BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**:**	**2272 of 2018**
First date of hearing	**:**	**12.03.2019**
Date of decision	**:**	**18.02.2022**

1. Mr. Kurian John
2. Mrs. Simmi Kurian

Both RR/o: H.No.161, Sector 5, Part 6, Gurugram, Haryana — **Complainants**

Versus

M/s Emaar MGF Land Ltd.
Address: 306-308, 3rd floor, Square One, C2, District Centre, New Delhi-110017. — **Respondent**

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

APPEARANCE:
Shri Tushar Bahmani — Advocate for the complainants
Shri J.K. Dang — Advocate for the respondent

ORDER

1. The present complaint dated 26.12.2018 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 26.07.2010 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 Hills, Sector 77, Gurugram.
2.	Total licensed project area	29.34 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no. and validity status	a) 56 of 2009 dated 31.08.2009 Valid/renewed up to 30.08.2024 b) 62 of 2013 dated 05.08.2013 Valid/renewed up to 04.08.2019
5.	HRERA registered/ not registered	**Registered vide no. 256 of 2017 dated 03.10.2017 for 45425.87 sq. mtrs.**
6.	HRERA registration valid up to	**02.10.2022**

7.	Occupation certificate	24.12.2019 [Additional document placed by the respondent]
8.	Date of provisional allotment letter	01.06.2010 [Page 41 of reply]
9.	Unit no.	PH4-71-0902, 9th floor, building no. 71 [Page 47 of complaint]
10.	Unit measuring (super area)	1950 sq. ft.
11.	Date of execution of buyer's agreement	26.07.2010 [Page 45 of complaint]
12.	Payment plan	Construction linked payment plan (Subvention plan) [Page 75 of complaint]
13.	Total consideration as per statement of account dated 07.01.2020	Rs.93,53,778/- [Additional document placed by the respondent]
14.	Total amount paid by the complainants as per statement of account dated 07.01.2020	Rs.87,67,224/- [Additional document placed by the respondent]
15.	Date of start of construction as per statement of account dated 07.01.2020	22.05.2011 [Additional document placed by the respondent]
16.	Due date of delivery of possession as per clause 11(a) of the said agreement i.e. 33 months from the date of start of construction i.e. 22.05.2011 plus grace period of 3 months for applying and obtaining the CC/OC in respect of the unit and/or the project. [Page 58 of complaint]	22.02.2014
17.	Date of offer of possession to the complainants	07.01.2020 [Additional document placed by the respondent]

18.	Delay in handing over possession w.e.f. 22.02.2014 till 07.03.2020 i.e., date of offer of possession (07.01.2020) plus 2 months	6 years 14 days

B. Facts of the complaint

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

i. That after learning about the upcoming residential project of the respondent, the complainants booked the unit bearing np. PH4-71-0902 admeasuring 1950 sq. ft. with the respondent by paying the initial booking amount in the project "Palm Hills". They agreed to the schedule of payment given to them after the transfer of unit in their names.

ii. That at the time of executing buyer's agreement with the respondent on 26.07.2010, they were informed that the possession of the booked unit shall be given within 33 + 3 months from the date of start of construction which was 22.05.2011. But the respondent deliberately failed to insert the possession date in the buyer's agreement and only mentioned that the possession will be delivered from the start of construction work whereas there is no mention of the date of commencement of construction.

iii. That the buyer's agreement was signed between the parties on 26.07.2010. The complainants had paid 95% of the total amount of the sale consideration as per the payment schedule as demanded

by the respondent. There is no default on their part as regard to the payments and the same have been duly paid to the respondent within time. As per clause 11(a) of the buyer's agreement dated 26.07.2010, the respondent was required to handover the actual physical possession of the said unit within a period of 33 + 3 months from the date of start of construction, i.e., on or before 22.05.2014.

iv. That as per clause 13(a) of the buyer's agreement dated 26.07.2010, in the event the respondent fails to deliver the possession of the unit to the complainants within the stipulated time period and as per the terms and conditions of the buyer's agreement, then the respondent shall pay to the complainants' compensation at the rate of Rs.7.50/- per sq. ft. of the super area of the unit per month for the period of delay.

v. That since, the respondent miserably failed to timely deliver the possession, the complainants along with other buyer's filed an FIR against the respondent as the respondent cheated them and other buyer's and hopelessly failed to deliver the possession of the unit as per the buyer's agreement. The respondent utilized the timely made payments by the complainants in other works instead of completing the construction of the unit in question in time and deliver the handover in time as promised. However, this FIR was withdrawn after falling for the fresh assurances and deep promises

to deliver the possession to the complainants after executing the settlement agreement. This settlement agreement was nothing but false and fraudulent tactics played by the respondent to compel the complainants to withdraw the FIR.

vi. That the respondent has committed unfair trade practice by not allowing the complainants to have visited a site even after repeated requests made to the respondent for the same. This shows that the respondent does not want the complainants to have the knowledge of the actual status of the progress of the construction of the apartment in question. The respondent has committed grave deficiency on its part and adopted serious unfair trade practice with the complainants by failing to deliver the possession of the unit booked within the prescribed time frame as promised in the buyer's agreement.

C. Relief sought

5. The complainants have filed the present compliant for seeking following reliefs:

i. Direct the respondent to pay delayed possession charges on the entire amount of sale consideration deposited till date with them to the complainants i.e. on Rs. 87,36,569/- @24% interest from the date of possession agreed as per the buyer's agreement i.e. on 22.05.2014 till actual handing over of physical possession of the apartment in dispute.

ii. Direct the respondent to handover the actual physical possession of the apartment in dispute along with payment of delayed possession charges.

6. On the date of hearing, the authority explained to the respondent/promoter about the contravention as alleged to have been committed in relation to section 11(4)(a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent

7. The respondent has contested the present complaint on the following grounds:

i. That complainants have filed the present complaint seeking compensation, delayed possession charges and interest for alleged delay in delivering possession of the unit booked by them. The respondent submitted that complaints pertaining to refund, compensation and interest are to be decided by the adjudicating officer under section 71 of the Act read with rule 29 of the rules and not by this hon'ble authority. Thus, the complaint is liable to rejected on this ground alone.

ii. That the complainants, in pursuance of application form dated 03.05.2019, were allotted an independent unit bearing no. PH4-71-0902 located on 9th floor in the said project vide allotment letter dated 01.06.2010. They consciously and wilfully opted for a construction linked plan for remittance of sale consideration for

the unit in question and further represented to the respondent that they shall remit every instalment on time as per the payment schedule.

iii. That right from the beginning, the complainants defaulted in payment of instalments. The respondent was constrained to issue a payment request letter dated 15.06.2010 requesting them to clear the outstanding balance of Rs. 21,29,784.75/-. The respondent requested them to remit the aforesaid amount to the respondent on or before 11.07.2010. However, they failed to remit the aforesaid amount within the time prescribed in the aforesaid letter. The respondent was constrained to issue payment request reminder dated 23.07.2010 reminding them that an amount of Rs.11,24,259/- was overdue and needed to be remitted to the respondent before 07.08.2010. Statement of account dated 02.01.2019 as maintained by the respondent in its due course of business reflects such other various occasions where the complainants have delayed in remittance of instalments on time.

iv. That as per clause 11(b)(iv) of the buyer's agreement, in the event of 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. Since, the complainants have defaulted in timely remittance of instalments, the date of delivery of possession is not liable to be determined in

the manner sought to be done in the present complaint by them. Clause 13 of the buyer's agreement further provides that the compensation for delay in delivery of possession shall only be given to such allottees who are not in default of their obligations as envisaged under the agreement and who have not defaulted in payment of instalments as per the payment plan incorporated in the buyer's agreement. Complainants, having defaulted in payment of instalments, are thus not entitled to any compensation or any amount towards interest under the buyer's agreement.

v. 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 construction of the tower where the unit in question is situated is almost complete. They have in fact already started the construction of 2nd staircase as mandated by law. It is expected that the construction of the second staircase will be competed in a year's time. Thereafter, upon issuance of the occupation certificate and subject to force majeure conditions, possession of the apartment shall be offered to the complainants.

vi. That the provisions of the Act are not retrospective in nature. The provisions of the Act cannot undo or modify the terms of the agreement duly executed prior to the coming into force of the Act. Further, it is submitted that merely because the Act applies to

ongoing projects which are registered with the authority, the Act cannot be called to be operating retrospectively. The provisions of the Act relied upon by the complainants for seeking interest cannot be called into aid in derogation and ignorance of the provisions of the buyer's agreement. The interest for the alleged delay demanded by the complainants is beyond the scope of the buyer's agreement. The complainants cannot demand any interest or compensation beyond the terms and conditions incorporated in the buyer's agreement.

vii. That the complainants have executed a settlement agreement dated 30.11.2016 with the respondent in full and final settlement of all the claims, contentions and grievances harboured by them. It is further pertinent to mention that the settlement agreement expressly records that the complainants are left with no further claims, benefits, compensation etc. of any nature whatsoever in respect of the unit in question and that the complainants shall not raise any other claim, compensation etc. of any nature whatsoever. The complainants have voluntarily and consciously executed an undertaking dated 26.07.2010 in favour of the respondent whereby they promised and assured the respondent that being in default of terms of the buyer's agreement and in consideration of waiver of the delayed payment charges amounting to Rs.54,890/-

by the respondent, the complainants could not raise any claim against the respondent.

viii. That the project of the respondent is an "ongoing project" under the Act and the same has been registered under the Act by the Haryana Real Estate Regulatory Authority vide memo no. HRERA-606/2017/1248 dated 03.10.2017. The said registration is valid till 02.10.2022. Therefore, the case of action, if any, would accrue in favour of the complainants to file a complaint for seeking any interest as alleged if the respondent fails to offer possession of the unit in question within the aforesaid timeframe. Thus, the complaint is liable to be dismissed on this ground alone.

ix. That the project has got delayed on account of following reasons which were/are beyond the power and control of the respondent. *Firstly*, the National Building Code was revised in the year 2016 and in terms of the same, all high-rise buildings (i.e. buildings having area of less than 500 sq. mtrs. and above), irrespective of area of each floor, are now required to have two staircases. It is expected that the construction of the second staircase will be completed in a year's time. Thereafter, upon issuance of the occupation certificate and subject to force majeure conditions, possession of the unit in question shall be offered to the complainants. *Secondly*, the respondent had to engage the services of Mitra Guha, a reputed contractor in real estate, to provide multi-

level car parking in the project. The said contractor started raising certain false and frivolous issues with the respondent due to which the contractor slowed down the progress of work at site. Any lack of performance from a reputed cannot be attributed to the respondent as the same was beyond its control.

x. That several allottees, including the complainants, have defaulted in timely remittance of payment of instalments which was an essential, crucial and 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 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 almost complete. The respondent has infact already started the construction of the 2nd staircase as mandated by law. It is expected that the construction of the 2nd staircase will be completed in a year's time. Thereafter, upon issuance of the occupation certificate and subject to force majeure conditions,

possession of the apartment shall be offered to the complainants. Hence, the present complaint deserves to be dismissed at the very threshold.

8. Copies of all the relevant documents have been filed and placed on record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submissions made by the parties.

9. On 21.12.2021, the respondent has brough on record the events that took place subsequently to the filing of the present complaint. That on 07.01.2020, the respondent has offered the possession of the subject unit to the complainants after receipt of occupation certificate dated 24.12.2019 from the competent authority.

E. Jurisdiction of the authority

10. The plea of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I Territorial jurisdiction

11. 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

12. Section 11(4)(a) of the Act, 2016 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.

13. 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 relief sought by the complainants

F.I Possession and delay possession charges

14. **Reliefs sought by the complainants**: The below-mentioned reliefs sought by the complainants are being taken together as the findings in one relief will definitely affect the result of the other relief and the same being interconnected:

i. Direct the respondent to pay delayed possession charges on the entire amount of sale consideration deposited till date with them to the complainants i.e. on Rs. 87,36,569/- @24% interest from the date of possession agreed as per the buyer's agreement i.e. on 22.05.2014 till actual handing over of physical possession of the apartment in dispute.

ii. Direct the respondent to handover the actual physical possession of the apartment in dispute along with payment of delayed possession charges.

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

> "**11. POSSESSION**
>
> ***(a)* Time of handing over the Possession**
>
> *Subject to terms of this clause and subject to the Allottee(s) having complied with all the terms and conditions of this Buyer's Agreement, and not being in default under any of the provisions of this Buyer's Agreement and compliance with all provisions, formalities, documentation etc., as prescribed by the Company, the Company proposes to hand over the possession of the Unit within* ***33 months from the date of start of construction,*** *subject to timely compliance of the provisions of the Buyer's Agreement by the Allottee. The Allottee(s) agrees and understands that the Company shall be entitled to a* ***grace period of three months, for applying and obtaining the completion certificate/occupation certificate in respect of the Unit and/or the Project.***"
>
> *(Emphasis supplied)*

17. **Due date of handing over possession and admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within 33 months from the date of start of construction and it is further provided in the 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/project. The construction commenced on 22.05.2011 as per the statement of account dated 07.01.2020. The period of 33 months expired on 22.02.2014. As a matter of fact, the promoter has not applied to the concerned authority for obtaining completion certificate/occupation certificate within the time limit prescribed by the promoter in the buyer's agreement. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 3 months

cannot be allowed to the promoter at this stage. Therefore, the due date of handing over possession as per the buyer's agreement comes out to be 22.02.2014.

18. The counsel for the complainants pointed to the facts of the matter including details of the settlement agreement dated 30.11.2016 as entered between both the parties. Clause 1 of the settlement agreement provides that the respondent agreed to pay an amount of compensation of Rs.6,80,063/- till the date of application of occupation certificate which as per schedule was March 2018. There was also a provision for increase or decrease of amount of compensation in case the date of occupation certificate is postponed or preponed.

19. The counsel for the complainants pleaded and specifically pointed out that clause 6 of the settlement agreement provides that both parties have every right to take any legal course of action if this agreement is not fulfilled as per agreed terms therein. The occupation certificate was applied on 21.02.2019 for tower in which the unit under reference is situated. Accordingly, there is a failure on the part of the respondent to apply for OC timely as per schedule i.e. March 2018. It is contended by learned counsel for complainants though there was a settlement agreement executed between the parties on 30.11.2016 but the same was not adhered to by the respondent builder. The possession of the allotted unit was to be offered to the complainants by applying for OC by March 2018 besides paying a sum of Rs. 6,80,063/-. Though the

amount was paid but the unit was not offered for possession. Its possession was offered only on 07.01.2020 i.e. after a gap of above two years. So as per clause 6 of the settlement agreement, the parties were given liberty to take any legal course of action if the agreement is not fulfilled as per the agreed terms therein. Since the respondent failed to fulfil its obligation as per terms and conditions of settlement, so the claimants are entitled for delayed possession charges as per builder buyer agreement dated 26.07.2010.

20. The counsel for the respondent categorically drew attention of the authority towards clause 1, 6 and 9 of the said settlement agreement. It is contended on behalf of the respondent builder that though the possession of the allotted unit was offered to the allottees on 07.01.2020 after receipt of occupation certificate dated 24.12.2019 but the same was offered as per settlement agreement dated 30.11.2016 wherein it is specific provided under clause 1 that "The allottee agrees that in case the date is changed whether prior to the mentioned date or post the same, the amount of compensation shall be increased/decreased accordingly. In case the date is preponed then the Allottee undertakes to remit the differential amount back to the Company at the time of hand over." In view of this settlement, the allottees received Rs. 6,80,063/- as compensation till the date of occupation. No doubt both the parties were given liberty to take any legal course of action if the agreement is not fulfilled as per agreed

terms therein but it was also mentioned under clause 6 that both the parties have obtained independent advice and opinion from competent professionals, consultants and lawyers, and have read and understood the entire contents of the agreement and other related documents and are fully aware of the meaning and effect of this agreement. After the execution of this agreement, the claimants have already received the above-mentioned amount from the respondent builder and also withdrew the complaints filed before the District Public Grievances Redressal Committee and the criminal case arising out of FIR No. 188, dated 05.07.2016 registered at DLF Phase 1, Police Station, Gurugram. There is nothing on record to show that after the settlement dated 30.11.2016, the complainants challenged the validity of the same before any forum. If there has been any coercion or duress of any kind on the complainants, then they might have approached some authority for redressal of their grievances. But they kept mum and filed the present complaint only on 26.12.2018 i.e. after a gap of about 2 years. Thus, the complaint filed is not maintainable. When the allottees choose to settle the dispute with the respondent and receive some amount as compensation on the basis of that settlement, then the principles of estoppel and waiver are applicable and their claim with regard to delayed possession charges is barred under the law.

21. The authority has considered the rival submissions made on behalf of both the parties. Before commenting on the validity of settlement

agreement dated 30.11.2016 entered into between the parties may be considered, a reference to some clauses of settlement is must and which are as under:

*"**NOW THIS AGREEMENT WITNESSETH AS FOLLOWS:***

1. *That he Company has, without prejudice, assured the Allottee that the parking space (covered) allotted to the Allottee in terms of the buyer's agreement will be allotted to the Allottee under or around the Tower in which the Said Unit is located. Further, the Allottee has requested the Company for compensation eligibility, despite being a defaulter in making payment of installments as per the payment plan, till the possession Unit is handed over, instead oof till the date of notice of offer of possession in terms of the buyer's agreement. The Company has accepted the request of the Allottee as a gesture of goodwill and the compensation for delay amounting to Rs.6,80,063/- till the date of application of OC which as per schedule shared is March 2018, shall be payable on signing of this settlement agreement. The Allottee agrees that in case the date is changed whether prior to the mentioned date or post the same, the amount of compensation shall be increased/decreased accordingly. In case the date is preponed then the Allottee undertakes to remit the differential amount back to the Company at the time of hand over.*

   It is mutually agreed that the abovementioned benefits being given to the Allottee shall be towards full and final settlement and the Allottee acknowledges that he/she/they is/are not left with any further claims, benefits, compensation, etc. of any nature whatsoever regarding the Said Unit and henceforth the ALLOTTEE shall not raise any other claim, compensation, etc. of any nature whatsoever. The said benefits shall be extended only after withdrawal of the complaint before the District Grievance Redressal Committee and quashing of the FIR.

2. ....
3. ....
4. ....
5. ....
6. *That the both parties have obtained independent advice and opinion from competent professionals, consultants and lawyers and have read and understood the entire contents of this Agreement and other related documents, and he is fully aware of the meaning and effect of this Agreement. <u>However, both parties will have the rights to take any legal course of action if this agreement is not fulfilled as per agreed terms therein</u>.*
7. ....
8. ....

9. That the Parties acknowledge and confirm that this agreement shall be irrevocable in nature to the extent that Parties fulfill all the terms in the settlement and is made with free will and without coercion and duress of any kind whatsoever on the Parties hereto....." (Emphasis supplied)

22. It is not disputed that prior to filing of the complaint before this authority on 26.12.2018, the complainants had already approached the local police for registration of a criminal case against the respondent-builder which led to registration of FIR No.188 dated 05.07.2016. Secondly, the complainants had already filed a complaint with regard to subject-matter before the District Public Grievance Redressal Committee on 22.04.2016. So, to settle both the cases pending before the different forums, the parties entered into a settlement on 30.11.2016 and which also led to withdrawal of both the cases detailed above against the respondent-builder. It is also not disputed that in pursuant to the settlement agreement, the complainants received a sum of Rs. 6,80,063/- as compensation till the date of application for OC i.e. March 2018. It is contended on behalf of the complainants that since the settlement agreement dated 30.11.2016 was not adhere to by the respondent-builder i.e., with regard to applying for occupation certificate by March 2018 and changing that date unilaterally, so that settlement agreement is not binding on the complainants. So, taking into consideration all these facts, it is to be seen as to whether the settlement agreement entered into between the parties on 30.11.2016 is binding on the parties. ***Firstly,*** the authority observes that whatever

will be the date for applying OC, there is no denial of the fact that there was delay/failure on the part of the respondent in applying for OC as per the settlement agreement. It is matter of fact that in clause 1 of the settlement agreement dated 30.11.2016, it is clearly mentioned that the respondent promoter will make an application for OC by March 2018. However, as per the documents placed on record, the respondent has made final application for obtaining OC on 21.02.2019 and the competent authority had granted the same on 24.12.2019. The authority observes that the respondent promoter has not kept his own promise as made by him in the said settlement agreement. Furthermore, clause 1 of the settlement agreement provides that the allottee agrees that in case the date (i.e., March 2018) was changed whether prior to the mentioned date or post the same, the amount of compensation shall be increased or decreased accordingly. However, the statement of account sent along with the "letter of offer of possession" on 07.01.2020, does not contain any adjustment of compensation as has been agreed in the settlement agreement.

23. ***Secondly,*** it is admitted by the respondent that the compensation of Rs.6,80,063/- under the settlement agreement is as per the terms of buyer's agreement only and has been paid in advance which was otherwise payable at the time of possession. Vide settlement agreement, the parties agreed to extend time period of handing over possession of the said unit as per the schedule for possession shared by

the company and in lieu of the allottee agreeing to extended timeline for handing over possession, the respondent has agreed to pay compensation at the rate prescribed in the buyer's agreement. As per clause 13 of the buyer's agreement, the allottee(s) shall be entitled to payment of compensation for delay at the rate of Rs.7.50/- per sq. ft. per month of the super area till the date of notice of possession. The promoter cannot take advantage of its dominant position as it extended timeline of handing over possession but in lieu of that it failed to give adequate advantage to the allottee. It is observed that as per the settlement-cum-amendment agreement, the respondent is still giving compensation as per the buyer's agreement i.e., @ Rs.7.50/- per sq. ft. per month of super area and is still very nominal and unjust. The terms of the agreement have been drafted mischievously by the respondent and are completely one sided as also held in para 181 of ***Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and ors. (W.P 2737 of 2017)***, wherein the Hon'ble Bombay HC bench held that:

> *"...Agreements entered into with individual purchasers were invariably one sided, standard-format agreements prepared by the builders/developers and which were overwhelmingly in their favour with unjust clauses on delayed delivery, time for conveyance to the society, obligations to obtain occupation/completion certificate etc. Individual purchasers had no scope or power to negotiate and had to accept these one-sided agreements."*

24. Hon'ble Supreme Court and various High Courts in a plethora of judgments have held that the terms of a contract shall not be binding if

it is shown that the same were one sided and unfair and the person signing did not have any other option but to sign the same. Reference can also be placed on the directions rendered by the Hon'ble Apex Court in civil appeal no. 12238 of 2018 titled as ***Pioneer Urban Land and Infrastructure Limited Vs. Govindan Raghavan*** (decided on 02.04.2019) as well as by the Hon'ble Bombay High Court in the ***Neelkamal Realtors Suburban Pvt. Ltd.*** (supra). A similar view has also been taken by the Apex court in ***IREO Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Ors***. (Civil appeal no. 5785 of 2019 dated 11.01.2021) as under:

> *".....that the incorporation of such one-sided and unreasonable clauses in the Apartment Buyer's Agreement constitutes an unfair trade practice under Section 2(1)(r) of the Consumer Protection Act. Even under the 1986 Act, the powers of the consumer fora were in no manner constrained to declare a contractual term as unfair or one-sided as an incident of the power to discontinue unfair or restrictive trade practices. An "unfair contract" has been defined under the 2019 Act, and powers have been conferred on the State Consumer Fora and the National Commission to declare contractual terms which are unfair, as null and void. This is a statutory recognition of a power which was implicit under the 1986 Act.*
>
> *In view of the above, we hold that the Developer cannot compel the apartment buyers to be bound by the one-sided contractual terms contained in the Apartment Buyer's Agreement."*

The same analogy can easily be applied in the present case where the respondent is promising to give very nominal amount of compensation and the complainants cannot be bound by such one-sided clause

25. ***Thirdly,*** the Hon'ble Bombay High Court in the ***Neelkamal Realtors Suburban Pvt. Ltd.*** (supra) has held that the scheme of the Act is retroactive in character and the relevant para is reproduced below:

> *"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."*

26. Accordingly, a law can be even framed to affect subsisting/existing contractual rights between the parties in the larger public interest as has been done in this Act where specific remedy has been provided under section 18 of the Act, in case of failure of promoter to handover possession as per agreement for sale and this specific remedy abrogates provisions of the agreement to that extent. Also, it is matter of fact that the provision of section 18 of the Act has not come into effect at the time when the parties entered into the settlement agreement dated 30.11.2016. Moreover, as per the said settlement agreement, the promoter has agreed to apply for the OC by March 2018. After lapse of such time, the complainants after waiting for a reasonable period of time have approached the authority by filing the present complaint on 26.12.2018 and the respondent has finally applied for OC on 21.02.2019. Thus, due to retroactive nature of section 18 of the Act, the

complainants are entitled to prescribed rate of interest as per the provisions of the Act and not nominal compensation as per the terms of the buyer's agreement/settlement agreement.

27. In light of the aforesaid reasons, the authority is of the view that it cannot take into consideration such settlement agreement, the terms of which are not kept by the one who has made it and is also in a dominant position. Further, also such agreement cannot take the statutory rights of the one who is in recessive position. In the interest of the natural justice, such settlement agreement cannot be taken into consideration by this authority while adjudicating on statutory rights of the complainants. Hence, the authority does not place reliance on the said settlement agreement and is of the view that mere nomenclature of document as "Settlement Agreement" will not take away the rights of the allottees to claim the statutory relief i.e. delayed possession charges as pre the provisions of section 18 of the Act.

28. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges at the rate of 24% p.a. However, 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.

29. The legislature in its wisdom in the subordinate legislation under the 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.

30. 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 marginal cost of lending rate +2% i.e., 9.30%.

31. **Rate of interest to be paid by complainants/allottees for 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;"

32. 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 delayed possession charges.

33. On consideration of the documents available on record and submissions made by the parties regarding contravention as per provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 11(a) of the buyer's agreement executed between the parties on 26.07.2010, the possession of the said unit was to be delivered within a period of 33 months from the date of start of construction and it is 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/project. As far as grace period is concerned, the same is disallowed for the reasons quoted above. The construction commenced on 22.05.2011 as per statement of account dated 07.01.2020. Therefore, the due date of handing over possession comes

out to be 22.02.2014. In the present case, the complainants were offered possession by the respondent on 07.01.2020 after obtaining occupation certificate on 24.12.2019 from the competent authority. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the complainants as per the terms and conditions of the buyer's agreement dated 26.07.2010 executed between the parties.

34. Section 19(10) of the Act obligates the allottees to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 24.12.2019. However, the respondent offered the possession of the unit in question to the complainants only on 07.01.2020, so it can be said that the complainants came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, they 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. 22.02.2014 till the expiry of 2 months from the date of offer of possession (07.01.2020) which comes out to be 07.03.2020.

35. The counsel for the complainants requested for handing over possession which stand already offered. Therefore, the complainants are directed to take possession of the subject unit within 2 months from the date of this order. No holding charges shall be charged by the respondent. Maintenance charges are payable after two months from the date of offer of possession.

36. 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 delay possession charges at prescribed rate of the interest @ 9.30 % p.a. w.e.f. 22.02.2014 till 07.03.2020 as per provisions of section 18(1) of the Act read with rule 15 of the rules. The respondent has already paid Rs.6,80,063/- towards delay in handing over possession vide settlement agreement dated 30.11.2016, therefore the amount i.e. Rs.6,80,063/- already paid to the complainants by the respondent as delay compensation as per the buyer's agreement shall be adjusted towards delay possession charges payable by the promoter at the prescribed rate of interest to be paid by the respondent as per the proviso to section 18(1) of the Act.

G. Directions of the authority

37. 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. 22.02.2014 till 07.03.2020 i.e. expiry of 2 months from the date of offer of possession (07.01.2020). The arrears of interest accrued so far shall be paid to the complainants within 90 days from the date of this order as per rule 16(2) of the rules.

ii. The amount i.e. Rs.6,80,063/- already paid to the complainants by the respondent as delay compensation as per the buyer's agreement shall be adjusted towards delay possession charges payable by the promoter at the prescribed rate of interest to be paid by the respondent as per the proviso to section 18(1) of the Act.

iii. The complainants are directed to take possession within 2 months from the date of this order as the respondent has already offered possession of the subject unit on 07.01.2020.

iv. 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 delayed possession charges as per section 2(za) of the Act.

v. 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.

38. Complaint stands disposed of.

39. File be consigned to registry.

(Vijay Kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 18.02.2022