

**BEFORE THE HARYANA REAL ESTATE APPELLATE
TRIBUNAL**

**Appeal No.431 of 2021
Date of decision: 16.05.2022**

Emaar India Ltd.

Registered Office: 306-308, Square one, C-2, District Centre, Saket,
New Delhi – 110017

Corporate Office: Emaar Business Park, MG Road, Sikanderpur,
Sector 28, Gurugram – 122002

...Appellant/Promoter

Versus

Dr. Ashok Kumar Vaid and Mrs. Subhyata Gupta, both are R/o C-
2/801, Uniworld City, Sector 30, Gurugram (Haryana)

...Respondents/allottees

CORAM:

Justice Darshan Singh (Retd.)

Shri Inderjeet Mehta

Shri Anil Kumar Gupta

Chairman

Member (Judicial)

Member (Technical)

Argued by:

Shri R.S. Rai, Ld. Senior counsel with Sh. Kunal
Dawar, Advocate, Ld. counsel for the
appellant/promoter.

Shri Sagar Chawla, Advocate, Ld. counsel for the
respondents/allottees.

ORDER:**ANIL KUMAR GUPTA, MEMBER (TECHNICAL):**

The present appeal has been preferred by the appellant-promoter under Section 44 of the Real Estate (Regulation & Development) Act, 2016 (hereinafter called as the Act of 2016) against the order dated 03.03.2021 passed by the Ld. Haryana Real Estate Regulatory Authority, Gurugram (hereinafter called as the Ld. Authority), whereby Complaint No.5137 of 2019 filed by the respondents/allottees was disposed of with the following directions:-

“32. 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 the handing over of possession. The arrears of interest accrued so far shall be paid to the complainants within 90 days from the date of this order and thereafter monthly payment of interest till handing over of possession shall be paid before 10th of each subsequent month.*
- ii. However, the respondent has already paid a sum of Rs.32,64,644/- towards delay in handing over possession at the time of offer of possession, therefore, the said amount shall be adjusted towards*

the amount to be paid by the respondent/promoter as delay possession charges under proviso to section 18(1) read with rule 15 of the rules.

- iii. The respondent is directed to complete the villa in all respects within 2 months from the date of this order and make it ready for habitation and make a valid offer of possession. At the same time the complainants are directed to take possession of the said villa after valid offer of possession.*
- iv. Both the parties shall participate toward registration of conveyance deed of the villa as provided under section 17 read with section 19(11) of the Act.*
- v. The respondent shall not charge holding charges from the complainants.*
- vi. The respondent shall not charge anything from the complainants which is not the part of buyer's agreement."*

2. As per averments in the complaint filed by the respondents/allottees, it was pleaded that the respondents/allottees filed a complaint under Section 31 of the Act read with Rule 28 of the Haryana Real Estate (Regulation & Development) Rules, 2017 (hereinafter called as the Rules) alleging therein that they had booked with the appellant/promoter a residential Unit No.MAR-MD-051 in Sector 64, Gurugram of 350 sq. yds. at the basic price of Rs.6,24,37,500/- on 30.04.2011. The Buyer's Agreement (hereinafter called as the Agreement) was executed between the parties on 03.06.2011. As per Clause 10(a) of the said Agreement, the possession was to be given within a period of 30 months plus 3

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months grace period i.e. up to 04.12.2013. The appellant changed the unit to another unit in the year 2015 and got an Addendum signed on 19.06.2015. However, no possession was offered by that time. Thereafter, possession was offered only on 29.03.2019. Thus, there is delay of 5 years in delivery of the possession to the complainants and the complainants have become entitled for interest for every month of delay at such rate as may be prescribed.

3. It was further pleaded that the respondents/allottees continued to pay the installments as per payment schedule plan as and when demanded by the appellant/promoter.

4. It was further pleaded that the respondents/allottees visited the site of the project in the month of January, 2015 and found that the construction on the site was stopped. The appellant/promoter never gave a clear picture as to why the construction on the site was stopped neither they gave any intimation regarding delay in delivery of the possession of the unit in question. Appellant further pleaded that on visit to the site, it was found that the project had only 48 plots, whereas the allotment made to the complainants was of House No.51. Aggrieved by the lag in construction and the missing plot, the complainants approached the appellant's officials, who refused to help the complainants initially, however, after long persuasions and various meetings, the appellant/promoter informed the complainants to take possession of

another house bearing No.MAR-BL-065 of size 500 sq. yds. in the same project for which further payments were made by the complainants. Thus, in respect of change in allotment, Addendum dated 19.06.2015 was executed between the appellant and the complainants.

5. It was further pleaded that the respondents had become entitled for delayed possession interest as per Section 18 of the Act.

6. The appellant/promoter has contested the complaint on the grounds, *inter alia*, that the Ld. Authority has no jurisdiction to entertain the complaint and it was further pleaded that the complaints pertaining to refund, possession, compensation and interest for a grievance under Sections 12, 14, 18 and 19 of the Act are required to be filed before the Ld. Adjudicating Officer under Rule 29 of the Rules and not before the Ld. Authority under Rule 28 of the Rules. The complaint, pertains to the alleged delay in delivery of possession and the complainants are seeking the relief of interest under Section 18 of the Act, therefore, is required to be filed before the Ld. Adjudicating Officer under Rule 29 of the Rules and not before the Ld. Authority under Rule 28 of the Rules.

7. It was further pleaded that even though the project of the appellant namely "MARBELLA" at Sector 65 & 66, Gurugram pertaining to the unit in question is covered under the definition of "ongoing projects" and registered with the Ld. Authority, the

complaint, if any, is still required to be filed before the Ld. Adjudicating Officer under Rule 29 of the Rules.

8. It was further pleaded that the appellant has continued with the construction of the project and was in the process of completing the construction of the project.

9. It was further pleaded that even though the appellant was required to apply the Occupation Certificate for the unit in question by 16.10.2022 (as mentioned, at the time of filing the application for registration of the project with Ld. Authority), however, the appellant applied the Occupation Certificate for the unit in question on 26.09.2018 and also obtained the Occupation Certificate on 03.12.2018. The appellant had issued offer of possession to the complainants on 29.03.2019 along with Statement of Accounts. However, as the complainants are only short-term and speculative investors, therefore, they were not interested in taking over the possession of the said apartment.

10. It was further pleaded that the Agreement dated 03.06.2011 and Addendum to Agreement dated 19.06.2015 was executed much prior to coming into force of the Act or the Rules. The adjudication of the complaint for interest and compensation, as provided under Sections 12, 14, 18 and 19 of the Act, has to be in reference to the Agreement for sale executed in terms of the Act and

the Rules and no other Agreement. Thus, in view of the above submissions, no relief can be granted to the complainants.

11. It was further pleaded that (a) till date, the complainants kept on making payments as per the payment plan, though not within the time prescribed, which resulted in delay payment charges/interest; (b) from the date of booking till the filing of the complaint, the complainants never raised any issue whatsoever clearly reveals that the they had no issue or concern about the said Agreement as well as terms and conditions of the Agreement and are now unnecessarily raising false and frivolous issues.

12. It was further pleaded that the total cost of the apartment comes to Rs.7,05,82,538/-, out of which, Rs.6,61,02,600/- has been paid towards sale consideration and the balance amount of Rs.37,77,720/- is towards credit-anti profiteering, compensation etc., which were not paid by the complainants, but were adjusted by the appellant as mentioned in the Statement of Accounts dated 21.11.2019 and the appellant has already given compensation of Rs.32,64,644/- to the complainants towards delay possession charges. Out of the above compensation, an amount of Rs.9,97,092/- was adjusted at the time of offer of possession and Rs.22,67,552/- was adjusted on 25.04.2019 as per the Statement of Accounts.

13. It was further pleaded that the proposed estimated time of handing over of possession of the said apartment was 30 months plus 3 months i.e. 33 months from the commencement of development works i.e. 25.05.2015 (+) 33 months = 25.02.2018 and not 04.03.2014 as alleged by the respondents/complainants.

14. It was further pleaded that the respondents/complainants have been defaulters, having deliberately failed to make the payment of various installments within the time prescribed, which resulted in delay payment charges as reflected in the Statement of Accounts dated 21.11.2019. On the request of the complainants and as a special gesture, delay payment charges of Rs.3,77,302/- has already been waived of. The current outstanding amount as on 21.11.2019 is Rs.66,45,449/- (Rs.24,29,042/- for HVAT, Rs.37,63,980/- for stamp duty, Rs.50,000/- for registration charges and Rs.4,02,427/- for advance monthly maintenance charges) in addition to the holding charges of Rs.5,06,169/-, duly mentioned in the Statement of Accounts, for which various requests, reminders and final notices were issued to the complainants.

15. It was further pleaded that the terms of the Agreement are binding between the parties.

16. All other pleas raised in the complaint were controverted and it was pleaded that the respondents-allottees were not entitled

for any relief in the facts and circumstances of the case and thus, prayed for dismissal of the appeal with heavy costs.

17. After hearing Ld. counsel for both the parties and appreciating the material on record, the Ld. Authority disposed of the complaint filed by the respondents-allottees vide impugned order dated 03.03.2021 issuing directions already reproduced in the upper part of this order.

18. We have heard Ld. counsel for the parties and have meticulously examined the record of the case. Learned counsel for both the parties have filed their written submissions/arguments.

19. In the written submissions, Ld. counsel for the appellant/promoter has raised an issue regarding retroactive application of the Act and contended that the application of the Act is from the date of coming into force of the Act and also relied upon the judgment of the Hon'ble High Court of Bombay in the case of 'Neelkamal Realtors Suburban Pvt. Ltd. and Others Vs. Union of India and Others' and the judgment of the Hon'ble Supreme Court in the case of 'M/s Newtech Promoters & Developers Pvt. Ltd. Vs. State of U.P. & Ors.' in Civil Appeal No.6745-6749 of 2021.

20. It was contended that the appellant/promoter cannot be put to undue loss and hardship through enactment of a new law for a project, which is not covered by the Act because when the appellant/promoter envisaged, planned, developed and calculated

the cost and risk factors of the project, it had not taken into consideration the provisions of the Act and amendment in Agreement by way of legislation.

21. It was further contended that the matter pertaining to Haryana RERA are still pending before the Hon'ble Apex Court and the Hon'ble Apex Court in Civil Appeal No.6745-6749 of 2021 titled as M/s Newtech Promoters & Developers Pvt. Ltd. (supra) while dealing with the matters arising out of the State of Uttar Pradesh, wherein certain issues i.e. retrospectivity/retroactivity, compliance of Section 43(5) of the Act, power to delegate judicial functions and power to the Ld. Authority under the Act, have been adjudicated upon. However, certain other issues, which are pertaining to the State of Haryana, are yet to be adjudicated upon i.e. validity of Section 2(1)(o) of the Rules, validity of the above-said amendment in the Rules as well as certain other issues are still pending adjudication before the Hon'ble Apex Court in various SLPs.

22. It was further contended that Clause 10(a) of the Agreement provides for delivery of possession of the unit within 30 months plus three months grace period, from the date of commencement of development works, subject to timely payment of installments and compliance by the complainants of all terms and conditions of the Agreement. However, grace period of three months has not been considered by the Ld. Authority in the impugned order

and has been denied merely on the ground of delay caused on completion of the project. The possession cannot be handed over to the allottees until statutory permission is not received from the competent authority, which is a time-consuming process and further there is a provision of the grace period of three months as provided in the Agreement. Therefore, time taken by the concerned statutory authority to issue Occupation Certificate in respect of the project has to be excluded from the computation of the time taken for implementation and development of the project.

23. It was further contended that the findings of the Ld. Authority in para 28 of the impugned order were focused on the observations of the Local Commissioner's report, whereas the physical status given in para 5 of the report clearly shows that the villa in question i.e. MAR-BL-065 is almost complete except for some minor defects like wooden flooring in one room, chimney in kitchen, touches in internal and external paint and patches of plaster, which do not render the villa uninhabitable and the same were on account of damage due to non-occupation of the villa after offer of possession. The Occupation Certificate was issued on 03.12.2018 and possession was offered way back on 29.03.2019. The present issue of damage, due to non-occupation of the villa after construction, is squarely covered by the Hon'ble Supreme Court's judgment in the case of 'DLF Homes Panchkula Pvt. Ltd. Vs. D.S. Dhanda, etc.' in SLP No.3623-3654 of 2019 and the Hon'ble

Supreme Court has settled the controversy that the complainants should seek assistance of the maintenance agency to undertake maintenance works that are necessary on account of damage due to non-occupation of the flats after construction.

24. It was further contended that the Local Commissioner's report of the unit in question was for four units in the same project named 'Marbella'. The report of the Local Commissioner does not corroborate with the final order passed by the Ld. Authority. The Occupation Certificate for the unit in question was received after its completion. The concerned Department has issued the Occupation Certificate and has certified that all basic infrastructural facilities have been laid and are operational.

25. It was further contended that the appellant was never given an opportunity to have a look at the report by the Local Commissioner before passing the impugned order. The appellant was not afforded any opportunity to object the observations of the Local Commissioner in the report and also no opportunity of hearing was granted to the appellant before reaching to such abrupt conclusion without any supporting documents therein.

26. It was further contended that minor defects like chipping of plaster, chipping of paint and minor cracks in some of the tiles at some places do not render the unit uninhabitable.

27. It was further contended that the complainants were duly informed about the schedule of possession as per Clauses 10, 11, 12, 13 and 16 of the Agreement entered into between the parties.

28. It was further contended that as per Section 19(10) of the Act, the allottees shall take physical possession of the unit within a period of two months from the date of issuance of the Occupation Certificate. The respondents/allottees have failed to take the physical possession of the apartment within a period of two months from the date of issuance of the Occupation Certificate for the said building.

29. It was further contended that the Hon'ble Apex Court in DLF Homes Panchkula Pvt. Ltd.'s case (supra) has settled the controversy that the payment of interest for delayed possession has to be calculated up to two months from the date of offer of possession in all situations, whereas the direction given by the Ld. Authority to the appellant to pay interest @9.30% per annum till handing over possession of the unit in question, is required to be set aside as per the law settled in DLF Homes Panchkula Pvt. Ltd. (supra) and the interest should be calculated till intimation of offer of possession.

30. It was further contended that the appellant/promoter is justified in demanding holding charges, if the allottee delays in taking over possession of the unit.

31. It was further contended that the Rule 7.2(B) of Model Agreement allows for holding charges. The allottee is to obtain possession of the unit in accordance with the offer of possession, holding charges as prescribed in the BBA. The legality/validity of the Agreement has not been challenged by the complainants. It is obligatory on the part of the allottee to obtain physical possession within a period of two months from the date of issuance of Occupation Certificate pertaining to the said unit. The objective of the incorporation of the holding charges is to ensure prompt takeover the possession by the allottee upon completion of various works by the developer. The properties of which physical possession has not been taken by the allottee are also required to be looked after and adequate security relating to the same is also required to be provided by the developer. There is also no reason both in law and on facts, on the basis of which, allottee can claim that he is not liable to make payment of holding charges.

32. It was further contended that the Ld. Authority has been swayed by the judgment of the Hon'ble National Consumer Disputes Redressal Commission, New Delhi, which pertains to Consumer Protection Act, whereby a passing reference was made to the levy of holding charges without properly appreciating that the provision of holding charges itself has been made in the Model Agreement by the said Authority itself.

33. With these contentions, Ld. counsel for the appellant contended for setting aside the impugned order dated 03.03.2021 passed by the Ld. Authority with regard to the order to the appellant to make the valid offer of possession of the unit and to declare Local Commissioner's report to be erroneous.

34. On the other hand, Ld. counsel for the respondents/allottees has contended that respondents are doctors, who enjoy a good reputation in the fraternity and in society at large.

35. It was further contended that the appellant commenced the development works in the project only on 04.04.2012, which is evident from the appellant's payment schedule. The appellant raised a demand on 27.04.2012 from the respondents for payment of installment linked to this milestone of 'On start of Site Infrastructure Development'. Physical possession of the property was, therefore, scheduled to be handed over to the respondents on or before 27.10.2014. The appellants had also included three months' grace period for the purpose of applying and obtaining the Occupation Certificate.

36. It was further contended that apart from not handing over the possession of the villa in time, the appellant failed to even construct the club or any other amenities as promised by it. Clause 1.2(a)(i)(7) relates to the club membership charges and the appellant has made it clear that they can arbitrarily charge maintenance and

development charges as per their own wish and have not given any indication of the approximate charges. However, the club has not been developed by the appellant till date and the appellant has already taken advance money with respect to the club membership, which the appellant is liable to refund the same with interest.

37. It was further contended that the letter of offer of possession was illegally issued by the appellant as it has procured the conditional Occupation Certificate on false pretext. The work at the villa was not complete and the villa was not fit for use.

38. It was further contended that the respondents/allottees were seeking possession of the unit, but the said villa was not fit for use as is evident from the report of Local Commissioner. The offer of possession accompanied with unreasonable additional demands. The appellant has deployed the labour force in Villa No.MAR-BL-065 and is trying to complete the balance works like paint, plaster etc. and removing the seepage issues or dampness from the walls of basement and ground floor. Therefore, Villa No.MAR-BL-065 is not in habitable condition due to seepage issues and pending works. The respondents sought possession of the villa vide letter dated 03.06.2021 (Annexure 1). Further it was contended that the respondent and the appellant were present during the visit of the Local Commissioner appointed by the Ld. Authority for inspection.

39. It was further contended that even after paying total sale consideration, the appellant has deprived of the respondents to enjoy the physical possession of the villa. The respondents have requested and wrote letters many times to the appellant requesting them for arranging a visit to the villa to ascertain that the villa is fully constructed, but the request of the respondents was denied by the appellant.

40. It was further contended that the provisions of the Act do not rewrite the clauses of completion or handing over possession in the Agreement. As per Section 4(2)(l)(C) of the Act, the promoter is given opportunity to prescribe fresh timeline while making registration of the project from penal consequences, however, the promoter is not absolved of its liability under the Agreement.

41. With these contentions, respondents contended for dismissal of the appeal.

42. We have duly considered the aforesaid contentions. As already mentioned in the written submissions, the appellant has raised various issues. It has been pleaded that the complaint was not maintainable before the Ld. Authority as the adjudicating powers to decide the violations of Sections 12, 14, 16, 18 and 19 vests with the Adjudicating Officer and consequently the impugned order passed by the Ld. Authority is without jurisdiction. It has been

further contended that the application of the Act is prospective in nature.

43. The issue regarding jurisdiction has been set at rest by the Hon'ble Apex Court with its authoritative pronouncement in case ***M/s Newtech Promoters & Developers Pvt. Ltd. vs. State of UP & Ors. Etc. 2022(1) R.C.R. (Civil) 357***, wherein the Hon'ble Apex Court has laid down as under:-

“86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is that although the Act indicates the distinct expressions like ‘refund’, ‘interest’, ‘penalty’ and ‘compensation’, a conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest thereon, it is the regulatory authority which has the power to examine and determine the outcome of a complaint. At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of Section 71 read with Section 72 of the Act. If the adjudication under Sections 12, 14, 18 and 19 other than

compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating officer under Section 71 and that would be against the mandate of the Act 2016.”

44. As per the aforesaid ratio of law laid down by the Hon’ble Apex Court, when there is a dispute with respect to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest thereon, it is the regulatory authority, which has the power to examine and determine the outcome of the complaint. The complaint has been filed by the respondents-allottees for grant of interest for delayed possession. So, the Ld. Authority was fully competent to entertain and decide the complaint and no fault can be found in this regard. Hence, the impugned order is perfectly within the competence of the Ld. Authority.

45. Similarly, the plea, raised by Ld. counsel for the appellant that the application of the Act is prospective, has also no force as the operation of the Act is retroactive in nature. Reference can be made to the case titled ***M/s Newtech Promoters & Developers Pvt. Ltd. vs. State of UP & Ors. Etc.*** (supra), wherein the Hon Apex Court has held as under:-

“41. The clear and unambiguous language of the statute is retroactive in operation and by applying purposive

interpretation rule of statutory construction, only one result is possible, i.e., the legislature consciously enacted a retroactive statute to ensure sale of plot, apartment or building, real estate project is done in an efficient and transparent manner so that the interest of consumers in the real estate sector is protected by all means and Sections 13, 18(1) and 19(4) are all beneficial provisions for safeguarding the pecuniary interest of the consumers/allottees. In the given circumstances, if the Act is held prospective then the adjudicatory mechanism under Section 31 would not be available to any of the allottee for an ongoing project. Thus, it negates the contention of the promoters regarding the contractual terms having an overriding effect over the retrospective applicability of the Act, even on facts of this case.”

“45. At the given time, there was no law regulating the real estate sector, development works/obligations of promoter and allottee, it was badly felt that such of the ongoing projects to which completion certificate has not been issued must be brought within the fold of the Act 2016 in securing the interests of allottees, promoters, real estate agents in its best possible way obviously, within the parameters of law. Merely because enactment as prayed is made retroactive in its operation, it cannot be said to be either violative of Articles 14 or 19(1)(g) of the Constitution of India. To the contrary, the Parliament indeed has the power to legislate even retrospectively to take into its fold the pre-existing contract and rights executed between the parties in the larger public interest.”

“53. That even the terms of the agreement to sale or home buyers agreement invariably indicates the intention of the

developer that any subsequent legislation, rules and regulations etc. issued by competent authorities will be binding on the parties. The clauses have imposed the applicability of subsequent legislations to be applicable and binding on the flat buyer/allottee and either of the parties, promoters/home buyers or allottees, cannot shirk from their responsibilities/liabilities under the Act and implies their challenge to the violation of the provisions of the Act and it negates the contention advanced by the appellants regarding contractual terms having an overriding effect to the retrospective applicability of the Authority under the provisions of the Act which is completely misplaced and deserves rejection.

54. From the scheme of the Act 2016, its application is retroactive in character and it can safely be observed that the projects already completed or to which the completion certificate has been granted are not under its fold and therefore, vested or accrued rights, if any, in no manner are affected. At the same time, it will apply after getting the on-going projects and future projects registered under Section 3 to prospectively follow the mandate of the Act 2016.”

46. The same legal position was laid down by the Division Bench of the Hon'ble Bombay High Court in **Neel Kamal Realtors Suburban Pvt. Ltd. & anr. Vs. Union of India and others** 2018(1) RCR (Civil) 298 (DB), wherein it was laid down as under: -

“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. As regards Article 19(1)(g) it is settled principles that the right conferred by sub-clause (g) of Article 19 is expressed in general language and if there had been no qualifying provisions like clause (6) the right so conferred would have been an absolute one.”*

47. As per the aforesaid ratio of law, the provisions of the Act are retroactive in nature and are applicable to an act or transaction in the process of completion. Thus, the rule of retroactivity will make the provisions of the Act and the Rules applicable to the acts or transactions, which were in the process of the completion though the contract/agreement might have taken place before the Act and the Rules became applicable. Hence, it cannot be stated that the provisions of the Act and the Rules made thereunder will only be prospective in nature and will not be applicable to the agreement for sale executed between the parties prior to the commencement of the Act.

48. The contentions of the Ld. counsel for the appellant that the interpretation of the Rules is still pending before the Hon'ble

Supreme Court of India and the Apex Court had no occasion to deal with the Section 31 in context of Rules 28 and 29 of the Rules, has been settled by the Division Bench of Hon'ble Punjab and Haryana High Court in "**Ramprastha Promoter and Developers Pvt. Ltd. Versus Union of India and others Law Finder Doc Id#1936807**".

The relevant paras of the above said judgment reads as under:-

"23) The Supreme Court has already decided on the issue pertaining to the competence/power of the Authority to direct refund of the amount, interest on the refund amount and/or directing payment of interest for delayed delivery of possession or penalty and interest thereupon being within the jurisdiction of the Authority under Section 31 of the 2016 Act. Hence any provision to the contrary under the Rules would be inconsequential. The Supreme Court having ruled on the competence of the Authority and maintainability of the complaint before the Authority under Section 31 of the Act, there is, thus, no occasion to enter into the scope of submission of the complaint under Rule 28 and/or Rule 29 of the Rules of 2017.

24) The substantive provision of the Act having been interpreted by the Supreme Court, the Rules have to be in tandem with the substantive Act.

25) *In light of the pronouncement of the Supreme Court in the matter of M/s Newtech Promoters (supra), the submission of the petitioner to await outcome of the SLP filed against the judgment in CWP No.38144 of 2018, passed by this Court, fails to impress upon us. The counsel representing the parties very fairly concede that the issue in question has already been decided by the Supreme Court. The prayer made in the complaint as extracted in the impugned orders by the Real Estate Regulatory Authority fall within the relief pertaining to refund of the amount; interest on the refund amount, or directing payment of interest for delayed delivery of possession. The power of adjudication and determination for the said relief is conferred upon the Regulatory Authority itself and not upon the Adjudicating Officer.*

26) *Hence, in view of the authoritative pronouncement of the Supreme Court in the matter of **M/s NewTech Promoters and Developers Private Limited Vs. State of UP And Others etc.,** as recorded in Para 86 thereof, the Authority would have the jurisdiction to entertain a complaint seeking refund of the amount and interest on the refund amount as well as for payment of interest on delayed delivery of*

possession and/or penalty and interest thereon. The jurisdiction in such matters would not be with the Adjudicating Officer.”

49. Thus, with the aforesaid findings of the Hon’ble High Court of Punjab and Haryana, the pendency of the Haryana matters will not affect the powers of the Ld. Authority to deal with the complaint of possession of unit along with interest on account of delayed delivery of possession.

50. On the one hand, the appellant has taken the plea that the provisions of the Act, Rules and Regulations made thereunder are not retrospective in nature and the same cannot undo or rewrite the terms and conditions of the buyer’s agreement. On the contrary, he contended that the conjoint reading of Clause 5, 7.1, 7.6 and 9.1 of the Model Agreement, Sections 4(2)(g) and 4(2)(l)(C) of the Act show that the promoter is entitled to provide/declare a revised date of completion of the project in the declaration form. We are unable to subscribe ourselves to these contentions. The declaration for the completion of the project under Section 4(2)(l)(C) of the Act is given unilaterally by the promoter to the Authority at the time of getting the real estate project registered. The allottee had no opportunity to raise any objection at that stage, so this unilateral Act of mentioning the date of completion of project by the builder will not abrogate the rights of the allottee under the agreements for sale entered into between the parties. The Division Bench of the Hon’ble Bombay

High Court in case **Neel Kamal Realtors Suburban Pvt. Ltd. & anr. Vs. Union of India and others** (Supra) has laid down as under: -

*“Section 4(2)(l)(C) enables the promoter to revise the date of completion of project and hand over possession. **The provisions of RERA, however, do not rewrite the clause of completion or handing over possession in agreement for sale.** Section 4(2)(l)(C) enables the promoter to give fresh time line independent of the time period stipulated in the agreements for sale entered into between him and the allottees so that he is not visited with penal consequences laid down under RERA. **In other words, by giving opportunity to the promoter to prescribe fresh time line under Section 4(2)(l)(C) he is not absolved of the liability under the agreement for sale.**”*

Also, in case **M/s Imperia Structures Ltd. and others Versus Anil Patni and others**, Law Finder DocId#1758728, the Hon’ble Apex Court has laid down as under:-

“33. We may now consider the effect of the registration of the Project under the RERA Act. In the present case the apartments were booked by the Complainants in 2011-2012 and the Builder Buyer Agreements were entered into in November, 2013. As promised, the construction should have been completed in 42 months. The period had expired well before the Project was registered under the provisions of the RERA Act. Merely because the registration under the RERA Act is

*valid till 31.12.2020 does not mean that the entitlement of the concerned allottees to maintain an action stands deferred. **It is relevant to note that even for the purposes of Section 18, the period has to be reckoned in terms of the agreement and not the registration. Condition no.(x) of the letter dated 17.11.2017 also entitles an allottee in same fashion. Therefore, the entitlement of the Complainants must be considered in the light of the terms of the Builder Buyer Agreements and was rightly dealt with by the Commission.***

Thus, as per the ratio of law laid down in the cases referred above, the revised date of completion of the project mentioned in the declaration form under Section 4(2)(l)(C) of the Act will not extend the date of delivery of possession as mentioned in the buyer's agreement.

51. It was contended by the appellant that the Rule 7.2(B) of Model Agreement allows for holding charges as the objective is to ensure prompt takeover by the allottee. Holding charges are the compensation of the expenditure for the maintenance and security, which the promoter/developer incurs during the time the possession is not taken by the allottees and the property remains unoccupied.

52. The Hon'ble National Consumer Disputes Redressal Commission, New Delhi (for short, 'NCDRC') in Consumer Case No.351 of 2015, **Capital Greens Flat Buyer Associations and others vs. DLF Universal Ltd. and another** has held as under:

“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 through it would be entitled to interest for the period the payment is delayed.”

The Hon'ble Supreme Court of India in Civil Appeal Nos.3864-3889 of 2020 titled as **“DLF Home Developers Ltd. (Earlier Known as DLF Universal Ltd) and another vs. Capital Greens Flat Buyers Association Etc. Etc.”** has upheld that above said findings regarding holding charges of the Hon'ble NCDRC.

Thus, we find no merit in the plea of the appellant for grant of holding charges from the date of offer of possession i.e. 29.03.2019 till the handing over of the possession.

53. The buyer's agreement was executed between the parties on 03.06.2011. Clause 10(a) of the agreement reads as under:-

“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 unit 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."

54. As per the aforesaid clause of the Agreement, the possession of the unit was to be delivered within 30 months from the date of commencement of the development works. The appellant-promoter was further allowed a grace period of three months for obtaining the completion/occupation certificate etc. So, the possession of the unit was to be delivered within 30 months plus grace period of three months from the date of commencement of the development works. The date of start of the unit has been reckoned from 24.04.2012. It is well known that it takes time to obtain Occupation Certificate from the concerned authorities after applying the Occupation Certificate. So, the appellant/promoter is entitled to avail grace period so provided in the Agreement for obtaining the Occupation Certificate. Thus, with inclusion of the grace period of three months as per provision in Clause 10(a) of the Agreement, the

total completion period becomes 33 months and the schedule date of completion comes out to be as 27.01.2015.

55. As per para 28 of the impugned order, complainant No.1 filed an affidavit dated 17.12.2020 stating that till the date of filing the complaint, they have not taken the possession of the villa since the villa is not in a habitable condition as there is water logging and seepage issues. The Ld. Authority appointed a Local Commission to visit the project and submit its report with respect to the status of the villa as well as the project. The Local Commission submitted its report on 01.02.2021, relevant part of which is reproduced as under:-

“6. OBSERVATIONS:

All the four villas are checked physically by visiting the site and it is observed that the labour force is working in villa no MAR-BL-065 at the time of site inspection. The presence of labour states that there were several pending works in the villa like paint, plaster, kitchen works, and some external finishing works like landscaping etc. and the labour is carrying out the pending works. Further there are some repair works like seepage issues or dampness in the walls of basement etc. There are two shades of paint on front external wall of the villa and several patches are plastered recently which are still left unpainted. The material used for finishing the pending and repair works is

also available in the villa. This shows that the works are progressing and not completed till date and the promoter is trying to complete the same in villa no MAR-BL-065. Therefore, it is stated that the villa is not in habitable condition as there is seepage issue in basement and some other works are not completed on promoter end till date.

9. CONCLUSION:

1. x x x x x

2. *All four villas are physically inspected and it is submitted that the works in three villas are completed except some cleaning works which are to be completed at the time of handing over the possession. These three villas are in habitable condition. But the forth villa no.MAR-BL-065 is not completed till date as there are seepage issue and some pending works. The promoter has deployed the labour force in villa no MAR-BL-065 and trying to complete the balance works like paint, plaster etc. and removing the seepage issues or dampness from the walls of basement and ground floor. Therefore, the villa no MAR-BL-065 is not in habitable condition due to seepage issues and pending works.”*

As per above-said report, there are serious issues with respect to the seepage and dampness from the walls of the basement

and ground floor. The appellant is contesting that paint, plaster, kitchen works and some external works are the minor works and are due to the fact that the flat remained unoccupied for a long time and in that situation, such works do occur. However, seepage and dampness from the walls of the basement and ground floor are a very serious issue unless this issue is attended and rectified, the villa cannot be said to be habitable. The Local Commission has observed that the promoter has deployed the labour force in the said villa and is trying to complete the balance works, which means the works relating to the villa were not complete, when the Local Commission visited the site. Moreover, even in this appeal, the appellant-promoter has nowhere said that there was no seepage/dampness or the seepage/dampness has been attended. It was specifically asked in our order dated 31.03.2022 as to whether any further offer of possession was given by the appellant to the respondents/allottees after 29.03.2019 (offer of possession) or after passing of the impugned order dated 03.03.2021. During the proceedings on 02.05.2022, it was intimated by the appellant that no fresh offer of possession was given to the respondents/allottees by them after 29.03.2019 or after passing of the impugned order dated 03.03.2021. The appellant is also contesting that there is no prayer by the respondents/allottees for possession in the complaint. The contention of the appellant is correct to the extent that there is no prayer in the complaint for possession by the

respondents/allottees, but this defect is cured by the affidavit dated 17.12.2020 of the respondents/allottees filed before the Ld. Authority, that till the date of filing of the affidavit, respondents/allottees have not taken possession of the villa as the villa is not in a habitable condition due to water logging and seepage issues. The total sale consideration, as per Statement of Account dated 21.11.2019, is Rs.7,05,82,538/-. The total amount paid by the complainants/allottees, as per the said Statement of Account, is Rs.7,05,82,538/-. In addition to above, the allottees have also become entitled for delayed possession interest. Thus, much amount is credited in the account of the allottees than the total amount of the sale consideration and the allottees are yet to be given possession.

Therefore, in view of the aforesaid observations, the order, of the Ld. Authority for grant of interest on delayed possession till the handing over of the possession, is in order and cannot be interfered with.

56. The appellant is contesting that out of the total amount of Rs.7,05,82,538/-, only Rs.6,68,04,818/- has been paid towards the sale consideration. The balance amount of Rs.37,77,720/- is towards the credit of anti-profiteering compensation and Rs.32,64,644/- on account of delayed possession charges, which was not paid by the complainants/allottees, but were adjusted by

the respondent as mentioned in the Statement of Account dated 21.11.2019. The appellant is also contesting that interest, on the balance amount of Rs.37,77,720/- towards credit of anti-profiteering compensation, is not payable to the allottees as this amount has been credited by the appellant in the account of the respondents/allottees. We observe that the objective of anti-profiteering law is to pass on the benefit accrued due to reduction of tax on account of changes in the tax laws to the customers. Therefore, this money is rightly due to the allottees and thus, the allottees are entitled for the interest on this amount. However, they are entitled for interest from the date on which this amount has been credited in their account.

57. No other point was argued before us by any of the parties.

58. Thus, keeping in view our aforesaid discussion, the impugned order dated 03.03.2021 passed by the Ld. Authority is hereby modified and the grace period of three months as per the provision of the Agreement is allowed. With this modification, there is no other merit in the present appeal and the same is hereby dismissed.

59. The amount deposited by the appellant-promoter i.e. Rs.2,57,61,603/- with this Tribunal to comply with the provisions of Section 43(5) of the Act be remitted to the Ld. Haryana Real Estate Regulatory Authority, Gurugram for disbursement to the

respondents-allottees along with interest accrued thereon subject to tax liability, if any, as per law and rules.

60. No order as to costs.

61. The copy of this order be communicated to the parties/Ld. counsel for the parties and the Ld. Authority for compliance.

62. File be consigned to the record.

Announced:

May 16, 2022

Justice Darshan Singh (Retd.)
Chairman,
Haryana Real Estate Appellate Tribunal,
Chandigarh

Inderjeet Mehta
Member (Judicial)

Anil Kumar Gupta
Member (Technical)

GVT

Emaar India Ltd. V/s Dr. Ashok Kumar Vaid & Anr.
Appeal No.431 of 2021

Present: None.

Vide our separate detailed order of the even date, the impugned order dated 03.03.2021 passed by the Ld. Authority is modified and the grace period of three months as per provision of the Agreement is allowed. With this modification, there is no other merit in the present appeal and the same is dismissed.

The amount deposited by the appellant-promoter i.e. Rs.2,57,61,603/- with this Tribunal to comply with the provisions of Section 43(5) of the Act be remitted to the Ld. Haryana Real Estate Regulatory Authority, Gurugram for disbursement to the respondents-allottees along with interest accrued thereon subject to tax liability, if any, as per law and rules.

Copy of this order along with detailed order be conveyed to all the concerned parties.

File be consigned to the records.

Justice Darshan Singh (Retd.)
Chairman
Haryana Real Estate Appellate Tribunal
Chandigarh

Inderjeet Mehta
Member (Judicial)

Anil Kumar Gupta
Member (Technical)

16.05.2022

GVT