFD and Mr. Shravan Gupta in favour of the "**Emaar Group**" (namely, Emaar Properties PJSC through Emaar Holding II) on 23.05.2016. Following the change of control, the Emaar Group discovered that during the MGFD Control Period, the respondent had been party to several questionable transactions which were not disclosed to the board of directors. These transactions involved *inter alia* related party transactions undertaken without due approvals under the Companies Act, 1956/ 2013, and included allotments of plots/ units to related entities made entirely without cost or at massive discounts to the detriment of the respondent.

x. That one such transaction involved the execution of a Joint Development Agreement on 06.03.2010 ("**JDA**") between the complainant and the respondent (while it was under the control of MGFD). Under the JDA, the complainant was paid an amount of Rs. 37.34 crores, without having any corresponding duties or obligations. Clearly, this amount had been siphoned from the respondent and pocketed by MGFD and the complainant under this fraudulent arrangement. This too was a related-party transaction, due disclosure of which was not made to the board of the respondent. Such and other unlawful transactions are a subject matter of proceedings before the Hon'ble NCLT under section 241 and 242 of the Companies Act, 2013 (*Company Petition (ND) 173 of 2019*), wherein adjudication is pending and a detailed investigation into *inter alia* the affairs of MGFD as well as the complainant has been prayed for.

xi. That apart from the fact that the present complaint is merely a cog in the wheel of the MGFD's *mala fide* campaign against the respondent and the complainant is not a genuine allottee/ consumer seeking redressal of a consumer-developer dispute, it is further submitted that the complainant is not an 'allottee' under the Act as the subject unit has been allotted on lease rental basis in consideration of premium and annual lease rent payable by the complainant after execution of a lease deed with the respondent. Thus, since the subject unit has been allotted on rent, the complainant, not being an 'allottee' under the Act, is not entitled to approach this hon'ble authority for relief. Further, the Act does not provide the definition of 'rent'. As per section 105 of the Transfer of Property Act, 1882, a 'lease' envisages *"transfer of a right to enjoy"* property in consideration of *inter alia* a price paid or promised to be rendered periodically. Such price to be rendered is called the "rent". The allotment of the subject unit was also given on rent and therefore, the complainant would not fall within the definition of 'allottee' as provided in the Act. In the present scenario, the buyer's agreement expressly provides that in addition to a lease premium, the complainant shall also be liable to pay annual lease rent in respect of the subject unit. The relevant clause from the buyer's agreement reads as follows:

> *"I. **Definitions and Interpretation:***
>
> ...
>
> *"**Annual Lease Rent**" shall mean the recurring annual rental payable to company by allottee for the said Unit annually, after the Lease Deed for the said Unit has been executed and registered."*

Thus, it is evident that the allotment of the subject unit was given on rent, that is a fact that has been conveniently withheld by the complainant. As a result, as per section 2(d), the complainant is not an 'allottee' under the Act and is not entitled to approach this hon'ble authority for any relief whatsoever.

xii. That the complainant has failed to comply with the obligation under the buyer's agreement and under section 19 of the Act. The complainant applied for allotment of the subject unit on lease basis through the allotment application dated 06.01.2016. The clause on "Detail of Unit Required for Allotment" in the application clearly noted that the lease premium/ consideration payable for the subject unit would be Rs. 22,49,626.50/-. It further provided that on execution, the terms and conditions of the buyer's agreement would supersede the terms and conditions contained in the allotment application. The buyer's agreement was executed between the complainant and the respondent on 21.12.2016. It provided the details, price, and payment plan for the subject unit in Annexure-III, which reiterates that a sum of Rs.22,49,626.50/- is payable as lease premium/ consideration for the subject unit, along with taxes as applicable.

xiii. That the buyer's agreement also provides for the following:

a. Under clause 2.2(b), it is agreed that the possession of the subject unit would be handed over to the complainant only upon payment of all outstanding dues, penalties, etc., along with delayed payment charges by the complainant to the satisfaction of the company.

b. Clauses 17 and 34 provide for various circumstances in which the date of possession shall stand extended. These *inter alia* include:

- Delay on account of any *force majeure* reasons or any other reasons beyond the control of the respondent;
- Any rule, regulation, judicial order or notification issued by the government or any other authority (including delays in getting appropriate sanctions and approvals) due to which the respondent would not be in a position to hand over the possession of the subject unit; and
- Any default or delay in payment as per Annexure III, till the payment of all outstanding amounts to the satisfaction of the company.

The foregoing provisions of the buyer's agreement clearly set out various rights and obligations of the complainant in respect of the subject unit. Though they have a direct and substantial bearing on the possession of the subject unit, these obligations have nevertheless been concealed and omitted from the complaint for the obvious reason that the complainant has failed to discharge and fulfil the same.

xiv. That as per the complaint and the documents filed along with it, the complainant has admitted that it has only paid an amount of Rs. 12,62,997/- towards the subject unit. Therefore, since the complainant has not paid the entire premium payable as consideration under the buyer' agreement, it is not entitled to claim possession of the subject unit. The claim that the consideration against the subject unit is *"fully paid"* is an outright lie designed to mislead this hon'ble authority into condoning the

circumvention of the complainant's contractual and statutory obligations. Both the allotment application and the buyer's agreement record in clear and unambiguous terms that the lease premium/ consideration payable towards the subject unit (inclusive of EDC, IDC, maintenance charges, etc. as on date of execution, but exclusive of applicable taxes, cesses, etc.) would be Rs.22,49,626.50/-. However, the complainant has admittedly only paid an amount of Rs.12,62,997/- towards the subject unit. In view of the amount remaining to be paid, the contention that *"nothing more remains to be paid"* is wholly incorrect. Accordingly, the complainant is neither entitled to claim possession of the subject unit nor is it entitled to claim any interest on account of delay thereof.

xv. That as per section 34 of the buyer's agreement, the date of possession shall stand reasonably extended in case of any delay of possession arising out of any notice, order, rule or notification of any governmental, public or competent authority. Since the execution of the buyer's agreement in December 2016, construction/ development activity has been suspended and otherwise hampered by orders/ directions of various authorities time and again. The respondent has placed on record several orders of various courts/tribunals/authorities to invoke clause 34 of the buyer's agreement. It was stated that these orders and directions passed by various governmental and judicial authorities hampered the ability of the respondent to continue with the construction and development of its Colonnade project, including the subject unit, as per the timeline envisaged under the buyer's

agreement. The buyer's agreement itself makes space for such contingencies, and accordingly, in terms of clauses 17 and 34 of the buyer's agreement, the time for delivery of possession shall stand reasonably extended for a period of 555 days. Thus, the appropriate date of possession is not February 2020, as claimed by the complainant.

xvi. That the complainant has filed the present complaint seeking reliefs under section 18 of the Act. If the respondent had failed to provide possession of the subject unit *"in accordance with the terms of the agreement for sale"*, only then could the complainant be entitled to seek the reliefs under section 18 of the Act. However, in the present scenario, the buyer's agreement does not constitute an *"agreement for sale"* as the terms therein clearly contemplates allotment on a lease basis in consideration of payment of premium and rent and not sale of the allotted unit. The ingredients required to be fulfilled for the invocation of section 18 of the Act are not satisfied and the complainant is not entitled to seek the reliefs of compensation or interest contemplated under section 18 of the Act.

xvii. That various unlawful transactions were undertaken by MGFD and the complainant while in control of the respondent company. These unlawful transactions were discovered by the Emaar Group only after acquiring control of the respondent after the MGF Control Period. As more and more illegalities committed by MGFD came to light, Emaar Group was constrained to initiate proceedings before the Hon'ble NCLT to seek *inter alia* compensation of the

wrongful losses caused to the respondent, and a detailed investigation into the affairs of MGFD, Mr. Shravan Gupta and their associated entities. Through the execution of the JDA, MGFD utilised the complainant as a conduit to siphon funds amounting to Rs. 37.34 crores and caused wrongful loss to the respondent. As such, the JDA and the complainant are intricately interlinked with the subject-matter of the NCLT proceedings.

xviii. That one of the key reliefs sought in the NCLT proceedings is a detailed investigation into the entire affairs of MGFD, Mr. Shravan Gupta and their associated entities (such as the complainant herein) and into the other unlawful transactions undertaken by them during the MGF Control Period. It is submitted that it is likely that such an investigation would also involve inquiry into the other transactions undertaken by MGFD (involving the complainant), including the execution of the present buyer's agreement in respect of the subject unit. Accordingly, the investigation may even return a finding that renders the allotment of the subject unit invalid or leads to the cancellation of the allotment. Therefore, the subject-matter of the complaint is substantially linked with and contingent on the subject-matter in issue in the NCLT proceedings. Proceeding in terms of the present complaint would have the effect of defeating the matters awaiting adjudication by the NCLT and amount to condonation of the unlawful transactions undertaken by the complainant and MGFD. Thus, until those proceedings are completed, the complaint and the reliefs sought therein would be premature at best. At worst, being a clear case of forum shopping, the complaint would constitute an abuse of the process of law and

of this hon'ble authority. Hence, it is submitted that this hon'ble authority may not entertain the present complaint and be pleased to dismiss it at the threshold.

11. On 28.10.2021, the complainant has filed rejoinder to the reply filed by the respondent wherein the complainant has refuted the averments of the respondent stating that the complainant is an allottee as defined in section 2(d) of the Act and has been described with such nomenclature in the entire buyer's agreement. Besides stating the above facts, the complainant also averred in its rejoinder that there is no stay from any courts/ forums staying the possession of the subject unit in his favour, moreover the list of disputed properties filed by the respondent along with its petition before NCLT does not include the subject unit.

E. Written arguments by complainant

12. The written arguments were filed by the complainant on 18.02.2022 wherein it is submitted as follows:

i. That the complainant is an allottee as defined in section 2(d) of the Act and has been described with such nomenclature in the entire buyer's agreement. The argument of the respondent that complainant is not an allottee is misconceived as section 2(d) of the Act itself states that "allottee in relation to a real estate project, means the person to whom the 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 as the subject unit has been allotted by the respondent on perpetual leasehold basis for a long duration of 99 years with a further renewable clause for further lease for 99 years. The complainant averred that as the respondent has failed to deliver the possession of subject unit, hence the complaint deserves to be allowed and the reliefs under the provision of the Act cannot be denied to the complainant merely because the respondent is in litigation with a company MGF Development Ltd. Besides stating the above facts, the complainant also averred in its rejoinder that there is no stay from any courts/ forums staying the possession of the subject property in favour of the complainant, moreover the list of disputed properties filed by the respondent along with its petition before NCLT does not include the subject unit. The complainant further denied the alleged invocation of force majeure clause by the respondent as the complainant was never informed about the same. As regard the nonpayment of outstanding amount, the complainant specifically submitted that as and when the payment was demanded, the complainant deposited the same without any delay. The respondent's claim for delay in construction and development of the project due to alleged acts of MGF Development Ltd. and criminal proceedings initiated by Green Heights, is also denied by the complainant as the complainant booked the unit in December 2016, however the

alleged FIR and other proceedings were of the year 2015 that is prior to booking of the unit by the complainant. As regard the respondent's averment that work could not be completed due to various Court orders, it is submitted that as per the information of the complainant, the external work of the project was completed way back in year 2018 and only internal work remained to be completed. Even since then, possession has not been offered. The respondent is baselessly trying to take benefit of orders though the possession has intentionally not been offered to the complainant with/ oblique motives.

ii. That the complainant being an allottee is entitled to possession as there is no stay / legal embargo from any court of law and is also entitled for payment of delayed possession charges. It is relevant to bring into the notice of this hon'ble authority that there is no stay operating in any form on the present proceedings, which prevents the respondent to handover the possession of the unit/plot in terms of buyer's agreement executed between the complainant and the respondent company. Further the respondent's argument that the complainant is not a genuine allottee, is wrong and without any basis and is liable to be discarded from the fact that the allotment of said unit has not been challenged in the NCLT Petition (Annexure R/9) filed in year 2019.

iii. That judgments relied upon by the respondent, itself negate the respondent's contention, as per which a person taking the property for a long-term lease like 99 years with a further renewable clause for other 99 years will be treated as owner against the whole of the world except the lessor. It is further submitted that the respondent never challenged the status of complainant as an allottee even though it received the payments in year 2017 and 2019 as well and as such for all purposes the complainant is an allottee and is covered within definition of allottee in terms of section 2(d) of the Act. Also, the entire agreement, describes the nomenclature of the complainant as an "allottee" and agreement is also termed and styled as "buyer's agreement" and as such the respondent now cannot resile from the stand/words mentioned in the agreement. Infact, in the buyer's agreement, the respondent has given right to the complainant to change the leasehold property into a freehold property on payment of Rs. 1000/- as and when the circumstances permit (Reference Annexure C/2, Clause 7, Bottom 4 lines of buyer's agreement). Further, the payment received by the respondent is termed as "premium" and not the "rent". Hence, the property has been allotted under a leasehold basis on receipt of "lease premium".

iv. That the arguments of the respondent that the complainant is a related entity of MGFD and that present property is a result of

siphoning of funds by MGFD is misconceived and does not hold water as besides the said allegations being false, the complainant is a separate legal entity that from MGFD having independent identity. As regards the documents regarding the document filed by the respondent relating to criminal proceedings, it is submitted that civil and criminal proceedings are totally different and are not alternative of each other. In case for the sake of arguments, the respondent's assertion would have been true, it would have canceled the transaction and would have not kept on taking money even in year 2019 i.e. much beyond after the demerger of respondent and MGFD. The above facts proves that the respondent just to circumvent the decision of this hon'ble authority is trying to mislead this authority by placing reliance of non-related documents.

v. That respondent has further averred that the construction and development got delayed due to the acts of MGFD and criminal proceedings initiated by M/s Green Heights. It is submitted that the alleged FIR registered on the complaint of M/s Green Heights, is of year 2015 when the complainant was neither in picture, as the complainant booked the said unit in December 2016. The respondent as such is trying to take undue benefit of an act, which happened prior to the execution of an agreement and which neither has any resemblance over the agreed time nor has any

effect on the completion & development of project. As regard the passing of orders of various courts/authorities, it is submitted that to the best of the knowledge of the complainant, the external development work was completed way back in year 2018. The respondent is only trying to take benefit of the orders though the underlying fact that the possession has intentionally not been offered to the complainant with oblique motives.

vi. That the respondent deliberately did not handover the possession of the unit to the complainant, no unconscionable "holding charges" and/or any other charges on the misconceived pretext of delay in taking over possession by the complainant, be imposed on the complainant, as sought for by the respondent.

F. Written arguments by respondent

13. The written arguments were filed by the respondent on 18.02.2022 wherein besides reiterating facts of the complaint and reply already filed by the respondent, it is submitted as follows:

i. That following clauses/covenants of buyer's agreement dated 21.12.2016 produced by the complainant as Annexure C/2 are extremely relevant:

a. Clause G of preamble of buyer's agreement dated 21.12.2016 at page no.19

"G. Pursuant to the receipt of the Application by the Company and upon completion of all procedural formalities, the Company has allotted the Unit to the Allottee in the Complex at such Total Lease Premium as described in detail in clause 1.1 (a) here-in-after. The Allottee agrees and understands that the areas provisionally allotted to it are tentative and are subject to change as contemplated in this Agreement, till the grant of occupation certificate by the competent authority."

b. Definition of 'Annual Lease Rent' of buyer's agreement dated 21.12.2016 –Annexure C/2 at page no.20

"Annul Lease Rent" shall mean the recurring annual rental payable to the company by the allottee for the said Unit annually, after the Lease Deed for the said Unit has been executed and registered.

c. Definition of 'Total Lease Premium' of buyer's agreement dated 21.12.2016 –Annexure C/2 at page no.21

"**Total Lease Premium**" means consideration payable for the said Unit as more particularly stated in the Payment Plan which includes **basic lease premium**, PLC (in case the Unit is preferentially located), but does not include other amounts payable as per the terms of this Agreement including but not limited to:

(i) Annual Lease Rent

(ii) IFMS

(iii) Stamp duty, registration and incidental charges as well as expenses for execution of the Agreement and lease deed etc.

(iv) A sum equivalent to the proportions share of Taxes and Cesses levied/leviable on the said Unit/Building/Complex.

(v) EDC/IDC as applicable.

(vi) Maintenance Charges, property tax, municipal tax, fees or levies of any kinds by whatever name called levied on the said Unit/Building/Complex.

(vii) The cost of mainline electricity connection charges, and diesel generator power back up charges, as applicable.

(viii) The cost of electric and water meter as well as charges for electricity and water connection and installation.

(ix) Any other charges or expenses as may be more particularly specified in the Agreement.

d. Clause no. 2.2 of the buyer's agreement dated 21.12.2016

Annexure C/2 at page no.2c

2.2 Total Lease Premium of Unit

"(i) The **Total Lease Premium basic lease premium, PLC, if applicable, Annual Lease Rent, payable by the Allottee to the Company, Save as aforesaid, the Allottee understands that the Total Lease Premium does not include any other charges, as reverse in this Agreement and the** Allottee shall be under an obligation to pay such additional cost as per the payment plan and/or as may be intimated to him by the Company, from time to time. The Allottee specifically understands that that time is of the essence with respect to the Allottee(s) obligations and undertakes to make all payments in time, without any reminders from the Company through A/c Payee Cheque(s)/Demand Draft(s) payable at New Delhi/Gurgaon. The Allottee agrees that the payments on due dates as set out in **Annexure –III** shall be made promptly.

e. Clause no.2 of buyer's agreement dated 21.12.2016 –Annexure

C/2 at page no.21

2. LEASE OF UNIT AND RIGHTS THERETO

2.1 Description of the Unit

(a) In consideration of the Allottee complying with the terms and conditions of this Agreement, completing various formalities, as may be required herein and agreeing to make timely and complete **payments of the Total Lease Premium as per the Payment Plan, the Company hereby agrees to give the said Unit on perpetual lease basis of 99 years to the Allottee and the Allottee hereby agrees to take the said Unit bearing no. CHC R-FF-018,** located on FIRST FLOOR having a Super Area 27.59. sq. meters (297 sq. ft.) (approx.) in the said Complex on a perpetual lease basis.

f. Clause 7 of buyer's agreement dated 21.12.2016—Annexure

C/2 at page 26

"7. Lease Deed

The Lease Deed shall be executed and got registered in favour of the Allottee subsequent to the receipt of occupation certificate for the

> Building/Complex and on receipt of the Total Lease Premium for the Unit including but no limited to delayed payment charges, interest, and other charges as reserved herein this Agreement along with the compliances of all other terms and conditions of the Agreement by the Allottee. The lease shall be for a period of 99 years (perpetual lease deed) on expiry of which the lease shall be renewed for a further period of 99 years at Rs.1000/- (Rupees One Thousand Only)."

That from the contents of the buyer's agreement dated 21.12.2016, it is evident that the said unit was to be leased out by the respondent in favour of the complainant. Thus, the transaction pertaining to said unit as reflected in buyer's agreement dated 21.12.2016 is not a transaction of sale.

ii. That so far as the transaction of lease is concerned, the respondent is placing reliance on the section 105 and 108 of the Transfer of Property Act, 1882 dealing with the definition of the term 'lease' and 'the rights and liabilities of lessor and lessee'.

iii. Further, the respondent placed reliance of judgment dated 12.08.2021 had been passed by the Haryana Real Estate Regulatory Authority, Gurugram in "***Varun Gupta Vs. Emaar MGF Land Limited***" and 40 other matters. At page number 73 of the aforesaid judgment, it has been held by the hon'ble authority as under:

> "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, allottee would not be a person to whom any plot, apartment or building is given on rent."

That from the statutory provisions mentioned hereinbefore it is evident that even though lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the leased property, the transaction continues to partake the character of lease and is not an absolute transfer of ownership. In such cases regardless of the tenure of lease the relationship between the lessor and the lessee is that of landlord and tenant. Unless and until any declaration (if permissible under law) is given by court of competent jurisdiction, a lessee cannot claim to be purchaser of the leased property.

iv. That the complexion of rights held by the lessor and the lessee in respect of land holdings wherein lease had been created for a span of 99 years by the owner in favour of the tenant was subject matter of consideration in various judgements passed by the hon'ble Supreme Court of India. In one such case a parcel of land wherein lease had been created for a span of 99 years was acquired by the concerned statutory authority. Disputes had arisen between the landlord and tenant with regard to apportionment of compensation, enhanced compensation and statutory benefits etc. That it was submitted on behalf of the lessee that lease in his favour

had been created for a span of 99 years which assumed the character of perpetual lease. It was stated on behalf of the tenant that on this account he was entitled to the entire amount of compensation. On the other hand, it was stated on behalf of the lessor/landowner that only lease hold rights had been conferred in favour of the tenant and the same could not be construed to be transfer of ownership regardless of the right of the lessee to seek renewal of lease.

v. That the hon'ble Supreme Court of India has held that even though lease had been created for a span of 99 years, such lessee would be entitled to 75% of compensation amount along with statutory benefits and the balance 25% of compensation amount along with statutory benefits would belong to the lessor. Reliance in this regard has been placed by the respondent on case titled as ***Brij Behari Sahai (D) through Lrs. v. State of Uttar Pradesh (2004 (1) SCC 641).***

vi. That in **Kachrulal Hiralal Dhoot v. The Gurdwara Board, Nanded & Ors. [AIR 1979 Bombay 31],** a Division Bench of the Bombay High Court held that in the matter of apportionment of compensation under the Land Acquisition Act, between owners of land and permanent tenants/permanent licensee, if the right of the owners was only to receive every year certain sum, then naturally upon acquisition of the property including their interests in the

land, they would receive the compensation which would be arrived at upon capitalisation of twenty years' income and that the rent has to be paid to be other claimants- permanent tenants/permanent licensees. **In Shiam Lal & Ors. v. Collector of Agra [AIR 1934 Allahabad 239],** a Full Bench of the High Court held that where an agricultural land of Zamindar over which tenant has occupancy right is acquired by Government under the Land Acquisition Act, the compensation awarded should be apportioned in the ratio of 10:6 annas, as between the Zamindar and the tenant, in the absence of evidence to the contrary, though not as a rule of law but as a rule of practice.

vii. That the proposition "Once a tenant always a tenant" has been upheld by the hon'ble courts several times. Also, it is settled proposition of law that the tenant cannot deny the title of the landlord. So much so it has been provided in section 116 of The Indian Evidence Act that if a tenant is desirous of denying the title of the landlord, it is incumbent upon him to surrender physical possession of the leased property to the landlord. Reliance in this regard is placed upon section 116 of the Indian Evidence Act, 1872 and the following citation: 2015(1) CIVIL COURT CASES 0327 and 2010 (3) PLR 480 P&H.

G. Jurisdiction of the authority

14. 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.

G.I Territorial jurisdiction

15. 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.

G.II Subject-matter jurisdiction

16. 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.

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

H. Affidavit filed by the respondent

18. The authority, vide order dated 18.11.2021, had directed the respondent to clarify certain issues w.r.t allotment/BBA, receipt of CC/part CC, balance amount to be paid by the complainant, and the matter being sub-judice before any authority, if any. In pursuance of the directions of the authority, the respondent filed an affidavit dated 06.12.2021 clarifying those issues being discussed as under:

i. **Whether the unit was allotted to the complainant and an allotment letter/BBA was signed/issued.**
ii. **Whether the unit still stands in the name of the complainant.**

19. With respect to the aforesaid clarification, the respondent submitted that the subject unit was allotted to the complainant, who executed the buyer's agreement on 21.12.2016. That the complainant has no locus standi to maintain the present complaint before this Hon'ble Authority as it does not fall within the ambit of an "allottee" as defined under

section 2 (d) of the Act. The provision clearly provides that an "allottee" does not include any person to whom a unit has been given on rent. In the present case, the terms between the complainant and the respondent in respect of the subject unit clearly provides that the allotment is on a lease basis and apart from the lease premium, an annual lease rent shall also be payable by the complainant after the execution of the lease deed. Thus, since the subject unit has been allotted in consideration of rent to be paid periodically after the execution of lease deed, the complainant cannot be said to be an "allottee" under the Act. Accordingly, the complainant is not entitled to approach this hon'ble authority for any relief.

20. The authority is of the view that the plea of the respondent that the complainant does not qualify to be an allottee as per the Act is not maintainable. The authority observes that the term "allottee" has been defined under section 2(d) of the Act and the same 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". (Emphasis supplied)*

21. Though much reliance is placed by learned counsel for the respondent on the definition of the word "allottee", as given in section 2 (d) of the

Act, to contend that the allottee does not include a person to whom such plot, apartment or building, as the case may be, is "given on rent". It is of grave importance that it must be remembered that the definition of the term 'allottee' in the present context includes a situation wherein the unit sold is a "freehold or leasehold". To that extent, it has to be held that, the definition of 'allottee' also includes the 'lease agreement', though it may not include such agreement wherein the apartment is in its real sense is given purely on rent and it is, in reality, an 'agreement of rent and lease' and not, in effect, a transaction of sale. It is a matter of fact which becomes evidently clear from the bare perusal of the buyer's agreement executed inter se parties that *firstly*, the said agreement is named as buyer's agreement and not as lease agreement. *Secondly*, in the beginning of the buyer's agreement i.e., where the title is being mentioned, the present complainant is referred to as the 'allottee(s)'. *Thirdly*, in the definition and interpretation part of the said agreement, the term allottee is being defined as 'as ascribed in the Preamble of the agreement'. And the last but not the least, everywhere in the said agreement, the word allottee is used in spite of the word 'lessee'. From all these above-mentioned reasoning, it becomes quite clear that to a man of normal prudence this gives an impression that he is an allottee and a unit has been allotted to him in lieu of certain consideration. Though one thing which deserves a special mention over here is that the total sale consideration is named as 'Total Lease Premium'

otherwise there is no other differentiation. The payment plan annexed as Annexure III of the buyer's agreement is very much similar to routine construction linked payment plan. The authority is of the view that after considering all the documents on record, it becomes apparently clear that the present complainant very well comes under the ambit of term 'allottee' as defined under section 2(d) of the Act.

22. The object of the Act, it may be recalled, is to regulate the real estate industry, to ensure greater accountability towards consumers and significantly to reduce frauds and delays, to bring into it the standardization, professionalism and the transparency, so that interests of the consumers are protected. In that view of the matter, the intention of the legislature was to protect those persons like complainant, who has invested substantial amounts in the real estate projects. Hence, they are required to be recognised as 'allottees'. If they are excluded from the definition of 'allottee' and thereby from the protection given under the Act, by giving restrictive meaning to the term 'allottee', the very object of the Act would stand frustrated, and the intent of the legislation would be defeated.

23. The authority further placed its reliance on judgement passed by Hon'ble High Court of Bombay in ***second appeal no. 9717, 18465, 18467 of 2018*** titled as ***Lavasa Corporation Limited Vs. Jitendra Jagdish Tulsiani and Ors***. wherein the Hon'ble High Court has decided a substantial question of law that whether the provisions of the RERA

are applicable to the 'agreement of lease' executed between appellant and respondents and has held as follows-

"67. Here in the case, as regards the word "Allottee", as a matter of fact, it can never be the intention of the Legislature to exclude long term leases from the purview of the Act; otherwise, the Legislature would not have used the words 'freehold' or 'leasehold', when it has defined the term 'Allottee', under Section 2(d) of the Act.

68. Moreover, exclusion of such long term lease from the purview of the Act would be defeating the very object of the Act. The Developer-Promoter may, in such cases, by executing the 'Agreement' with the nomenclature as the 'Agreement of Lease', can very conveniently escape from the clutches of the provisions of this Act. When the Legislature has stated in the definition of the term 'Allottee' that it does not include the person, to whom the plot, apartment or building is "given on rent", the intention of the Legislature was only to exclude pure 'Agreements of Lease' or the 'rent', as the Lessees therein have not invested the substantial amount, like purchase price, of the apartment in completion of the project. One may also include therein licenses, but one cannot exclude the persons, who have invested more than 80% of the purchase price of the apartment. One also cannot exclude the transactions, in which the apartment was to be built and then the possession thereof was to be handed over on payment of the entire consideration amount at the market rate. Such 'Agreements' can in no way be called as 'Agreements of Lease' at all. The intention of the Legislature, which is found reflected in the 'Objects and Reasons' of the Act and its various provisions, makes it abundantly clear that, to all the projects, wherein the possession of the apartments is to be handed over in consideration of the sale price or the market price, such projects are included under the purview of this Act. It has to be held that, the Legislature would have never intended to exclude the persons like the Respondents, who have invested their hard earned money in such projects, from the protective and beneficial provisions of this Act.

71. Here the Hayden's Rule of Suppression of Mischief needs to be applied with full force and if that Rule is applied, then the provisions of the RERA are required to be held as equally applicable to the long term leases, like the present one of "999 years"; or, where the substantial amount of consideration is already obtained by the 'Developer'. Then the definitions of the terms 'Allottee', or, 'Real Estate Project', or, even that of 'Promoter', are required to be interpreted in that context and not in isolation, by placing reliance simplicitor on the word 'selling' used in these three definitions. As rightly submitted by learned counsel for the Respondents, the word 'selling' is grammatical variation of the word "sold", used in section 2(d) of the Act in the definition of the term "Allottee". If the allotment of a plot, apartment or building, as the case may be, can be whether as a freehold or as leasehold, then the word 'selling' used in the definitions of 'Promoter' and 'Real Estate Project' also includes the

allotment of a plot by lease. Merely because the Legislature has excluded the allotment, when it is given on rent, it does not exclude the long term lease like the present one. That will be defeating and frustrating the object of the Act and hence, it has to be held that the Appellate Tribunal has rightly held that, so far as the present case is concerned, considering the long term lease of '999 years', it would definitely amount to sale."

24. In the light of the aforesaid judgement and from a bare perusal of the definition of the term 'allottee', it becomes evidently clear that the complainant very well falls within the definition of the term "allottee" as defined in section 2(d) of the Act. The subject unit was allotted to the complainant vide allotment letter dated 19.07.2016 and thereafter, a buyer's agreement has been executed inter se parties on 21.12.2016. Therefore, the complainant is an allottee as per section 2(d) of the Act and the rights and obligation of the complainant and the respondent will be governed by the said buyer's agreement.

iii. Whether CC/part CC/OC of the project/part of the project has been received.

25. With respect to the aforesaid clarification, the respondent submitted that for the subject unit, the occupation certificate is yet to be applied for.

26. With regard to the above-mentioned issue, the authority observes that the project in question is still not complete, and the respondent has yet to apply for the occupation certificate in respect of the said project. Also, the possession of the unit in question is still to be offered by the respondent.

iv. Whether there is any balance amount as per BBA required to be paid by the complainant

27. The respondent submitted that the allotment application and the buyer's agreement record in clear and unambiguous terms that the lease premium/consideration payable towards the subject unit (inclusive of EDC, IDC, maintenance charges, etc. as on date of execution, but exclusive of applicable taxes, cesses, etc.) would be Rs.22,49,626.50/-. However, the complainant has admittedly only paid an amount of Rs. 12,62,997/- towards the subject unit. In view of the amount remaining to be paid, the contention that *"nothing more remains to be paid"* is wholly incorrect. Accordingly, the complainant is neither entitled to claim possession of the subject unit nor is it entitled to claim any interest on account of delay thereof.

28. With respect to the above, the complainant is directed to pay outstanding dues as per provisions of section 19(6) & (7) of the Act and the rate of interest chargeable from the complainant/allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delay possession charges as per section 2(za) of the Act. Also, the respondent is not entitled to claim holding charges from the complainant/allottee at any point of time even after being part of the buyer's agreement as per law settled by Hon'ble Supreme Court in Civil appeal nos. 3864-3899/2020 decided on 14.12.2020.

v. Whether there is any legal embargo or stay order of any court in giving possession of these units to the complainant and also payment of delayed possession charges as per stator provisions of proviso to section 18(1) of the Act, 2016.

29. The respondent submitted that there are there are several disputes between MGFD and the respondent which are pending before the hon'ble NCLT, where the respondent has sought an investigation into transactions such as the allotment of the subject unit. That on 30.11.2021, the NCLT New Delhi has initiated the Corporate Insolvency Resolution Process of MGFD and thereby declared a moratorium.

30. The authority is of the view that this submission of the respondent has no legs to stand. It is a matter of fact that the jurisdiction of NCLT and this authority are independent in nature. Moreover, the complainant is not a party to those proceedings which are pending adjudication before Hon'ble NCLT. Also, it is of grave importance to mention over here that no order has been passed by any competent court which prevents this authority to proceed with the complaint under the provisions of the Act. The respondent has not shown any provision or law under any statute which requires the present proceedings to be deferred or stayed since the proceedings before the hon'ble NCLT is pending at the instance of another company and the present proceedings are under the Act of 2016. The issues which are raised here cannot be part of the proceedings before the Hon'ble NCLT. The authority is of the view that it is a delaying tactics followed by the respondent. Further, under the

guise of the pendency of the Hon'ble NCLT proceedings, the respondent cannot run away from its liability under this Act. As noted, the complainant and MGFD are independent legal entities with their own independent right to seek remedy under the law. The complainant has approached this authority under the Act seeking to enforce its statutory rights. The proceedings under the Act are not subject to proceedings pending before the Hon'ble NCLT. The authority holds that we are not, and cannot, opine on the issues pending consideration before the Hon'ble NCLT. We are exercising our jurisdiction exclusively within the four corners of the Act. In view of the above-mentioned reasoning, the submission of the respondent, stands rejected.

31. The respondent further alleged that the buyer's agreement in question is a fraudulent transaction and therefore, needs to be ignored. In this regard, the authority observes that the respondent has chosen to file voluminous records, however, there is not a single piece of paper showing that the respondent has ever disputed the existence of the buyer's agreement. Further, the respondent has not brought on record anything to show that a police complaint was filed alleging fraud being played with respect to the execution of the buyer's agreement. A contract between the parties is sacrosanct and cannot be washed away by a party at their whims and fancies. It is undisputed that the respondent has received the entire consideration amount as agreed upon in the buyer's agreement. The respondent is, therefore, estopped

from denying the existence, veracity and enforceability of the contract. It appears for the first time, when the complainant chose to enforce its right before this authority under the provisions of the Act, that the respondent raised the issue of fraudulent transaction to defeat the right of the complainant. The authority has to proceed within the realm of the Act. Once a complaint has been filed and the execution of the buyer's agreement is not disputed and payment of the entire consideration also remains admitted, the authority would be failing in its statutory duty if it does not proceed with the matter under the provisions of the Act. The authority after considering the relevant documents on record and after hearing both the parties is of the opinion that the submission of the respondent is liable to be rejected.

I. Findings of the authority

I.I Delay possession charges

32. **Relief sought by the complainant:** In the following complaints, the complainant is seeking possession of the subject unit along with delay possession charges for the delay in handing over possession of the subject unit as per proviso to section 18(1) of the Act.

Sr. No	Complaint No./Title/Date of filing	Date of execution of buyer's agreement	Due date of possession	Offer of possession	Relief sought	Period for which the complainant is entitled to DPC and delay occasioned in handing over possession till date of decision
1	CR/3191/2021	21.12.2016	01.02.2020	Not offered	1. Possession 2. DPC	W.e.f. 01.02.2020 till handing over of possession

	Nanny Infrastructure Private Limited Vs. Emaar India Limited **D.O.F-** 13.08.2021	[Page 18 of complaint]		**TC-** Rs. 23,58,217 **AP-** Rs. 12,62,997		or upto two months from the valid offer of possession, whichever is earlier Delay calculated till date of decision i.e. 22.02.2022 - 2 years 21 days
2	CR/3192/2021 Nanny Infrastructure Private Limited Vs. Emaar India Limited **D.O.F-** 13.08.2021	21.12.2016 [Page 18 of complaint]	01.02.2020	Not offered **TC-** Rs. 51,07,850 **AP-** Rs. 27,59,311	1. Possession 2. DPC	W.e.f. 01.02.2020 till handing over of possession or upto two months from the valid offer of possession, whichever is earlier Delay calculated till date of decision i.e. 22.02.2022 - 2 years 21 days

33. In the present complaint, the complainant intends to continue with the project and is seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under.

> *"**Section 18: - Return of amount and compensation***
>
> *18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building, —*
>
> .....
>
> *Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."*

34. Clause 16 of the buyer's agreement provides time period for handing over the possession and the same is reproduced below:

> ***"16. Possession***
>
> ***(a) Time of handing over the Possession***
>
> *(i) The Company shall endeavour to offer possession of the Unit to the Allottee within **42 months from Aug, 2016 from the date of start of construction whichever is earlier**, subject, however, to **Force Majeure conditions as stated in clause 34 of the Agreement** and further subject to the Allottee having strictly complied with all the terms and conditions of this Agreement and not being in default under*

any provision of this Agreement and all amounts due and payable by the Allottee under this Agreement having been paid in time to the Company. The company shall give notice to the Allottee, offering in writing, to the Allottee to take possession of the Unit for his occupation and use ("Notice/Intimation of Possession").

(ii) The Allottee agrees and understands that the Company shall be entitled to a ***grace period of 4 months over and above the period more particularly specified here-in-above in clause 16(i)(a), for applying and obtaining necessary approvals in respect of the Complex."*** *(Emphasis supplied)*

35. **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 a period of 42 months from August 2016 or from the date of start of construction whichever is earlier, and it is further provided in the said clause of the agreement that the said time period is subject to the force majeure conditions.

36. The respondent submitted that the period consumed in the force majeure events or the situations beyond control of the respondent has to be excluded while computing delay in handing over possession. The respondent in this regard has placed certain orders or record to invoke the force majeure clause. The authority has considered the said orders. *Firstly*, the order no. 40-3/2020 DM-I(A) of the Ministry of Home Affairs dated 24.03.2020, 15.04.2020 & 01.05.2020 and order no. 9/3-2020 HARERA/GGM does not have any application to the present matter as the due date of possession in the present matter is 01.02.2020. It was an obligation on the part of the respondent promoter to complete the construction of the subject unit in the stipulated time period and to

handover the possession of the subject unit before the due date of possession which he clearly failed to do. It is clearly a case where there is an established deficiency of service on the part of the respondent promoter. It is a well settled law that no one can take benefit out of his own wrong. In view of the same, the benefit these orders cannot be accrued in the favour of the respondent promoter who has failed to fulfil its obligations as per the provisions of the Act. Furthermore, the outbreak of a pandemic cannot be used as an excuse for non-performance of a contract for which the deadlines were much before the outbreak itself and for the said reason the said time period is not excluded while calculating the delay in handing over possession and in view of the same the authority place reliance on decision of Hon'ble Delhi High Court in case titled as ***M/s Halliburton Offshore Services Inc. V/S Vedanta Ltd. & Anr.*** bearing no. O.M.P (I) (Comm.) no. 88/ 2020 and I.As 3696-3697/2020 dated 29.05.2020. *Secondly*, the respondent has relied on minutes of 35th meeting of Task Force on graded action plan held on 12.11.2018 at CPCB, Delhi. The authority on bare perusal of the same observes that in the said meeting the construction activities are permitted during daytime i.e. between 6:00 Hrs. - 18:00 Hrs. In view of the same, the said minutes of 35th meeting of Task Force on graded action plan held on 12.11.2018 at CPCB, Delhi, cannot be applied to the present matter. *Thirdly*, the respondent has placed reliance on order dated 04.11.2019 in civil writ petition no.

13029/1985 MC Mehta Vs. Union of India of Hon'ble Supreme Court of India. The authority is of the considered view that the said order on which the respondent is relying was passed on 04.11.2019. It is a matter of fact that the due date of possession in the present matter is 01.02.2020. The respondent promoter has proposed to offer possession by 01.02.2020 in view of the buyer's agreement executed inter se parties. On that analogy, the respondent promoter should have complete the major chunk of its construction work by the date of this order. However, it is pertinent to mention over here that even after two years of due date of possession, the project in question is nowhere near completion and the promoter has even failed to apply for occupation certificate in respect of the said project. In view of the above-mentioned reasoning, the respondent promoter cannot be allowed to take benefit of the said order of the Hon'ble Apex court. It is evidently clear that the respondent has failed to place any other relevant document on record to substantiate the fact that force majeure conditions existed during the time period for handing over the possession as per the buyer's agreement. Accordingly, the grace period as claimed by the respondent promoter on account of the force majeure is disallowed.

37. Furthermore, the said clause provides for grace period of 4 months over and above period more particularly specified here-in-above in sub-clause (a)(i) of clause 16, for applying and obtaining necessary approvals in respect of the complex. The respondent has not applied for

obtaining the occupation certificate during grace period or reasonable time; hence grace period of 4 months or otherwise is not allowed. The date of start of construction is not available on the record, so, the authority is left with no other option but to calculate the due date of possession from August 2016. Therefore, the due date of handing over possession comes out to be 01.02.2020 as per the clause 16 of the buyer's agreement.

38. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges at the prescribed rate. 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.*

39. 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. 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., 22.02.2022 is 7.30%. Accordingly, the prescribed rate of interest will be MCLR + 2% i.e., 9.30%.

40. **Rate of interest to be paid by the complainant 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;"*

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

42. In the present complaint, it is clear that the respondent has not applied for occupation certificate/completion certificate in respect of project in question and the possession of the subject unit is yet to be offered.

Therefore, the respondent is directed to give possession of the subject unit to the complainant within 2 months of obtaining necessary approvals from the competent authority as per provisions of section 19(10) of the Act.

43. 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 16 of the buyer's agreement executed between the parties on 21.12.2016, the possession of the subject flat was to be delivered within a period of 42 months from August 2016 or from the date of start of construction whichever is earlier. The date of start of construction is not available on the record so, the authority is left with no other option but to calculate the due date of possession from August 2016. Therefore, the due date of handing over the possession comes out to be 01.02.2020. The respondent has not received the occupation certificate/completion certificate in respect of the project in question and the possession of the subject unit is yet to be offered. The authority is of the considered view that there is a delay on the part of the respondent to offer physical possession of the subject unit to the complainant as per the terms and conditions of the buyer's agreement dated 21.12.2016 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 21.12.2016 to hand over the possession within the stipulated time frame.

44. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainant is entitled to delayed possession at prescribed rate of interest i.e. 9.30% p.a. w.e.f. the due date of handing over the possession as per the buyer's agreement i.e. 01.02.2020 till the date of handing over of the possession of the unit or up to two months from the valid offer of possession if possession is not taken by the complainant, whichever is earlier as per provisions of section 18(1) of the Act read with rule 15 of the rules.

J. Directions of the authority

45. 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 give possession of the subject unit to the complainant within 2 months of obtaining necessary approvals from the competent authority as per provisions of section 19(10) of the Act.

ii. The respondent is further directed to pay interest at the prescribed rate i.e. simple interest at the rate of 9.30% per annum for every

month of delay on the amount paid by the complainant w.e.f due date of handing over possession as per the buyer's agreement till the date of handing over of the actual physical possession of the unit or up to two months from the valid written offer of possession if possession is not taken by the complainant, whichever is earlier. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order as per rule 16(2) of the rules.

iii. The due date of possession, the time period for which the complainant is entitled to delay possession charges and amount on which interest is to be calculated for all the connected complaints are detailed in table given in para 229 of this order. Hence, the delay possession charges in those complaints based the above decision of the authority shall be squarely applicable in all the complaints mentioned in para 3 of this order.

iv. The respondent is entitled to the outstanding dues, if any, payable by the complainant. Further, the interest on the delay payments from the complainant shall be charged at the prescribed rate i.e. 9.30% by the respondent/promoter which is the same as is being granted to the complainant in case of delayed possession charges as per section 2(za) of the Act.

v. The respondent shall set off the outstanding dues upon duly informing the complainant of the same in writing against the delay possession charges which the respondent is liable to pay to the complainant as the proviso to section 18 (1) of the Act.

vi. The respondent shall not charge anything from the complainant which is not part of the buyer's agreement. The respondent is not entitled to claim holding charges from the complainant(s)/allottee(s) 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.

46. This decision shall *mutatis mutandis* apply to complaint bearing no. CR/3192/2021 titled as Nanny Infrastructure Private Limited Vs. Emaar India Limited.

47. Complaint stands disposed of. True certified copy of this order shall be placed in complaint bearing no. CR/3192/2021. There shall be separate decree in individual cases.

48. File be consigned to registry.

(Vijay Kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman
Haryana Real Estate Regulatory Authority, Gurugram

Dated: 22.02.2022

Judgement uploaded on 04.03.2022.