# BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

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| **Complaint no.** | **:** | **3283 of 2020** |
| **Complaint filed on** | **:** | **16.10.2020** |
| **First date of hearing** | **:** | **09.12.2020** |
| **Date of decision** | **:** | **18.02.2022** |

1. Shalu Mehra
2. Uday Mehra

Both RR/o: Flat no. 302, Tower 25, Gurgaon Greens, Sector 102, Gurugram, Haryana-122505. **Complainants**

Versus

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

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

**APPEARANCE:**
Shri Jagdeep Kumar Advocate for the complainants
Shri J.K. Dang Advocate for the respondent

## ORDER

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

## A. Project and unit related details

2. 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 | Gurgaon Greens, Sector 102, Gurugram. |
| 2. | Project area | 13.531 acres |
| 3. | Nature of the project | Group housing colony |
| 4. | DTCP license no. and validity status | 75 of 2012 dated 31.07.2012<br>Valid/renewed up to 30.07.2020 |
| 5. | Name of licensee | Kamdhenu Projects Pvt. Ltd. and another C/o Emaar MGF Land Ltd. |
| 6. | HRERA registered/ not registered | **Registered vide no. 36(a) of 2017 dated 05.12.2017 for 95829.92 sq. mtrs.** |
| | HRERA registration valid up to | **31.12.2018** |
| 7. | HRERA extension of registration vide | **01 of 2019 dated 02.08.2019** |
| | Extension valid up to | **31.12.2019** |
| 8. | Occupation certificate granted on | 16.07.2019<br>[annexure R13, page 162 of reply] |
| 9. | Provisional allotment letter dated | 28.01.2013<br>[annexure P2, page 49 of complaint] |
| 10. | Unit no. | GGN-25-0302, 3rd floor, tower no. 25<br>[annexure P3, page 64 of complaint] |
| 11. | Unit measuring | 1650 sq. ft. |
| 12. | Date of execution of buyer's agreement | 23.04.2013<br>[annexure P3, page 61 of complaint] |
| 13. | Payment plan | Construction linked payment plan<br>[Page 92 of complaint] |

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| 14. | Total consideration as per statement of account dated 09.12.2020 at page 112 of reply | Rs.1,26,57,393/- |
| 15. | Total amount paid by the complainants as per statement of account dated 09.12.2020 at page 114 of reply | Rs.1,26,61,403/- |
| 16. | Date of start of construction as per statement of account dated 09.12.2020 at page 112 of reply | 22.06.2013 |
| 17. | Due date of delivery of possession as per clause 14(a) of the said agreement i.e. 36 months from the date of start of construction (22.06.2013) + grace period of 5 months, for applying and obtaining completion certificate/ occupation certificate in respect of the unit and/or the project.<br>[Page 77 of complaint] | 22.06.2016<br>**[Note:** Grace period is not included] |
| 18. | Date of offer of possession to the complainants | 19.07.2019<br>[annexure R5, page 108 of reply] |
| 19. | Delay in handing over possession w.e.f. 22.06.2016 till 19.09.2019 i.e. date of offer of possession (19.07.2019) + 2 months | 3 years 2 months 28 days |
| 20. | Delay compensation already paid by the respondent in terms of the buyer's agreement as per statement of account dated 19.12.2020 at page 113 of reply | Rs.4,19,462/- |
| 21. | Unit handover letter | 22.10.2019<br>[annexure R7, page 115 of reply] |
| 22. | Conveyance deed executed on | 20.11.2019<br>[annexure R8, page 118 of reply] |

## B. Facts of the complaint

3. The complainants made following submissions in the complaint:

i. That somewhere in the starting of 2012, the respondent through its business development associate approached them with an offer to invest and buy a flat in the proposed project of the respondent. On 27.08.2012, the complainants had a meeting with respondent where the respondent explained the project details and highlighted the amenities of the project like joggers park, joggers track, rose garden, 2 swimming pool, amphitheater and many more. Relying on these details, the complainants enquired about the availability of flat on 3rd floor in tower 25 which was a unit consisting area of 1650 sq. ft. It was represented to the complainants that the respondent has already processed the file for all the necessary sanctions and approvals from the appropriate and concerned authorities for the development and completion of said project on time with the promised quality and specification. The respondent had also shown the brochures and advertisement material of the said project to them and assured that the allotment letter and builder buyer agreement for the said project would be issued to them within one week of booking to made by them. The complainants, relying upon those assurances and believing them to be true, booked a residential flat bearing no. 0302 on 3rd floor in tower – 25 in the proposed project of the respondent measuring

approximately super area of 1650 sq. ft. Accordingly, they have paid Rs. 7,50,000/- as booking amount on 27.08.2012.

ii. That on 28.01.2013, approximately after one year, the respondent issued a provisional allotment letter containing very stringent and biased contractual terms which are illegal, arbitrary, unilateral and discriminatory in nature because every clause was drafted in a one-sided way and a single breach of unilateral terms of provisional allotment letter by the complainants, will cost them forfeiture of 15% of total consideration value of unit. Respondent exceptionally increased the net consideration value of flat by adding EDC, IDC and PLC and when complainants opposed the unfair trade practices of respondent, they were informed that EDC, IDC and PLC are just the government levies, and they are as per the standard rules of government. Further, the delay payment charges will be imposed @ 24% which is standard rule of company and company will also compensate at the rate of Rs. 7.50/- per sq. ft. per month in case of delay in possession of flat by company. Complainants opposed these illegal, arbitrary, unilateral and discriminatory terms of provisional allotment letter but there was no other option left with them because if they stop the further payment of installments then in that case, respondent may forfeit 15% of total consideration value from the total amount paid by them. Thereafter, on 23.04.2013 the buyer's agreement was

executed on similar illegal, arbitrary, unilateral and discriminatory terms narrated by respondent in provisional allotment letter.

iii. That as per the clause 14 of the buyer's agreement dated 23.04.2013, the respondent had agreed and promised to complete the construction of the said flat and deliver its possession within a period of 36 months with a five (5) months grace period thereon from the date of start of construction. The proposed possession date as per buyer's agreement was due on 21.11.2016. However, the respondent has breached the terms of said buyer's agreement and failed to fulfill its obligations and has not delivered possession of said flat within the agreed time frame of the buyer's agreement.

iv. That as per annexure-III (Schedule of Payments) of buyer's agreement, the total sale consideration of the said flat was Rs.1,17,10,267/- (exclusive of service tax and GST but includes the charges towards the basic price- Rs.97,99,367/-, car parking Rs.3,00,000/-, Governmental charges (EDC & IDC) Rs.5,70,900/-, club membership Rs.50,000/-, IFMS Rs.82,500/-, and PLC for 3rd floor- Rs.82,500/-, PLC for joggers park facing- Rs.3,30,000/- and PLC for central park of Rs.4,95,000/-). But later at the time of possession, the respondent increased the sale consideration to Rs.1,17,40,343/- without any reason for the same, and respondent also charged IFMS @ Rs.82,500/- separately, whereas IFMS charges were already included in sale consideration and that way

respondent charged IFMS twice from complainants. In total, the respondent increased the sale consideration by Rs.1,12,576/- (Rs.30,076/- + Rs.82,500/-) without any reason which is illegal, arbitrary, unilateral and unfair trade practice. Complainants opposed the increase in sales consideration at time of possession, but respondent did not pay any attention towards their claims.

v. That as per the statement dated 31.12.2019, issued by the respondent, the complainants have already paid Rs.1,21,41,867/- towards total sale consideration as demanded by the respondent from time to time and now nothing is pending to be paid on the part of complainants.

vi. That the possession was offered by respondent through letter "Intimation of Possession" dated 19.07.2019 which was not a valid offer of possession because respondent had offered the possession with stringent condition to pay certain amounts which were never part of agreement. At the time of offer of possession, builder did not adjusted the penalty for delay possession. Respondent demanded Rs.1,44,540/- towards two-year advance maintenance charges from complainants which was never agreed under the buyer's agreement and respondent also demanded a lien marked FD of Rs. 2,71,850/- on pretext of future liability against HVAT which are also unfair trade practice.

vii. That respondent left no other option to complainants, but to pay the payment of two-year maintenance charges Rs. 1,44,540/- and fixed deposit of Rs.2,71,850/- with a lien marked in favour of Emaar MGF Land Limited and Rs.4,40,280/- towards e-stamp duty and Rs.50,000 towards registration charges of above said unit in addition to final demand raised by respondent along with offer of possession. Respondent gave physical handover of aforesaid property on 22.10.2019 after receiving all payments on 03.08.2019 from the complainants.

viii. That after taking possession of flat on 22.10.2019, the complainants also identified some major structural changes which were done by respondent in project in comparison to features of project narrated to them on 28.08.2012 at the office of respondent. Now, the tower no. 23, 24, 25, 26, 27 consists of G+14 floors in comparison to G+13 floors informed at the time of booking. Area of central park was told to be 8 acres but in reality, it is very small as compared to 8 acres and respondent also build car parking underneath 'central park'. Joggers park does not exist whereas respondent charged Rs.3,33,000/- from complainants on the pretext of PLC for joggers park. The respondent also charged PLC of Rs.4,95,000/- from them on pretext of unit facing central park whereas from complainant's flat it is not visible at all. The unit in question being at 3rd floor, view of central park is 100% obstructed

by club house and the complainants reported the same to the respondent and asked refund of the said amount (PLC charged for central greens i.e. Rs.4,95,000) but respondent never answered the complainants' grievance. Most of the amenities does not exist in project whereas it was highlight at the time of booking of flat. Respondent did not even confirm or revised the exact amount of EDC, IDC and PLC after considering the structural changes neither they provided the receipts or documentary records showing the exact amount of EDC, IDC and PLC paid to government.

ix. That the respondent charged exceptionally high PLC from complainants without even transferring the ownership rights of amenities to complainants on the common area of project. Respondent compelled almost every flat owner (total 672) through unilateral buyer's agreement to pay PLC of Rs. 4,95,000/- for central park whereas respondent sold car parking of Rs.3,00,000/- each underneath central park, this way respondent sold same area twice to residents and collected exceptionally high and unilateral and unjustified PLC from complainants. Respondent only spread grass on roof of covered parking area and sell it as "central green" at exceptionally high rate of Rs.4,95,000/- each.

x. That the respondent did not provide the final measurement of above said unit. Respondent charged all IDC, EDC and PLC and maintenance charges as per area of unit i.e. 1650 sq. ft. but there is

no architect confirmation provided by respondent about the final unit area which respondent was going to handover to the complainants.

xi. That the respondent compelled the complainants to pay two-year advance maintenance of Rs.1,44,000/- (@Rs.3.63 per sq. ft. per month) before taking the physical possession of flat which is a unilateral demand of respondent and even the calculation of maintenance charges are not as per the buyer's agreement. Now after taking possession of subject flat, respondent with a malafide intention started overcharging complainants in the name of common area electricity charges and fixed monthly electricity charges of Rs. 860/- per month. Respondent charged the complainants for electricity supplied by the distribution licensee (DHBVN) at a tariff higher than the rates for domestic supply category, which is illegal, arbitrary, unilateral act of the respondent. Respondent is using the same electricity connection for pending project activities whereas respondent should have a separate temporary electricity connection for the same. Buyer's agreement defined the formula of calculation of maintenance charges and other common charges which also include charges concerning common area electricity charges, but respondent unilaterally charged stringent charges from complainants in the name of maintenance charges and common area electricity

charges. Also, the respondent installed a prepaid electric meter system in each flat and charged a fixed minimum charge of Rs. 860 per month without any usage by the complainants, whereas no such fixed charge was claimed by the distribution licensee (DHBVN) electricity supplying agency. Respondent charge far more than total expenses incurred by respondent against electricity bill received from DHBVN Haryana and electricity produced through DG. Respondent also charged hire charges for electricity meter whereas respondent already took Rs.1,22,662/- under head "other charges" for electricity meter fitting which is not in line with buyer's agreement.

xii. That the cause of action accrued in the favour of the complainants and against the respondent on 27.08.2012 when the said flat was booked by them, and it further arose when respondent failed/ neglected to deliver the said flat on proposed delivery date. The cause of action is continuing and is still subsisting on day-to-day basis.

## C. Relief sought by the complainants

4. The complainants have filed the present compliant for seeking following relief:

i. Direct the respondent to pay interest at the applicable rate on account of delay in offering possession on amount paid by the

complainants from the date of payment till the date of delivery of possession.

ii. Direct the respondent to return Rs.1,12,576/- unreasonably charged by respondent by increasing sale price after execution of buyer' s agreement.

iii. Direct the respondent to refund PLC of Rs.4,95,000/- for 'central park' collected from the complainants.

iv. Direct the respondent to return the total advance amount taken by the respondent on account of maintenance charges.

v. Direct the respondent to issue necessary instruction to complainant's bank to remove the lien marked over fixed deposit of Rs.2,71,850/- in favour of the respondent on the pretext of future payment of HVAT.

vi. Direct the respondent to show the actual records of paying EDC and IDC to government and return the excess amount collected from complainants.

vii. Restrain the respondent to charge fixed monthly charges for electricity and restrain respondent to charge common area electricity charges till respondent did not submit the actual consumption of electricity at common area and till respondent installed a temporary electricity meter from electricity distributor licensee (DHBVN) for their pending project activity.

viii. Direct the respondent to charge electricity charges in accordance with consumptions of units by complainants and restrain the respondent from charging fixed minimum charges on electricity meters.

ix. Direct the respondent to get the flat measurement done by independent architect and furnish report of actual size of flat to complainants and adjust the cost in accordance with actual size delivered to the complainants.

5. 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 and to plead guilty or not to plead guilty.

**D. Reply by the respondent**

6. The respondent has raised certain preliminary objections and has contested the present complaint on the following grounds:

i. That the complainants have filed the present complaint seeking interest and compensation for alleged delay in delivering possession of the apartment booked by the complainants. It is respectfully submitted that such complaints 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. 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 23.04.2013. That 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. The provisions of the Act relied upon by the complainants for seeking interest or compensation cannot be called in to aid in derogation and in negation of the provisions of the buyer's agreement. The complainants cannot claim any relief which is not contemplated under the provisions of the buyer's agreement. Assuming, without in manner admitting any delay on the part of the respondent in delivering possession, it is 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 or contrary to the agreed terms and conditions between the parties.

iii. That the complainants are not "allottees" but are actually investors who have purchased the apartment in question as a speculative investment. The complainants are wilful and persistent defaulters who have failed to make payment of the sale consideration as per the payment plan opted by them.

iv. That the complainants were provisionally allotted apartment no. GGN-25-0302, admeasuring super area of 1650 sq. ft. approximately. The complainants had opted for a construction linked payment plan. Thereafter, the buyer's agreement was executed between the complainants and the respondent on 23.04.2013. Right from the very beginning, the complainants had delayed in making timely payment of the instalments as per the payment plan voluntarily chosen by them. The statement of account dated 09.12.2020 reflects the payments made by the complainants as well as the delayed payment interest levied on the complainants by the respondent.

v. That as per the terms and conditions of the buyer's agreement, the complainants were under a contractual obligation to make timely payment of all amounts payable under the buyer's agreement, on or before the due dates of payment failing which the respondent is entitled to levy delayed payment charges in accordance with clause 1.2(c) read with clauses 12 and 13 of the buyer's agreement.

vi. That the respondent registered the project under the provisions of the Act. The project had been initially registered till 31.12.2018. Thereafter, the respondent applied for extension of RERA registration. Consequently, extension of RERA registration certificate dated 02.08.2019 had been issued by this hon'ble authority to the respondent.

vii. That the respondent completed construction of the tower in which the said unit is situated and applied for the occupation certificate in respect thereon on 11.02.2019. The occupation certificate was issued by the competent authority on 16.07.2019. Upon receipt of the occupation certificate, the respondent offered possession of the subject unit to the complainants vide letter dated 19.07.2019. The complainants were called upon to remit balance amount and also to complete the necessary formalities and documentation so as to enable the respondent to hand over possession of the apartment to the complainants. It is pertinent to mention herein that compensation amounting to Rs. 4,19,462/- was also credited to the complainants in accordance with clause 16(c) of the buyer's agreement. The complainants, being in default of the buyer's agreement are not entitled to any compensation from the respondent. However, instead of clearing their outstanding dues and taking possession of the apartment, the complainants addressed frivolous correspondence to the respondent. Eventually, the complainants took possession of the subject unit on 22.10.2019 by executing the unit hand over letter. Thereafter, conveyance deed bearing vasika no. 9601 dated 20.11.2019 had been executed in favour of the complainants by the respondent.

viii. That at the time of taking possession of the apartment, the complainants have certified themselves to be fully satisfied with

regard to the measurements, location, direction, developments et cetera of the unit and also admitted and acknowledge that they do not have any claim of any nature whatsoever against the respondent and that upon acceptance of possession, the liabilities and obligations of the respondent as enumerated in the allotment letter/buyer's agreement, stand fully satisfied. Thus, the complainants are estopped from filing the present complaint. The complaint is not maintainable after issuance of the handover letter and execution & registration of the conveyance deed in favour of the complainants.

ix. That the contractual relationship between the complainants and the respondent is governed by the terms and conditions of the buyer's agreement dated 23.04.2013. Clause 12 of the buyer's agreement provides that time shall be the essence of the contract in respect of the allottee's obligation to perform/observe all obligations of the allottee including timely payment of the sale consideration as well as other amounts payable by the allottee under the agreement. Clause 13 of the buyer's agreement, *inter alia*, provides for levy of interest on delayed payments by the allottee.

x. That clause 14 of the buyer's agreement provides that subject to force majeure conditions and delay caused on account of reasons beyond the control of the respondent, and subject to the allottee

not being in default of any of the terms and conditions of the same, the respondent expects to deliver possession of the apartment within a period of 36 months plus five months grace period, from the date of start of construction of the project. In the case of delay by the allottee in making payment or delay on account of reasons beyond the control of the respondent, the time for delivery of possession stands extended automatically. In the present case, the complainants are defaulter who have failed to make timely payment of sale consideration as per the payment plan and are thus in breach of the buyer's agreement. The time period for delivery of possession automatically stands extended in the case of the complainants. On account of delay and defaults by the complainants, the due date for delivery of possession stands extended in accordance with clause 14(b)(iv) of the buyer's agreement, till payment of all outstanding amounts to the satisfaction of the respondent.

xi. That the respondent had completed construction of the apartment/tower by February 2019 and had applied for issuance of the occupation certificate on 11.02.2019. The occupation certificate was issued by the competent authority on 16.07.2019. It is respectfully submitted that after submission of the application for issuance of the occupation certificate, the respondent cannot be held liable in any manner for the time taken by the competent

authority to process the application and issue the occupation certificate. Thus, the said period taken by the competent authority in issuing the occupation certificate as well as time taken by government/statutory authorities in according approvals, permissions etc., necessarily have to be excluded while computing the time period for delivery of possession.

xii. That the respondent denied that IFMS amount has been charged twice from the complainants. It is wrong and denied that the sale consideration has been increased by Rs. 1,12,576/-. The sale consideration amount does not include applicable taxes, stamp duty, registration charges and interest on delayed payments. It is absolutely wrong and emphatically denied that the respondent has adopted any illegal, arbitrary, unilateral or unfair trade practice. On the contrary, all the demands raised by the respondent are strictly in accordance with the buyer's agreement.

xiii. That the respondent denied that it is not entitled to demand maintenance charges from the complainants. On the contrary, in accordance with clause 21 of the buyer's agreement, the complainants are bound to pay maintenance charges, including advance maintenance charges for a period of one year or as may be decided by the respondent/the maintenance agency at its discretion.

xiv. That insofar as HVAT is concerned, it is denied that the respondent is not entitled to demand the lien marked over the fixed deposit furnished by the complainants towards VAT liability which is payable by the complainants under the buyer's agreement. Once the VAT liability is finally determined, after payment towards the same, any excess amount shall be duly refunded to the complainants and any shortfall shall be accordingly demanded from the complainants. It is pertinent to mention that the complainants are liable to pay all taxes, levies, fees that are applicable upon the apartment booked by the complainants as per clause 3 of the buyer's agreement. Furthermore, although these amounts are collected by the respondent, the respondent does not retain the same and is merely a channel through which the said amounts are ultimately received by the government. It is absolutely wrong and emphatically denied that the respondent has adopted any unfair trade practice.

xv. That insofar the PLC is concerned, these charges are applicable to apartments which are located preferentially. The quantum of PLC charged by the respondent is a matter of record. The PLC is not a government levy but a premium payable upon apartments which are preferentially located. The respondent denied that the central greens are not visible from the said unit. It is wrong and denied that the view of the central park is obstructed by the club house. It is

wrong and denied that the respondent is liable to refund the PLC charge to the complainants. The said unit is facing the Central Green and consequently PLC is applicable. It is wrong and denied that PLC is liable to be refunded. It is wrong and denied that the area of the Central Park was stated to be 8 acres. It is wrong and denied that the joggers park does not exist on site. It is wrong and denied that the PLC amount charged by the respondent for the joggers park is liable to be refunded to the complainants. That the respondent has duly constructed the project in accordance with the plans duly sanctioned and approved by the competent authority. It is submitted that had there been any irregularity on the part of the respondent, the competent authority would not have issued the occupation certificate in favour of the respondent.

xvi. That clause 10(i) of the buyer's agreement specifically provides that the respondent has duly provided all the information and clarifications as required by the complainants and that the complainants have not relied upon or been influenced by any architects plan, sales plan, sales brochure, advertisements, representations, warranties, statements or estimates made by the respondent or its representatives, while booking the apartment in question. It is pertinent to mention herein that the brochure is not a binding contract between the parties but is merely an artistic rendering of the project, broadly depicting its proposed features

and facilities. The contractual relationship between the respondent and the complainants is governed by the buyer's agreement executed by the parties and the respondent has duly constructed the project/apartment in question in accordance with the buyer's agreement.

xvii. That insofar as the plans of the project are concerned, it is clearly provided in clause 5 of the buyer's agreement that the plans of the project are tentative and subject to change at the discretion of the respondent or as directed by any competent authority. Clause 6 of the buyer's agreement further provides that the complainants shall not raise any objection for any additions, alterations or modifications in the project carried out by the respondent, including changing building plans, floor plans, location, preferential location, unit number, increase or decrease in the number of apartments/floors/blocks of the super area of the unit, designs, specifications et cetera. It is only when the change/modification results in increase/decrease of the super area by 10% or more that the consent of the complainants is required to be taken.

xviii. The respondent denied that it is required to transfer ownership rights of the amenities of all the common areas in the project to the complainants. In accordance with the Haryana Apartment Ownership Act, 1983, the respondent is required to hand over the

common areas and facilities to the association of apartment owners and not to the allottees individually. It is submitted that the super area, as calculated in accordance with the buyer's agreement comprises of the area of the unit along with the pro rata share in the common areas and facilities of the project. The confirmation by the architect shall be provided by the respondent at the time of filing of the 'Deed of Declaration' before the competent authority under the Haryana Apartment Ownership Act, 1983. The respondent is not required to provide any independent confirmation to the complainants.

xix. That the respondent has charged the EDC/IDC at the rates prescribed by the government. It is wrong and denied that any surplus amount has been charged by the respondent from the complainants towards EDC, IDC or PLC.

xx. That the electricity charges are being charged as per DHBVN and HERC guidelines for bulk supply domestic tariff rates by the respondent from the allottees. The complainants have falsely alleged that the respondent is overcharging the electricity charges from the allottees. Furthermore, as far as usage of the same electricity connection for pending project activities is concerned, it is submitted that the electricity being used on project related work is being metered and charged to the respondent. The electricity is

charged from the allottees as per DHBVN/HERC guidelines in the following manner:

a. Energy Charges- Rs. 6.20/- per unit
b. Fuel Surcharge Adjustment- Rs. 0.37/- per unit (amended from time to time)
c. Electricity Duty @ 1.5%- Rs. 0.10/-
d. Municipal Tax @ 2.3% - Rs. 0.14/-

Therefore, the total cost of electricity per unit is quantified at Rs.6.81/-. It is pertinent to mention that common area electricity charges do not include maintenance charges. Both the charges are demanded separately. Furthermore, the complainants had undertaken to timely remit the electricity charges in terms of the maintenance agreement as well as the buyer's agreement duly executed by him. The complainants are estopped from challenging the levy of electricity charges in the facts and circumstances of the case. The quantum of amount charged by the respondent from the complainants in respect of the electricity charges is a matter of record. The fixed minimum charges have been determined in accordance with the terms and conditions incorporated in the maintenance agreement as well as the buyer's agreement.

xxi. That it is denied that the respondent had fixed minimum charges of Rs.860/- per month to be paid by the complainants without any electricity usage on their part. The quantum of amount charged by the respondent towards installation of electricity meter is also matter of record. Furthermore, as per DHBVN sales circular, the

minimum charges or fixed charges were being billed on the contract demand of individual customer at a rate of Rs.100/KW. However, since DHBVN is charging the respondent on its recorded demand, this collection was stopped with effect from 31.12.2020. Furthermore, the amount so collected was reimbursed in the form of electricity units to the tune of 117.4 units.

xxii. 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 conceptualization and development of the said project. Furthermore, when the proposed allottees default in their payments as per schedule agreed upon, the failure has a cascading effect on the operations and the cost for proper execution of the project increases exponentially whereas enormous business losses befall upon the respondent. The respondent, despite default of several allottees, has diligently and earnestly pursued the development of the project in question and has constructed the project in question as expeditiously as possible. 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. Based on the above submissions, the respondent

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

**E. Written arguments by the complainants**

7. The complainants have filed written arguments on 08.04.2021. The complainants submitted that the espondent offered the possession on 19.07.2019 with stringent condition to pay certain amounts which are never be a part of agreement and respondent did not receive the completion certificate of various other towers of the project and as on 19.07.2019 project was delayed by approx. 3 years. At the time of offer of possession builder did not adjust the penalty for delay possession. In case of delay payment, builder charged the penalty @24% per annum and for delay in possession committed to give the Rs. 7.5/- sq. ft. only, this is illegal, arbitrary, unilateral and discriminatory and above all respondent did not even adjust a single penny on account of delay in possession. Respondent did not even allow complainants to visit the property at "Gurgaon Greens" before clearing the final demand raised by respondent along with the offer of possession. Respondent demanded two-year advance maintenance charges from complainants which was never agreed under the buyer's agreement and respondent also demanded a lien marked FD of Rs. 2,71,850/- in pretext of future liability against HVAT which are also an unfair trade practice. Respondent also compelled complainants to furnish indemnity-cum-undertaking for taking possession of flat by referring the unilateral

clause 15 (b) of one-sided Buyers Agreement. The said indemnity-cum-undertaking was not a voluntary act on the part of the complainants, rather, they had to furnish this indemnity-cum-undertaking under duress and coercion in order to obtain the delivery of legal, and physical possession of flat. In view of the ratio of law laid down by the hon'ble Apex Court in **Wg. Cdr. Arifur Rahman Khan and Aleya Sultana and others vs. DLF Southern Homes Pvt. Ltd. (now known as BEGUR OMR Homes Pvt. Ltd.) and others** 2020(3) R.C.R.(Civil) 544, it was held that the allottees will not lose their right to claim interest for delayed possession merely on the ground that the conveyance deed had already been executed. The execution of the conveyance deed cannot extinguish the cause of action which had already accrued to the allottees due to delay in delivery of possession.

8. 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**

9. The preliminary objections raised by the respondent regarding jurisdiction of the authority to entertain the present complaint 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.

**F.I Territorial jurisdiction**

10. 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**

11. 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.*

12. 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

13. The respondent contended 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 respondent further submitted that the provisions of the Act are not retrospective in nature and the provisions of the Act cannot undo or modify the terms of buyer's agreement duly executed prior to coming into effect of the Act.

14. The authority is of the view that the Act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements made between the buyers

and sellers. The said contention has been upheld in the landmark judgment of ***Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)*** which provides as under:

> *"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter.....*
>
> *122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."*

15. 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."*

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

**G.II Objection regarding entitlement of DPC on ground of complainants being investors**

17. The respondent submitted that the complainants are investor and not consumer/allottee, thus, the complainants are not entitled to the protection of the Act and thus, the present complaint is not maintainable.

18. The authority observes that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states main aims and objects of enacting a statute but at the same time preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that under section 31 of the Act, any

aggrieved person can file a complaint against the promoter if the promoter contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the buyer's agreement, it is revealed that the complainants are an allottee/buyer and they have paid total price of Rs.1,26,61,403/- to the promoter towards purchase of the said unit in the project of the promoter. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

> *"2(d) "allottee" in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;"*

19. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the buyer's agreement executed between respondent and complainants, it is crystal clear that the complainants are allottees as the subject unit was allotted to them by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled as ***M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr.***

has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the complainants-allottees being investors are not entitled to protection of this Act stands rejected.

**G.III Objection regarding exclusion of time taken by the competent authority in processing the application and issuance of occupation certificate**

20. As far as contention of the respondent with respect to the exclusion of time taken by the competent authority in processing the application and issuance of occupation certificate is concerned, the authority observed that the respondent had applied for grant of occupation certificate on 11.02.2019 and thereafter vide memo no. ZP-835-AD(RA)/2018/16816 dated 16.07.2019, the occupation certificate has been granted by the competent authority under the prevailing law. The authority cannot be a silent spectator to the deficiency in the application submitted by the promoter for issuance of occupancy certificate. It is evident from the occupation certificate dated 16.07.2019 that an incomplete application for grant of OC was applied on 11.02.2019 as fire NOC from the competent authority was granted only on 30.05.2019 which is subsequent to the filing of application for occupation certificate. Also, the Chief Engineer-I, HSVP, Panchkula has submitted his requisite report in respect of the said project on 19.06.2019. The District Town Planner, Gurugram and Senior Town Planner, Gurugram has submitted requisite report about this project on

03.06.2019 and 10.06.2019 respectively. As such, the application submitted on 11.02.2019 was incomplete and an incomplete application is no application in the eyes of law.

21. The application for issuance of occupancy certificate shall be moved in the prescribed forms and accompanied by the documents mentioned in sub-code 4.10.1 of the Haryana Building Code, 2017. As per sub-code 4.10.4 of the said Code, after receipt of application for grant of occupation certificate, the competent authority shall communicate in writing within 60 days, its decision for grant/ refusal of such permission for occupation of the building in Form BR-VII. In the present case, the respondent has completed its application for occupation certificate only on 19.06.2019 and consequently the concerned authority has granted occupation certificate on 16.07.2019. Therefore, in view of the deficiency in the said application dated 11.02.2019 and aforesaid reasons, no delay in granting occupation certificate can be attributed to the concerned statutory authority.

**G.IV Whether signing of unit hand over letter or indemnity-cum-undertaking at the time of possession extinguishes the right of the allottee to claim delay possession charges.**

22. The respondent contended that at the time of taking possession of the subject unit vide unit hand over letter dated 22.10.2019, the complainants have certified themselves to be fully satisfied with regard to the measurements, location, direction, developments et cetera of the unit and also admitted and acknowledge that they do not have any claim

of any nature whatsoever against the respondent and that upon acceptance of possession, the liabilities and obligations of the respondent as enumerated in the allotment letter/buyer's agreement, stand fully satisfied. The relevant para of the unit handover letter relied upon reads as under:

> *"The Allottee, hereby, certifies that he / she has taken over the peaceful and vacant physical possession of the aforesaid Unit after fully satisfying himself / herself with regard to its measurements, location, dimension and development etc. and hereafter the Allottee has no claim of any nature whatsoever against the Company with regard to the size, dimension, area, location and legal status of the aforesaid Home.*
>
> *Upon acceptance of possession, the liabilities and obligations of the Company as enumerated in the allotment letter/Agreement executed in favour of the Allottee stand satisfied."*

23. In the complaint bearing no. ***4031 of 2019*** titled as ***Varun Gupta V/s Emaar MGF Land Ltd.,*** the authority has comprehensively dealt with this issue and has held that the aforesaid unit handover letter does not preclude the complainants from exercising their right to claim delay possession charges as per the provisions of the Act.

In light of the aforesaid order, the complainants are entitled to delay possession charges as per provisions of the Act despite signing of indemnity at the time of possession or unit handover letter.

**G.V Whether the execution of the conveyance deed extinguishes the right of the allottee to claim delay possession charges?**

24. The respondent submitted that the complainants have executed the conveyance deed on 20.11.2019 and therefore, the transaction between the complainants and the respondent have been concluded and no right

or liability can be asserted by respondent or the complainants against the other. Therefore, the complainants are estopped from claiming any interest in the facts and circumstances of the case. The present complaint is nothing but a gross misuse of process of law.

25. In the complaint bearing no. ***4031 of 2019*** titled as ***Varun Gupta V/s Emaar MGF Land Ltd.,*** the authority has comprehensively dealt with this issue and has held that taking over the possession and thereafter execution of the conveyance deed can best be termed as respondent having discharged its liabilities as per the buyer's agreement and upon taking possession, and/or executing conveyance deed, the complainants never gave up their statutory right to seek delayed possession charges as per the provisions of the said Act. Also, the same view has been upheld by the Hon'ble Supreme Court in case titled as **Wg. Cdr. Arifur Rahman Khan and Aleya Sultana and Ors. Vs. DLF Southern Homes Pvt. Ltd. (now Known as BEGUR OMR Homes Pvt. Ltd.) and Ors. (Civil appeal no. 6239 of 2019) dated 24.08.2020**, the relevant paras are reproduced herein below:

> *"34 The developer has not disputed these communications. Though these are four communications issued by the developer, the appellants submitted that they are not isolated aberrations but fit into a pattern. The developer does not state that it was willing to offer the flat purchasers possession of their flats and the right to execute conveyance of the flats while reserving their claim for compensation for delay. On the contrary, the tenor of the communications indicates that while executing the Deeds of Conveyance, the flat buyers were informed that no form of protest or reservation would be acceptable. The flat buyers were essentially presented with an unfair choice of*

*either retaining their right to pursue their claims (in which event they would not get possession or title in the meantime) or to forsake the claims in order to perfect their title to the flats for which they had paid valuable consideration. In this backdrop, the simple question which we need to address is whether a flat buyer who seeks to espouse a claim against the developer for delayed possession can as a consequence of doing so be compelled to defer the right to obtain a conveyance to perfect their title. It would, in our view, be manifestly unreasonable to expect that in order to pursue a claim for compensation for delayed handing over of possession, the purchaser must indefinitely defer obtaining a conveyance of the premises purchased or, if they seek to obtain a Deed of Conveyance to forsake the right to claim compensation. This basically is a position which the NCDRC has espoused. We cannot countenance that view.*

*35. The flat purchasers invested hard earned money. It is only reasonable to presume that the next logical step is for the purchaser to perfect the title to the premises which have been allotted under the terms of the ABA. But the submission of the developer is that the purchaser forsakes the remedy before the consumer forum by seeking a Deed of Conveyance. To accept such a construction would lead to an absurd consequence of requiring the purchaser either to abandon a just claim as a condition for obtaining the conveyance or to indefinitely delay the execution of the Deed of Conveyance pending protracted consumer litigation."*

26. Therefore, in furtherance of ***Varun Gupta V/s Emaar MGF Land Ltd. (supra)*** and the law laid down by the hon'ble Apex Court in the **Wg. Cdr. Arifur Rahman (supra)**, this authority holds that even after execution of the conveyance deed, the complainants cannot be precluded from their right to seek delay possession charges from the respondent-promoter.

## H. Findings on the reliefs sought by the complainants

### H.I Delay possession charges

27. **Relief sought by the complainants**: Direct the respondent to pay interest at the applicable rate on account of delay in offering possession

on amount paid by the complainants from the date of payment till the date of delivery of possession.

28. 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."*

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

> **"14. POSSESSION**
>
> ***(a)*** **Time of handing over the possession**
>
> *Subject to terms of this clause and barring force majeure conditions, and subject to the Allottee having complied with all the terms and conditions of this Agreement, and not being in default under any of the provisions of this Agreement and compliance with all provisions, formalities, documentation etc., as prescribed by the Company. The Company proposes to hand over the possession of the Unit within 36 (Thirty Six) months from the date of start of construction., subject to timely compliance of the provisions of the Agreement by the Allottee. The Allottee agrees and understands that the Company shall be entitled to a grace period of 5 (five) months, for applying and obtaining the completion certificate/occupation certificate in respect of the Unit and/or the Project."*

30. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement, and the complainants not being in default under any provisions of this agreement and compliance

with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment time period for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottees of their right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

31. **Due date of possession and admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within 36 (thirty-six) months from the date of start of construction and further provided in agreement that promoter shall be entitled to a grace period of 5 months for applying and obtaining completion certificate/occupation certificate in respect of said unit. The date of start of construction is 22.06.2013 as per statement of account dated 09.12.2020. The period of 36 months expired on 22.06.2016. As a matter of fact, the promoter has not applied to the concerned authority

for obtaining completion certificate/ occupation certificate within the time limit (36 months) prescribed by the promoter in the buyer's agreement. The promoter has moved the application for issuance of occupation certificate only on 11.02.2019 when the period of 36 months has already expired. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, the benefit of grace period of 5 months cannot be allowed to the promoter due to aforesaid reasons.

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

> ***Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]***
>
> *(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.:*
>
> *Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.*

33. The legislature in its wisdom in the subordinate legislation under rule 15 of the rules has determined the prescribed rate of interest. The rate

of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.

34. Taking the case from another angle, the complainants-allottees were entitled to the delayed possession charges/interest only at the rate of Rs.7.50/- per sq. ft. per month of the super area as per clause 16 of the buyer's agreement for the period of such delay; whereas, as per clause 13 of the buyer's agreement, the promoter was entitled to interest @ 24% per annum at the time of every succeeding instalment from the due date of instalment till date of payment on account for the delayed payments by the allottee. The functions of the authority are to safeguard the interest of the aggrieved person, may be the allottee or the promoter. The rights of the parties are to be balanced and must be equitable. The promoter cannot be allowed to take undue advantage of his dominant position and to exploit the needs of the home buyers. This authority is duty bound to take into consideration the legislative intent i.e., to protect the interest of the consumers/allottees in the real estate sector. The clauses of the buyer's agreement entered into between the parties are one-sided, unfair and unreasonable with respect to the grant of interest for delayed possession. There are various other clauses in the buyer's agreement which give sweeping powers to the promoter to cancel the allotment and forfeit the amount paid. Thus, the terms and conditions of the buyer's agreement are ex-facie one-sided, unfair and

unreasonable, and the same shall constitute the unfair trade practice on the part of the promoter. These types of discriminatory terms and conditions of the buyer's agreement will not be final and binding.

35. 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%.

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

> *"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.*
> *Explanation. —For the purpose of this clause—*
> *(i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*
> *(ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"*

37. 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.

38. On consideration of the documents available on record and submissions made by the parties regarding contravention as per provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 14(a) of the buyer's agreement executed between the parties on 23.04.2013, the possession of the subject flat was to be delivered within a period of 36 months from the date of start of construction plus 5 months grace period for applying and obtaining the completion certificate/ occupation certificate in respect of the unit and/or the project. The construction was started on 22.06.2013. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over possession comes out to be 22.06.2016. Occupation certificate was granted by the concerned authority on 16.07.2019 and thereafter, the possession of the subject flat was offered to the complainants on 19.07.2019. Copies of the same have been placed on record. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the subject flat and it is failure on part of the promoter to fulfil its obligations and responsibilities as per the buyer's agreement dated 23.04.2013 to hand over the possession within the stipulated period.

39. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 16.07.2019. The respondent offered the possession of the unit in question to the complainants only on 19.07.2019, so it can be said that the complainants came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the complainants should be given 2 months' time from the date of offer of possession. These 2 months' of reasonable time is being given to the complainants keeping in mind that even after intimation of possession practically they have to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e. 22.06.2016 till the expiry of 2 months from the date of offer of possession (19.07.2019) which comes out to be 19.09.2019.

40. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainants are entitled to delayed possession at prescribed rate of interest i.e. 9.30% p.a. w.e.f. 22.06.2016

till 19.09.2019 as per provisions of section 18(1) of the Act read with rule 15 of the rules.

41. Also, the amount of Rs.4,19,462/- (as per statement of account dated 09.12.2020) so paid by the respondent to the complainants towards compensation for delay in handing over possession shall be adjusted towards the delay possession charges to be paid by the respondent in terms of proviso to section 18(1) of the Act.

**H.II Return of amount unreasonably charged by increasing sale price.**

42. **Relief sought by the complainants:** Direct the respondent to return Rs.1,12,576/- unreasonably charged by the respondent by increasing sale price after execution of buyer's agreement between the respondent and the complainants.

43. With respect to the said relief sought by the complainants, the complainants submitted that as per Annexure-III (Schedule of Payments) of buyer's agreement, the sales consideration exclusive of ST and GST is Rs.1,17,10,267/- (which includes IFMS of Rs.82,500/-) but later at the time of intimation of possession, the respondent increased it to Rs.1,17,40,343/- without any reason for the same. The respondent also charged IFMS of Rs.82,500/- separately, whereas IFMS charges were already included in sale consideration and that way respondent charged IFMS twice from complainant. In total respondent increased the sale consideration by Rs.1,12,576/ (Rs.30,076/ +Rs.82,500/). On the other hand, the respondent has denied that any amount has been

added or the sale consideration has been increased by the respondent in the manner claimed by the complainant and it was also denied that IFMS charges have been collected twice.

44. The authority observes that as per Annexure-III (Schedule of Payments) of buyer's agreement, the IFMS was payable along with the last instalment and in fact, the same was demanded by the respondent vide 'Letter of Offer of Possession' dated 19.07.2019 i.e., last instalment. The authority observes that per schedule of payment annexed with the buyer's agreement (annexure P3, page 92 of complaint), the total sale consideration is Rs.1,17,10,267/- which is inclusive of basic sale price, EDC and IDC, club membership, IFMS, car parking, PLC and additional charges. Whereas as per state nent of account dated 31.12.2019 (annexure P6, page 122 of complaint), the sale consideration has been increased to Rs.1,17,40,343/- i.e., an increase of Rs.30,076/-. Further IFMS of Rs.82,500/- has also been again added. Accordingly, Rs.1,12,576/- have been charged extra. Therefore, the respondent is directed to delete the said amount from the total sale consideration.

**H.III Preferential Location Charges (PLC)**

45. **Relief sought by the complainants:** Direct the respondent to refund PLC of 'Central Park' of Rs.4,95,000/- collected from the complainants.

46. The complainants have raised the question about the justification of preferential location charges raised by the promoter. Admittedly the

complainants made the payment of Rs.4,95,000/- as 'Preferential Location Charges' towards the commitment to have central green. The complainants are seeking refund of the entire amount along with reasonable interest paid towards PLC as the view of central park is 100% obstructed by club house and the unit is not preferentially located. The respondent contended that the quantum of PLC charged by the respondent is matter of record and denied that the central green area is not visible from the unit in question. Moreover, preferential location of the unit is not exclusive to the ocular aspect thereof.

47. Needless to say, that the agreement for sale/BBA executed between the parties i.e. the promoter and the allottee is binding on them and they are not entitled to avoid any term or condition contained herein except those terms or conditions which are against the public policy or where there are reasons to believe that the same were incorporated in the agreement by the promoter by taking benefit of his being in dominant position and the allottee had no option but to sign on the dotted lines. PLC is to be dealt as per the provisions of the buyer's agreement dated 23.04.2013, where the said agreement have been entered into before coming into force of the Act. As per clause 1.2(e)(i) of the buyer's agreement, the following provisions have been made regarding PLC:

> *"**1.2(e) Preferential Location Charges***
> *(i) The proportionate amount of the preferential location charges ('**PLC**') for certain units in the Project which inter alia would be charged for Central Greens for Rs.4,95,000/-, Joggers Park Facing*

*for Rs,3,30,000/-, Third Floor for Rs,82,500/- and if the Allottee opts for any such Unit, the PLC for the same shall be included in the Total Consideration payable by the Allottee as set out in clause 1.2(a)(i) above for the said Unit.*

*(ii) The Allottee understands that if due to change in layout plan, the location of any Unit, whether preferentially located or otherwise is changed to any other preferential location, where the PLC are higher than the rate as mentioned hereinabove, then in such a case the Allottee shall be liable to pay the PLC as per the revised PLC decided by the Company within thirty (30) days of any such communication received by the Allottee in this regard. However, if due to the change in the layout plan the Unit ceases to be preferentially located, then in such an event the Company shall be liable to refund only the amount of PLC paid by the Allottee without any interest and/or compensation and/or damages and/or costs of any nature whatsoever and such refund shall be adjusted in the following installment for the Unit."*

48. On the date of hearing i.e., 19.10.2021, local commission was appointed with respect to the preferential location of the unit and the local commission has submitted the report on 13.12.2021. The relevant portion of the report is reproduced below:

*"6. CONCLUSION:*

*The site of project named "Gurgaon Greens" being developed by M/s Emaar MGF Land Limited has been inspected and it is found that:*

1. *In the unit no. 901 Tower 15, the central green is not clearly visible from the centre of the balcony whereas the central green can be viewed from one of the extreme corners of the balcony.*
2. *In the unit no. 902 Tower 15, the central green is not clearly visible from the centre of the balcony whereas the central green can be viewed from one of the extreme corners of the balcony.*
3. *In the unit no. 302 of Tower 25, the view of central green from the balcony of unit is completely obstructed by the community building/ shopping.*
4. *In the unit no. 202 of Tower 25, the view of central green from the balcony of unit is completely obstructed by the community building/ shopping whereas the promoter has developed a green area along with fountain on the ground level which is visible from the balcony of the unit."*

49. In the present complaint, the unit no. 302 is located in tower 25. As per report of Local Commission, the view of central green from the balcony of unit is completely obstructed by the community building/ shopping. Therefore, in light of the said report, the authority is of the view that as the unit in question has ceased to be preferentially located, the respondent is directed to return the amount of Rs.4,95,000/- so collected towards PLC "Central Greens".

**H.IV Advance maintenance charges**

50. **Relief sought by the complainants:** Direct the respondent to refund the total advance amount taken by the respondent on account of maintenance charges.

51. With respect to the relief sought by the complainants regarding advance maintenance charges, the relevant clause of the buyer's agreement is as follows:

> *"21. MAINTENANCE*
>
> *(a) The Allottee hereby agrees and undertakes to enter into a separate Maintenance Agreement as per the draft provided as Annexure-IX to this Agreement with the Maintenance Agency.*
>
> *(b) The Allottee further agrees and undertakes to pay the Maintenance Charges as may be levied by the Maintenance Agency for the upkeep and maintenance of the Project, its common areas, utilities, equipment installed in the Building and such other facilities forming part of the Project. Further, the Allottee agrees and undertakes to pay in advance, along with the last installment specified under Payment Plan, advance maintenance charge (AMC) equivalent to Maintenance Charges for a period of one year or as maybe decided by the Company / Maintenance Agency at its discretion. Such charges payable by the Allottee will be subject to escalation of such costs and expenses as may be levied by the Maintenance Agency. The Company reserves the right to change, modify, amend and impose*

*additional conditions in the Tripartite Maintenance Agreement at its sole discretion from time to time"* *(Emphasis supplied)*

52. The grievance of the complainants is that the respondent compelled them to pay 2 years advance maintenance charges i.e. a sum of Rs.1,44,540/- (@ Rs.3.63 per sq. ft. per month) before taking physical possession of the unit which is a unilateral demand of the respondent and even the calculation of maintenance charges are not as per the buyer's agreement. On the other hand, the respondent submitted that the respondent has collected all the amounts strictly in accordance with the terms and conditions of the buyer's agreement.

53. The authority has comprehensively dealt with this issue in the complaint bearing no. ***4031 of 2019*** titled as ***Varun Gupta V/s Emaar MGF Land Ltd.*** wherein the authority has held that the respondent is right in demanding advance maintenance charges at the rates' prescribed in the builder buyer's agreement at the time of offer of possession. However, the respondent shall not demand the advance maintenance charges for more than one year from the allottee even in those cases wherein no specific clause has been prescribed in the agreement or where the AMC has been demanded for more than a year.

54. The authority is of the view that the respondent is entitled to collect advance maintenance charges as per the buyer's agreement executed between the parties. However, the period for which advance maintenance charges (AMC) is 'evied should not be arbitrary and unjustified. It is interesting to note that as per above quoted clause 21

of the buyer's agreement, the respondent has agreed to charge AMC for a period of one year, however, at the time of offer of possession vide letter dated 19.07.2019, the respondent has demanded Rs.1,44,540/- towards advance maintenance charges (@ Rs.3.65 per sq. ft.) for period of 24 months.

55. Keeping in view the aforesaid facts, the authority is of the view that the respondent is right in demanding advance maintenance charges at the rate prescribed therein at the time of offer of possession in view of the judgement (supra). However, the respondent shall not demand the advance maintenance charges for more than one year from the complainants.

**H.V Whether respondent is justified in creating lien over fixed deposit on pretext of future payment of HVAT**

56. **Relief sought by the complainants:** Direct the respondent to issue necessary instructions to the complainant's bank to remove lien marked over FD of Rs.2,71,850/- in favour of the respondent on the pretext of future payment of HVAT.

57. The complainants submitted that the respondent has demanded a lien marked FD of Rs.2,71,850/- in favour of the respondent on the pretext of future liability of HVAT along with letter of offer of possession. The complainants contended that the respondent left him with no other option but to make the payment of 2-year maintenance charges, FD with a lien marked in favour of respondent, e-stamp duty, registration

charges in addition to final demands raised by the respondent along with the offer of possession. Afterwards, the respondent gave physical handover of the aforesaid unit on 22.10.2019 after receiving all the payments in 03.08.2019. On the other hand, the respondent had submitted that all the amounts demanded from the complainants at the time of offer of possession had been demanded in accordance with the terms and conditions incorporated in the buyer's agreement. In any case, the complainants had accepted the demands of the respondent and has already remitted the amounts mentioned in the corresponding paragraph of the complaint. The complainants have admitted their obligation to discharge HVAT liability thereunder.

58. The authority has decided this in the complaint bearing no. ***4031 of 2019*** titled as ***Varun Gupta V/s Emaar MGF Land Ltd.*** wherein the authority has held that the promoter is entitled to charge VAT from the allottee for the period up to 31.03.2014 @ 1.05% (one percent VAT + 5 percent surcharge on VAT). However, the promoter cannot charge any VAT from the allottees/prospective buyers for the period 01.04.2014 to 30.06.2017 as the same was to be borne by the promoter-developer only. The respondent-promoter is bound to adjust the said amount, if charged from the allottee with the dues payable by him or refund the amount if no dues are payable by him.

59. In the present complaint, the respondent has not charged any amount towards HVAT for the period of 01.04.2014 till 30.06.2017, however,

vide letter of offer of possession dated 19.07.2019 has demanded lien marked FD of Rs. 2,71,850/- towards future liability of HVAT for liability post 01.04.2014 till 30.06.2017. In light of judgement stated above, the respondent shall not demand the same and the lien so marked be removed. Information about the same be also sent to the concerned bank by the respondent as well as complainants along with copy of this order.

**G.VI Records of EDC & IDC, flat measurement and electricity charges**

60. **Reliefs sought by the complainants:**

i. Direct the respondent to show the actual records of paying EDC and IDC to government and return the excess amount collected from complainants.

ii. Restrain the respondent to charge fixed monthly charges for electricity and restrain respondent to charge common area electricity charges till respondent did not submit the actual consumption of electricity at common area and till respondent installed a temporary electricity meter from electricity distributor licensee (DHBVN) for their pending project activity.

iii. Direct the respondent to charge electricity charges in accordance with consumptions of units by complainants and restrain the respondent from charging fixed minimum charges on electricity meters.

iv. Direct the respondent to get the flat measurement done by independent architect and furnish report of actual size of flat to complainants and adjust the cost in accordance with actual size delivered to the complainants.

61. With respect to the aforesaid reliefs sought by the complainants, the counsel for the complainants has not pressed them at the time of arguments. Therefore, the authority has not deliberated on the aforesaid reliefs.

## I. Directions of the authority

62. 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. 22.06.2016 till 19.09.2019 i.e. expiry of 2 months from the date of offer of possession (19.07.2019). The arrears of interest accrued so far shall be paid to the complainants within 90 days from the date of this order as per rule 16(2) of the rules.

ii. Also, the amount of Rs.4,19,462/- so paid by the respondent towards compensation for delay in handing over possession shall

be adjusted towards the delay possession charges to be paid by the respondent in terms of proviso to section 18(1) of the Act.

iii. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delay possession charges as per section 2(za) of the Act.

iv. The respondent shall delete an amount of Rs.1,12,576/- from the total sale consideration.

v. The respondent is directed to return the amount of Rs.4,95,000/- so collected towards PLC "Central Greens" as the unit has ceased to be preferentially located.

vi. The respondent cannot charge any HVAT from the allottees/ prospective buyers for the period 01.04.2014 to 30.06.2017 as the same was to be borne by the promoter-developer only. Therefore, the respondent shall not demand the same and the lien so marked be removed. Information about the same be also sent to the concerned bank by the promoter as well as complainants along with copy of this order.

vii. The respondent shall collect the advance maintenance charges for 1 year only which is as per the buyer's agreement executed between the parties and shall not extend this time period

arbitrarily. Therefore, the extra amount so collected shall be refunded back to the complainants.

viii. 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.

63. Complaint stands disposed of.

64. File be consigned to registry.

**(Vijay Kumar Goyal)**
Member

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

Dated: 18.02.2022