BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**:**	**230 of 2019**
Complaint filed on	**:**	**29.01.2019**
First date of hearing	**:**	**18.10.2019**
Date of decision	**:**	**31.03.2021**

1. Alok Goel
2. Parul Goel

Both RR/o H.No. E-41, Phase I,
Ashok Vihar, New Delhi-110052. **Complainants**

Versus

M/s Emaar MGF Land Ltd.
Address: Emaar MGF Business Park, 2nd floor,
M.G. Road, Sikanderpur Chowk, Sector 28,
Gurugram-122002, Haryana. **Respondent**

CORAM:
Shri Samir Kumar **Member**
Shri Vijay Kumar Goyal **Member**

APPEARANCE:
Shri Sagar Chawla along with Shri Nishant Bhardwaj — Advocates for the complainants
Shri J.K. Dang along with Shri Ishaan Dang — Advocates 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 25.02.2011 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. Unit and project 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	Marbella, Sector 65 and 66, Gurugram.
2.	Total licensed project area	107.919 acres
3.	Nature of the project	Residential plotted colony
4.	DTCP license no. and validity status	i. 97 of 2010 dated 18.11.2010 for 106.856 acres Valid/renewed up to 18.11.2022 ii. 41 of 2011 dated 03.05.2011 for 1.06 acres Valid/renewed up to 03.05.2024

5.	Building plan approved on	13.06.2013 [Page 248 of complaint]
6.	Environmental clearance approved on	24.12.2013 [Page 165 of complaint]
7.	Consent to Establish granted on	11.11.2014 [Page 179 of complaint]
8.	HRERA registered/ not registered	**Registered vide no. 307 of 2017 dated 17.10.2017 for 41.86 acres**
	HRERA registration valid up to	**16.10.2022**
9.	**Occupation certificate**	**15.10.2018** [Page 214 of complaint]
10.	Provisional allotment letter	22.11.2010 [Page 126 of complaint]
11.	Villa/unit no.	MAR-MD-036 [Page 7 of complaint]
12.	Villa/unit measuring as per buyer's agreement	6520 sq. ft. super built up area on 350 sq. yd. plot [Page 7 of complaint]
13.	Date of execution of buyer's agreement	25.02.2011 [Page 5 complaint]
14.	Payment plan	Construction linked payment plan [Page 41 of complaint]
15.	Total consideration as per statement of account dated 23.07.2019	Rs.5,70,12,231/- [Page 77 of complaint]
16.	Total amount paid by the complainants as per statement of account dated 23.07.2019	Rs.5,02,91,832/- [Page 79 of complaint]
17.	Date of start of construction as per statement of account dated 23.07.2019	27.04.2012
18.	Due date of delivery of possession as per clause 10(a) of	27.10.2014

	the said agreement i.e., 30 months from commencement of development work **(i.e. 27.04.2012)** plus grace period of 3 months, for applying and obtaining the occupation certificate in respect of the villa. [Page 18 of complaint]	**[Note:** Grace period is not included]
19.	Date of offer of possession to the complainants	16.11.2018 [Page 182 of complaint]
20.	Delay in handing over possession w.e.f. 27.10.2014 till 16.01.2019 i.e. date of offer of possession (16.11.2018) + 2 months	4 years 2 month 20 days

B. Facts of the complaint

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

i. That respondent is the developer/owner of a plotted colony *Marbella* situated at Sector 65 and 66, Gurugram, Haryana being developed pursuant to licenses no. 97 of 2010 dated 18.11.2010 and 41 of 2011 dated 03.05.2011. The villa bearing no. MAR-MD-036 was purchased by the complainants from the respondent in accordance with the buyer's agreement dated 25.02.2011. That various violations have been committed by the respondent with respect to the said project and the villa. In the year 2010, the respondent launched, advertised and marketed a residential plotted colony under the name of 'Marbella'. At that time, the respondent lured the complainants into booking a villa bearing no. MAR-MD-036 admeasuring 6520 sq. ft. on a plot of land measuring 350 square yards. The empanelled broker (M/s C-Pearl Real Estate Consultants and

Builders Pvt Ltd.) had shown brochures of the project at that time. The respondent *inter-alia* claimed that the project was '*Exclusive*' and '*Impeccably planned*'. It is also notable that the said brochure described in great detail a layout of the project and also the floor plans of the three kinds of villa's that would be developed by the respondent in the project i.e. 'Villa Belinda' measuring 8,120 sq. ft., 'Villa Monada' measuring 6520 sq. ft. and 'Villa Belleza' measuring 5,605 sq. ft. Notably, the layout contained in these brochure showed the locations of where each of the categories of villa's would be located and the location of the main road etc.

ii. That believing the representations made by the empanelled broker and the employees of the respondent, on 12.10.2010, the complainant no. 1 applied to the empanelled broker seeking allotment of "Monada Villa" bearing tentative unit no. 36, measuring 6520 sq. ft. Along with this application, the complainants paid booking advance of Rs. 30,00,000/- in two equal cheques dated 12.08.2010 and 30.08.2010 as per the demand of the respondent which were duly received and acknowledged by the respondent. That the statement of accounts dated 23.07.2019 issued by the respondent clearly acknowledges that the respondent has received an amount of Rs.15,00,000/- on 17.08.2010 and another amount of Rs.15,00,000/- on 30.08.2010 as '*Booking Receipt (Cheque)*' in respect of the villa. It is clear that up to 30.08.2010, the

respondent had received Rs.30,00,000/- from the complainant no. 1 towards the booking amount for the villa.

iii. That on 18.11.2010, license no. 97 of 2010 (hereinafter referred as license 1) *inter-alia* granted to the respondent for setting up a '*Residential Plotted Colony*' on land admeasuring 108.006 acres falling in revenue estate Maidawas Sector 65 and 66, Gurgaon- Manesar Urban Complex. Some pertinent conditions of the said license are set out hereunder:

> *"b) That the conditions of the agreements already executed are duly fulfilled and the provisions of the Haryana Development and Regulation of Urban Areas Act, 1975 and Rules, 1976 made thereunder are duly complied with.*
> *c) That the demarcation plan of the Residential Plotted Colony area is submitted before starting the development works in the colony and for approval of the zoning plan.*
> *g) That you will not give any advertisement for sale of flats/floor area in Residential Plotted Colony before the approval of layout plan/building plans.*
> *p) The licence is valid upto 17-11-2014."*

iv. That notably, section 7 (i) of the Haryana Development and Regulation of Urban Areas Act, 1975 provides as under:

> *"7. **Prohibition to advertise and transfer plots**. - Save as provided in Section 9, [no person including a property dealer shall]-*
> *(i) without obtaining a licence under Section 3, transfer or agree to transfer in any manner plots in a colony to transfer in any manner plots in a colony or make an advertisement or receive any amount in respect thereof;*
> *(ii) erect or re-erect any building in any colony in respect of which a licence under Section 3 has not been granted.*
> *(iii) erect or re-erect any building other than for purposes of agriculture on the land sub-divided for agriculture as defined in clause (aa) of Section 2 of this Act."*

v. Section 12 of RERA Act reads as under:

"12. Where any person makes an advance or a deposit on the basis of the information contained in the notice, advertisement or prospectus, or on the basis of any model apartment, plot or building, as the case may be, and sustains any loss or damage by reason of any incorrect, false statement included therein, he shall be compensated by the promoter in the manner as provided under this Act. ..."

vi. Thus, from the foregoing, it is amply clear that by advertising the said project in August 2010 through its empanelled broker and then receiving an amount of Rs.30,00,000/- from the complainant no. 1 towards the booking amount for the villa, the respondent has clearly violated the provisions of section 7 (i) of the Haryana Development and Regulation of Urban Areas Act, 1975 as the respondent did not possess any license at that time; under section 3 of the Haryana Development and Regulation of Urban Areas Act, 1975 for developing the said project. Needless to say, this also violates clause 3 b) and 3 g) of the license no.1. Thus, the respondent is in violation of section 12 of the Act of the Act.

vii. That thereafter, on 24.11.2010, the respondent issued an allotment letter dated 22.11.2010 to the complainant no. 1 provisionally allotting the villa no. MAR-MD-036 in the said project to the complainant no. 1. Notably, in this letter to cover its own illegalities, the respondent incorrectly refers to an application dated 19.11.2010, this is clear as the application and booking payment of Rs.30,00,000/- was already made by the complainant no. 1 as far back as on 12.08.2010 and 30.08.2010.

viii. That the allotment letter clearly mentions that "*...since the Super Area, building plans, floor plans and specifications in the Project is tentative as on the date of issuance of Allotment Letter...*". This makes it amply clear that the respondent has clearly violated clause 3 g) of the license no. 1 as it has not only marketed the subject project but has gone to the extent of allotting the villa in the said project prior to the building plans for the same being approved by the competent authorities. Due to this violation, it is clear that under section 8 (1) of the Haryana Development and Regulation of Urban Areas Act, 1975, licence no. 1 granted to the respondent is liable to be cancelled.

ix. That thereafter, on 25.02.2011, after a delay of almost 6 months, the buyer's agreement was executed with respect to the villa for a total consideration of Rs.5,44,77,600/- plus applicable taxes. Clause 10 (a) of the buyer's agreement provides that the possession of the villa was to be given to the complainants within 30 months from the date of 'commencement of development' work at the said project. Further, clause 10(a) of the buyer's agreement provides for a grace period of 3 months, for applying and obtaining the occupation certificate in respect of the said villa.

x. That the buyer's agreement is a completely one-sided document and various clauses have been inserted by the respondent to prejudice the interests of the complainants. This is apparent from the fact that a delay in payment of an

installment by the complainants attract interest at the rate of 24% per annum, while at the same time, delay in handing over possession only attracts a penalty of Rs. 10 per sq. ft. per month.

xi. That to cover up its illegal actions, the respondent has fraudulently recorded that the complainants have applied for the allotment of the villa on 19.11.2010 i.e., one day after license no. 1 was granted to the respondent. The complainants had filed their request for allotment on 12.08.2010 along with cheques for Rs.30,00,000/- and said was accepted by the respondent even prior to it having obtained license no. 1 in clear violation of the law.

xii. That the respondent misrepresented that it would be developing the said project on a plot of land measuring 109.036 acres and under license no. 1 it had the requisite authority to develop the subject project. To the shock of the complainants, the fact is as on date of the buyer's agreement, the respondent had only license no. 1 which was for 108.006 acres. The fact that the respondent has mislead the complainants is clear from the fact that leading upto the buyer's agreement, the complainants had on various occasions sought confirmation from the respondent if it had the requisite licenses for the project to which no confirmation was given. It was only on 03.05.2011 that the respondent received license no. 41 of 2011 for additional land measuring 1.063 acres and thus cumulatively measuring to 109.069 acres falling in the

revenue estate of village Maidawas, Sector 65 and 66, Gurugram-Manesar Urban Complex which enabled the respondent to apply for approval plan of the building at plot no. MMD-036. The said license was only valid till 02.05.2015 (Hereinafter referred as 'license no. 2'). Notably, all conditions in the license no.1 and license no. 2 are identical.

xiii. That the respondent represented that the said project was already under development as on date of the buyer's agreement. Thus, in terms of the clause 10 (a) of the buyer's agreement, the possession of the subject unit was to be delivered within 30+3 months from the date of the buyer's agreement, which would be by 25.11.2013.

xiv. That the respondent has clearly violated clause 3 g) of the license no. 1 as it has not only marketed the said project but has gone to the extent of executing the buyer's agreement in respect of the villa with the complainants where it clearly acknowledges that the building plans have not been approved by the DTCP at the time of the execution of the buyer's agreement. In addition to the aforementioned, brochure of the said project created by the respondent and provided to the complainants in August 2010 and the appointment of the empanelled broker by the respondent to market the said project on or before August 2010 i.e., much prior to obtaining license no. 1 thus is a clear violation of section 7 (i) of the Haryana Development and Regulation of Urban Areas Act, 1975. The buyer's agreement establishes beyond doubt the fact

that the respondent has directly engaged in the marketing of the said project as Recital 'I' categorically mentions that "*...The Allotee(s) has confirmed that only after satisfying himself/herself/itself/themselves, he/she/it/they are executing this Agreement and has/have not relied upon and is not induced by any **sale brochures/advertisements**, representations etc. **whether made orally by the Company** or any its agents/brokers/employees...*" [**Emphasis Supplied**] Thus, it is clear that as the respondent has violated clause 3 g) of the license no. 1 and section 12 of the Act of the Act.

xv. That rule 15 of the Haryana Development and Regulation of Urban Areas Rules, 1976 prescribes that a coloniser must start the laying out of the colony and development works within a period of three months of the grant of licence. Thus, the respondent ought to have commenced development of the said project within 3 months of the grant of licence no. 1 i.e., by 18.02.2011. However, as can be seen from the statement of account as on 23.07.2019 that the respondent has only raised a demand for the start of the '*site infrastructure development*'. Thus, it is clear that the respondent has violated rule 15 of the Haryana Development and Regulation of Urban Areas Rules, 1976 and resultantly in terms of the section 8 (1) of the Haryana Development and Regulation of Urban Areas Act, 1975, the licence no. 1 is liable to be cancelled. Here, it must be mentioned that the complainants maintain the position that the respondent has in fact started the development of the said

project much prior to January 2012 as on 09.04.2012, the respondent has sent some *'updated photos of Site Infrastructure'* whose metadata when examined reveals that they were taken on 05.01.2012. In accordance with law, the respondent had to start the construction on or before 18.02.2011 and accordingly the respondent was obligated to deliver the possession of the villa within 30 months from this date.

xvi. That rule 15 of the Haryana Development and Regulation of Urban Areas Rules, 1976 also prescribes that the coloniser must complete the construction of the development works of the project before the expiry of the period of the licence. Notably licence no. 1 was to expire on 17.11.2014. However, the respondent's employee has confirmed to the complainants that the respondent had failed to complete the construction the villa till 25.09.2020. As per the complainants, the respondent has till date not completed the construction of the said villa. The complainants have made a total payment of Rs. 5,02,91,832/- between 17.10.2010 till 28.02.2016 to the respondent in respect of the said villa. This is approximately 95% of the entire consideration of the villa.

xvii. That the respondent raised illegal demands of payment without achieving the construction milestones and till date the construction of villa is in progress. The respondent even procured the conditional occupation certificate on fabricated and unsigned documents. The respondent did not procure

necessary approvals from the relevant competent environmental authorities namely SEIAA, Aravali NOC from DC office, HSPCB and other relevant authorities. The respondent has in fact commenced the development of the villa in violation of the licenses. This is clear from the fact that point 3 i) of the licenses clearly mandate that no construction can be commenced without the respondent obtaining approval from the relevant competent environmental authorities. The licenses/NOC from the relevant authorities for the said project was obtained by the respondent only on 24.12.2013 and the latest approval was received on 11.11.2014 i.e. less than a year before the villa was to be delivered to the complainants. Till this date, the respondent had no right to commence the work at the said project site and had done so illegally as far back as on 25.02.2011, however, it had initiated construction at the said project as far back as in 2011.

xviii. That despite the construction of the subject villa not being completed, the respondent on 16.11.2018 issued a letter of offer of possession informing the complainants that it had received the occupation certificate for the villa and requesting the complainants to take possession of the villa. Thus, on 05.12.2018, the complainant no. 1 visited the villa and to his shock discovered that the villa was not even near completion. The complainant no. 1 in his e-mail of 14.12.2018 wrote to the respondent clearly pointing out the incomplete nature of the villa. Being surprised as to how a conditional occupation

certificate could be given by the authorities when the villa was nowhere near completion, the complainants decided to examine the conditional occupation certificate. The conditional occupation certificate was granted to the respondent on 15.10.2018. On examining the conditional occupation certificate, the complainants discovered that the occupation certificate was (a) conditional and (b) had been obtained by the respondent under the self-certification policy pursuant to an application dated 17.07.2018.

xix. That on 26.10.2020, the complainant no. 1 filed an RTI with the authorities *inter-alia* seeking *"...Copies of application, documents and affidavits submitted by Emaar and/or through its architect Mr. Gaurav Sharma to apply for and obtaining conditional occupational certificate dated 15.10.2018...."*. In response to the said RTI on 11.11.2020, the authorities provided the documents to the complainant no. 1. On an examination of the documents as provided by the authorities in response to the RTI, the complainants were shocked to discover the underlying:

a. That in their application dated 05.07.2018 for reasons best known to the respondent, the respondent applied for the occupation certificate for MMD-32 and 36 collectively. Of the 8 villas for which the respondent applied for an occupation certificate at the time only MMD-32 and 36 were applied for collectively.

b. That the respondent has filed Form BSR-III under Code 4.11 for the grant of the completion certificate but has not provided the date on which the construction of the villa has been completed. This makes it amply clear that the construction of the villa was not completed when the respondent applied for the occupation certificate. The respondent has also applied for Form BSR – IV. Form BSR – IV i.e. certificate of conformity to rules and structure safety filed by the respondent pursuant code 4.11(1) and (2) has no date appended to it. This made the said form invalid.

c. That the *'Compounding Proforma for Residential Plots in Licensed Colonies'* in violation of Code 4.11(1) (i) has only been signed by the architect and not by the respondent or the structural engineer.

d. That the complainants discovered that form BR-III i.e. the approval of the Building Plans was only issued to the respondent on 13.06.2013 vide memo no. 553. This makes it clear that as mentioned above the respondent has clearly violated clause 3 g) of the licenses as till 13.06.2013 the respondent could not advertise the villa let alone execute the buyer's agreement. Notably, the BR-III does not mention the date of the application by the respondent for the building plans. Notably, the BR-III also mentions that respondent would *'not apply for occupation certificate till all the development works in the licenced*

colony are completed and functional'. It is amply clear that the respondent has violated this provision as the said project is nowhere near completion and yet somehow the respondent has not only applied but also obtained the occupation certificate even without the villa being complete.

e. That the request from the respondent for the grant of the occupation certificate of the villa does not mention the date of the application and is itself undated further it also fails to mention as to what form has been filed by the respondent for the grant of the certificate. The certification by the respondent that there was no compoundable violation at the site of villa does not contain a single detail and is blank. Undertaking by the respondent fails to mention the date and nature of the application filed by the respondent for grant of occupation certificate.

f. That the affidavit signed by the respondent is clearly fraudulent as (a) it is not notarised (b) it does not contain a date (c) it does not mention the application and form filed for grant of occupation certificate. The respondent through Mr. Rajnish Bhardwaj has made false statement in the said affidavit that the construction debris have been cleared from the villa as can be seen from the photos appended at Annexure C-16 along with the e-mail of 14.12.2018. The photographs make it clear that on

05.12.2018, there was construction debris strewn all over and around the villa. In fact, the villa was not completed at all at the time and is still not complete. In fact, the pictures of the rear lawn of the villa attached along with the application for grant of the occupation certificate in respect of the said villa clearly shows debris present in the rear lawn of the villa.

g. That in violation of Code 4.11(1)(iii), the respondent has failed to attach pictures of the front, side, rear setbacks of the building and nor of essential areas like cut outs and shafts from the roof top. In fact, there is not a single picture from the roof top of the villa. Most of the alleged pictures of the interiors of the villa have not been identified as belonging to which villa MMD 32 or MMD 36. Clearly, the respondent has misused the pictures of MMD 32 to get the occupation certificate for the subject villa.

h. That in light of the foregoing violations in the application by the respondent for grant of the occupation certificate to DTCP, it is inconceivable how the occupation certificate in respect of the villa has been granted to the respondent. It is clear that there are clear violations of the provisions of the Haryana Building Code 2017 and errors in the application. It is clear that the said occupation certificate is clearly invalid. As stated above, till date, the construction of the villa has not been completed by the respondent, as confirmed by the employee of the

respondent in September 2020. In light of all these violations, the complainant no. 1 has on 07.07.2020 and 28.10.2020 filed two complaints with the DTCP requesting it to examine the violations of the law and licenses by the respondent and to take action against the respondent in this regard. On 10.10.2020, the DTCP has issued a memo to the respondent seeking its reply in the matter. However, till date no reply has been forthcoming from the respondent.

xx. That the respondent extended On Time Payment Rebate benefits to the complainants whereby the respondent promised a waiver of the last installment of 5% of Basic Sale Price (hereinafter referred as 'OTPR'). The respondent reiterates that all other terms and conditions of buyer's agreement shall remain the same. In pursuance of its *mala-fide* agenda, the respondent attempted to deprive the complainants of their OTPR entitlement. The respondent has raised payment demands under the construction-linked plan prior to achieving the construction milestones.

xxi. That on 02.07.2015, the respondent raised a demand for "Completion of Brickwork" this is the 10th installment in the construction linked plan availed by the complainants. This was followed by another demand on 03.08.2015 for "Completion of External Plaster" which is the 11th installment in the construction linked plan availed by the complainants.

xxii. That as the project had been delayed for so many years, the complainants requested the respondent for an inspection of the villa to determine its status as it was nearing completion according to the respondent. On 24.12.2015, the complainants visited the villa for an inspection. Pursuant the inspection, the complainants discovered that the respondent had illegally raised the said demands as neither the brickwork nor the plaster work had been completed by the respondent. The complainants took pictures of the incomplete work as seen on site and sent them to the respondent on 20.01.2016. Thereafter, on 27.01.2016, the complainants specifically raised the issue with the respondent as to how they had raised the demands dated 02.07.2015 and 03.08.2015 for "Completion of Brickwork" and "Completion of External Plaster" respectively when the work on the same had not in fact been completed. Pertinently, despite the illegal nature of the demand in February 2016, the complainants paid these demands despite the same not being due.

xxiii. That pertinently, on 18.01.2016, the respondent sought to compel the complainants to sign an indemnity bond under the pretext that it would restore the OTPR benefits till installment no. 9, if the complainants did so. Notably, this was a fraudulent and misleading request as in the joint site visit of the villa on 24.12.2015, the complainants had already raised the issue of the illegal demand no. 10 and 11 being raised by the respondent. Thus, even if the indemnity bond had been signed

by the complainants, they would according to the respondent still be in default of installment nos. 10 and 11 and thus the respondent would still deny the benefit of OTPR to the complainants.

xxiv. That further the letter dated 18.01.2016 itself proceeded on an erroneous basis that there was a need for a restoration of the OTPR of the complainants till the installment no. 9. The complainants had been consistently paying their installments on time and therefore, are entitled to OTPR in any event. It is admitted by the respondent on 17.04.2018 that the OTPR is restored till installment no. 9. Also, as the respondent had been clearly illegally raising demands on the complainants thus it was in no position to deny the complainants their right to OTPR.

xxv. That the *mala-fide* intention behind the offer of indemnity was that the wordings of the indemnity bond were such that it would compel the complainants to admitting to a default in timely payment when it was none. For all these reasons and more, the complainants refused to sign the indemnity bond proposed by the respondent. Subsequently, on 18.02.2016, the respondent agreed to restore the OTPR and waive the delay interest charges.

xxvi. That however, on 02.03.2016, the respondent demanded that the complainants provide the indemnity if the respondent was to restore the OTPR and waive the delay interest charges. Thus, having waived the delay penalty and restoring the OTPR in

February 2016, the respondent illegally withdrew the same in March 2016, all this while the respondent was raising illegal demands for payment to which it was not entitled.

xxvii. That thereafter, two years later on 16.08.2017, the respondent raised the demand for the payment for the 12th installment i.e., 'laying of the internal marble flooring'. The period of this delay clearly proves that the demand for the installment nos. 10 and 11 raised in July and August 2015 respectively had been raised fraudulently and it took over 2 years for the same to in fact be completed so that the marble flooring could be done at the villa.

xxviii. That, thereafter, having learned from their past experiences, on 06.03.2018, the complainants visited the villa and in the site inspection discovered that not only had the milestone not been met but also that the materials for the same were short and had been ordered. Thus, again the respondent had raised an illegal demand, this was communicated to the respondent on 07.03.2018. Even on 05.12.2018, the digging work at the villa was in the process in the basement of the villa so on what pretext did the respondent raise demand towards 'marble flooring complete'.

xxix. That thus, it is clear that the complainants are entitled to OTPR as admittedly OTPR has been restored till installment no. 9 and for installment nos. 10, 11 and 12 the demands were illegally made prior to achieving the targets and were still paid by the complainants. As the respondent has substantially delayed the

construction of the villa and in fact raised demands without completing the milestones, it is clear that the OTPR benefits of the complainants must be restored. Thus, the respondent's attempt to deny the OTPR to the complainants is *mala-fide*. Resultantly, this authority is requested to declare that the complainants are entitled to OTPR and waiver of any delay payment charges.

xxx. That Inspector of Lifts has only on 21.11.2018 certified the lift installed in the villa. Without prejudice to the fact that this certification has been received by the respondent under false pretexts. Thus, in terms of the condition contained in the OC the respondent could not have offered possession till this certificate was received by it. Thus, by issuing the intimation of possession on 16.11.2018 prior to receiving the lift certification on 21.11.2018, the respondent has illegally issued the intimation of possession. Even the lift certification issued by the 'Inspector of Lifts' on 21.11.2018 has been fraudulently obtained by the respondent as the manufacturer of the lift i.e. Schindler India Pvt. Ltd. admits that the lift was only handed over on 19.02.2019. Thus, prior to the handover no certification could have been obtained. Thus, till 19.02.2019 in any event the respondent could not have offered the intimation of possession.

xxxi. That the respondent could not have offered the possession as in fact the work at the subject villa has not been complete and the villa is not '**fit for use**'. This is clear from the fact that on

05.12.2018, after receiving the intimation of possession, the complainants visited the villa for an inspection. To their horror, the complainants discovered that the villa was nowhere close to completion and that the respondent had fraudulently issued the intimation of possession knowing fully well that the villa was not complete. On 14.12.2018, the complainants sent notification via an e-mail to the respondent enclosing a full report on incompletion of the construction work at the said villa and its incomplete nature. In specific, the complainants attached various photographs of the said villa showing the incomplete construction. Mr. V Radha Krishna, General Manager (Projects) at EMAAR Land Limited has in WhatsApp communications with the complainant no. 1 specifically admitted that as on 25.09.2020, the work at the villa MMD-036 was still ongoing and he will finish and handover the keys to Project Management team and/or Customer care team to give further date of handover of the subject villa. On 05.09.2020, Mr. V Radha Krishna promised to send the photographs once the villa MAR-MD-036 will be fit for use and ready for handover but he did not share any photograph. Thus, even today, the villa is not fit for use and ready for possession.

xxxii. That the permanent electricity connection at the said project was only installed sometime by end of 2020 as the respondent has failed to build the 33 KV substation required to support the required power demand of the said project. The DTCP has on

30.10.2019 issued a notification that makes it clear that prior to grant of OC on the request of the developer, the power utility will give a status update as to the completion of the electrical infrastructure of the project as per the approved electrification plan. As till date there is barely any electrification infrastructure at the said project and no OC can be granted by the competent authorities to the respondent in respect of the said project.

xxxiii. That till date, the respondent has failed to start the construction on any community centre and other community buildings. This is despite the fact that while granting renewal to licenses by DTCP, Haryana, they had specifically instructed to complete the construction work of community site as per Haryana Act No. 4 of 2012 dated 03.04.2012. Notably, in line with proviso to section 3 (3) (iv) of the Haryana Urban Development Authority Act, the community centre and other community buildings for the said project should have been completed on 18.11.2016 in respect of license 1 or latest by 03.05.2017 in respect of license 2.

xxxiv. That the respondent has been brushing aside all requisite norms and stipulations and has accumulated huge amount of hard-earned money of various investors/buyers in the project including the complainants and have delayed the handing over of the physical possession of the villa. As narrated hereinabove, the respondent has indulged in both "restrictive trade practice" and "unfair trade practice" by its various acts and

omissions. Despite complying with the draconian terms of the buyer's agreement due to the wrongful actions of the respondent, the complainants have incurred substantial losses primarily arising from delay in handover of the possession of the villa. The rate of interest payable by the developer to the individual/allottees in case of delay penalty is to be equal to the rate of interest which the individual/allottee shall be liable to pay the developer in case of default. This same principle has been echoed in section 2(za) (i) of the Act of 2016.

C. Reliefs sought by the complainants:

5. The complainants have sought following reliefs:

i. Direct the respondent to complete the construction of the subject villa bearing no. MAR-MD-036 in accordance with Annexure-5 of the buyer's agreement and make it 'fit for use'.

ii. Direct the respondent to handover the peaceful, physical and legal possession of the villa bearing no. MAR-MD-036 to the complainants after joint inspection.

iii. Direct the respondent to pay interest for every month of delay, from the date of booking i.e. 12.08.2010 till the handing over of the physical possession at 24% per annum.

iv. Direct the respondent to remove delayed payment charges illegally and arbitrarily levied by the respondent on the complainants.

v. Direct the respondent to give the On Time Payment Rebate ('OTPR') to the complainants, thereby removing the last installment of 5% of basic sale price in accordance letter dated 26.02.2011 and 17.03.2011 which is an integral part of the buyer's agreement.

vi. Direct the respondent to remove holding charges illegally and arbitrarily levied by the respondent on the complainants.

vii. Direct the respondent to pay a sum of Rs. 5 lakhs towards compensation for mental agony, mental harassment caused to the complainants due to the high-handed conduct, fraudulent assurances, unfair trade practices and abuse of dominant position by the respondent.

viii. Direct the respondent to pay an amount of Rs. 4,33,000/- towards litigation expenses.

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 raised certain preliminary objections and has contested the complaint on the following grounds:

i. The present complaint filed by the complainants is not maintainable and the authority has no jurisdiction whatsoever to entertain the present complaint. That the complainants have filed the present complaint seeking, inter alia, refund and interest for alleged delay in delivering possession of the subject villa booked by the complainants. The complaints pertaining to compensation 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 authority. The present complaint is liable to be dismissed on this ground alone.

ii. 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 25.02.2011. 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 complainants for seeking interest cannot be called in to aid in derogation and to ignore the

provisions of the buyer's agreement. It is further submitted that 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.

iii. That the complainant no.1 vide an application dated 19.11.2010 applied to the respondent for provisional allotment of a villa in the said project. The complainant no.1, in pursuance of the aforesaid application form, was allotted an independent villa bearing no. MAR-MD-036 in the project vide provisional allotment letter dated 22.11.2010. The complainant no.1 consciously and wilfully opted for a payment plan in which the first three installments were time bound while the remaining installments were construction linked. The complainants agreed and undertook to remit the sale consideration for the villa in question on time as per the payment schedule. However, right from the very beginning complainant no. 1 failed to make payment in a timely manner. Despite having promised and undertaken to adhere with the payment plan, the complainant no.1 miserably defaulted in timely payment of installments. Consequently, the respondent

was compelled to issue demand notices and reminders for payment. The statement of account reflects the payments made by the complainants and the delayed payment charges accrued thereon.

iv. That the complainant no.1 made a request for the addition of the name of complainant no.2 as a co-allottee in respect of the villa in question. The said request was acceded to by the respondent. Thereafter, the complainants executed the buyer's agreement with the respondent on 25.02.2011 and agreed and undertook to abide by the same. By letter dated 26.02.2011, the respondent offered a "On Time Payment Rebate" plan which offered waiver of the last installment of 5% basic sale price (as per the exclusions and conditions set out in the offer letter) to such allottees who made timely payment of all installments on or before the due dates.

v. That the complainants wanted to avail a home loan to finance the purchase of the villa. The loan approval letter from the Housing Development Finance Corporation Limited (HDFC Limited), a tripartite agreement between the complainants, the respondent and HDFC Ltd was executed, and No Objection Certificate issued by HDFC Ltd, are annexed with the reply. In the meanwhile, the complainants had also been defaulting in

payment of installments to the HDFC Ltd. A notice dated 07.10.2016 was issued by HDFC Ltd. addressed to the complainants calling upon them to regularize the outstanding EMIs amounting to Rs 9,03,309/-.

vi. That the respondent had registered the project under the Act of 2016. The registration certificate bearing memo no. HRERA-1031/2017/1467 dated 17.10.2017 was granted by this authority and the project has been registered till 16.10.2022. In other words, the date for delivery, consequent to registration stands extended up till 16.10.2022. The respondent has already offered possession of the villa in question within the period of registration and therefore no cause of action can be construed to have arisen in favour of the complainants to file a complaint for seeking any interest as alleged.

vii. That the respondent completed construction of the villa and made an application to the competent authority for issuance of the occupation certificate in respect thereof. The competent authority issued the occupation certificate vide memo dated 10982 dated 15.10.2018.

viii. That upon receipt of the occupation certificate, the possession of the subject villa was offered to the complainants vide letter

dated 16.11.2018. The complainants were called upon to remit the balance amount payable, complete the requisite formalities and documentation to enable the respondent to hand over possession of the villa to the complainants. Since, the complainants did not come forward to take possession of the villa, a reminder for possession dated 27.12.2018 was sent to the complainants. However, instead of taking possession of the subject villa, the complainants have proceeded to file the present false and frivolous complaint. The complainants engaged in communication with the respondent demanding compensation for alleged delay in offer of possession. It was explained to the complainants that in accordance with the terms and conditions of the buyer's agreement dated 25.02.2011, that only such allottees, who have complied with all the terms and conditions of the buyer's agreement, including making timely payment of installments are entitled to receive any compensation under the buyer's agreement dated 25.02.2011. Furthermore, it was explained by the respondent that in the event of any delay in delivery of possession due to delay or non-receipt of the occupation certificate and/or any other permission/sanction from the competent authorities, then in such an event no compensation

or any other compensation shall be payable to the allottees. In the present case, the complainants have delayed payment of installments and are consequently not eligible to receive any compensation from the respondent.

ix. That clause 10 of the buyer's agreement provides that subject to the allottee having complied with all the terms and conditions of the agreement, and not being in default of the same, possession of the villa would be handed over within 30 months plus grace period of three months, from the date of commencement of the development work. Time period for delivery of possession shall stand extended on the occurrence of delay for reasons beyond the control of the respondent and on account of time taken by Government and Statutory Authorities in according approvals, permissions and sanctions. In the event of default in payment of amounts demanded by the respondent under the buyer's agreement, the time for delivery of possession shall also stand extended.

x. That the development work started on 13.11.2013 and hence it is absolutely wrong and emphatically denied that as per the buyer's agreement, the possession of the villa was to be handed over latest by August 2013. It is respectfully submitted that the complainants have, by their conduct, waived the time

period for delivery of possession as set out under the buyer's agreement by refraining from objecting to or taking any steps to repudiate the contract. On the contrary, the complainants continued to make payment of sale consideration knowing fully well that development of the project commenced after the expiry of the so-called timelines for delivery as set out under the buyer's agreement dated 25.02.2011. Thus, assuming without admitting in any manner that time was the essence of the contract in so far as delivery of possession was concerned in the manner alleged by the complainants, it is submitted that after November 2013, time ceased to be the essence of the contract in so far as delivery of possession of the villa is concerned. In fact, it is submitted that by failing to object or repudiate the buyer's agreement even after August 2013 and by continuing to make payments thereafter, the complainants have waived any specified timelines for delivery of possession under the buyer's agreement dated 25.02.2011. Thus, the complainants claim for interest on any so-called delay in offer of possession is erroneous and misconceived.

xi. That the complainants were offered possession of the subject villa through letter of offer of possession dated 16.11.2018. The complainants were called upon to remit balance payment

including delayed payment charges and to complete the necessary formalities/documentation necessary for handover of the villa in question to the complainants. However, the complainants did not take any step to complete the necessary formalities or to pay the balance amount liable to be paid by him and proceeded to file the instant frivolous and misconceived complaint.

xii. That the complainants do not have adequate funds to remit the balance payment requisite for obtaining possession in terms of the buyer's agreement and consequently in order to needlessly linger on the matter, the complainants have preferred the instant complaint. The complainants are needlessly avoiding the completion of the transaction with the intent of evading the consequences as enumerated in the buyer's agreement for delay in obtaining of possession on the part of the respective allottee. Therefore, there is no equity in favour of the complainants.

xiii. That several allottees, including the complainants, 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

defaults in their payment 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 villa in question stands completed and the respondent had already offered the possession of the villa in question to the complainants. Therefore, there is no default or lapse on the part of the respondent and there in 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.

E. Written arguments by the complainants

8. The complainants have filed written arguments on 10.02.2021 wherein it is stated that in accordance with rule 15 of the Haryana Development and Regulation of Urban Areas Rules, 1976, the

respondent ought to have commenced the development of said project within 3 months of the grant of license no.97 of 2010 dated 18.11.2010 or within 3 months of the execution of buyer's agreement.

9. That after execution of BBA on 25.02.2011, the respondent commenced the site infra development at site but did not raise demand as per construction-linked payment plan for 'start of site Infra development' until 05.04.2012 with malafide intention to dupe the buyer on delivery deadline of 30 months from the start of site infra development work at site. This malafide intention gets proven by the fact that when the complainants requested the respondent for site photographs and vide email dated 09.04.2012, the respondent shared 27 photographs of the site and the photographs were found clicked on 05.01.2012 by the respondent and it is clearly visible in theses photographs that site infra development work started many months prior to 05.01.2012 but respondent did not disclose the 'start of infra development work' at site until 05.01.2012. This clearly shows the malafide intention of respondent to hide the actual construction date in order to cheat the complainants and take more time for delivery of the project. Therefore, the DPC should be granted from the date of booking, i.e.

12.08.2010. (Ref: Annexure C 20 (Colly.), Pg. 17 of the affidavit dated 04.11.2020).

10. That the respondent has raised payment demands under the construction linked plan without achieving the construction milestones. This was solely done with the intention of depriving the complainants to claim On Time Payment Rebate ('OTPR') and utilizing these funds for the respondent's own use. The respondent promised OTPR (Pg. 137-138, Email dated 26.02.2011 and 17.03.2011). However, the respondent mischievously sent an email to the complainants asking them to sign an indemnity bond and only then they shall pay the OTPR. (C-25, Pg. 107 of the affidavit dated 04.11.2020).

11. That the respondent raised illegal demands of payment without achieving the construction milestones and till date the construction of villa is in progress. The respondent even procured the conditional occupation certificate on fabricated and unsigned documents (C-37 wrongly referred as C-35 in the additional affidavit filed on 17.12.2020). The respondent did not procure necessary approvals from the relevant competent environmental authorities namely SEIAA, Aravali NOC from DM office, HSPCB and other relevant authorities. The respondent has failed to handover the possession of the subject villa even today.

12. Pertinently, on 26.02.2011 i.e., immediately after the execution of the buyer's agreement the respondent extended a "Pay on time" Reward or "On time payment Rebate" ('**OTPR**') to the complainants. This meant that if the complainants made all payments in their construction linked plan on or before the due dates then the last installment of 5% of the Basic Sale Price would be waived by the respondent (Annexure C-4). The respondent offered the OTPR on 26.02.2011 and consequently on 17.03.2011 to the complainants which makes an integral part of the BBA. It is also pertinent to mention that the OTPR offered to the complainants was based on valid demands raised by the respondent, i.e. demands raised at the time of achieving construction milestones at the subject villa. It is further pertinent to mention over here that in accordance with Annexure C-25 of the affidavit dated 04.11.2020, the respondent failed to achieve the construction milestones and was raising frivolous demands on the complainants. (C-25, Pg. 107). It is also relevant that the respondent thereafter, in order to deprive complainants from taking its legal action against the respondent, tried to coerce the complainants to sign an indemnity bond in lieu of OTPR. This fact also establishes that the respondent has been in default from the very inception of the project.

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

F. Jurisdiction of the authority

14. The preliminary objection raised by the respondent regarding jurisdiction of the authority to entertain the present complaint also stands rejected. The authority observed that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

F.I Territorial jurisdiction

15. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram District, therefore this authority has complete territorial jurisdiction to deal with the present complaint.

F.II Subject-matter jurisdiction

16. Section 11(4)(a) of the Act provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

Section 11

.....

(4) The promoter shall-

(a) be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

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

G. Findings on the objections raised by the respondent

G.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

18. Another contention of the respondent is that authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the buyer's agreement executed between the parties and no agreement for sale as referred to under the provisions of the Act or the said rules has been executed inter se parties. 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.

19. 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 allottees and promoter. The said contention has been upheld by the Bombay High Court 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."*

20. 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."*

21. 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 agreement subject to the condition that the same are in accordance with the Act and are not unreasonable or exorbitant in nature.

G.II Objection regarding handing over possession as per declaration given under section 4(2)(l)(C) of RERA Act

22. The counsel for the respondent submitted that the registration of the project is valid till 16.10.2022 and the respondent has already offered possession of the subject villa in question within the period of registration and therefore no cause of action can be construed to have arisen in favour of the complainants to file a complaint for seeking any interest as alleged. Therefore, next question of determination is whether the respondent is entitled to avail the time given to him by the authority at the time of registering the project under section 3 & 4 of the Act.

23. It is now settled law that the provisions of the Act and the rules are also applicable to ongoing project and the term ongoing project has been defined in rule 2(1)(o) of the rules of 2017. The new as well as the ongoing project are required to be registered under section 3 and section 4 of the Act.

24. Section 4(2)(l)(C) of the Act requires that while applying for registration of the real estate project, the promoter has to file a declaration under section 4(2)(l)(C) of the Act and the same is reproduced as under: -

"Section 4: - Application for registration of real estate projects

(2)The promoter shall enclose the following documents along with the application referred to in sub-section (1), namely: —

.....

(l): -a declaration, supported by an affidavit, which shall be signed by the promoter or any person authorised by the promoter, stating: — .....

(C) the time period within which he undertakes to complete the project or phase thereof, as the case may be...."

25. The authority observes that the time period for handing over the possession is committed by the builder as per the relevant clause of buyer's agreement and the commitment of the promoter regarding handing over of possession of the unit is taken accordingly. The new timeline indicated in respect of ongoing project by the promoter while making an application for registration of the project does not change the commitment of the promoter to hand over the possession by the due date as per the buyer's agreement. The new timeline as indicated by the promoter in the declaration under section 4(2)(l)(C) is now the new timeline as indicated by him for the completion of the project. Although, penal proceedings shall not be initiated against the builder for not meeting the committed due date of possession but now, if the promoter fails to complete the project in declared timeline, then he is liable for penal proceedings. The due date of possession as per the agreement remains unchanged and promoter is liable for the consequences and

obligations arising out of failure in handing over possession by the due date as committed by him in the apartment buyer agreement and he is liable for the delayed possession charges as provided in proviso to section 18(1) of the Act. The same issue has been dealt by hon'ble Bombay High Court in case titled as ***Neelkamal Realtors Suburban Pvt. Ltd. and anr. vs Union of India and ors.*** and has observed 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..."*

G.III Application filed by the respondent for dismissal of the complaint

26. The respondent has submitted in the said application that the complainants have filed a writ petition before the Hon'ble Punjab and Haryana High Court bearing no. 4730 of 2021 wherein the complainants have raised the same issues which are subject matter of the present complaint. The Hon'ble High Court has refrained from issuing notice in the said writ petition to the respondent herein but disposed off the writ petition with a direction to the Director General, Town and Country Planning Department, Haryana, to consider and decide the complaint made by the complainants dated 28.10.2020 within a period of 6 weeks from the

date of receipt of the said order dated 01.03.2021. The respondent prayed before the authority to dismiss the present complaint or in alternative, it prayed that the complaint be adjourned sine die to await the decision of the Director General, Town and Country Planning Department, Haryana, on the said complaint as made by the complainants on 28.10.2020 in accordance with the order dated 01.03.2021 passed by the Hon'ble Punjab and Haryana High Court in CWP 4730 of 2021 in this regard.

27. The matter was discussed and argued from both sides in detail. They have raised certain points which have already been raised before the Hon'ble High Court in CWP no. 4730 of 2021 and a copy of the same is attached. In the said CWP, the Hon'ble High Court has issued directions that without adverting to the merits of the case, respondent no.2 DTCP is directed to consider and decide complaint dated 28.10.2020 expeditiously, preferably, within 6 weeks from the date of receipt of copy of this order.

28. So far as this authority is considered, counsel for the respondent has given a copy of occupation certificate dated 15.10.2018 and a copy of offer of possession letter dated 16.11.2018, it is a fit case for grant of delayed possession charges. Although, the decision of the authority in the present complaint will remain subject to any

decision of the DTCP in complaint dated 28.10.2020 with respect to the subject villa.

H. Findings on the relief sought by the complainants

H.I Possession and delay possession charges

Relief 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 these reliefs are interconnected:

i. Direct the respondent to complete the construction of the subject villa bearing no. MAR-MD-036 in accordance with Annexure-5 of the buyer's agreement and make it 'fit for use'.

ii. Direct the respondent to handover the peaceful, physical and legal possession of the subject villa bearing no. MAR-MD-036 to the complainants after joint inspection.

iii. Direct the respondent to pay interest for every month of delay, from the date of booking i.e. 12.08.2010 till the handing over of the physical possession at 24% per annum.

iv. Direct the respondent to remove delayed payment charges illegally and arbitrarily levied by the respondent on the complainants.

29. 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."*

30. The clause 10(a) of the buyer's agreement provides for handing over of possession and is reproduced below for ready reference:

> ***"10. 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 Villa within 30 (thirty) months from commencement of development work. 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 occupation certificate in respect of the Villa."*

31. 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 date 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 villa and to deprive the allottee of his 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 other option but to sign on the doted lines.

32. **Due date of handing over possession and admissibility of grace period:** The complainants are contesting that the due date of handing over possession shall be computed either from **12.08.2010** (date of booking) or from the date of execution of the buyer's agreement i.e. **25.02.2011** or from **18.02.2011** (i.e. 3 months of obtaining license) or from **27.04.2012** (as per statement of account dated 23.07.2019, the respondent raised demand on account of 'On start of Site Infrastructure Development').

33. The authority is of the view that it is a matter of fact that clause 10(a) of the buyer's agreement which provides timeline for handing

over possession clearly stipulates that the promoter has proposed to hand over the possession of the subject villa within 30 (thirty) months from commencement of development work. In view of the above, there is no question of calculating the due date of possession from the date of booking or from execution of buyer's agreement and the averments of the complainants in this regard stands rejected as it is clearly stated in the said possession clause that the due date will be calculated from the 'date of commencement of development works' which are clearly mentioned in the statement of accounts dated 23.07.2019 which provides that demand on account of 'On start of site infrastructure development' was raised on 27.04.2012 (annexure C6 colly page 77 of complaint). With regard to the violation of conditions of the license as alleged by the counsel for the complainants is concerned, the authority observes that it is not the competent forum for the adjudication of the said violations and the complainants may approach the competent authority i.e., DTCP, Haryana as it is the domain of DTCP, Haryana. Keeping in view the above said reasoning, the date of handing over possession is reckoned from 27.04.2012, i.e., the date of which demand on account of 'On start of site infrastructure development' was raised by the respondent/promoter.

34. The promoter has proposed to hand over the possession of the said villa within 30 (thirty) months from commencement of development work and further provided in agreement that promoter shall be entitled to a grace period of 3 months for applying and obtaining occupation certificate in respect of villa. It is a matter of fact that the demand on account of 'On start of site infrastructure development' was raised on 27.04.2012 which is evident from the statement of account dated 23.07.2019. The period of 30 months as mentioned in possession clause 10(a) expired on 27.10.2014. Further, the promoter has not applied to the concerned authority for obtaining occupation certificate within the time limit (30 months) prescribed by the promoter in the said possession clause of the buyer's agreement. The promoter has moved an application for issuance of occupation certificate only on 17.07.2018 (annexure C17 on page 214 of the complaint) i.e., after the expiry of the period of 30. It is a well settled law that one cannot be allowed to take advantage of his own wrong. Accordingly, the authority holds that the benefit of grace period of 3 months cannot be allowed to the promoter in the present matter. Therefore, the due date of handing over possession of the subject villa comes out to be 27.10.2014.

35. The counsel for the complainants made certain allegations with regard to the violation of law and licenses by the respondent promoter. The counsel for the complainants also submitted that the occupation certificate for the subject villa has been fraudulently obtained by the respondent promoter. Further, it has been mentioned that the complainants have filed two complaints dated 07.07.2020 and 28.10.2020 with the DTCP requesting it to examine the violations of the law and licenses by the respondent and to take action against the respondent in this regard.

36. Now after considering all the above-mentioned facts, the authority is of the view that the matter with respect to the obtaining of the occupation certificate is pending adjudication before the competent authority. It is also relevant to mention here that the Hon'ble Punjab and Haryana High Court in CWP no. 4730-2021 vide order dated 01.03.2021 has already directed the DTCP to consider and decide the complaint dated 28.10.2020 expeditiously, preferably, within a period of six weeks from the date of receipt of a certified copy of the order. The occupation certificate is granted by the competent authority i.e. DTCP, Haryana and is the appropriate forum to approach in case of any dispute with regard to the occupation certificate. In the present case, there is an OC dated 15.10.2018 in respect of the subject unit which has been granted by

the competent authority. Hence, the authority observes that on this day there is a valid OC which has been placed on record and afterwards, the possession of the subject villa has been offered to the complainants on 16.11.2018. However, the decision of the authority in the present complaint will remain subject to any decision of the DTCP in complaint dated 28.10.2020 with respect to the subject villa.

37. As per section 19(10) of the Act, every allottee shall take possession of the apartment, plot or building as the case may be, within a period of two months of issuance of occupancy certificate. In the present case, the occupation certificate in respect of the subject villa has been granted by the competent authority on 15.10.2018 and thereafter, the possession of the subject villa has been offered to the complainants on 16.11.2018. In view of the same, the complainants are directed to take possession of the subject villa within 1 month from the date of this order after clearing outstanding dues.

38. **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.*

39. The legislature in its wisdom in the subordinate legislation under the provision of 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.

40. Taking the case from another angle, the complainants-allottees were entitled to the delayed possession charges/interest only at the rate of Rs.10/- per sq. ft. per month of the super built-up area as per clause 12 of the buyer's agreement for the period of such delay; whereas, as per clause 1.2(c) of the buyer's agreement, the promoter was entitled to charge simple interest @ 24% per annum till the date on which such installment is paid by the allottee to the company. The functions of the authority are to safeguard the interest of the aggrieved person, may it 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.

41. 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., 31.03.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

42. **Admissibility of interest on delay payments at the prescribed rate of interest:** 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;"*

43. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 9.30% by the respondents/promoters which is the same as is being granted to the complainants in case of delayed possession charges.

H.II On time payment rebate

44. **Relief sought by the complainants:** Direct the respondent to give the **On Time Payment Rebate** ('OTPR') to the complainants, thereby removing the last installment of 5% of basic sale price in accordance letter dated 26.02.2011 and 17.03.2011 which is an integral part of the buyer's agreement.

45. The complainants are contending that they are entitled to OTPR as admittedly OTPR has been restored till installment no. 9 and for installment nos. 10, 11 and 12 the demands were illegally made prior to achieving the targets and were still paid by the complainants. As the respondent has substantially delayed the construction of the villa and in fact raised demands without completing the milestones, it is clear that the OTPR benefits of the complainants must be restored, and delay payment charges shall be waived.

46. With respect to the waiver of the last installment of 5% BSP as per On-Time-Payment-Rebate (OTPR) scheme, the respondent gave the said benefit to the complainants firstly vide letter dated 26.02.2011. The relevant portion of the letter is reproduced below:

> *"As a part of our Customer centered business philosophy, we are happy to extend the benefit of the "Pay on time" reward (waiver of the last installment of 5% of Basic Sale Price) scheme to you.*
> *The scheme is only applicable subject to your making all payments/installments on or before the due dates as per the payment schedule starting from the date of allotment." (Emphasis supplied)*

47. Later on, the same was confirmed by the respondent vide letter dated 17.03.2011. Subsequently vide email dated 07.01.2013, the respondent has again admitted the said benefit to the complainants and the relevant portion is reproduced below:

> *"This is with reference to your villa MD-036 in Marbella, we would like to inform you that as on date you are eligible for on time payment rebate (i.e. at the time of possession 5% basic would be waive off). To*

avail the benefit of the scheme you are requested to pls make all your payment on time in future as well..." *(Emphasis supplied)*

48. Subsequently, vide email dated 18.01.2016 the benefit was again restored to the complainants. The relevant portion is reproduced below:

> *"This is with reference to unit # MAR-MD-036 booked with us in our project Marbella.*
> *Basis your request, and considering yours as a one off exceptional case, the company has agreed to restore the On-time payment benefit till installment # 9, along with 100% waiver of delay interest charges that has been levied on the said unit subject to us receiving the overdue amount of Rs.67,69,744/- on or before 22nd Jan 16 along with the enclosed indemnity.*
> *The indemnity needs to be executed on a 100 Rs stamp paper and notarized; and is required to update your account with us with the waivers/approvals received."* *(Emphasis supplied)*

49. Thereafter, the complainants vide email dated 19.01.2016 and 20.01.2016 contended that the respondent has raised demands of installments no. 10th and 11th without achieving the construction milestone as per payment plan. However, the authority observes that there is no evidence on record which corroborates the above-mentioned contention of the complainants. The authority cannot grant a relief on the basis of merely allegations.

50. Lastly, vide email dated 18.02.2016 the benefit was again restored to the complainants. The relevant portion is reproduced below:

> *"This is with reference to unit # MAR-MD-036 booked with us in our project Marbella.*
> *As per our discussions and your request, considering yours as an exceptional case, the company has agreed to restore the on-time payment benefit for the said unit subject to future payments being*

made as per our payment schedule (as and when demanded by the company).
Further we have also agreed to waive the delay interest charges levied on the said unit till 22nd Jan 16 amounting to Rs.7,26,000: balance delay interest charges is payable within this month."

(Emphasis supplied)

51. It is pertinent to note that the respondent has issued various demand letters and payment request letters on account of complainants' default in making the payments on time. The demand letters/ payment request letter dated 16.03.2016, 16.08.2017, 04.10.2017, 15.01.2018, 02.05.2018, 25.06.2018, 28.07.2018 and 20.09.2018 were issued post the email dated 18.02.2016.

52. The complainants were entitled to the said benefit with a pre-condition that the complainants have to make all payments/ installments on or before the due dates as per the payment schedule starting from the date of allotment. In the facts and circumstance of the present complaint, as the complainants have failed to make timely payments as per the payment plan thus, they are not entitled to take benefit of the said scheme.

H.III Holding charges

53. **Relief sought by the complainants:** Direct the respondent to remove holding charges illegally and arbitrarily levied by the respondent on the complainants.

54. The counsel for the respondent submitted that as the complainants are not coming forward to take possession, they are liable to pay holding charges.

55. With respect to holding charges, the hon'ble NCDRC in its order dated 03.01.2020 in case titled as **Capital Greens Flat Buyer Association and Ors. V. DLF Universal Ltd., Consumer case no. 351 of 2015** held as under:

> *"36. It transpired during the course of arguments that the OP has demanded holding charges and maintenance charges from the allottees. As far as maintenance charges are concerned, the same should be paid by the allottee from the date the possession is offered to him unless he was prevented from taking possession solely on account of the OP insisting upon execution of the Indemnity-cum-Undertaking in the format prescribed by it for the purpose. If maintenance charges for a particular period have been waived by the developer, the allottee shall also be entitled to such a waiver. As far as holding charges are concerned, the developer having received the sale consideration has nothing to lose by holding possession of the allotted flat except that it would be required to maintain the apartment. Therefore, the holding charges will not be payable to the developer. Even in a case where the possession has been delayed on account of the allottee having not paid the entire sale consideration, the developer shall not be entitled to any holding charges though it would be entitled to interest for the period the payment is delayed."*
>
> *(Emphasis supplied)*

56. The said judgment of NCDRC was also upheld by the Hon'ble Supreme Court vide its judgement dated 14.12.2020 passed in the Civil appeal nos. 3864-3889 of 2020 against the order of NCDRC (supra).

57. In view of the above, the respondent shall not charge anything from the complainants which is not the part of the buyer's agreement.

Further, the respondent shall not charge 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.

H.IV Compensation

58. **Relief sought by the complainants:** Direct the respondent to pay a sum of Rs.5 lakhs towards compensation for mental agony, mental harassment caused to the complainants due to the high-handed conduct, fraudulent assurances, unfair trade practices and abuse of dominant position by the respondent and direct the respondent to pay an amount of Rs.4,33,000/- towards litigation expenses.

59. The complainants are claiming compensation in the above-mentioned relief. The authority is of the view that it is important to understand that the Act has clearly provided interest and compensation as separate entitlement/rights which the allottee can claim. For claiming compensation under sections 12, 14, 18 and section 19 of the Act, the complainants are at liberty to file a separate complaint before adjudicating officer under section 31 read with section 71 of the Act of 2016 and rule 29 of the rules of 2017.

60. 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 buyer's agreement. By virtue of clause 10(a) of the buyer's agreement executed between the parties on 25.02.2011, possession of the booked unit was to be delivered within a period of 30 months plus 3 months grace period from commencement of development work i.e. 27.04.2012. 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 27.10.2014. In the present case, the complainants were offered possession by the respondent on 16.11.2018 after receipt of OC dated 15.10.2018. Copies of the same have been placed on record.

61. 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 rate of the prescribed interest @ 9.30% p.a. w.e.f. the due date of possession as per the buyer's agreement i.e., 27.10.2014 till 16.01.2019 i.e., the date of offer of possession plus two months as per provisions of section 18(1) of the Act read with rule 15 of the rules.

I. Directions of the authority

62. Hence, the authority hereby passes the following 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. 27.10.2014 till 16.01.2019 i.e. offer of possession (16.11.2018) plus two months. 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 of 2017.

ii. The complainants are directed to take possession of the subject villa within 1 month from the date of this order after clearing outstanding dues. The complainants are at liberty to visit the site and point out ambiguity, if any, and he shall come before authority.

iii. The respondent shall not charge anything from the complainants which is not the part of the buyer's agreement. The respondent shall not 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.

63. The decision of the authority in the present complaint will remain subject to any decision of the DTCP in complaint dated 28.10.2020 with respect to the subject villa.

64. Complaint stands disposed of.

65. File be consigned to registry.

(Samir Kumar)
Member

(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 31.03.2021