

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

Complaint no. : 4054 of 2021
Complaint filed on : 02.11.2021
First date of hearing : 15.12.2021
Date of decision : 18.02.2022

Narintr Sachavirawongse
through SPA Holder Shri Parminder Pal Singh
R/o: H.No.C-72, Kirti Nagar, New Delhi - 110015.

Complainant

Versus

M/s Emaar India Ltd.
(Formerly known as Emaar MGF Land Ltd.)
Office: Emaar Business Park, MG Road,
Sikanderpur Chowk, Sector 28,
Gurugram - 122002, Haryana.

Respondent

CORAM:

Dr. K.K Khandelwal
Shri Vijay Kumar Goyal

**Chairman
Member**

APPEARANCE:

Shri Rishabh Jain
Shri Dhruv Rohatgi

Advocate for the complainant
Advocate for the respondent

ORDER

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



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

2. Since, the buyer's agreement has been executed on 01.04.2013 i.e. prior to the commencement of the Act ibid, therefore, the penal proceedings cannot be initiated retrospectively. Hence, the authority has decided to treat the present complaint as an application for non-compliance of statutory obligation on part of the promoter/respondent in terms of section 34(f) of the Act ibid.

A. Project and unit related details

3. The 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 tabular form:

S. No.	Heads	Information
1.	Project name and location	Gurgaon Greens, Sector 102, Gurugram, Haryana
2.	Project area	13.531 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no. and validity status	75 of 2012 dated 31.07.2012 Valid/renewed up to 30.07.2020
5.	Name of licensee	Kamdhenu Projects Pvt. Ltd. and another C/o Emaar MGF Land Ltd.
6.	HRERA registered/ not registered	Registered vide no. 36(a) of 2017 dated 05.12.2017 for 95829.92 sq. mtrs.
	HRERA registration valid up to	31.12.2018
	HRERA extension of	01 of 2019 dated 02.08.2019



	registration vide no.	
	Extension valid up to	31.12.2019
7.	Occupation certificate granted on	16.07.2019 [annexure R7, page 117 of reply]
8.	Allotment letter dated	25.01.2013 [annexure P2, page 33 of complaint]
9.	Unit no.	GGN-23-0801, 8 th floor, building no. 23 [annexure P2, page 33 of complaint]
10.	Unit measuring	1650 sq. ft. [Page 33 of complaint]
11.	Date of execution of buyer's agreement	01.04.2013 [annexure P3, page 36 of complaint]
12.	Payment plan	Construction linked payment plan [Page 42 of complaint]
13.	Total consideration as per statement of account dated 26.11.2021 at page 113 of reply	Rs.1,03,98,633/-
14.	Total amount paid by the complainant as per statement of account dated 26.11.2021 at page 114 of reply	Rs.1,04,02,340/-
15.	Date of start of construction as per statement of account dated 26.11.2021 at page 113 of reply	20.06.2013
16.	Due date of delivery of possession as per clause 14(a) of the said agreement i.e. 36 months from the date of start of construction (20.06.2013) + grace period of 5 months, for applying and obtaining completion certificate/ occupation certificate in respect of the unit and/or the project. [Page 38 of complaint]	20.06.2016 [Note: Grace period is not included]
17.	Date of offer of possession to the complainant	19.07.2019 [annexure P4, page 43 of compliant]



18.	Unit handover dated	15.10.2019 [annexure R11, page 131 of reply]
19.	Conveyance deed executed on	25.10.2019 [annexure R12, page 134 of reply]
20.	Delay in handing over possession w.e.f. 20.06.2016 till 19.09.2019 i.e. date of offer of possession (19.07.2019) + 2 months	3 years 2 months 30 days
21.	Delay compensation already paid by the respondent in terms of the buyer's agreement as per statement of account dated 26.11.2021 at page 114 of reply	Rs.4,28,412/-

B. Facts of the complaint

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

- i. That grievance of the complainant relates to breach of contract, false promises, gross unfair trade practices and deficiencies in the services committed by the respondent in regard to the unit no. GGN-23-0801, 8th floor, tower - 23 having a super area of 1650 sq. ft. in Sector - 102, Gurugram, Haryana, purchased by the complainant by paying his hard earned money. The complainant had paid the complete payments to the respondent, as and when demanded by the respondent. The respondent has not paid the delay possession charges to the complainant since 01.04.2016, the actual legal date of possession till 15.10.2019, the date of handing over the possession.
- ii. That the complainant was approached by the sale representatives of the respondent, who made tall claims about the project in

question as the world class project. The complainant was invited to the sales office and was lavishly entertained, and promises were made to him that the possession of his unit would be handed over in time including that of parking, horticulture, club and other common areas. The complainant was impressed by their oral statements and representations and was ultimately lured to pay Rs.7,50,000/- as booking amount to the respondent for booking of the subject unit.

- iii. That the respondent issued the welcome letter dated 25.01.2013 to the complainant and thereafter a provisional allotment letter dated 25.01.2013 was also issued by the respondent mentioning allotment of unit no. GGN-23-0801, 8th floor, tower - 23 measuring a super area of 1650 sq. ft. to the complainant in the project in question for a total consideration of Rs.99,86,401/- inclusive of EDC, IDC, PLC, car parking, club membership, IFMS etc. Subsequently, the buyer's agreement was executed between the complainant and the respondent on 01.04.2013. The date of handing over the possession of the subject unit as per clause 14(a) of the buyer's agreement comes out to be 01.04.2016, calculated 36 months from the date of start of construction.
- iv. That the respondent issued a letter of offer of possession of unit to the complainant on 19.07.2019 and further demanded payment of final dues of Rs.10,44,382/- for taking possession of

the said unit, from the complainant. The complainant made all payments timely as and when demanded by the respondent and, in total, paid a sum of Rs.1,04,02,340/- way back till 07.08.2019 i.e. more than 100 % payable amount, as and when demanded by the respondent.

- v. That the complainant was forced to sign the indemnity cum undertaking dated 08.08.2019 prepared and drafted by the respondent before handing over the possession of the subject unit. The respondent issued a unit handover letter to the complainant on 15.10.2019 and handed over the physical possession of the said unit. The respondent also allotted exclusive right to use car parking space P-111 to the complainant. The complainant approached the respondent and pleaded for delivery of possession of his unit as per the buyer's agreement on various occasions. The respondent did not reply to his letters, emails, personal visits, telephone calls, seeking information about the status of the project and delivery of possession of his unit, thereby the respondent violated section 19 of the Act. Respondent has not paid the delay possession charges to the complainant since 01.04.2016, the actual legal date of possession till 15.10.2019, the date of handing over the possession of the unit in terms of section 11(4)(a) of the Act read with section 18 of the Act.

C. Relief sought by the complainant

5. The complainant is seeking the following relief:

- i. Direct the respondent to pay interest for every month of delay in offering possession of the unit since 01.04.2016 to the complainant, on the amount taken from the complainant for the sale consideration along with additional charges for the unit, at the prescribed rate as per the Act till the handing over the possession of the unit i.e., 15.10.2019.
- ii. Any other damages, interest and relief which the hon'ble authority may deems fit and proper under the circumstances of the case may kindly be pleased in the favour of the complainant and against the respondent.

D. Reply filed by the respondent

6. The respondent contested the complaint on the following grounds:

- i. That the present complaint is based on an erroneous interpretation of the provisions of the Act as well as an incorrect understanding of the terms and conditions of the buyer's agreement dated 01.04.2013. The provisions of the Act are not retrospective in nature. The provisions of the Act cannot undo or modify the terms of an agreement duly executed prior to coming into effect of the Act. It is further submitted that merely because the Act applies to ongoing projects which are registered with the authority, the Act cannot be said to be operating retrospectively. The provisions of the Act relied upon by the complainant for seeking interest cannot be called in to aid in derogation and

ignorance of the provisions of the buyer's agreement. The interest is compensatory in nature and cannot be granted in derogation and ignorance of the provisions of the buyer's agreement. It is further submitted that the interest for the alleged delay demanded by the complainant is beyond the scope of the buyer's agreement. The complainant cannot demand any interest or compensation beyond the terms and conditions incorporated in the buyer's agreement.

- ii. That the complainant vide an application form applied to the respondent for provisional allotment of a unit in the project. The complainant, in pursuance of the aforesaid application form, was allotted an independent unit bearing no. GGN-23-0801, located on the second floor, in the project vide provisional allotment letter dated 25.01.2013. The complainant consciously and willfully opted for a construction linked plan for remittance of the sale consideration for the unit in question and further represented to the respondent that he shall remit every installment on time as per the payment schedule. The respondent had no reason to suspect the bonafide of the complainant and proceeded to allot the unit in question in their favor. Thereafter, buyer's agreement dated 01.04.2013 was executed between the complainant and the respondent.
- iii. That the complainant was irregular in payment of instalments. The respondent was constrained to issue reminders and letters to the complainant requesting him to make payment of demanded amounts. Several payment request letters, reminders etc. were

sent to the complainant by the respondent clearly mentioning the amount that was outstanding and the due date for remittance of the respective amounts as per the schedule of payments, requesting the complainant to timely discharge his outstanding financial liability but to no avail. Statement of account dated 26.11.2021 as maintained by the respondent in due course of its business depicts delay in remittance of various payments by the complainant.

- iv. That the complainant consciously and maliciously chose to ignore the payment request letters and reminders issued by the respondent and flouted in making timely payments of the instalments which was an essential, crucial and an indispensable requirement under the buyer's agreement. Furthermore, when the proposed allottees default in their payments as per schedule agreed upon, the failure has a cascading effect on the operations and the cost for proper execution of the project increases exponentially and further causes enormous business losses to the respondent. The complainant chose to ignore all these aspects and wilfully defaulted in making timely payments. It is submitted that the respondent despite defaults of several allottees earnestly fulfilled its obligations under the buyer's agreement and completed the project as expeditiously as possible in the facts and circumstances of the case. Therefore, there is no equity in favour of the complainant.
- v. That clause 14(b)(v) of the buyer's agreement provides that in the event of any default or delay in payment of instalments as per the

schedule of payments incorporated in the buyer's agreement, the time for delivery of possession shall also stand extended. Clause 16 of the buyer's agreement further provides that compensation for any delay in delivery of possession shall only be given to such allottees who are not in default of their obligations envisaged under the agreement and who have not defaulted in payment of instalments as per the payment plan incorporated in the agreement. It is submitted that the complainant has defaulted in timely remittance of the instalments and hence the date of delivery option is not liable to determine the matter sought to be done by the complainant. The complainant is conscious and aware of the said agreement and has filed the present complaint to harass the respondent and compel the respondent to surrender to his illegal demands. It is submitted that the filing of the present complaint is nothing but an abuse of the process of law.

- vi. That despite there being a number of defaulters in the project, the respondent itself infused funds into the project and has diligently developed the project in question. The respondent had applied for occupation certificate on 11.02.2019. Occupation certificate was thereafter issued in favour of the respondent vide memo bearing no. ZP-835/AD(RA)/2018/16816 dated 16.07.2019. It is pertinent to note that once an application for grant of occupation certificate is submitted for approval in the office of the concerned statutory authority, the respondent ceases to have any control over the same. The grant of sanction of the occupation certificate is the prerogative of the concerned statutory authority over



which the respondent cannot exercise any influence. As far as the respondent is concerned, it has diligently and sincerely pursued the matter with the concerned statutory authority for obtaining of the occupation certificate. No fault or lapse can be attributed to the respondent in the facts and circumstances of the case. Therefore, the time period utilised by the statutory authority to grant occupation certificate to the respondent is necessarily required to be excluded from computation of the time period utilised for implementation and development of the project.

- vii. That the construction of the project/allotted unit in question already stands completed and the respondent has already offered possession of the unit in question to the complainant. Furthermore, the project of the respondent has been registered under the Act and the rules. Registration certificate was granted by the Haryana Real Estate Regulatory Authority vide memo no. HRERA-139/2017/2294 dated 05.12.2017. It is pertinent to mention that the respondent had applied for extension of the registration and the validity of registration certificate was extended till 31.12.2019. However, since the respondent has delivered possession of the units comprised in the relevant part of the project, the registration of the same has not been extended thereafter.
- viii. That the complainant was offered possession of the unit in question through letter of offer of possession dated 19.07.2019. The complainant was called upon to remit balance payment including delayed payment charges and to complete the

necessary formalities/documentation necessary for handover of the unit in question to the complainant. However, the complainant approached the respondent with request for payment of compensation for the alleged delay in utter disregard of the terms and conditions of the buyer's agreement. The respondent explained to the complainant that he is not entitled to any compensation in terms of the buyer's agreement on account of default in timely remittance of instalments as per schedule of payment incorporated in the buyer's agreement. The respondent earnestly requested the complainant to obtain possession of the unit in question and further requested the complainant to execute a conveyance deed in respect of the unit in question after completing all the formalities regarding delivery of possession. However, the complainant did not pay any heed to the legitimate, just and fair requests of the respondent and threatened the respondent with institution of unwarranted litigation.

- ix. That the respondent in order to settle the unwarranted controversy needlessly instigated by the complainant proceeded to credit an amount of Rs.4,28,412/- to the account of the complainant in full and final satisfaction of his alleged grievances. Moreover, it is pertinent to mention that the respondent has also credited a sum of Rs. 77,686/- as benefit on account of Anti-Profiting and Rs. 10,596/- for early payment rebate. Without prejudice to the rights of the respondent, delayed interest if any has to be calculated only on the amounts deposited by the allottees/complainant towards the basic principle amount of the



unit in question and not on any amount credited by the respondent, or any payment made by the allottees/complainant towards delayed payment charges or any taxes/statutory payments etc.

- x. That after receipt of the aforesaid amount, the complainant approached the respondent requesting it to deliver the possession of the unit in question. A unit handover letter dated 15.10.2019 was executed by the complainant, specifically and expressly agreeing that the liabilities and obligations of the respondent as enumerated in the allotment letter or the buyer's agreement stand satisfied. The complainant has intentionally distorted the real and true facts in order to generate an impression that the respondent has reneged from its commitments. No cause of action has arisen or subsists in favour of the complainant to institute or prosecute the instant complaint. The complainant has preferred the instant complaint on absolutely false and extraneous grounds in order to needlessly victimise and harass the respondent.
- xi. That after execution of the unit handover letter dated 15.10.2019 and obtaining of possession of the unit in question, the complainant is left with no right, entitlement or claim against the respondent. It needs to be highlighted that the complainant has further executed a conveyance deed dated 25.10.2019 in respect of the unit in question. The transaction between the complainant and the respondent stands concluded and no right or liability can be asserted by the respondent or the complainant against the

other. It is pertinent to take into reckoning that the complainant has obtained possession of the unit in question and has executed conveyance deed in respect thereof, after receipt of the amount of Rs. 4,28,412/- from the respondent. The instant complaint is a gross misuse of process of law.

- xii. That several allottees, including the complainant, have defaulted in timely remittance of payment of installments which was an essential, crucial and an indispensable requirement for conceptualisation and development of the project in question. Furthermore, when the proposed allottees default in their payments as per schedule agreed upon, the failure has a cascading effect on the operations and the cost for proper execution of the project increases exponentially whereas enormous business losses befall upon the respondent. The respondent, despite default of several allottees, has diligently and earnestly pursued the development of the project in question and has constructed the project in question as expeditiously as possible. It is submitted that the construction of the tower in which the unit in question is situated is complete and the respondent has already offered possession of the unit in question to the complainant. Therefore, there is no default or lapse on the part of the respondent and there is no equity in favour of the complainant. It is evident from the entire sequence of events, that no illegality can be attributed to the respondent. The allegations levelled by the complainant are totally baseless. Thus, it is most respectfully

submitted that the present complaint deserves to be dismissed at the very threshold.

E. Jurisdiction of the authority

7. 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

8. 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

9. 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.

10. 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.

F. Findings on the objections raised by the respondent

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

11. The respondent raised an objection that the provisions of the Act are not retrospective in nature and the provisions of the Act cannot undo or modify the terms of an agreement duly executed prior to coming into force of the Act. The authority is of the view that the Act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/ situation in a specific/particular manner,



then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of **Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)** which provides as under:

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

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

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

“34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of

completion. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."

13. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the buyer's agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of the Act, rules and regulations made thereunder and are not unreasonable or exorbitant in nature.

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

14. As far as contention of the respondent with respect to the exclusion of time taken by the competent authority in processing the application and issuance of occupation certificate is concerned, the authority observed that the respondent had applied for grant of occupation certificate on 11.02.2019 and thereafter vide memo no. ZP-835-AD(RA)/2018/16816 dated 16.07.2019, the occupation certificate has



been granted by the competent authority under the prevailing law. The authority cannot be a silent spectator to the deficiency in the application submitted by the promoter for issuance of occupancy certificate. It is evident from the occupation certificate dated 16.07.2019 that an incomplete application for grant of OC was applied on 11.02.2019 as fire NOC from the competent authority was granted only on 30.05.2019 which is subsequent to the filing of application for occupation certificate. Also, the Chief Engineer-I, HSVP, Panchkula has submitted his requisite report in respect of the said project on 19.06.2019. The District Town Planner, Gurugram and Senior Town Planner, Gurugram has submitted requisite report about this project on 03.06.2019 and 10.06.2019 respectively. As such, the application submitted on 11.02.2019 was incomplete and an incomplete application is no application in the eyes of law.

15. The application for issuance of occupancy certificate shall be moved in the prescribed forms and accompanied by the documents mentioned in sub-code 4.10.1 of the Haryana Building Code, 2017. As per sub-code 4.10.4 of the said Code, after receipt of application for grant of occupancy certificate, the competent authority shall communicate in writing within 60 days, its decision for grant/ refusal of such permission for occupation of the building in Form BR-VII. In the present case, the respondent has completed its application for occupancy certificate only on 19.06.2019 and consequently the



concerned authority has granted occupation certificate on 16.07.2019. Therefore, in view of the deficiency in the said application dated 11.02.2019 and aforesaid reasons, no delay in granting occupation certificate can be attributed to the concerned statutory authority.

G. Findings of the authority

G.I Delay possession charges

16. **Relief sought by the complainant:** Direct the respondent to pay interest for every month of delay in offering possession of the unit since 01.04.2016 to the complainant, on the amount taken from the complainant for the sale consideration along with additional charges for the unit, at the prescribed rate as per the Act till the handing over the possession of the unit i.e., 15.10.2019.
17. In the present complaint, the complainant intends to continue with the project and is seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under.

"Section 18: - Return of amount and compensation

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

.....

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

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

"14. POSSESSION

(a) Time of handing over the Possession

Subject to terms of this clause and barring force majeure conditions, and subject to the Allottee having complied with all the terms and conditions of this Agreement, and not being in default under any of the provisions of this Agreement and compliance with all provisions, formalities, documentation etc., as prescribed by the Company. The Company proposes to hand over the possession of the Unit within 36 (Thirty Six) months from the date of start of construction, subject to timely compliance of the provisions of the Agreement by the Allottee. The Allottee agrees and understands that the Company shall be entitled to a grace period of 5 (five) months, for applying and obtaining the completion certificate/occupation certificate in respect of the Unit and/or the Project." (Emphasis supplied)

19. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement, and the complainant not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment time period for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottees of their right accruing after



delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

20. **Due date of handing over possession and admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within 36 (thirty-six) months from the date of start of construction and further provided in agreement that promoter shall be entitled to a grace period of 5 months for applying and obtaining completion certificate/occupation certificate in respect of said unit. The date of start of construction is 20.06.2013 as per statement of account dated 26.11.2021. The period of 36 months expired on 20.06.2016. As a matter of fact, the promoter has not applied to the concerned authority for obtaining completion certificate/ occupation certificate within the time limit (36 months) prescribed by the promoter in the buyer's agreement. The promoter has moved the application for issuance of occupation certificate only on 11.02.2019 when the period of 36 months has already expired. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, the benefit of grace period of 5 months cannot be allowed to the promoter at this stage. Therefore, the due date of handing over possession of the subject unit comes out to be 20.06.2016.

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

Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]

- (1) *For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.*

Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.

22. 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.
23. Taking the case from another angle, the complainant-allottee was entitled to the delayed possession charges/interest only at the rate of Rs.7.50/- per sq. ft. per month of the super area as per clause 16 of the buyer's agreement for the period of such delay; whereas, as per clause 13 of the buyer's agreement, the promoter was entitled to interest @



24% per annum at the time of every succeeding instalment from the due date of instalment till date of payment on account for the delayed payments by the allottee. The functions of the authority are to safeguard the interest of the aggrieved person, may be the allottee or the promoter. The rights of the parties are to be balanced and must be equitable. The promoter cannot be allowed to take undue advantage of his dominant position and to exploit the needs of the home buyers. This authority is duty bound to take into consideration the legislative intent i.e., to protect the interest of the consumers/allottees in the real estate sector. The clauses of the buyer's agreement entered into between the parties are one-sided, unfair and unreasonable with respect to the grant of interest for delayed possession. There are various other clauses in the buyer's agreement which give sweeping powers to the promoter to cancel the allotment and forfeit the amount paid. Thus, the terms and conditions of the buyer's agreement are ex-facie one-sided, unfair and unreasonable, and the same shall constitute the unfair trade practice on the part of the promoter. These types of discriminatory terms and conditions of the buyer's agreement will not be final and binding.

24. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., 18.02.2022 is 7.30%. Accordingly, the prescribed rate of interest will be MCLR +2% i.e., 9.30%.



25. **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;"*

26. 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.

27. On consideration of the documents available on record and submissions made by the parties regarding contravention as per provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 14(a) of the buyer's agreement executed between the parties on



01.04.2013, the possession of the subject flat was to be delivered within a period of 36 months from the date of start of construction plus 5 months grace period for applying and obtaining the completion certificate/ occupation certificate in respect of the unit and/or the project. The construction was started on 20.06.2013. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over possession comes out to be 20.06.2016. Occupation certificate was granted by the concerned authority on 16.07.2019 and thereafter, the possession of the subject flat was offered to the complainant on 19.07.2019. Copies of the same have been placed on record. Thereafter, the complainant had taken possession of the subject unit vide unit handover letter dated 15.10.2019 and subsequently, the conveyance deed was executed on 25.10.2019. The authority in complaint bearing no. **4031 of 2019** titled as **Varun Gupta V/s Emaar MGF Land Ltd.** has comprehensively decided that the execution of conveyance deed/unit handover letter between the parties does not waive/extinguish the allottee/complainant right to delay possession charges under section 18(1) of the Act. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the subject flat to the complainant as per the terms and conditions of the buyer's agreement dated 01.04.2013 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 01.04.2013 to hand over the possession within the stipulated period.

28. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 16.07.2019. The respondent offered the possession of the unit in question to the complainant only on 19.07.2019, so it can be said that the complainant came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the complainant should be given 2 months' time from the date of offer of possession. These 2 months' of reasonable time is being given to the complainant keeping in mind that even after intimation of possession practically he has to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e. 20.06.2016 till the expiry of 2 months from the date of offer of possession (19.07.2019) which comes out to be 19.09.2019.
29. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the



respondent is established. As such the complainant is entitled to delayed possession at prescribed rate of interest i.e. 9.30% p.a. w.e.f. 20.06.2016 till 19.09.2019 as per provisions of section 18(1) of the Act read with rule 15 of the rules.

30. Also, the amount of Rs.4,28,412/- (as per statement of account dated 26.11.2021) so paid by the respondent to the complainant towards compensation for delay in handing over possession shall be adjusted towards the delay possession charges to be paid by the respondent in terms of proviso to section 18(1) of the Act.

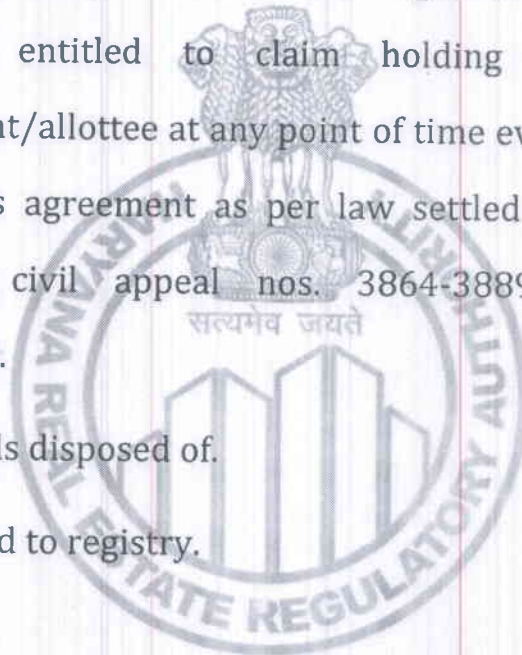
H. Directions of the authority

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

- i. The respondent is directed to pay the interest at the prescribed rate i.e. 9.30% per annum for every month of delay on the amount paid by the complainant from due date of possession i.e. 20.06.2016 till 19.09.2019 i.e. expiry of 2 months from the date of offer of possession (19.07.2019). 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.



- ii. Also, the amount of Rs.4,28,412/- so paid by the respondent towards compensation for delay in handing over possession shall be adjusted towards the delay possession charges to be paid by the respondent in terms of proviso to section 18(1) of the Act.
- iii. The respondent shall not charge anything from the complainant which is not the part of the buyer's agreement. The respondent is also 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. 3864-3889/2020 decided on 14.12.2020.
32. Complaint stands disposed of.
33. File be consigned to registry.



v.1-3
(Vijay Kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 18.02.2022

Order uploaded on 16.03.2022.