

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

Complaint no. : 2893 of 2020
First date of hearing : 13.05.2021
Date of decision : 29.07.2021

1. Laddi Paramjit Singh
2. Preetika Chimni
Both RR/o: C-2B/97C, Janakpuri,
New Delhi-110058

Complainants

Versus

M/s Emaar MGF Land Ltd.
Registered Office: 306-308, Square One,
C-2, District Centre, Saket,
New Delhi-110017

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

Respondent

CORAM:

Shri Samir Kumar
Shri Vijay Kumar Goyal

Member
Member

APPEARANCE:

Shri Deepanshu Sharma
Shri J.K. Dang

Advocate for the complainants
Advocate for the respondent

ORDER

1. The present complaint dated 05.10.2020 has been filed by the complainants/allottees in Form CRA under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate

(Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions to the allottee as per the agreement for sale executed inter se them.

2. Since, the buyer's agreement has been executed on 05.10.2010 i.e. prior to the commencement of the Act *ibid*, therefore, the penal proceedings cannot be initiated retrospectively. Hence, the authority has decided to treat the present complaint as an application for non-compliance of statutory obligation on part of the promoter/respondent in terms of section 34(f) of the Act *ibid*.

A. Project and unit related details

3. The particulars of the project, the details of sale consideration, the amount paid by the complainants, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S.No.	Heads	Information
1.	Project name and location	Palm Hills, Sector 77, Gurugram.
2.	Project area	29.34 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no. and validity status	a) 56 of 2009 dated 31.08.2009 (For 24.4 acres) Valid/renewed up to 30.08.2024

		b) 62 of 2013 dated 05.08.2013 (For 4.87 acres) Valid/renewed up to 04.08.2019
5.	Name of licensee	Robin Software Pvt. Ltd. and another C/o Emaar MGF Land Ltd.
6.	HRERA registered/ not registered	Registered vide no. 12 of 2020 dated 27.05.2020 for 7.41 acres
7.	HRERA registration valid up to	Ex-post facto approval w.e.f. 27.05.2020 till 24.12.2019
8.	Occupation certificate received on	24.12.2019 [Page 112 of reply]
9.	Provisional allotment letter dated	28.08.2010 [Page 26 of complaint]
10.	Unit no.	PH3-08-0802, 8 th floor, building no. 8 [Page 31 of complaint]
11.	Unit measuring	1450 sq. ft.
12.	Date of execution of buyer's agreement	05.10.2010 [Page 29 of complaint]
13.	Payment plan	Construction linked payment plan [Page 60 of reply]
14.	Total consideration as per statement of account dated 09.09.2020 at page 107 of reply	Rs.69,42,842/-
15.	Total amount paid by the complainants as per statement of account dated 09.09.2020 at page 108 of reply	Rs.72,66,881/-
16.	Date of start of construction as per statement of account dated 09.09.2020 at page 107 of reply	25.02.2011

17.	Due date of delivery of possession as per clause 11(a) of the said agreement i.e. 33 months from the date of start of construction plus grace period of 3 months for applying and obtaining the CC/OC in respect of the unit and/or the project. [Page 41 of complaint]	25.11.2013 [Note: Grace period is not included]
18.	Date of offer of possession to the complainants	03.01.2020 [Page 132 of reply]
19.	Delay in handing over possession till 03.03.2020 i.e. date of offer of possession (03.01.2020) + 2 months	6 years 3 months 7 days

B. Facts of the complaint

4. The complainants have made following submissions in the complaint:
- That sometime in the month of July in 2010, complainants were looking for a residential apartment to accommodate for the growing need of their family and therefore were looking for a residential apartment in Gurugram. The officials/representatives of the respondent company having knowledge of the same approached the complainants and lured them by brochures, catalogues and several representations and warranties made to them. Given the representations and warranties of the representative of the respondent company and also considering the reputation of the Emaar Dubai, the

complainants agreed to book a residential apartment, admeasuring 1450 sq. ft. in the project being developed by the respondent company in the name and style of "Palm Hills", on land admeasuring 24.77 acres (approx.) in Sector 77, Gurugram, Haryana. Accordingly, on 05.08.2010, the complainants paid for the booking amount and were subsequently allotted unit bearing no. PH3-08-0802 in the said project vide provisional allotment letter dated 28.08.2010.

- ii. That pursuant thereto a buyer's agreement dated 05.10.2010 was executed between the parties. In terms of clause 11(a) of the said agreement, the possession for the said unit was supposed to be delivered within 33 months from the date of start of construction. In addition to the said period, the respondent is also eligible for a grace period of 3 months over and above the said 33 months period.
- iii. That the said clause is in total contradiction of the understanding between the parties, as at the time of booking the unit, the complainants were promised delivery of the property in question within 33 months from the date of booking. However, the respondent company, after having received substantial sums of

money from the complainants unilaterally changed the material timelines of the delivery of possession. Given the same, at this stage the complainants having no option had to hesitantly sign the said unilateral and onerous buyer's agreement.

- iv. That the possession of the unit in question should have been handed over by 04.10.2013 by the respondent company if its original representation is taken into account. However, even if the date of possession is to be reckoned as per the said agreement, the possession of the unit in question should have been handed over to complainants by 24.02.2014 as the date of start of construction of the said project as per the respondent company is 25.02.2011. However, no delivery was made for another 6 years. Complainants had to make alternate arrangements for accommodation.
- v. That it was only on 04.05.2020, that the respondent offered possession of the unit vide its offer of possession letter dated 03.01.2020, after delay of over 6 years. The complainants have been requesting the respondent company for grant of possession along with compensation in terms of the Act and rules made thereunder. However, the respondent is now denying the

complainants the rightful compensation/interest for the said delay.

C. Relief sought by the complainants

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

i. Direct the respondent company to pay interest @10.20% per annum on the delay in handing over the possession till realization of the same in view of the violation of section 18 of the Act.

ii. Any other relief which this hon'ble authority deems fit and proper.

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

D. Reply by the respondent

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

i. That the complainants had filed the present complaint seeking interest for alleged delay in delivering possession of the apartment booked by them. The complaints pertaining to refund, compensation and interest are to be decided by the adjudicating officer under section 71 of the

Act read with rule 29 of the rules and not by this hon'ble authority. The present complaint is liable to be dismissed on this ground alone. Moreover, it is respectfully submitted that the adjudicating officer derives his jurisdiction from the central act which cannot be negated by the rules made thereunder.

- 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 05.10.2010. 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. It is further submitted that merely because the Act applies to ongoing projects which are registered with the authority, the Act cannot be said to be operating retrospectively. The provisions of the Act relied upon by the complainants for seeking interest cannot be called in to aid in derogation and ignorance of the provisions of the buyer's agreement.
- iii. That Mr. Paramjeet Singh Chimni and the complainants vide application form dated 05.08.2010 applied to the respondent for provisional allotment of a unit in the

project. Mr. Paramjeet Singh Chimni and the complainants, in pursuance of the aforesaid application form, were allotted an independent unit bearing no. PH3-08-0802, located on the 8th floor, in the project vide provisional allotment letter dated 28.08.2010. Mr. Paramjeet Singh Chimni and the complainants consciously and wilfully opted for a construction linked plan for remittance of the sale consideration for the unit in question and further represented to the respondent that Mr. Paramjeet Singh Chimni and the complainants would remit every instalment on time as per the payment schedule.

- iv. That Mr. Paramjeet Singh Chimni on account of natural love and affection withdrew his name as a co-applicant. Mr. Paramjeet Singh Chimni was thus left with no right, title or interest in the unit in question. The name of Paramjit Singh Chimni was deleted dated on 02.07.2019. After withdrawal of the name of Mr. Paramjeet Singh Chimni as a co-applicant, the provisional allotment of the unit in question vested with the complainants.
- v. That the complainants persistently defaulted in timely remittance of the instalments to the respondent. The respondent was constrained to issue various demand

letters, notices, reminders etc. to the complainants requesting them to remit their outstanding dues. Statement of account dated 09.09.2020 maintained by the respondent in due course of its business reflects the delay in remittance of the due amount by the complainants.

- vi. That the complainants consciously and maliciously chose to ignore the payment schedule issued by the respondent and flouted in making timely payment of the instalment, which was an essential, crucial and an indispensable requirement under the buyer's agreement. 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 and further causes enormous business losses to the respondent. The complainants chose to ignore all these aspects and wilfully defaulted in making timely payments. It is submitted that the respondent despite defaults of several allottees earnestly fulfilled its obligations under the buyer's agreement and completed the project as expeditiously as possible in the facts and circumstances of the case. Therefore, there is no equity in favour of the complainants.

- vii. That clause 11 of the buyer's agreement provides that subject to the allottees having complied with all the terms and conditions of the agreement, and not being in default of the same, possession of the unit would be handed over within 33 months plus grace period of 3 months, from the date of start of construction. It is further provided in the buyer's agreement that time period for delivery of possession shall stand extended on the occurrence of delay for reasons beyond the control of the respondent. Furthermore, it is categorically expressed in clause 11(b)(iv) that in the event of any default or delay in payment of instalments as per the schedule of payments incorporated in the buyer's agreement, the time for delivery of possession shall also stand extended. That the complainants have defaulted in timely remittance of the instalments. Thus, the time period for delivery of possession of the unit in question is not liable to be determined in the manner claimed by the complainants.
- viii. That clause 13 of the buyer's agreement further provides that compensation for any delay in delivery of possession shall only be given to such allottees who are not in default of their obligations envisaged under the agreement and who have not defaulted in payment of instalments as per

the payment plan incorporated in the agreement. In case of delay caused due to non- receipt of occupation certificate, completion certificate or any other permission/sanction from the competent authorities, no compensation or any other compensation shall be payable to the allottees. Complainants, having defaulted in payment of instalments, are thus not entitled to any compensation or any amount towards interest under the buyer's agreement. It is submitted that the complainants by way of instant complaint are demanding interest for alleged delay in delivery of possession. The interest is compensatory in nature and cannot be granted in derogation and ignorance of the provisions of the buyer's agreement.

- ix. That despite there being a number of defaulters in the project, the respondent itself infused funds into the project and has diligently developed the project in question. The respondent submitted an application dated 26.04.2017 to the competent authority. The occupation certificate was thereafter granted on 24.12.2019 vide memo bearing no. ZP-567-Vol-I/JD(RD)/2019/31934 in favour of the respondent. It is pertinent to note that once an application for grant of occupation certificate is

submitted for approval in the office of the concerned statutory authority, the respondent ceases to have any control over the same. The grant of occupation certificate is the prerogative of the concerned statutory authority over which the respondent cannot exercise any influence. As far as respondent is concerned, it has diligently and sincerely pursued the matter with the concerned statutory authority for obtaining of the occupation certificate. Therefore, the time period utilised by the concerned statutory authority for grant of occupation certificate is necessarily required to be excluded from the computation of time period utilised by the respondent for implementation and development of the project.

- x. That the respondent submitted that the project has got delayed on account of following reasons which were/are beyond the power and control of the respondent. *Firstly*, the National Building Code was revised in the year 2016 and in terms of the same, all high-rise buildings (i.e. buildings having area of less than 500 sq. mtrs. and above), irrespective of area of each floor, are now required to have two staircases. Eventually, so as not to cause any further delay in the project and so as to avoid jeopardizing the safety of the occupants of the buildings

in question including the building in which the apartment in question is situated, the respondent had taken a decision to go ahead and construct the second staircase and the respondent has succeeded in completing construction of the apartment in question and the occupation certificate in respect thereof has been received on 24.12.2019. Thereafter, possession of the apartment has been offered to the complainants vide offer of possession letter dated 03.01.2020. *Secondly*, the respondent had to engage the services of Mitra Guha, a reputed contractor in real estate, to provide multi-level car parking in the project. The said contractor started raising certain false and frivolous issues with the respondent due to which the contractor slowed down the progress of work at site. Any lack of performance from a reputed cannot be attributed to the respondent as the same was beyond its control.

- xi. That despite all the adversities faced by the respondent, the respondent has succeeded in completing construction of the apartment in question and the occupation certificate in respect thereof has been received on 24.12.2019. Thereafter, possession of the apartment has been offered to the complainants vide offer of possession

letter dated 03.01.2020. The complainants had been called upon to make payment of balance sale consideration and complete necessary formalities so as to enable the respondent to hand over possession of the apartment to them. Additionally, the respondent credited an amount of Rs.7,64,766/- to the account of the complainants as a gesture of goodwill. The complainants have duly accepted the aforesaid amount in full and final satisfaction of their alleged grievances. The instant complaint is a gross misuse of process of law.

- xii. That the project of the respondent has been registered under the Act and the Rules vide no. HRERA-606/2017/1248 dated 03.10.2017. Without admitting or acknowledging in any manner the truth or legality of the allegations levelled by the complainants and without prejudice to the contentions of the respondent, it is respectfully submitted that the complaint preferred by the complainants is devoid of any cause of action. It is submitted that this hon'ble authority has granted 02.10.2022 as the date of completion of the project and therefore cause of action, if any, would accrue in favour of the complainants to file a complaint for seeking any interest as alleged if and only the respondent fails to offer

possession of the unit in question within the aforesaid time. Thus, the complaint is liable to be dismissed on this ground alone.

- xiii. That several allottees, including the complainants had defaulted in timely remittance of payment of installments which was an essential, crucial and an indispensable requirement for conceptualization and development of the project in question. Furthermore, when the proposed allottees default in their payments as per schedule agreed upon, the failure has a cascading effect on the operations and 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 is no equity in favour of the complainants. It is evident from the entire sequence of events, that no illegality can be attributed to the respondent. The allegations levelled by the complainants are totally baseless. Thus, it is most respectfully

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

E. Jurisdiction of the authority

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

E.I Territorial jurisdiction

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

E.II Subject-matter jurisdiction

10. The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as per provisions of section 11(4)(a) of the Act leaving aside compensation which is to be decided by the

adjudicating officer if pursued by the complainants at a later stage.

F. Findings on the objections raised by the respondent

F.I Objection regarding jurisdiction of authority w.r.t. buyer's agreement executed prior to coming into force of the Act

11. 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.
12. 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."

13. 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."

14. 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 and are not unreasonable or exorbitant in nature.

F.II Objection regarding exclusion of time taken by the competent authority in processing the application and issuance of occupation certificate

15. 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 21.02.2019 and thereafter vide memo no. ZP-567-Vol-1/JD(RD)/2019/31934 dated 24.12.2019, 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 24.12.2019 that an incomplete application for grant of OC was applied on 21.02.2019 as fire NOC from the competent authority was granted only on 12.12.2019 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 06.12.2019. The District Town Planner, Gurugram and Senior Town Planner, Gurugram has submitted requisite report about this project on 29.11.2019 and 02.12.2019 respectively. As such, the application submitted on 21.02.2019 was incomplete and an incomplete application is no application in the eyes of law.

16. 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 12.12.2019 and consequently the concerned authority has granted occupation certificate on 24.12.2019. Therefore, in view of the deficiency in the said application dated 21.02.2019 and aforesaid reasons, no delay in granting occupation certificate can be attributed to the concerned statutory authority.

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

17. The respondent submitted that authority has granted 02.10.2022 as the date of completion of the project and therefore cause of action, if any, would accrue in favour of the complainants to file a complaint for seeking any interest as alleged if and only the respondent fails to offer possession of the unit in question within the aforesaid time. Thus, the complaint is liable to be dismissed on this ground alone. Therefore, next question of determination is whether the respondent is entitled to avail the time given to him by the authority at the time of registering the project under section 3 & 4 of the Act.

18. It is now settled law that the provisions of the Act and the rules are also applicable to ongoing project and the term ongoing project has been defined in rule 2(1)(o) of the rules. The new as well as the ongoing project are required to be registered under section 3 and section 4 of the Act.
19. Section 4(2)(1)(C) of the Act requires that while applying for registration of the real estate project, the promoter has to file a declaration under section 4(2)(1)(C) of the Act and the same is reproduced as under: -

Section 4: - Application for registration of real estate projects

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

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

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

20. The time period for handing over the possession is committed by the builder as per the relevant clause of buyer's agreement and the commitment of the promoter regarding handing over of possession of the unit is taken accordingly. The new timeline indicated in respect of ongoing project by the promoter while making an application for registration of the project does not change the commitment of the promoter to hand over the possession by the due date as per the buyer's agreement. The

new timeline as indicated by the promoter in the declaration under section 4(2)(l)(C) is now the new timeline as indicated by him for the completion of the project. Although, penal proceedings shall not be initiated against the builder for not meeting the committed due date of possession but now, if the promoter fails to complete the project in declared timeline, then he is liable for penal proceedings. The due date of possession as per the agreement remains unchanged and promoter is liable for the consequences and obligations arising out of failure in handing over possession by the due date as committed by him in the apartment buyer agreement and he is liable for the delayed possession charges as provided in proviso to section 18(1) of the Act. The same issue has been dealt by hon'ble Bombay High Court in case titled as ***Neelkamal Realtors Suburban Pvt. Ltd. and anr. vs Union of India and ors.*** and has observed as under:

"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter..."

G. Findings on the relief sought by the complainants

G.I Delay possession charges

21. **Relief sought by the complainants:** Direct the respondent company to pay interest @10.20% per annum on the delay in handing over the possession till realization of the same in view of the violation of section 18 of the Act.

22. 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."

23. As per clause 11(a) of the agreement provided for time period for handing over of possession and is reproduced below:

"11. POSSESSION

(a) Time of handing over the possession

Subject to terms of this clause and subject to the Allottee(s) having complied with all the terms and conditions of this Buyer's Agreement, and not being in default under any of the provisions of this Buyer's Agreement and compliance with all provisions, formalities, documentation etc. as prescribed by the Company, the Company proposes to hand over the possession of the unit within 33 months from the date of start of construction, subject to timely compliance of the provisions of the Buyer's Agreement by the Allottee. The Allottee(s) agrees and understands that the Company shall be entitled to a grace period of 3 months, for applying and obtaining the completion certificate/occupation certificate in respect of the Unit and/or the Project."

24. 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 allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.
25. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within 33 (thirty-

three) months from the date of start of construction and further provided in agreement that promoter shall be entitled to a grace period of 3 months for applying and obtaining completion certificate/occupation certificate in respect of said unit. The date of start of construction is 25.02.2011 as per statement of account dated 09.09.2020. The period of 33 months expired on 25.11.2013. As a matter of fact, the promoter has not applied to the concerned authority for obtaining completion certificate/ occupation certificate within the time limit prescribed by the promoter in the buyer's agreement. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 3 months cannot be allowed to the promoter at this stage.

26. **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.

27. The legislature in its wisdom in the subordinate legislation under the rule 15 of the rules has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.
28. 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 as per relevant clauses of the buyer's agreement for the period of such delay; whereas, the promoter was entitled to interest @ 24% per annum compounded at the time of every succeeding instalment for the delayed payments. 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 dominate 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.

29. 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., 29.07.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

30. **Rate of interest to be paid by complainants for delay in making payments:** The respondent contended that the complainants has defaulted in making timely payments of the instalments as per the payment plan, therefore, the

complainants are liable to pay interest on the outstanding payments.

31. The authority observed that the definition of term 'interest' as defined under section 2(z a) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default.

The relevant section is reproduced below:

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

Explanation. —For the purpose of this clause—

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

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

33. On consideration of the documents available on record and submissions made by the parties regarding contravention as per provisions of the Act, the authority is satisfied that the

respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 11(a) of the buyer's agreement executed between the parties on 05.10.2010, possession of the booked unit was to be delivered within a period of 33 months from the date of start of construction i.e. 25.02.2011. 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 25.11.2013. The respondent has offered possession of the subject unit on 03.01.2020 after receipt of occupation certificate dated 24.12.2019. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the complainants as per the terms and conditions of the buyer's agreement dated 05.10.2010 executed between the parties.

34. 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 24.12.2019. However, the respondent offered the possession of the unit in question to the complainants only on 03.01.2020, so it can be said that the complainants came to

know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, he 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 he has 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. 25.11.2013 till the expiry of 2 months from the date of offer of possession (03.01.2020) which comes out to be 03.03.2020.

35. 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 charges at rate of the prescribed interest i.e. 9.30% p.a. w.e.f. due date of delivery of possession 25.11.2013 till 03.03.2020 as per provisions of section 18(1) of the Act read with rule 15 of the Rules.
36. Also, the amount of Rs.7,64,766/- so paid by the respondent to the complainants towards compensation for delay in handing

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

H. Directions of the authority

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

- i. The respondent is directed to pay the interest at the prescribed rate i.e. 9.30 % per annum for every month of delay on the amount paid by the complainants from due date of possession i.e. 25.11.2013 till 03.03.2020 i.e. expiry of 2 months from the date of offer of possession (03.01.2020). The arrears of interest accrued so far shall be paid to the complainants within 90 days from the date of this order as per rule 16(2) of the rules.
- ii. Also, the amount of Rs.7,64,766/- 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.
- iii. The respondent shall not charge anything from the complainants which is not the part of the buyer's

- agreement. The respondent is not entitled to claim holding charges from the complainants/allottees at any point of time even after being part of the builder buyer's agreement as per law settled by hon'ble Supreme Court in civil appeal nos. 3864-3899/2020 decided on 14.12.2020.
- iv. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
- v. 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 respondents/promoters which is the same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.
38. Complaint stands disposed of.
39. File be consigned to registry.


(Samir Kumar)
Member


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 29.07.2021

Judgement uploaded on 14.09.2021.