

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

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 LIMITED)	
PROJECT NAME		EMERALD HILLS (PLOTS)	
S.No.	COMPLAINT NO.	COMPLAINT TITLE	APPEARANCE
1.	CR/3039/2021	Chirau Prop build Private limited V/S Emaar India Limited	Sh. Ravinder Singh Sh. Ashish Joshi
2.	CR/3040/2021	Chirau Prop build Private limited V/S Emaar India Limited	Sh. Ravinder Singh Sh. Ashish Joshi
3.	CR/3043/2021	Chirau Prop build Private limited V/S Emaar India Limited	Sh. Ravinder Singh Sh. Ashish Joshi
4.	CR/3048/2021	Chirau Prop build Private limited V/S Emaar India Limited	Sh. Ravinder Singh Sh. Ashish Joshi
5.	CR/3047/2021	Chirau Prop build Private limited V/S Emaar India Limited	Sh. Ravinder Singh Sh. J.K. Dang
6.	CR/3044/2021	Blossom Conbuild Private Limited V/S Emaar India Limited	Sh. Ravinder Singh Sh. J.K. Dang
7.	CR/3045/2021	Blossom Conbuild Private Limited V/S Emaar India Limited	Sh. Ravinder Singh Sh. Ashish Joshi
8.	CR/3046/2021	Blossom Conbuild Private Limited V/S Emaar India Limited	Sh. Ravinder Singh Sh. Ashish Joshi
9.	CR/3036/2021	Zack Estate V/S Emaar India Limited	Sh. Ravinder Singh Sh. J.K. Dang
10.	CR/3050/2021	Zack Estate V/S Emaar India Limited	Sh. Ravinder Singh Sh. J.K. Dang

CORAM:

Dr. K.K Khandelwal
 Shri Vijay Kumar Goyal

**Chairman
 Member**

ORDER

1. This order shall dispose off all the 10 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- Emerald Hills (Plots) 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 plots 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, plot 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	EMERALD HILLS (PLOTS)
Possession Clause 8: 'Subject to force majeure conditions and reasons beyond the control of the Company, the Company shall make every endeavour to deliver possession of the Plot to the Allottee(s) within a period of 27 (twenty seven) months from the date of execution of this Buyer's Agreement. In the event that the possession of the Plot is likely to be delayed for reason of any force majeure event or any other reason beyond the control of the Company including government strike or due to civil commotion or by reason of war or enemy action or earthquake or any act of God or if non delivery is as a result of any act, notice, order, rule or notification of the Government and any other public or Competent Authority or for any reason beyond	

the control of the Company, then in any of the aforesaid events, the Company shall upon notice claiming force majeure to the Allottee(s) be entitled to such extension of time till the force majeure event persists or the reason beyond the control of the Company exists. In the event that the Company fails to deliver possession of the Plot without existence of any force majeure event or reason beyond the control of the Company within 30 (thirty) months from the date of execution of this Agreement, the Company shall be liable to pay to the Allottee(s), a penalty of the sum of Rs. 50/- (Rupees Fifty only) per sq. yd. per month for such period of delay beyond 27 months from the date of execution of this Agreement. It is made clear to the Allottee(s) and understood by the Allottee(s) that under no circumstances the Possession of the Plot will be handed over to the Allottee(s) prior to the execution of the Sale Deed/Conveyance Deed.'

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

Sr No	Complaint No./Title/D ate of filing	Reply statu s	Plot no.	Date of allotment letter	Date of execution of buyer's agreement	Due date of possession	Offer of possession	Relief sought
1	CR/3039/20 21 Chirau Propbuild Private limited V/S Emaar India Limited D.O.F: 02.08.2021	05.10. 2021	EHP-500 T- 058 [Page 24 of complaint]	N/A SA- 22.12.2015 (NL) [Page 71 of complaint]	10.08.2010 [Page 18 of complaint]	10.11.2012	09.03.2016 [Page 83 of reply] TC- Rs. 1,15,30,580 AP- Rs. 1,11,45,371 [Page 147 of reply]	1. Possession 2. DPC
2	CR/3040/20 21 Chirau Propbuild Private limited V/S Emaar India Limited D.O.F: 02.08.2021	05.10. 2021	EHP-500 T- 059 [Page 25 of complaint]	N/A SA- 22.12.2015 (NL) [Page 65 of complaint]	10.08.2010 [Page 20 of complaint]	10.11.2012	09.03.2016 [Page 83 of reply] TC- Rs. 1,15,30,580 AP- Rs. 1,11,45,371 [Page 147 of reply]	1. Possession 2. DPC
3	CR/3043/20 21 Chirau Propbuild Private limited V/S Emaar India Limited D.O.F: 02.08.2021	05.10. 2021	EHP-500 T- 060 [Page 25 of complaint]	N/A SA- 22.12.2015 (NL) [Page 59 of complaint]	11.11.2010 [Page 20 of complaint]	11.02.2013	09.03.2016 [Page 83 of reply] TC- Rs. 1,15,30,580 AP- Rs. 1,11,45,371 [Page 147 of reply]	1. Possession 2. DPC

4	CR/3048/20 21 Chirau Propbuild Private limited V/S Emaar India Limited D.O.F: 02.08.2021	05.10. 2021	EHP-500 T- 065 [Page 25 of complaint]	N/A SA- 22.12.2015 (NL) [Page 65 of complaint]	24.11.2010 [Page 20 of complaint]	24.02.2013	16.11.2017 [Page 83 of reply] TC- Rs. 1,15,46,551 AP- Rs. 1,11,45,371 [Page 147 of reply]	1. Possession 2. DPC
5	CR/3047/20 21 Chirau Propbuild Private limited V/S Emaar India Limited D.O.F: 02.08.2021	05.10. 2021	EHP-500 T- 064 [Page 25 of complaint]	N/A SA- 22.12.2015 (NL) [Page 65 of complaint]	04.11.2010 [Page 20 of complaint]	04.02.2013	16.11.2017 [Page 83 of reply] TC- Rs. 1,15,81,551 AP- Rs. 1,11,45,371 [Page 147 of reply]	1. Possession 2. DPC
6	CR/3044/20 21 Blossom Conbuild Private Limited V/S Emaar India Limited D.O.F: 02.08.2021	05.10. 2021	EHP-500 T- 061 [Page 22 of complaint]	N/A SA- 22.12.2015 (NL) [Page 62 of complaint]	11.11.2010 [As admitted by respondent at page 6 of reply]	11.11.2012 [24 months from the execution of agreement]	16.11.2017 TC- Rs. 1,16,66,929 AP- Rs. 1,11,45,371 [Page 147 of reply]	1. Possession 2. DPC
7	CR/3045/20 21 Blossom Conbuild Private Limited V/S Emaar India Limited D.O.F: 03.08.2021	04.10. 2021	EHP-500 T- 062 [Page 25 of complaint]	N/A SA- 22.12.2015 (NE) [Page 69 of complaint]	11.11.2010 [Page 20 of complaint]	11.02.2013	16.11.2017 [Page 83 of reply] TC- Rs. 1,15,46,551 AP- Rs. 1,11,45,371 [Page 147 of reply]	1. Possession 2. DPC
8	CR/3046/20 1 Blossom Conbuild Private Limited V/S	05.10. 2021	EHP-500 T- 063 [Page 25 of complaint]	N/A SA- 22.12.2015 (NL) [Page 20 of complaint]	24.11.2010 [Page 20 of complaint]	24.02.2013	16.11.2017 [Page 83 of reply] TC- Rs. 1,15,46,551	1. Possession 2. DPC

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	Emaar India Limited D.O.F: 03.08.2021			[Page 64 of complaint]			AP- Rs. 1,11,45,371 [Page 147 of reply]	
9	CR/3036/2021 Zack Estate V/S Emaar India Limited D.O.F: 03.08.2021	05.10.2021	EHP-500 T-057 [Page 25 of complaint]	N/A SA-22.12.2015 (NL) [Page 66 of complaint]	24.11.2010 [Page 20 of complaint]	24.02.2013	09.03.2016 [Page 83 of reply] TC- Rs. 1,16,42,128 AP- Rs. 1,11,45,371 [Page 147 of reply]	1.Possession 2.DPC
10	CR/3050/2021 Zack Estate V/S Emaar India Limited D.O.F: 03.08.2021	05.10.2021	EHP-500 T-056 [Page 27 of complaint]	N/A SA-15.12.2015 (Endorsement on BBA) [Page 62 of complaint]	24.11.2010 [Page 22 of complaint]	24.02.2013	09.03.2016 [Page 83 of reply] TC- Rs. 1,16,42,128 AP- Rs. 1,18,79,705 [Page 147 of reply]	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
NL	Nomination letter
SA	Subsequent allottee
TC	Total consideration
AP	Amount paid by the allottee/s
N/A	Not available on record

4. The aforesaid complaints 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 plots 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 the possession of the subject plot by the due date as per 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/3039/2021)**
7. The facts of all the complaints filed by the complainant/allottee are almost similar. Out of the above referred matters, the particulars of the lead complaint no. 3039 of 2021 titled as ***Chirau Propbuild 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 (10 in number) and the ratio of this complaint shall be applicable in the rest of the complaints. 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	Emerald Hills (Plots), Sector 65, Gurugram, Haryana
2.	Project area	102.74 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no. and validity status	10 of 2009 dated 21.05.2009 Valid/renewed up to 20.05.2019
5.	HRERA registered/ not registered	Not registered
6.	Part completion certificate granted on	Not placed on record
7.	Date of allotment in favour of original allottee i.e. Crave Infratech Pvt. Ltd.	Not placed on record
8.	Plot no.	EHP-500 T-058 [Page 24 of complaint]
9.	Plot measuring	Decreased to 499.96 sq. yds. from earlier of 500 sq. yds. [Page 83 of reply]
10.	Date of execution of buyer's agreement	10.08.2010 [page no. 18 of complaint]
11.	Payment plan	Time linked payment plan [Page 48 of complaint]
12.	Total consideration of said plot as per statement of account dated 20.08.2021 at page 147 of reply	Rs. 1,15,30,580/-
13.	Total amount paid by the complainant as per statement of account dated 20.08.2021 at page 147 of reply	Rs. 1,11,45,371/-
14.	Possession clause	8. <i>Subject to force majeure conditions and reason beyond the control of the Company, the Company shall make every endeavour to deliver possession of the Plot to the Allottee(s) within a period of 27 (twenty seven) months from the date of execution of this Buyer's Agreement. In the event that the possession of the Plot is likely to be delayed for reasons of any force majeure</i>



		<p>event or any other reason beyond the control of the Company including government strike or due to civil commotion or by reason of war or enemy action or earthquake or any act of God or if non delivery is as a result of any act, notice, order, rule, or notification of the Government and any other public or Competent Authority or for any reason beyond the control of the Company, then in any of the aforesaid events, the Company shall upon notice claiming force majeure to the Allottee(s) be entitled to such extension of time till the force majeure event persists or the reason beyond the control of the Company exists. In the event that the Company fails to deliver possession of the Plot without existence of any force majeure event or any reason beyond the control of the Company within 30 (thirty) months from the date of execution of this Agreement, the Company shall be liable to pay to the Allottee(s) a penalty of the sum Rs. 50/- (Rupees Fifty only) per sq. yd. per month for such period of delay beyond 27 months from the date of execution of this Agreement. It is made clear to the Allottee(s) and understood by the Allottee(s) that under no circumstances the Possession of the Plot will be handed over to the Allottee(s) prior to the execution of the Sale Deed/Conveyance Deed.</p>
15.	Due date of delivery of possession as per clause 8 of the said agreement	10.11.2012
16.	Nomination letter in favour of complainant	22.12.2015
17.	Date of offer of possession to the complainant	09.03.2016 [page 83 of reply]
18.	Delay in handing over possession w.e.f. the date of stepping into the shoes of original allottee (nomination letter) i.e. 22.15.2015 till the date of decision i.e. 22.02.2022	6 years 2 months

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B. Facts of the complaint

8. The complainant has made the following averments in the complaint:

- i. That initially M/s Crave Infratech Pvt Ltd, the previous buyer booked a plot in the project, Emerald Hills of the respondent and was thereon allotted plot bearing no. **EHP-500/T-58** admeasuring 500 sq. yd. (hereinafter referred to as the "said Plot"). In this regard, the previous buyer formally entered into a buyer's agreement dated 10.08.2010 with the respondent.
- ii. That respondent erstwhile namely Emaar MGF Land Ltd. with the consent of the previous allottee (M/s Crave Infratech Pvt. Ltd.), on 14.12.2015, transferred the allotment of the said plot in favour of the complainant M/s Chirau Propbuild Pvt. Ltd. Upon the transfer of allotment in terms of application/affidavit dated 15.12.2015 of the said previous purchaser/complainant, the name of the complainant i.e. M/s Chirau Propbuild Pvt. Ltd. was endorsed by the respondent in the said buyers agreement dated 10.08.2010. The respondent issued nomination confirmation letter dated 22.12.2015, thereby formally approving the transfer of allotment of the said plot in favour of the complainant. The complainant paid the entire consideration amount towards allotment of the said plot. Consequently, the complainant stepped into the shoes of the previous allottee/buyer in regard to the allotment of the said plot.
- iii. That consequently the terms of buyer's agreement dated 10.08.2010, executed between the original buyer and the respondent company, were made applicable upon the complainant and in terms clause 8 of the buyer's agreement, the possession for the said plot was supposed to be delivered within 27 months i.e.



far back on 10.11.2012. In November 2019, the complainant on coming to know that the respondent had initiated delivery of possession of the plots to the other plot buyers, approached the respondent for possession of the said plot, but the respondent started dillydallying on the issue of possession of the said plot.

- iv. That in view of the fact that the complainant has paid the entire consideration amount in respect of the said plot, the plot of the complainant still remains undeveloped due to the negligence of the respondent whereas the other plots in vicinity have been fully developed. There has been huge delay in handing over the possession of the plot. The respondent despite continuous follow-ups on the part of the complainant, is yet to deliver the possession of the said plot to the complainant.
- v. 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 and grant of interest for the period of delay.

C. Relief sought by the complainant

9. The complainant is seeking the following relief:
 - i. Direct the respondent company to pay interest on the delay in handing over the possession with effect from 10.11.2012 till realization of the same in view of the violation of section 18 of the Act.
 - ii. Direct the respondent to provide possession of the plot no. EHP-500 T-058 in its project Emerald Hills, Sector-65 Gurugram.

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- 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 is not a genuine consumer/allottee and seeks to mislead this authority. The complainant company is a related entity of MGF Developments Limited ("MGFD"). The subject plot was originally allotted to another related entity of MGF, Crave Infratech Private Limited, who executed the buyer's agreement dated 10.08.2010. Thereafter, the allotment was transferred in favour of the complainant and the same was taken on record by the respondent vide endorsement dated 15.12.2015. An 'Intimation of Possession' letter was also issued by the respondent on 09.03.2016. Considering the fact that MGF exercised control over the respondent, the original allottee, and the complainant at the time of allotment and endorsement of the subject plot, it is evident that the entire transaction was actually undertaken not between distinct entities but between different arms of the same entity. In that light, the complainant cannot be said to be a genuine buyer or consumer having the locus to avail the remedy under RERA. Allowing the same would constitute a manifest abuse of process of this hon'ble authority.
- ii. The respondent and MGF 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.

- 2499.960/HTG) for disputes that have arisen in relation to the restructuring of the respondent company. Therefore, the subject-matter of the complaint is substantially linked with and contingent on the subject-matter in issue in the NCLT proceedings.
- iii. That the present complaint is not maintainable under the Act for the following reasons: (i) there is no violation of section 18 of Act; and (ii) the complainant has failed to fulfil its duties under section 19 of Act. The complainant is required to make necessary outstanding payments before being entitled to possession of the subject plot. The amounts in respect of the principal payment and delayed payment charges are outstanding and due to be paid by the complainant. In view of the amount of consideration still remaining to be paid, the complainant is not entitled to possession of the subject plot and its averment that "the allotment of the said plot is fully paid and nothing remains due as on date" is entirely untrue. 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 present complaint is not maintainable on account of affidavit executed by the complainant. The present complaint is not maintainable as the complainant availed a waiver of outstanding delay payment charges from the respondent and in lieu of the same, executed an affidavit dated 15.12.2015 swearing that it shall not be entitled to any compensation for delay in hand over of possession.
- v. That the present complaint has been filed to circumvent contractual obligations. The buyer's agreement dated 10.08.2010 and the endorsement dated 15.12.2015 in respect of the subject

plot are to be read with and subject to a settlement agreement in the form of a memorandum of understanding (MOU) executed between MGF and the respondent.

- vi. That pertinently, on account of delays in payment of various instalments for the subject plot, an amount of Rs.1,11,59,433/- had accumulated as delay payment charges to be paid to the respondent company. However, the outstanding delay payment charges amount was waived off in lieu of the complainant executing an affidavit on 15.12.2015 swearing that it "shall not be entitled to any compensation for delay in handing over possession". In other words, the affidavit formed the consideration for the waiver of outstanding delay payment charges.
- vii. That it is critical to note that the entire transaction of the subject plot was given effect during the MGF control period. The allotment, endorsement, delay payment charges waiver, and 'Intimation of Possession' were all issued in favour of MGF's related entities while MGF controlled the respondent company. According to the Respondent, the requirements of the Companies Act, 1956/ 2013 have not been complied with, which are: (i) duly disclosed to and approved by the board of directors of the respondent; and (ii) conducted fairly at an arms' length basis.
- viii. It is also alleged that the subject plot was allotted at a grossly undervalued consideration. As against the prevailing sale rate of around Rs.70,000/- per sq. yd. for other plots and allottees in the Emerald Hills Project, the subject plot was acquired by the complainant at the highly discounted rate of around Rs.20,000/- per sq. yd.

- ix. That in addition to the plots allotted to MGFD-related entities at enormous discounts (that included the subject plot), the respondent alleged that certain other allotments were made to the complainant entities completely free of cost for entering into the agreements identified as Collaboration Agreements I, Landowners Agreements I, Collaboration Agreements II, and Landowners Agreements II in the MOU ("Initial Agreements"). According to the respondent, thirty-nine (39) such plots were allotted to complainant entities pursuant to Collaboration Agreements-I and Landowners Agreements-I. Thirty-seven (37) plots were allotted to complainant entities pursuant to Collaboration Agreements-II and Landowners Agreements-II.
- x. That to resolve the issues between the respondent and MGFD, MOU was between the said two parties with respect to the differences between them. Clause 2 of the MOU provided that "all concerns, claims and grievances raised stand redressed to entire satisfaction of MGF entities and nothing stands pending against Emaar entities in any manner whatsoever subject to fulfilment of the terms and conditions of this MoU". In view of this MOU, the respondent contends that the terms of the buyer's agreement applicable to the complainant vide endorsement dated 15.12.2015, were made subject to and have to be read with the MOU on 21.08.2017.
- xi. The respondent, apart from raising the above objections as regards maintainability of the complaint, has stated on merits of the complaint that the complainant is not entitled to possession of the subject plot. As per the respondent, according to clause 9 of the buyer's agreement, the handover of possession of the subject plot

is "subject to the Allottee(s) having complied with all the terms and conditions of this Buyer's Agreement". Therefore, the complainant is entitled to possess the subject plot only upon complying with all obligations under the buyer's agreement, i.e., after discharging its payment obligations. However, as of August/ September 2021, the complainant is liable to pay the following outstanding amounts under the buyer's agreement in respect of the subject plot:

S. No.	Particulars	Amount (INR/-)
1.	Balance of Principal Amount	4,96,757
2.	DPC	2,91,587
3.	Holding Charges (including GST)	16,20,512
4.	Total Outstanding	24,08,856

- xii. It is further submitted that in case the affidavit executed by the complainant is found not binding, in addition to the aforesaid amounts, the complainant would also be liable to pay an additional amount of Rs.1,11,59,433/- along with penal interest thereon, being the delay payment charges waived off by the respondent in December 2015 on the basis of the complainant's affidavit that it shall not be entitled to any compensation for delay in possession. Accordingly, since all amounts due and payable under the buyer's agreement have not been paid in time to the respondent, the complainant is not entitled to seek possession of the subject plot in any case. Thus, there is no violation of section 18 by the respondent, whether in terms of the MOU or in terms of the buyer's agreement. Additionally, failure to make the necessary payments as per the buyer's agreement also amounts to a violation of section 19(6) of the Act by the complainant. Accordingly, it is submitted

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that the present complaint is wholly unmaintainable and may be dismissed by this hon'ble authority.

11. On 26.10.2021, the complainant has filed rejoinder to the reply filed by the respondent wherein the complainant has refuted the assertions of the respondent stating that as the respondent has failed to deliver the possession of subject plot 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. over some disputes between them and MGF Development Limited is related to the complainant. Besides stating the above facts, the complainant also averred in its rejoinder that the list of disputed properties filed by the respondent along with its petition before NCLT does not include the subject plot much less there is any stay of any court/tribunal pertaining to the subject plot.

E. Written arguments by the complainant

12. The written arguments were filed by the complainant on 18.02.2022 wherein it is submitted as follows:
- That the complainant being an allottee (as per the definition of the Act) 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 as the possession of the subject plot has deliberately not been given by the respondent to the complainant. As such the allotment of the present plot is of more than ten years and the same were allotted on the price agreed in line with the plots sold to any other parties of the project. The completion certificate has also not been received.

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- ii. That argument of the respondent that this hon'ble authority has no jurisdiction to adjudicate the present complaint on the premise that application for occupation certificate (OC) has been made during the time of applicability of the Rules in the State of Haryana as such fell under the category of completed project and not "ongoing project", does not hold water in view of the view of observation of this hon'ble authority in judgment inter-alia dated 12.08.2021 in complaint no. CR/4031/2019, wherein in this authority held that "*only that project shall be excluded from the purview of ongoing project which had received the completion certificate prior to the Act and such project will not require registration*". Further the Hon'ble Supreme Court of India in Civil appeal nos. 6745-6749/2021 titled as "*Newtech Promoter and Developer Pvt. Ltd. V/s State of U.P and Ors.*" reported as *MANU/SC/1056/2021*, while upholding the judgment of Hon'ble High Court of Allahabad held that "*the intention of the legislature by necessary implication and without any ambiguity is to include those project which were on going and in cases where completion certificate has not been issued within fold of the Act*".
- iii. That 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 plot in terms of buyer's agreement. Since the NCLT proceeding have been filed with incorrect facts, so, the same are liable to be dismissed.
- iv. That the respondent's argument that the complainant is not a genuine buyer and subject plot is subject to MOU, is also wrong and

without any basis and is liable to be discarded from the fact that neither the complainant is a party to the said MOU, nor the allotment of the subject plot is the subject matter in the NCLT petition (Annexure R/11) filed in year 2019. Also, the buyer's agreement executed, account ledger/statement maintained, letters/correspondences issued by the respondent annexed as Annexure R/6, proves the relation of the complainant with the respondent as of allottee with the promoter as per the Act and as such the genuine allottee of the subject property. Further, the MOU is not relevant in the present matter as the same is a separate independent document between the parties and has its own resolution mechanism and as such have no concern with regard to the present complainant.

- v. That the respondent's argument regarding the issuance of letter of possession dated 09.03.2016, it is submitted that the same has neither been received by the complainant nor any proof of dispatch or receipt has been placed on record by the respondent from which it can safely be presumed that the said letter is fabricated and has been created to falsely claim to the effect that the complainant defaulted in taking possession. The said fact can be fortified from the fact that no reminder letter has been attached by the respondent, though in every such case, the developer issues repeated reminder letters.
- vi. That respondent's further argument that the complainant is not entitled for any delay possession charges on the premise that it availed waiver of Rs. 1,11,59,433/- accumulated as delay payment charges by the date of transfer of allotment, is also not well



founded and is liable to be discarded. Even it is assumed for the sake of arguments that any such undertaking came from the allottee e.g., the complainant waiving delay compensation, such waiver could be only until the period of the said undertaking since the past. There cannot be any blank future waiver of delay compensation for any unknown period for which the respondent might delay in handing over the possession. Infact the waiver was towards the charges accumulated in favour of the original allottee on a mutual understanding between the erstwhile allottee and the respondent and not the complainant, which is a separate legal entity independent of the original allottee. It has been held by this hon'ble authority in judgment dated 12.08.2021 passed in complaint no. CR/4031/2019 wherein this hon'ble authority held that *"No reliance can be placed on any such affidavit/ indemnity-cum-undertaking and the same is liable to be discarded and ignored in its totality. Therefore, this authority does not place reliance on the said affidavit/indemnity cum undertaking"*.

- vii. That the complainant prays before this hon'ble authority that the present complaint may kindly be allowed in terms of the prayer/relief clause. It is further prayed that since, it is clear that the respondent deliberately did not handover the possession of the plot 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 the respondent



13. The written arguments were filed by the counsel of respondent, Shri J.K. Dang, on 21.02.2022 wherein besides reiterating facts of the complaint and reply already filed by the respondent, it is submitted as follows:

- i. That the complainant has not denied that Memorandum of Understanding dated 21.08.2017 had been executed between the respondent and MGF and others. As highlighted earlier, aforesaid Memorandum of Understanding dated 21.08.2017 required the complainant entities to assign their rights under the initial agreements (including rights over the free plots) in favour of the respondent entities through execution of various additional agreements, deeds and documents (**"Supplementary Agreements"**).
- ii. That threadbare examination of Memorandum of Understanding dated 21.08.2017 makes it evident that the complainant's rights over the said plot and the freedom to deal with it were contingent on the complainant entities fulfilling their obligation to execute the supplementary agreements. It has been comprehensively established by the respondent that between September and December 2017, drafts of the supplementary agreements were negotiated between MGF and the respondent. It is relevant to highlight that at no point did MGF deny or object to: (i) its obligation of executing the supplementary agreements; and (ii) the understanding that the execution of the supplementary agreements formed a necessary condition for the settlement of all the plots in the said MOU. Therefore, it would be just, fair, proper and legitimate on the part of respondent to contend that since, in terms of memorandum of understanding dated 21.08.2017 the

execution of the supplementary agreements is still pending it stands completely established that the obligations of the complainant entities remain unfulfilled. On this account the respondent has fairly and legally claimed that the allotment of the said plot in favour of the complainant should be kept in abeyance.

- iii. That the complainant is not entitled to raise any claim for compensation, damages or possession in lieu thereof. In fact, on account of execution of Memorandum of Understanding dated 21.08.2017 the terms and conditions incorporated in buyer's agreement dated 04.11.2010 were altered. To and fro exchange of contracts between the respondent and MGFD cannot be disregarded even though it did not culminate in execution thereof. The aforesaid exchange establishes that MGFD had accepted that supplementary agreements would be executed. The said plot figures at serial number 58 on page 109 of Annexure D forming part of Memorandum of Understanding dated 21.08.2017. With respect to the aforesaid contention, the respondent placed reliance on section 62 and 63 of the Indian Contract Act, 1872. It was further contended that such acceptance of modifications of terms of contract has been construed under law to constitute novation of contract and reliance in this regard was placed on following citations: **2017(8) SUPREME COURT CASES 0237 and AIR 1981 SC 2085.**

- iv. That moreover, the terms and conditions contained in subsequent Memorandum of Understanding dated 21.08.2017 modify the terms and conditions incorporated in buyer's agreement dated 04.11.2010. It is settled proposition of law that such modified

terms and conditions incorporated in a subsequent contract become a part of the original contract itself. Reliance in this regard is placed on the following citation: 2017(1) SUPREME COURT CASES 0487 and 2008(37) RCR(Civil) 876. It is an undeniable fact that the complainant is a related party of MGF. It is also not a matter of dispute that MGF exercises significant influence over the functioning of the complainant.

- v. That now it has to be seen as to whether M/s MGF Developments Ltd. and the complainant were/are related parties or not. The respondent has produced copy of MGF Developments Ltd. audited financial statement for the financial year ended on 31.03.2019. That the respondent has produced copy of joint venture agreement between MGF Developments Ltd., Emaar India Ltd. and Emaar Properties PJSC. Thus, even in terms of joint-venture agreement the transaction as has been set up by the complainant was prohibited. Thus, the transaction is bad both on account of being violative of contractual covenants and also being in infringement of applicable statutory provisions. A transaction which is bad in the eye of law should not be permitted to be enforced especially when illegalities relating thereto are brought to the attention of the honourable court. It is settled proposition of law that whenever the contract which is the outcome of cheating/fraud is brought before the honourable court for enforcement, the same shall not be done at the instance of the erring party and reliance in this regard is placed on the citation **2010(1) CIVIL COURT CASES 0785.**

G. Jurisdiction of the authority

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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.

E.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.

E.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. Findings on the objections raised by the respondent

H.I Application for deferment of proceedings filed by the respondent

18. The counsel for the respondent has moved an application for keeping the proceedings of the authority in abeyance (in respect of matters at S. Nos. 1 to 3; 9 and 10) in compliance of order of the Hon'ble High Court in CWP no. 19958 of 2017 titled as "**Gurgaon Citizens Council and Anr. Versus State of Haryana & ors.**" and in appeal no. 35 of 2021 titled as **Emaar India Limited Versus Simmi Sikka & Anr.**, the appeal is pending before the Hon'ble High court. The counsel for the respondent has placed on record various orders dated 14.12.2021 passed by the Hon'ble Appellate Tribunal in **appeal no. 102 of 2020, 103 of 2020, 105 of 2020, 106 of 2020** wherein Hon'ble Appellate Tribunal has passed following orders- "*Ld. Counsels for both the parties are seeking adjournment as the matter is still to be adjudicated by the Hon'ble High Court regarding some of the points involved in the present appeal. Now the case stands adjourned to 14th February, 2022 for further proceedings.*" As per the respondent, the issue pending before the Hon'ble High Court relates to applicability of the Act on projects which commenced prior to coming in force of Act.

19. In respect of the said application, arguments were heard from both the sides. The authority observes that the issues raised in the application now stand already settled by the Hon'ble Supreme Court of India vide judgment dated 11.11.2021 in civil appeal titled as **M/s. Newtech Promoters & Developers Pvt. Ltd. v. State of UP [Civil Appeal nos.**

6745-6749 of 2021]. The Hon'ble Supreme Court dealt with five issues in the said judgment, one of which was as under:

"Whether the Act 2016 is retrospective or retroactive in its operation and what will be its legal consequence if tested on the anvil of the Constitution of India?"

20. The Hon'ble Supreme Court answered the above question as under:

37. Looking to the scheme of Act 2016 and Section 3 in particular of which a detailed discussion has been made, all "ongoing projects" that commence prior to the Act and in respect to which completion certificate has not been issued are covered under the Act. It manifests that the legislative intent is to make the Act applicable not only to the projects which were yet to commence after the Act became operational but also to bring under its fold the ongoing projects and to protect from its inception the inter se rights of the stake holders, including allottees/home buyers, promoters and real estate agents while imposing certain duties and responsibilities on each of them and to regulate, administer and supervise the unregulated real estate sector within the fold of the real estate authority...

41. The clear and unambiguous language of the statute is retroactive in operation and by applying purposive interpretation Rule of statutory construction, only one result is possible, i.e., the legislature consciously enacted a retroactive statute to ensure sale of plot, apartment or building, real estate project is done in an efficient and transparent manner so that the interest of consumers in the real estate sector is protected by all means and Sections 13, 18(1) and 19(4) are all beneficial provisions for safeguarding the pecuniary interest of the consumers/allottees. In the given circumstances, if the Act is held prospective then the adjudicatory mechanism Under Section 31 would not be available to any of the allottee for an on-going project. Thus, it negates the contention of the promoters regarding the contractual terms having an overriding effect over the retrospective applicability of the Act, even on facts of this case...

52. The Parliament intended to bring within the fold of the statute the ongoing real estate projects in its wide amplitude used the term "converting and existing building or a part thereof into apartments" including every kind of developmental activity either existing or upcoming in future Under Section 3(1) of the Act, the intention of the legislature by necessary implication and without any ambiguity is to include those projects which were ongoing and in cases where completion certificate has not been issued within fold of the Act.

53. That even the terms of the agreement to sale or home buyers agreement invariably indicates the intention of the developer that any subsequent legislation, Rules and Regulations etc. issued by competent



authorities will be binding on the parties. The clauses have imposed the applicability of subsequent legislations to be applicable and binding on the flat buyer/allottee and either of the parties, promoters/home buyers or allottees, cannot shirk from their responsibilities/liabilities under the Act and implies their challenge to the violation of the provisions of the Act and it negates the contention advanced by the Appellants regarding contractual terms having an overriding effect to the retrospective applicability of the Authority under the provisions of the Act which is completely misplaced and deserves rejection.

54. From the scheme of the Act 2016, its application is retroactive in character and it can safely be observed that the projects already completed or to which the completion certificate has been granted are not under its fold and therefore, vested or accrued rights, if any, in no manner are affected. At the same time, it will apply after getting the on-going projects and future projects registered under Section 3 to prospectively follow the mandate of the Act 2016."

21. That the counsels for the respondent were specifically asked by this authority that whether there is any stay order granted by any court in respect of the present matter. The counsels for the respondent replied in negative and confirmed that there is no stay granted by any court in respect of the present matter.
22. The main plea taken by the counsels for the respondent is regarding filing of application for part CC on 30.01.2014. The fate of application is not known and the counsel for the respondent submitted that the fate of application is not known to them, and it is pending. None of the counsels for the respondent was able to apprise the authority whether there was any response from the DTCP on the application for part CC filed by them. Whether there was any follow up from their side to pursue the said application. No averment has been made categorically whether the said application was complete. This application for part CC is pending with the DTCP from the last more than 8 years. Without any documentary proof or some other evidence, it cannot be concluded that application was complete and if it was incomplete then it is no



application in the eyes of law and the very basis of taking plea of rule 2 (o) of Haryana Rules, 2017 goes.

23. The Hon'ble Supreme Court of India judgment as quoted above has categorically decided that only those projects are exempted from registration for which completion certificate has been obtained and fact of the matter is that for this project completion certificate has still not been obtained. The attention of the counsels of the respondent was drawn towards para 3 of their application dated 30.01.2014 for issuing part completion certificate wherein it has been admitted that services are still incomplete. The para-no.3 of the application is reproduced below for ready reference as under:

"We would like to inform you that the execution of services as per proposal dated 13.09.2009 is in full swing. Further to inform you that the application to renew the license has already been submitted on 18.04.2013". (emphasis supplied)

24. The counsel for the respondent also in response to above drew attention of the authority towards para 4 of the application. From the application it is quite clear that the promoter has also done certain unauthorized construction on 194 plots and has also sought regularization of the same which very clearly indicates the conduct of the promoter.
25. Furthermore, the errant conduct of the respondent can be seen through the numerous complaints filed in this authority. A total of 790 complaints were received in this authority against the promoter Emaar India Limited (formerly known as Emaar MGF Land Limited) w.r.t 21 different projects and out of these 174 complaints (132 are pending + 42 are sine die) are still pending for adjudication. As of now, a sum total of 616 complaints have been disposed of by this authority.

S.No.	PROMOTER NAME	PROJECT NAME
1	EMAAR MGF LAND LIMITED (Now known as Emaar India Ltd.)	CAPITAL TOWERS
		COMMERCE PARK
		DIGITAL GREENS
		EMERALD ESTATE APARTMENTS AT EMERALD HILLS
		EMERALD FLOORS PREMIER AT EMERALD ESTATE
		EMERALD FLOORS PREMIER II AT EMERALD ESTATE
		EMERALD FLOORS PREMIER III AT EMERALD ESTATE
		EMERALD FLOORS SELECT AT EMERALD HILLS
		EMERALD HILLS-FLOORS
		EMERALD HILLS-PLOTS
		EMERALD PLAZA AT EMERALD HILLS
		GURGAON GREENS
		IMPERIAL GARDENS
		MARBELLA
		PALM GARDENS
		PALM HILLS
		THE PALM DRIVE
		THE PALM TERRACES
		THE PALM TERRACES SELECT
		THE ENCLAVE
		COLONADE
TOTAL	21 projects	

26. The quantum of the complaints as received in this authority against the erring promoter itself depicts the bad track record of the promoter. Most of the projects which are developed by the promoter are delayed due to which thousands of allottees who have invested their hard-earned money are suffering from financial hardship along with mental stress. In a developing country like ours, it is still a dream for millions of citizens to have their own home. The promoter who is already in a dominant position tries to abuse the recessive allottees by taking their hard-earned money and not giving them the possession in timely manner. The respondent has a history of delayed projects which is evident from the statistics mentioned above and a large number of allottees are suffering because of the same. In respect of the Act, the

endeavour was to ameliorate the sufferings of the allottees/persons, who have invested their hard-earned money in the real estate sector. The object of the RERA is to protect the 'allottees' and simplify the remedying of the wrongs committed by the 'promoter'. One of the modes prescribed under the Act to regulate the real estate sector was to make the promoter liable to pay interest on the amount paid by the allottee where the promoter has failed to complete the project in stipulated time. The provisions of section 18 of the Act are in that way, a remedy available to the allottees.

27. The most pious objective behind the enactment of the Real Estate (Regulation and Development) Act, 2016 is to ensure the sale of real estate project in an efficient and transparent manner along with protecting the interest of the consumers in the real estate sector. The pious object of the Act is to ensure the completion of the real estate projects in a time bound manner. This law was enacted to suppress this mischief of the promoter and to provide effective remedy to the consumers. The authority on the matters like this is of the view that such tactics of the erring promoter needs to be severely dealt with so that the intent of the legislature and the dream of the allottees to have a home of their own is not defeated.
28. The application filed by the respondent is not maintainable and stands rejected on the basis of order dated 11.11.2021 passed by the Hon'ble Supreme Court in civil appeal titled as *M/s. Newtech Promoters & Developers Pvt. Ltd. v. State of UP [civil appeal nos. 6745-6749 of 2021]*. In light of the above, the authority decides to further proceed with the complaint as such.

I. Affidavit filed by the respondent



29. 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 plot was allotted to the complainant and an allotment letter/BBA was signed/issued.

ii. Whether the plot still stands in the name of the complainant.

30. With respect to the aforesaid clarification, the respondent submitted that the subject plot is subject matter of the MOU dated 21 August 2017 and was allotted originally to the related entity of MGF, Crave Infratech Private Limited and was later transferred in favour of the complainant. The respondent submitted that the subject plot was originally allotted to a related entity of MGF, Crave Infratech Private Limited, who executed the buyer's agreement on 10.08.2010. Thereafter, the allotment was transferred in favour of the complainant vide endorsement dated 15.12.2015. An 'Intimation for Possession' letter was also issued by the respondent on 09.03.2016. However, neither the allotment nor the subject transfer is valid. The allotment was made during the MGF Control Period, i.e., the period since incorporation and till 23 May 2016 (when MGF through its promoter was in control of Emaar MGF Land Limited). Also, it is submitted that despite issuance of the allotment letter, the complainant does not qualify to be an allottee as comprehended under the Act. In that light, the complainant cannot be said to be a genuine buyer or consumer having the *locus* to avail the remedy under the Act.



31. 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)

32. From a bare perusal of the definition, it becomes evidently clear that the transferee of an apartment, plot or building who acquires it by any mode is an allottee and this issue has been comprehensively dealt with by the authority in complaint bearing no. 4031 of 2019 titled as **Varun Gupta Versus Emaar MGF Land Ltd. (CR/4031/2019)**. Even, if the complainant is an arm to MGF, it does not make him a less allottee. In the present complaint, the complainant is a subsequent allottee and the respondent had acknowledged the same vide nomination letter dated 22.12.2015. An endorsement to this effect has also been made on the buyer's agreement dated 10.08.2010 which was executed between the original allottee and the respondent. Thus, as soon as the plot is re-allotted in the complainant's name, he will become the allottee and nomenclature "subsequent allottee" shall only remain for identification use by the promoter. Further, the Act does not draw any difference between the allottee and subsequent allottee per se and the rights and obligation of the complainant and the respondent will also be governed by the said buyer's agreement.

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

33. With respect to the aforesaid clarification, the respondent submitted that for the subject plot, the project is fully complete. It is the plot owner who is required to apply for and get the completion certificate.

34. With regard to the above-mentioned issue, the counsel for the respondent was specifically asked whether part CC has been obtained by the respondent till date. The counsels for the respondent submitted that the respondent had applied for part CC on 30.01.2014 and they have not obtained part CC from the concerned authority till date. Therefore, the offer of possession dated 09.03.2016 issued by the respondent promoter is not valid offer of possession as the possession of the subject plot was offered without obtaining part CC. In view of the above, the said offer is held to be unlawful and not a valid offer.

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

35. The respondent submitted that by December 2015, an amount of Rs.1,11,59,433/- had accumulated as delayed payment charges to be paid by the complainant on account of multiple delays in payment of various instalments due to be paid to the respondent in respect of the subject plot. This waiver is also reflected in the statement of accounts. However, during the MGF Control Period, the said outstanding DPC pursuant to the complainant undertaking to the effect that it shall not be entitled to compensation for delay of possession was fraudulently and without authority waived off. The complainant thus executed an affidavit dated 15.12.2015 swearing that it "*shall not be entitled to any compensation for delay in handing over possession*". In the event that the



affidavit is found to not be maintainable, the very basis for waiver of the delayed payment charges owed by the complainant becomes void. Accordingly, the complainant becomes liable to pay a sum of Rs.1,11,59,433/- to the respondent, being the outstanding delay payment charges amount waived off in respect of the subject plot. Moreover, in addition to the aforesaid amount, as of August/ September 2021, the complainant is liable to pay the following outstanding amounts under the agreement in respect of the subject plot:

S. No.	Particulars	Amount (INR/-)
1.	Balance of Principal Amount	4,96,757
2.	DPC	2,91,578
3.	Holding Charges (including GST)	16,20,512
	Total Outstanding	24,08,847

36. The affidavit dated 15.12.2015 relied upon by the respondent swearing that it "shall not be entitled to any compensation for delay in handing over possession" is set aside by the authority as this issue has already been comprehensively dealt with by this authority in complaint bearing no. 4031 of 2019 titled as *Varun Gupta Versus Emaar MGF Land Ltd. (CR/4031/2019)* and the relevant para of the same is reproduced below:

"67. The authority further is unable to gather any reason or has not been exposed to any reasonable justification as to why a need arose for the complainant to sign any such affidavit or indemnity-cum-undertaking and as to why the complainant had agreed to surrender his legal rights which were available or had accrued in favour of the original allottees. In the instant matter in dispute, it is not the case of the respondent that the re-allotment of the unit was made in the name of the subsequent purchaser after the expiry of the due date of delivery of possession of the unit. Thus, so far as the due date of delivery of possession had not come yet and before that the unit had been re-allotted in the name of the subsequent allottee, the subsequent-allottee will be bound by all the terms and conditions of the

builder buyer's agreement including the rights and liabilities. Thus, no sane person would ever execute such an affidavit or indemnity-cum-undertaking unless and until some arduous and/or compelling conditions are put before him with a condition that unless and until, these arduous and/or compelling conditions are performed by him, he will not be given any relief and he is thus left with no other option but to obey these conditions. Exactly same situation has been demonstratively happened here, when the subsequent-allottee had been asked to give the affidavit or indemnity-cum-undertaking in question before transferring the unit in the name of the subsequent allottee otherwise such transfer may not be allowed by the promoter. Such an undertaking/ indemnity bond given by a person thereby giving up his valuable rights must be shown to have been executed in a free atmosphere and should not give rise to any suspicion. No reliance can be placed on any such affidavit/ indemnity-cum-undertaking and the same is liable to be discarded and ignored in its totality. Therefore, this authority does not place reliance on the said affidavit/indemnity cum undertaking. To fortify this view, we place reliance on the order dated 03.01.2020 passed by Hon'ble NCDRC in case titled as Capital Greens Flat Buyer Association and Ors. Vs. DLF Universal Ltd., Consumer case no. 351 of 2015, wherein it was held that the execution of indemnity-cum-undertaking would defeat the provisions of section 23 and 28 of the Indian Contract Act, 1872 and therefore, would be against public policy, besides being an unfair trade practice. The said judgment of NCDRC was also upheld by the Hon'ble Supreme Court vide its judgement dated 14.12.2020 passed in civil appeal nos. 3864-3889 of 2020 against the order of NCDRC."

37. In addition to above, such an affidavit cannot be used by the respondent to deny the statutory benefits of the complainant. The respondent has claimed under the affidavit that the complainant has 'waived' its right to compensation. The Hon'ble Supreme Court has held in ***Municipal Corporation of Greater Bombay v Dr. Hakimwadi Tenants' Association reported in 1988 Supp Supreme Court Cases 55*** that the essence of a waiver is estoppel and where there is no estoppel, there is no waiver. Therefore, in essence, the respondent's contention is that the complainant is estopped from enforcing its statutory right to seek compensation. It is well-settled law that there is no estoppel against statute [Dugar Tea Industries Pvt. Ltd. v State of Assam reported in (2016) 9 Supreme Court Cases 519]. Had the complainant waived off a



contractual right by way of affidavit, the respondent could have, subject to just exceptions, availed the benefit of section 63 of the Indian Contract Act, 1872. But that is not the case here. The Act grants specific statutory right to every buyer to seek compensation / interest if the conditions so permit in terms of the law. Such a right cannot be deemed to have been waived off on account of an affidavit on part of the complainant. Permitting such a course would defeat the very purpose for which the Act has been enacted. The promoters under some pretext or the other would start requiring the buyers to provide such affidavits. The buyers would then have the additional burden of proving the circumstances under which the affidavit was given. This would have a cascading effect on the statutory rights of the buyers. We cannot therefore accept such affidavits as waiver or estoppel to the statutory rights in favour of the complainant. The contentions of waiver and estoppel are thus rejected.

38. The respondent claims that in case the authority does not accept/consider the affidavit of the complainant, then the delay payment interest, which was waived of by the respondent to the tune of Rs.1,11,59,433/-, needs to be reinstated and accordingly, the complainant becomes liable to pay the same to the respondent towards delay payment interest. The authority considered the buyer's agreement executed inter se parties and it observes that the clause 3 of the said agreement provides for charging of interest at the rate of 24% compounded quarterly from the due date of instalment, as per the payment schedule, till the date of payment. Further, it is pertinent to mention that no detailed calculation has been provided by the respondent as to how these calculations were reached and the above-

mentioned figure of Rs.1,11,59,433/- is attained. Presumably, the formula in above clause 3 has been invoked. It is a matter of fact that the buyer's agreement was executed in the year 2010 and the final payment has been made in 2015. It's very strange that in merely five years, the delay payment charges are almost equivalent to the total value of the plot itself. Whatever it is, the authority is of the considered view that the rate of interest leviable on the outstanding payments cannot be more than what is prescribed as per section 19(7) of the Act. Further clarity in this regard is obtained vide when we go through rule 15 of the rules which clearly states that "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate plus two percent. In succeeding paragraphs, we have already held that 9.30 % interest will be paid to the complainant for the delayed possession. Same rate of interest applies to the respondent's claim as well. Accordingly, the delay payment charges need to be re-calculated at the rate of 9.30 % for the period between due date of instalment till the date of actual payment and accordingly, the complainant is required to pay the delay payment charges.

39. Also, the claim of the respondent that it is entitled to holding charges from the complainant/allottee is also unsubstantiated. 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 plots to the complainant and also payment of delayed possession charges as per**

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statutory provisions of proviso to section 18(1) of the Act, 2016?

40. The respondent submitted that there are several legal bars to continue with the present proceedings:

- a. The Hon'ble NCLT has proceeded to appoint an CIRP against MGFD which has significant influence and control over the complainant and as such capability to fulfil its obligations is questionable;
- b. Disputes between MGFD and the respondent are pending before the Hon'ble NCLT, where the respondent has sought an investigation including transactions such as the allotment of the subject plot;
- c. The relationship between the complainant and the respondent is governed by the MOU which has an arbitration clause, and thus the parties ought to be referred to arbitration;
- d. The compliant is barred by limitation having been made after a gross delay;
- e. Fraudulent transactions should not be given effect to.

The respondent has contended that there had been fraudulent related-party transactions undertaken by MGFD while the MGFD was controlling the affairs of the respondent company and the same is pending adjudication before Hon'ble NCLT and therefore, the authority ought not to proceed with these complaints. 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 MGF D 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.

41. 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.

42. It is also alleged by the respondent that the subject plot was allotted at a grossly undervalued consideration. According to the respondent, as against the prevailing sale rate of around Rs.70,000/- per sq. yd. for other plots and allottees in the subject project, the subject plot was acquired by the complainant at the highly discounted rate of around Rs.20,000/- per sq. yd. The authority opines that the burden of proof that the prevailing rate in the subject project was much more than what was agreed upon in the buyer's agreement was on the respondent. It is also worth mentioning that apart from making a hollow statement, the respondent has not brought on record any agreement to sell with other allottees in the same project at the relevant time when the allotment

was made to the complainant to show that the prevailing sale rate of around Rs. 70,000/- per sq. yard. Moreover, the collectorate rate has not been brought on record by the respondent promoter for the relevant time to show that the sale consideration is grossly undervalued. In the view of the facts mentioned above, the authority rejects the said contention of the respondent promoter.

43. The respondent has contended that the issues under consideration ought to be referred to arbitration in view of the MOU between the respondent and a third party, MGF. The authority is of the opinion that the jurisdiction of the authority cannot be fettered by the existence of an arbitration clause in the buyer's agreement/ MOU as it may be noted that section 79 of the Act bars the jurisdiction of civil courts about any matter which falls within the purview of this authority, or the Real Estate Appellate Tribunal. Thus, the intention to render such disputes as non-arbitrable seems to be clear. Also, section 88 of the Act says that the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. Further, the authority puts reliance on catena of judgments of the Hon'ble Supreme Court, particularly in *National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506*, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, consequently the authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause. It is the choice of the complainant being the dominus litis to opt for or not as has been held by the hon'ble Apex Court in

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Management Committee, Montfort Senior Secondary School v Vijay Kumar [(2005) 7 Supreme Court Cases 472].

44. Further, in ***Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017***, the National Consumer Disputes Redressal Commission, New Delhi (NCDRC) has held that the arbitration clause in agreements between the complainants and builders could not circumscribe the jurisdiction of a consumer. The relevant paras are reproduced below:

"49. Support to the above view is also lent by Section 79 of the recently enacted Real Estate (Regulation and Development) Act, 2016 (for short "the Real Estate Act"). Section 79 of the said Act reads as follows:-

"79. Bar of jurisdiction - No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."

It can thus, be seen that the said provision expressly ousts the jurisdiction of the Civil Court in respect of any matter which the Real Estate Regulatory Authority, established under Sub-section (1) of Section 20 or the Adjudicating Officer, appointed under Sub-section (1) of Section 71 or the Real Estate Appellate Tribunal established under Section 43 of the Real Estate Act, is empowered to determine. Hence, in view of the binding dictum of the Hon'ble Supreme Court in *A. Ayyaswamy (supra)*, the matters/disputes, which the Authorities under the Real Estate Act are empowered to decide, are non-arbitrable, notwithstanding an Arbitration Agreement between the parties to such matters, which, to a large extent, are similar to the disputes falling for resolution under the Consumer Act.

56. Consequently, we unhesitatingly reject the arguments on behalf of the Builder and hold that an Arbitration Clause in the afore-stated kind of Agreements between the Complainants and the Builder cannot circumscribe the jurisdiction of a Consumer Fora, notwithstanding the amendments made to Section 8 of the Arbitration Act."

45. While considering the issue of maintainability of a complaint before a consumer forum/commission in the fact of an existing arbitration clause in the builder buyer agreement, the Hon'ble Supreme Court in case titled as ***M/s Emaar MGF Land Ltd. V. Aftab Singh in revision***

petition no. 2629-30/2018 in civil appeal no. 23512-23513 of 2017 decided on 10.12.2018 has upheld the aforesaid judgement of NCDRC and as provided in Article 141 of the Constitution of India, the law declared by the Supreme Court shall be binding on all courts within the territory of India and accordingly, the authority is bound by the aforesaid view. The relevant para of the judgement passed by the Supreme Court is reproduced below:

"25. This Court in the series of judgments as noticed above considered the provisions of Consumer Protection Act, 1986 as well as Arbitration Act, 1996 and laid down that complaint under Consumer Protection Act being a special remedy, despite there being an arbitration agreement the proceedings before Consumer Forum have to go on and no error committed by Consumer Forum on rejecting the application. There is reason for not interjecting proceedings under Consumer Protection Act on the strength an arbitration agreement by Act, 1996. The remedy under Consumer Protection Act is a remedy provided to a consumer when there is a defect in any goods or services. The complaint means any allegation in writing made by a complainant has also been explained in Section 2(c) of the Act. The remedy under the Consumer Protection Act is confined to complaint by consumer as defined under the Act for defect or deficiencies caused by a service provider, the cheap and a quick remedy has been provided to the consumer which is the object and purpose of the Act as noticed above."

46. Therefore, in view of the above judgements and considering the provisions of the Act, the authority is of the view that complainant is well within its right to seek a special remedy available in a beneficial Act such as the Consumer Protection Act and the Real Estate (Regulation and Development) Act, 2016 instead of going in for an arbitration. Hence, we have no hesitation in holding that this authority has the requisite jurisdiction to entertain the complaint and that the dispute does not require to be referred to arbitration necessarily. It is pertinent to mention over here that in such circumstances, the judgment of the Hon'ble Supreme Court in the case of **Chloro Controls India Pvt. Ltd. v Severn Trent Water Purification Inc. reported in (2013) 1 Supreme**

Court Cases 641 has no application to the present case. In the light of the above-mentioned reasons, the authority is of the view that the objection of the respondents stands rejected.

47. Another preliminary objection of the respondent is that the complaint is barred by limitation. It is submitted by the respondent that the case of the complainant is that the respondent failed to give possession of the subject plot by the promised dates, i.e., by February 2013. The respondent submits that the date of alleged default in the present case is February 2013, i.e., the date on which possession was to be allegedly offered by the respondent as per the buyer's agreement. Therefore, the complaint ought to have been filed a complaint within a period of three years from the date of alleged default, i.e., by February 2016. It is a matter of fact that the present complaint has been filed in August 2021, i.e., after a period of around 8 years from the date of alleged default. In view of this, it is submitted by the respondent that the complaint is barred by limitation. To buttress this point, the respondent has relied upon a decision of this Authority in complaint bearing no. 1769 of 2020 titled as *Indra Duggal versus Chandigarh Overseas Pvt. Ltd. & Anr.*
48. The authority is of the view that on perusal of the buyer's agreement it is evidently clear that the respondent promoter has proposed to offer possession of the subject plot within a period of 27 months of the execution of the said agreement. Admittedly, this was not done. Furthermore, the respondent permitted transfer of the allotment of the said plot in favour of the present complainant on 14.12.2015. Admittedly, till that time also, the subject plot was not ready for possession. The claim of the complainant in the present matter is under proviso to section 18(1) of the Act which guarantees interest to the

buyer 'for every month of delay'. It is a matter of fact that there is a continuous or a running cause of action right from the time of the allotment of the subject plot till date. Every month of delay in giving possession to the complainant give rise to a fresh cause of action in favour of the complainant. In view of the above-mentioned reasoning, the contention of the respondent w.r.t limitation is not sustainable and the same is liable to be rejected. The authority decides to proceed with the present matter as such.

J. Findings of the authority

J.I Delayed possession charges

49. **Relief sought by the complainant:** In the following complaints, the complainant is seeking possession of the subject plot along with delay possession charges for the delay in handing over possession of the subject plot 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 and date of nomination letter	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/3039/2021 Chirau Propbuild Private limited V/S Emaar India Limited D.O.F: 02.08.2021	10.08.2010 [Page 18 of complaint] SA- 22.12.2015 (NL) [Page 71 of complaint]	10.11.2012	09.03.2016 [Page 83 of reply] TC- Rs. 1,15,30,580 AP- Rs. 1,11,45,371 [Page 147 of reply]	1. Possession 2. DPC	W.e.f. 22.12.2015 till handing over of possession or up to two months from the valid offer of possession, whichever is earlier Delay calculated till date of decision i.e. 22.02.2022 - 6 years 2 months
2	CR/3040/2021 Chirau Propbuild Private limited V/S	10.08.2010 [Page 20 of complaint] SA- 22.12.2015 (NL)	10.11.2012	09.03.2016 [Page 83 of reply] TC- Rs. 1,15,30,580	1. Possession 2. DPC	W.e.f. 22.12.2015 till handing over of possession or up to two months from the valid offer of possession, whichever is earlier



Complaint nos. 3039, 3040, 3043, 3048, 3047, 3044, 3045, 3046, 3036 and 3050 of 2021

	Emaar India Limited D.O.F: 02.08.2021	[Page 65 of complaint]		AP- Rs. 1,11,45,371 [Page 147 of reply]		Delay calculated till date of decision i.e. 22.02.2022 - 6 years 2 months
3	CR/3043/2021 Chirau Propbuild Private Limited V/S Emaar India Limited D.O.F: 02.08.2021	11.11.2010 [Page 20 of complaint] SA- 22.12.2015 (NL) [Page 59 of complaint]	11.02.2013	09.03.2016 [Page 83 of reply] TC- Rs. 1,15,30,580 AP- Rs. 1,11,45,371 [Page 147 of reply]	1. Possession 2. DPC	W.e.f. 22.12.2015 till handing over of possession or up to two months from the valid offer of possession, whichever is earlier Delay calculated till date of decision i.e. 22.02.2022 - 6 years 2 months
4	CR/3048/2021 Chirau Propbuild Private Limited V/S Emaar India Limited D.O.F: 02.08.2021	24.11.2010 [Page 20 of complaint] SA- 22.12.2015 (NL) [Page 65 of complaint]	24.02.2013	16.11.2017 [Page 83 of reply] TC- Rs. 1,15,46,551 AP- Rs. 1,11,45,371 [Page 147 of reply]	1. Possession 2. DPC	W.e.f. 22.12.2015 till handing over of possession or up to two months from the valid offer of possession, whichever is earlier Delay calculated till date of decision i.e. 22.02.2022 - 6 years 2 months
5	CR/3047/2021 Chirau Propbuild Private Limited V/S Emaar India Limited D.O.F: 02.08.2021	04.11.2010 [Page 20 of complaint] SA- 22.12.2015 (NL) [Page 65 of complaint]	04.02.2013	16.11.2017 [Page 83 of reply] TC- Rs. 1,15,81,851 AP- Rs. 1,11,45,371 [Page 147 of reply]	1. Possession 2. DPC	W.e.f. 22.12.2015 till handing over of possession or up to two months from the valid offer of possession, whichever is earlier Delay calculated till date of decision i.e. 22.02.2022 - 6 years 2 months
6	CR/3044/2021 Blossom Conbuild Private Limited V/S Emaar India Limited D.O.F: 02.08.2021	11.11.2010 [Page 6 of reply] SA- 22.12.2015 (NL) [Page 62 of complaint]	11.11.2012 [24 months from the execution of agreement]	16.11.2017 TC- Rs. 1,16,66,929 AP- Rs. 1,11,45,371 [Page 147 of reply]	1. Possession 2. DPC	W.e.f. 22.12.2015 till handing over of possession or up to two months from the valid offer of possession, whichever is earlier Delay calculated till date of decision i.e. 22.02.2022 - 6 years 2 months
7	CR/3045/2021	11.11.2010 [Page 20 of complaint]	11.02.2013	16.11.2017 [Page 83 of reply]	1. Possession 2. DPC	W.e.f. 22.12.2015 till handing over of possession or up to two months from

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	Blossom Conbuild Private Limited V/S Emaar India Limited D.O.F: 03.08.2021	SA- 22.12.2015 (NL) [Page 69 of complaint]		TC- Rs. 1,15,46,551 AP- Rs. 1,11,45,371 [Page 147 of reply]		the valid offer of possession, whichever is earlier Delay calculated till date of decision i.e. 22.02.2022 - 6 years 2 months
B	CR/3046/2021 Blossom Conbuild Private Limited V/S Emaar India Limited D.O.F: 03.08.2021	24.11.2010 [Page 20 of complaint] SA- 22.12.2015 (NL) [Page 64 of complaint]	24.02.2013	16.11.2017 [Page 83 of reply] TC- Rs. 1,15,46,551 AP- Rs. 1,11,45,371 [Page 147 of reply]	1. Possession 2. DPC	W.e.f. 22.12.2015 till handing over of possession or up to two months from the valid offer of possession, whichever is earlier Delay calculated till date of decision i.e. 22.02.2022 - 6 years 2 months
9	CR/3036/2021 Zack Estate V/S Emaar India Limited D.O.F: 03.08.2021	24.11.2010 [Page 20 of complaint] SA- 22.12.2015 (NL) [Page 66 of complaint]	24.02.2013	09.03.2016 [Page 83 of reply] TC- Rs. 1,16,42,128 AP- Rs. 1,11,45,371 [Page 147 of reply]	1. Possession 2. DPC	W.e.f. 22.12.2015 till handing over of possession or up to two months from the valid offer of possession, whichever is earlier Delay calculated till date of decision i.e. 22.02.2022 - 6 years 2 months
10	CR/3050/2021 Zack Estate V/S Emaar India Limited D.O.F: 03.08.2021	24.11.2010 [Page 22 of complaint] SA- 15.12.2015 (Endorsement on BBA) [Page 62 of complaint]	24.02.2013	09.03.2016 [Page 83 of reply] TC- Rs. 1,16,42,128 AP- Rs. 1,18,79,705 [Page 147 of reply]	1. Possession. 2. DPC	W.e.f. 15.12.2015 till handing over of possession or up to two months from the valid offer of possession, whichever is earlier Delay calculated till date of decision i.e. 22.02.2022 - 6 years 2 months 7 days

50. 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

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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."

51. Clause 8 of the buyer's agreement provides time period for handing over the possession and the same is reproduced below:

"8. Subject to force majeure conditions and reason beyond the control of the Company, the Company shall make every endeavour to deliver possession of the Plot to the Allottee(s) within a period of 27 (twenty seven) months from the date of execution of this Buyer's Agreement. In the event that the possession of the Plot is likely to be delayed for reasons of any force majeure event or any other reason beyond the control of the Company including government strike or due to civil commotion or by reason of war or enemy action or earthquake or any act of God or if non delivery is as a result of any act, notice, order, rule, or notification of the Government and any other public or Competent Authority or for any reason beyond the control of the Company, then in any of the aforesaid events, the Company shall upon notice claiming force majeure to the Allottee(s) be entitled to such extension of time till the force majeure event persists or the reason beyond the control of the Company exists. In the event that the Company fails to deliver possession of the Plot without existence of any force majeure event or any reason beyond the control of the Company within 30 (thirty) months from the date of execution of this Agreement, the Company shall be liable to pay to the Allottee(s) a penalty of the sum Rs. 50/- (Rupees Fifty only) per sq. yd. per month for such period of delay beyond 27 months from the date of execution of this Agreement. It is made clear to the Allottee(s) and understood by the Allottee(s) that under no circumstances the Possession of the Plot will be handed over to the Allottee(s) prior to the execution of the Sale Deed/Conveyance Deed." (Emphasis supplied)

52. **Due date of handing over possession and admissibility of grace period:** The promoter has proposed to hand over the possession of the subject plot within a period of 27 months from the date of execution of the buyer's agreement and it is further provided in the said clause of the agreement that the said time period is subject to the force majeure conditions or of like nature over which respondent could not exercise

control or action. It is of grave importance to mention over here that the respondent has failed to place on record any document to substantiate his claims w.r.t the fact that force majeure conditions existed as a result of which the construction of the subject project is delayed and for that reason there is a delay in handing over of possession of the subject plot. Therefore, the grace period is not allowed while computing due date of handing over possession. As per the documents placed on record, the agreement was executed on 10.08.2010. Therefore, the due date of handing over possession comes out to be 10.11.2012 as per the clause 8 of the buyer's agreement.

53. **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.

54. 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%.

55. **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;"*

56. 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.

57. **Validity of offer of possession:** The authority in complaint bearing no. **5137 of 2019 titled as Dr. Ashok Kumar Vaid and anr. Versus Emaar MGF Land Ltd.**, has comprehensively dealt with the components of valid offer of possession and they are as follows:

- i. Possession must be offered after obtaining OC/CC;
- ii. The subject plot should be in habitable condition;

- iii. Possession should not be accompanied by unreasonable additional demands.

58. In the present complaint, the respondent has offered the possession of the subject plot vide letter dated 09.03.2016. It is evident from bare perusal of the documents placed on record by both the parties that the said offer was made without obtaining part CC for the part of the project where the subject plot is situated. In simple words, the said offer was made without obtaining the pre-requisites from the competent authority. Therefore, the said offer of possession dated 09.03.2016 is not valid in the eyes of law and the same is held to be unlawful.
59. 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 8 of the buyer's agreement executed between the parties on 10.08.2010, the possession of the subject plot was to be delivered within a period of 27 months from the date of execution of the buyer's agreement. The buyer's agreement was executed inter se parties on 10.08.2010. Therefore, the due date of handing over possession comes out to be 10.11.2012 as the grace period is not allowed in the present matter for the reasons stated above. The complainant in the present complaint is a subsequent allottee and had purchased the plot in question from the original allottee and thereafter, the respondent had acknowledged the same transaction vide nomination letter dated 22.12.2015. In terms of the order passed by the authority in complaint titled as **Varun Gupta Versus Emaar MGF Land Ltd. (CR/4031/2019)**, the complainant is

entitled to delayed possession charges w.e.f. the date of nomination letter dated 22.12.2015 i.e., date on which the complainant stepped into the shoes of the original allottee. The respondent has not received the part CC from the competent authority, therefore, the offer of possession dated 09.03.2016 cannot be deemed to valid in the eyes of law. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the subject plot to the complainant as per the terms and conditions of the buyer's agreement dated 10.08.2010 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 10.08.2010 to hand over the possession of the subject plot within the stipulated time frame.

60. 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. from the date on which the complainant stepped into the shoes of the original allottee (date of nomination letter) i.e. 22.12.2015 till the date of handing over of the actual physical possession of the subject plot 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.

K. Directions of the authority


61. 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):

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- i. The respondent is directed to give possession of the subject plot 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. the date on which the complainant stepped into the shoes of the original allottee (date of nomination letter) till the date of handing over of the actual physical possession of the plot 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 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 46 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.
62. This decision shall *mutatis mutandis* apply to cases mentioned in para 3 of this order.
63. Complaints stand disposed of. True certified copy of this order shall be placed in the case file of each matter. There shall be separate decree in individual cases.
64. File be consigned to registry.

V.I. 
(Vijay Kumar Goyal)
Member
Haryana Real Estate Regulatory Authority, Gurugram


(Dr. K.K. Khandelwal)
Chairman

Dated: 22.02.2022

Judgement uploaded on 04.03.2022.

