

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

Complaint no. : 4891 of 2021
Complaint filed on : 16.12.2021
First date of hearing : 01.02.2022
Date of decision : 01.02.2022

1. Sunil Kumar
2. Shweta Kumari
Both RR/o: L-49D, 1st floor, L-Block,
Saket, New Delhi-110017.

Complainants

Versus

M/s Emaar India Ltd.
(Formerly known as Emaar MGF Land Ltd.)
Office: 306-308, 3rd floor, Square One, C-2,
District Centre, Saket, New Delhi-110017.

Respondent

CORAM:

Dr. K.K Khandelwal
Shri Vijay Kumar Goyal

**Chairman
Member**

APPEARANCE:

Shri Nilotpal Shyam
Shri Harshit Batra

Advocate for the complainants
Advocate for the respondent

ORDER

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

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

2. Since, the buyer's agreement has been executed on 18.11.2011 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 complainants, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

| S. No. | Heads | Information |
|--------|--------------------------------------|---|
| 1. | Project name and location | Palm Gardens, Sector 83, Gurugram, Haryana |
| 2. | Project area | 21.90 acres |
| 3. | Nature of the project | Group housing colony |
| 4. | DTCP license no. and validity status | 108 of 2010 dated 18.12.2010 Valid/renewed up to 17.12.2020 |
| 5. | HRERA registered/ not registered | Registered vide no. 330 of 2017 dated 24.10.2017 (1, 2, 6, 8 to 12 and other facilities and amenities) |
| | HRERA registration valid up to | 31.12.2018 |
| | HRERA extension of registration vide | 02 of 2019 dated 02.08.2019 |
| | Extension valid up to | 31.12.2019 |



| | | |
|-----|--|--|
| 6. | Occupation certificate granted on | 17.10.2019 [annexure R7, page 178 of reply] |
| 7. | Allotment letter dated | 05.11.2011 [page 26 of complaint] |
| 8. | Unit no. | PGN-12-0405, 4 th floor, tower 12 [page 34 of complaint] |
| 9. | Unit measuring | 1900 sq. ft. [Page 34 of complaint] |
| 10. | Date of execution of buyer's agreement | 18.11.2011 [page 33 of complaint] |
| 11. | Payment plan | Construction linked payment plan [Page 44 of complaint] |
| 12. | Total consideration as per the statement of account dated 21.01.2022 at page 240 of reply | Rs.1,06,60,677/- |
| 13. | Total amount paid by the complainants as per the statement of account dated 21.01.2022 at page 242 of reply | Rs.1,07,67,291/- |
| 14. | Date of start of construction as per the statement of account dated 21.01.2022 at page 240 of reply | 30.11.2012 |
| 15. | Due date of delivery of possession as per clause 10(a) of the said agreement i.e. 36 months from the date of start of construction (30.11.2012) + grace period of 3 months, for applying and obtaining completion certificate/ occupation certificate in respect of the unit and/or the project. [Page 38 of complaint] | 30.11.2015 [Note: Grace period is not included] |
| 16. | Date of offer of possession to the complainants | 22.10.2019 [annexure R8, page 180 of reply] |
| 17. | Unit handover dated | 24.12.2019 [annexure R8, page 191 of reply] |

| | | |
|-----|---|--|
| 18. | Conveyance deed executed on | 07.01.2020 [annexure R9, page 196 of reply] |
| 19. | Delay in handing over possession w.e.f. 30.11.2015 till 22.12.2019 i.e. date of offer of possession (22.10.2019) + 2 months | 4 years 22 days |
| 20. | Delay compensation already paid by the respondent in terms of the buyer's agreement as per statement of account dated 21.01.2022 at page 241 of reply | Rs.6,23,447/- |

B. Facts of the complaint

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

- i. That complainants submitted application for allotment of unit no. PGN-12-0405 situated at 4th floor of building no. 12 in the said project having super area of 1900 sq. ft. The complainants started payment from 24.10.2011. Complainants made the first payment of Rs.7,50,000/- on 24.10.2011 for booking of unit no. PGN-12-0405 in the impugned project. The plan of payment opted was construction linked plan. The respondent company issued welcome letter bearing *Ref.No. WL/PGN/714077* dated 05.11.2011 for unit no. PGN-12-0405 in the said project. That the parties later entered into a buyer's agreement on 18.11.2011 for the sale of subject unit PGN-12-0405 having super area of approximately 1900 sq. ft. for a total consideration of Rs. 1,04,67,327/-.

- ii. That the terms of ABA is *ex facie* one-sided arbitrary and not binding on the Complainants in view of law laid down by Hon'ble Supreme Court in ***Pioneer Urban Land & Infrastructure Ltd. V. Geetu Gidwani Verma and Anr.*** CA No. **1677 of 2019** judgment dated **4/02/2019** wherein the Hon'ble Apex Court observed as under:
- "A term of a contract will not be final and binding if it is shown that the flat purchasers had no option but to sign on the dotted line, on a contract framed by the builder. The contractual terms of the Agreement dated 08.05.2012 are ex-facie one-sided, unfair, and unreasonable. The incorporation of such one-sided clauses in an agreement constitutes an unfair trade practice as per Section 2 (r) of the Consumer Protection Act, 1986 since it adopts unfair methods or practices for the purpose of selling the flats by the Builder."*
- iii. That as per clause 10(a) of the buyer's agreement, the possession date for the said unit PGN-12-0405 was agreed to be 36 months from the start of construction with grace period of 3 months for applying and obtaining completion certificate/occupation certificate in respect of the unit. Clause 16 of said buyer's agreement also stipulates a compensation for delay @ 7.50 per sq. ft. per month of the super area till the date of notice of possession, if the respondent company fails to deliver the possession of the impugned unit within the proposed handover of possession date.
- iv. That pursuant to the buyer's agreement, the complainants made a total payment of Rs.1,05,48,132 /- to the respondent

company. The said amount was paid towards the impugned unit in accordance with the demand raised by the respondent company. The complainants have paid 100 % of the sale consideration towards the cost of the unit no. PGN-12-0405 including costs towards other facilities. The respondent company has failed to deliver the possession in agreed time-frame i.e., by 30.11.2015 in terms of clause 10(a) of the buyer's agreement for reasons best known to the respondent.

- v. That the possession of the impugned flat was offered by the respondent vide letter of offer of possession dated 22.10.2019. However, the unit was handed over vide unit handover letter dated 24.12.2019. Therefore, there is an unexplained and unreasonable delay of four (4) years on the part of respondent in handing over the possession of the subject unit to the complainants.
- vi. That the complainants has paid the demands raised within the stipulated time without any default in accordance with the buyer's agreement and thus entitled to the interest at prescribed rate for the unreasonable delays in delivering the possession by the respondent company. Henceforth, the respondent company is liable to pay interest for delayed period of handing over the possession i.e. from 31.12.2015 till the date



of handing over the possession i.e. till 24.12.2019 in accordance with section 18 of the Act.

- vii. That the conveyance deed dated 07.01.2020 was executed between the complainants and the respondent company. It is pertinent to note that the conclusion of conveyance between the parties does not waive the complainants right to claim delayed compensation from the respondent company. The hon'ble authority made it very clear through its judgment in **Ajay Kumar and anr v. M/S Emaar MGF Land Ltd, Complaint No. 3369 of 2019** wherein it was observed that:

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

*32. The allottees have invested their hard-earned money which there is no doubt that the promoter has been enjoying benefits of and the next step is to get their title perfected by executing a conveyance deed which is the statutory right of the allottee. Also the obligation of the developer - promoter does not end with the execution of a conveyance deed' The essence and purpose of the Act was to curb the menace created by the developer/promoter and safeguard the interests of the allottees by protecting them from being exploited by the dominant position of the developer which he thrusts on the innocent allottees. Therefore, in furtherance to the Hon'ble Apex Court judgement and the law laid down in the **Wg. Cdr. Arifur Rahman (supra)**, this authority holds that even after execution of the conveyance deed, the complainants cannot be precluded from*

their right to seek delay possession charges from the respondent-Promoter."

Hence execution of conveyance deed dated 07.01.2020 does not discharge the respondent company from its liabilities as per the buyer's agreement. Hence, this complaint for the below mentioned reliefs.

C. Relief sought by the complainants

5. The complainants are seeking the following relief:

- i. Direct the respondent to pay interest at prescribed rate for the delayed period of handing over possession calculated from the promised date of possession till actual date of offer of possession on the amount paid by the complainants towards the subject unit.
- ii. Any other order or relief which this hon'ble authority may deem fit and proper in the facts and circumstances of the case, may kindly be passed in favour of the complainants and against the respondent company.

D. Reply filed by the respondent

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

- i. That the complainants have got no *locus standi* or cause of action to file the present complaint. The present complaint is based on an erroneous interpretation of the provisions of the Act as well as an incorrect understanding of the terms and

conditions of the buyer's agreement dated 18.11. 2011. Also, the complainants are investors and have booked multiple units in their name. That along with the unit in question, the complainants have also booked unit no. IG-09-0602 in another real estate project of the respondent. The complainants cannot approach the hon'ble authority with respect to their investments and hence, present complaint is liable to be dismissed.

- ii. That the complainants being interested in the real estate development of the respondent in the said project tentatively applied for provisional allotment of the unit vide application form dated 24.10.2011, and were consequently allotted unit no. PGN-12-0405 on 4th floor in building/tower no. 12, having a super area of 1900 sq. ft. vide a provisional allotment letter dated 05.11.2011. Thereafter, the complainants were given the buyer's agreement on 05.11.2011 and the complainants executed the buyer's agreement on 18.11.2011 after having perused the contents of the buyer's agreement and after having willingly and voluntarily agreeing to the same.
- iii. That as per the clause 10(a) of the buyer's agreement, the delivery of possession of the unit was proposed to be within 36 months from the date of start of construction and a grace period of 3 months, i.e., by 29.02.2016. That the delivery of

possession of the unit was *"Subject to terms of this clause and subject to the Allottee(s) not being in default under any provisions of this Buyer's Agreement and compliance with all provisions, formalities, documentation etc...."*

- iv. That various allottees of the project have delayed in making payments against their respective units. As is widely known and understood that the continuous flow of funds is pertinent to the real estate industry, without the same, there is ought to be delays in the construction status. Even with the various violations caused by various allottees, the respondent has shown an exemplary conduct as a real estate promoter which should be duly taken into account.
- v. That the project has also got delayed on account that the contractor hired by the respondent i.e. ILFS (M/s Infrastructure Leasing & Financial Services), a reputed contractor in real estate, started raising certain false and frivolous issues with the respondent due to which they had slowed down the progress of work at site. The respondent was constrained to issue several letters to ILFS requesting it to proceed and complete the construction work in accordance with the decided schedule. However, ILFS continued with its wanton acts of instigating frivolous and false disputes for reasons best known to it. It is submitted that the respondent

cannot exercise any influence over the working of ILFS. ILFS has intentionally delayed the progress of construction for which the respondent cannot be held liable either in equity or in accordance with the provisions of the agreement.

- vi. That all these circumstances come within the purview of the *force majeure* clause and hence allow a reasonable time to the respondent. That it must also be noted that the respondent had the right to suspend the construction of the project upon happening of circumstances beyond the control of the respondent as per clause 10(b)(i) of the buyer's agreement, however, despite all the hardships faced by the respondent, it did not suspend the construction and managed to keep the project afloat through all the adversities.
- vii. That the respondent has complied with all of its obligations, not only with respect to the buyer's agreement with the complainants but also as per the concerned laws, rules and regulations thereunder and the local authorities. The respondent had got the project registered on 24.10.2017, extended till 31.12.2019. That despite the innumerable hardships being faced by the respondent, it completed the construction of the project and applied for part occupation certificate vide an application dated 11.02.2019 before the concerned authority and successfully attained the occupation

certificate dated 17.10.2019. That the respondent has already submitted an application for the occupation certificate dated 11.02.2019 for grant of occupation certificate before the concerned statutory authority. It is respectfully submitted that once an application for grant of occupation certificate is submitted to the concerned statutory authority to respondent ceases to have any control over the same. The grant of occupation certificate is the prerogative of the concerned statutory authority and the respondent does not exercise any influence in any manner whatsoever over the same. There is a delay of around 8 months caused due to the non-issuance of the occupation certificate by the statutory authority while calculating the period of delay. Therefore, it is respectfully submitted that the time period utilised by the concerned statutory authority for granting the occupation certificate is liable to be excluded from the time period utilised for implementation of the project.

- viii. That thereafter and only after obtaining the requisite permissions, the respondent legally offered the possession of the unit to the complainants on 22.10.2019. The complainants thereafter executed the indemnity cum undertaking for possession on 14.11.2019 and subsequently, the physical possession of the unit was taken on 24.12.2019. It needs to be

categorically noted that the complainants had satisfied themselves with regard to the measurement, location, dimension and development etc. of the unit and the complainants had no claim of any nature whatsoever against the company with regard to the size, dimension, area, location and legal status of the unit, and had taken the peaceful possession of the unit, as is evident in the unit handover letter.

- ix. That the absolute title over the unit was transferred to the complainants through conveyance deed dated 07.01.2020 bearing vasika no. 8299. That the complainants after having executed the conveyance deed for two years, taking peaceful possession of the unit, and having enjoyed such possession for such a long period, the complainants should not be entitled to claim the interest on the delayed possession. The relationship between the parties has been terminated after the execution of the conveyance deed and hence, no claim lies at this instance. Therefore, there is no default or lapse on the part of the respondent and there is no equity in favour of the complainants. It is evident from the entire sequence of events, that no illegality can be attributed to the respondent. The allegations levelled by the complainants are totally baseless. Thus, it is most respectfully submitted that the present complaint deserves to be dismissed at the very threshold. That

after having slept on their rights for a number of years, the complainants cannot be rightly allowed to have the present claims.

- x. That without accepting the contents of the complaint in any manner whatsoever, the *bonafide* conduct of the respondent has to be highlighted as the respondent has credited an amount of Rs.12,637/- towards early payment rebate and Rs.6,23,447 as compensation credited on IOP, as is evident from the statement of account dated 21.01.2022. Further, an amount of Rs.16,677/- was credited towards anti-profiting. Without prejudice to the rights of the respondent, delayed interest, if any, has to be calculated only on the amounts deposited by the allottees/complainants 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/complainants towards delayed payment charges or any taxes/statutory payments etc.
- xi. That in light of the *bona fide* conduct of the respondent, the peaceful possession having been taken by the complainants, compensation taken by the complainants at the time of offer of possession, non-existence of cause of action and the frivolous complaint filed by the complainants, this complaint is bound to be dismissed with costs in favour of the respondent.

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 complainants at a later stage.

F. Findings on the objections raised by the respondent

F.I Objection regarding entitlement of DPC on ground of complainants being investor.

11. The respondent contended that the complainants are the investors and have purchased units apart from the subject unit in some other project of the respondent. Therefore, the complainants are not "allottee" or home buyer under the Act but investors and thus the present complaint is not maintainable.
12. The authority observed that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that under section 31 of the Act, any aggrieved person can file a complaint against the promoter if the

promoter contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the buyer's agreement, it is revealed that the complainants are allottees/buyers and they have paid total price of Rs. 1,07,67,291/- to the promoter towards purchase of the said unit in the project of the promoter. At this stage, it is important to stress upon the definition of term 'allottee' under the Act, the same is reproduced below for ready reference:

"2(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;"

13. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the buyer's agreement executed between respondent and complainants, it is crystal clear that the complainants are allottee(s) as the subject unit was allotted to them by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 000600000010557 titled as *M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr.* has also held that the concept of investor is not

defined or referred in the Act. Thus, the contention of promoter that the allottee being an investor is not entitled to protection of this Act stands rejected.

G. Findings of the authority

G.I Delay possession charges

14. **Relief sought by the complainants:** Direct the respondent to pay interest at prescribed rate for the delayed period of handing over possession calculated from the promised date of possession till actual date of offer of possession on the amount paid by the complainants towards the subject unit.
15. In the present complaint, the complainants intend to continue with the project and are seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under.

"Section 18: - Return of amount and compensation

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

.....

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

16. Clause 10(a) of the buyer's agreement provides time period for handing over the possession and the same is reproduced below:

"10. POSSESSION

(a) Time of handing over the Possession

*Subject to terms of this clause and subject to Allottee(s) having complied with all the terms and conditions of this Buyer's Agreement, and not being in default under any of the provisions of this Buyer's Agreement and compliance with all provisions, formalities, documentation etc., as prescribed by the Company, the Company proposes to hand over the possession of the Unit **within 36 (thirty six) months from the date of start of construction**, subject to timely compliance of the provisions of the Buyer's Agreement by the Allottee. The Allottee(s) agrees and understands that the Company shall be entitled to a **grace period of 3 (three) months, for applying and obtaining the completion certificate/ occupation certificate in respect of the Unit and/or the Project.**" (Emphasis supplied)*

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

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

18. **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 3 months for applying and obtaining completion certificate/occupation certificate in respect of said unit. The date of start of construction is 30.11.2012 as per statement of account dated 21.01.2022. The period of 36 months expired on 30.11.2015. 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 3 months cannot be allowed to the promoter at this stage. Therefore, the due date of possession comes out to be 30.11.2015.

19. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges at



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

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

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

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

20. 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.
21. Taking the case from another angle, the complainants-allottees were entitled to the delayed possession charges/interest only at the rate of Rs.7.50/- per sq. ft. per month of the super area as per clause 12 of the buyer's agreement for the period of such delay; whereas, as per clause 1.2(b) of the buyer's agreement, the promoter was entitled to interest @ 24% per annum at the time of every succeeding instalment from the due date of instalment till date of payment on

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

22. 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., 01.02.2022 is 7.30%. Accordingly, the prescribed rate of interest will be MCLR +2% i.e., 9.30%.

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

"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.

Explanation. —For the purpose of this clause—

- (i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*
- (ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"*

24. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same as is being granted to the complainants in case of delay possession charges.
25. 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 10(a) of the buyer's agreement executed between the parties

on 18.11.2011, the possession of the subject flat was to be delivered within a period of 36 months from the date of start of construction plus 3 months grace period for applying and obtaining the completion certificate/ occupation certificate in respect of the unit and/or the project. The construction was started on 30.11.2012. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over possession comes out to be 30.11.2015. Occupation certificate was granted by the concerned authority on 17.10.2019 and thereafter, the possession of the subject flat was offered to the complainants on 22.10.2019. Copies of the same have been placed on record. Thereafter, the complainants had taken possession of the subject unit vide unit handover letter dated 24.12.2019 and subsequently, the conveyance deed was executed on 07.01.2020. 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 allottees/complainants 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 complainants as per the terms and conditions of the buyer's agreement dated 18.11.2011 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 18.11.2011 to hand over the possession within the stipulated period.
26. 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 17.10.2019. The respondent offered the possession of the unit in question to the complainants only on 22.10.2019, so it can be said that the complainants came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the complainants should be given 2 months' time from the date of offer of possession. These 2 months' of reasonable time is being given to the complainants keeping in mind that even after intimation of possession practically they have to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e. 30.11.2015 till the expiry of 2 months from the date of offer of possession (22.10.2019) which comes out to be 22.12.2019.

27. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainants are entitled to delayed possession at prescribed rate of interest i.e. 9.30% p.a. w.e.f. 30.11.2015 till 22.12.2019 as per provisions of section 18(1) of the Act read with rule 15 of the rules.
28. Also, the amount of Rs.6,23,447/- (as per statement of account dated 21.01.2022) so paid by the respondent to the complainants towards compensation for delay in handing over possession shall be adjusted towards the delay possession charges to be paid by the respondent in terms of proviso to section 18(1) of the Act.

H. Directions of the authority

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

- i. The respondent is directed to pay the interest at the prescribed rate i.e. 9.30% per annum for every month of delay on the amount paid by the complainants from due date of possession i.e. 30.11.2015 till 22.12.2019 i.e. expiry of 2 months from the date of offer of possession (22.10.2019). The arrears of interest accrued so far shall be paid to the complainants within 90 days from the date of this order as per rule 16(2) of the rules.

- ii. Also, the amount of Rs.6,23,447/- so paid by the respondent towards compensation for delay in handing over possession shall be adjusted towards the delay possession charges to be paid by the respondent in terms of proviso to section 18(1) of the Act.
- iii. The respondent shall not charge anything from the complainants which is not the part of the buyer's agreement. The respondent is also not entitled to claim holding charges from the complainants/allottees at any point of time even after being part of the buyer's agreement as per law settled by hon'ble Supreme Court in civil appeal nos. 3864-3889/2020 decided on 14.12.2020.
30. Complaint stands disposed of.
31. File be consigned to registry.


(Vijay Kumar Goyal)
Member

HARERA
GURUGRAM

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

Dated: 01.02.2022