# BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

**Complaint no. : 3188 and 3189 of 2021**
**Complaints filed on : 13.08.2021**
**Date of decision : 10.10.2023**

| NAME OF THE BUILDER | | EMAAR INDIA LIMITED (Formerly known as Emaar MGF Land Ltd.) | |
|---|---|---|---|
| PROJECT NAME | | COLONNADE | |
| S.No. | COMPLAINT NO. | COMPLAINT TITLE | APPEARANCE |
| 1. | CR/3188/2021 | M/s Padampur Nirman Pvt. Ltd. V/S Emaar India Limited | Sh. Ravinder Singh, Adv. Sh. J.K. Dang, Adv. |
| 2. | CR/3189/2021 | M/s Padampur Nirman Pvt. Ltd. V/S Emaar India Limited | Sh. Ravinder Singh, Adv. Sh. J.K. Dang, Adv. |

**CORAM:**
Shri Vijay Kumar Goyal — **Member**
Shri Ashok Sangwan — **Member**
Shri Sanjeev Kumar Arora — **Member**

## ORDER

1. This order shall dispose off 2 complaints titled as above filed before this authority in Form CRA under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) also 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 parties.

2. The core issues emanating from them are similar in nature and the complainant in the above referred matters are allottees of the project- 'Emerald Villa-Plots at Emerald Hills' being developed by the same respondent promoter i.e., M/s Emaar MGF Land Limited (now known as 'M/s Emaar India Limited' vide Certificate of Incorporation dated 07.10.2020). The terms and conditions of the buyer's agreements that had been executed *inter se* parties are also almost similar with some additions or variation. The fulcrum of the issue involved in all these cases pertains to failure on the part of the respondent/promoter to deliver timely possession of the units in question, seeking award for delayed possession charges. For the above-mentioned reasons, the aforesaid complaints are being dealt with by this common order.

3. The details of the complaints, reply status, unit no., date of allotment letter, date of agreement, date of start of construction, due date of possession, offer of possession and relief sought are given in the table below:

| **EMAAR INDIA LIMITED (Formerly known as EMAAR MGF LAND LIMITED)** | |
|---|---|
| **PROJECT NAME** | **'Emerald Villa-Plots at Emerald Hills, Sector 65, Gurugram, Haryana'** |
| **Possession Clause 8:** *Subject to force majeure conditions and reasons beyond the control of the Company, the Company shall make every endeavour to deliver possession of the Plot to the Allottee(s) within a period of* ***24 (twenty four) months from the date of execution of this Buyer's Agreement.*** *In the event that the possession of the Plot is likely to be delayed for reason of any force majeure event or any other reason beyond the control of the Company including government strike or due to civil commotion or by reason of war or enemy action or earthquake or any act of God or if non delivery is as a result of any act, notice, order, rule or notification of the Government and any other public or Competent Authority or for any reason beyond the control of the Company, then in any of the aforesaid events, the Company shall upon notice claiming force* | |

*majeure to the Allottee(s) be entitled to such extension of time till the force majeure event persists or the reason beyond the control of the Company exists. In the event that the Company fails to deliver possession of the Plot without existence of any force majeure event or reason beyond the control of the Company within 27 (twenty seven) months from the date of execution of this Agreement, the Company shall be liable to pay to the Allottee(s), a penalty of the sum of Rs. 50/- (Rupees Fifty only) per sq. yd. per month for such period of delay beyond 27 months from the date of execution of this Agreement. It is made clear to the Allottee(s) and understood by the Allottee(s) that under no circumstances the Possession of the Plot will be handed over to the Allottee(s) prior to the execution of the Sale Deed/ Conveyance Deed.*

| Sr. No | Complaint No./Title/ Date of filing | Reply status | Unit/Plot no. and area | Date of allotment letter | Date of execution of buyer's agreement | Due date of possession | Offer of possession | Relief sought |
|---|---|---|---|---|---|---|---|---|
| 1 | CR/3188/ 2021<br><br>Padampur Nirman Pvt. Ltd. Vs. Emaar India Limited<br><br>**D.O.F-** 13.08.2021 | 05.10. 2021 | EVP-A-T-169,<br>(Change in area- 757.78 sq. yds. from earlier area of 758 sq. yds.)<br><br>[Vide IoP at page 138 of reply] | 16.11.2012<br><br>[Page 16 of complaint] | 27.11.2012<br><br>[Page 25 of complaint] | 27.11.2014 | 19.07.2016<br><br>[Page 138 of reply]<br><br>**BSP-** Rs1/-<br><br>**TC-** Rs. 24,11,744<br><br>**AP-** Rs. 1/- | 1. Possession<br>2. DPC |
| 2 | CR/3189/ 2021<br><br>Padampur Nirman Pvt. Ltd. Vs. Emaar India Limited<br><br>**D.O.F-** 13.08.2021 | 05.10. 2021 | EVP-A-T-173,<br>(757.78 sq. yds. from earlier area of 758 sq. yds.)<br><br>[Vide IoP at page 138 of reply] | 16.11.2012<br><br>[Page 16 of complaint] | 27.11.2012<br><br>[Page 21 of complaint] | 27.11.2014 | 19.07.2016<br><br>[Page 138 of reply]<br><br>**BSP-** Rs1/-<br><br>**TC-** Rs. 24,11,744<br><br>**AP-** Rs. 1/- | 1.Possession<br>2.DPC |

**Note**: In the table referred above certain abbreviations have been used. They are elaborated as follows:

| **Abbreviation** | **Full form** |
|---|---|
| D.O.F: | Date of filing of complaint |
| DPC | Delayed possession charges |
| BSP | Basic Sale Price |
| TC | Total Consideration |
| AP | Amount paid by the allottee/s |
| IoP | Intimation of Possession |

4. The aforesaid complaints dated 13.08.2021 were filed under section 31 of the Act read with rule 28 of the rules by the complainant against the promoter M/s Emaar India Limited on account of violation of the buyer's agreement executed between the parties in respect of said units for not handing over possession by the due date which is an obligation on the part of the promoter under section 11(4)(a) of the Act ibid apart from the contractual obligation. Delay possession charges to be paid by the promoter is positive obligation under proviso to section 18 of the Act in case of failure of the promoter to hand over possession by the due date as per builder buyer's agreement.

5. The authority has decided to treat the said complaints as an application for non-compliance of statutory obligations on the part of the promoter/respondent in terms of section 34(f) of the Act which mandates the authority to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under the Act, the rules and the regulations made thereunder.

## A. Lead case (CR/3188/2021)

6. The facts of both the complaints filed by the complainant/allottee are almost similar. Out of the above referred matters, the particulars of the lead complaint no. 3188 of 2021 titled as ***Padampur Nirman Pvt. Ltd. Vs. Emaar India Limited*** are taken into consideration for determining the right of the allottee(s) qua possession and delay possession charges as per proviso to section 18(1) of the Act for deciding both the

complaints. The facts of this complaint is considered for disposal of both the matters and the ratio of this complaint shall be applicable in another complaint also. The requisite particulars of the project, the details of sale consideration, the amount paid by the complainant, date of proposed handing over the possession, delay period, if any, have been detailed in the following table:

| S. No. | Heads | Information |
|---|---|---|
| 1. | Project name and location | Emerald Villa-Plots at Emerald Hills, Sector 65, Gurugram, Haryana |
| 2. | Project area | 102.74 acres |
| 3. | Nature of the project | Residential plotted colony |
| 4. | DTCP license no. and validity status | 10 of 2009 dated 21.05.2009<br>Valid/renewed up to 20.05.2019 |
| 5. | HRERA registered/ not registered | **Registered vide no. 162 of 2017 dated 29.08.2017**<br>**Valid till 28.08.2022** |
| 6. | Completion certificate/ Occupation certificate granted on | 08.01.2018<br>[As per affidavit filed by the respondent] |
| 7. | Date of allotment letter | 16.11.2012<br>[Page 16 of complaint] |
| 8. | Unit/plot no. | EVP-A-T-169<br>[Page 28 of complaint] |
| 9. | Unit measuring | 759 sq. yds.<br>[Page 28 of complaint] |
| 10. | Change in area of the unit vide letter of offer of possession at page 138 of reply | 757.78 sq. yds. from earlier area of 758 sq. yds. |
| 11. | Date of execution of buyer's agreement | 27.11.2012<br>[Page no. 25 of complaint] |
| 12. | Payment plan | Collaborator payment plan<br>[Page 53 of complaint] |

| | | |
|---|---|---|
| | | |
| 13. | Basic sale consideration of the plot | Rs.1/- (Exclusive of EDC & IDC) |
| 14. | Total consideration of said plot as per statement of account dated 15.09.2021 at page 176 of reply | Rs. 24,11,744/- |
| 15. | Total amount paid by the complainant as per clause 1.(b) of the buyer's agreement | Rs.1/- |
| 16. | Possession clause -8 | *8. Subject to force majeure conditions and reasons beyond the control of the Company, the Company shall make every endeavour to deliver possession of the Plot to the Allottee(s)* ***within a period of 24 (twenty four) months from the date of execution of this Buyer's Agreement****. In the event that the possession of the Plot is likely to be delayed for reason of any force majeure event or any other reason beyond the control of the Company including government strike or due to civil commotion or by reason of war or enemy action or earthquake or any act of God or if non delivery Is as a result of any act, notice, order, rule or notification of the Government and any other public or Competent Authority or for any reason beyond the control of the Company, then in any of the aforesaid events,* ***the Company shall upon notice claiming force majeure to the Allottee(s) be entitled to such extension of time till the force majeure event persists or the reason beyond the control of the Company exists****. In the event that the Company fails to deliver possession of the Plot without existence of any force majeure event or reason beyond the control of the Company within 27 (twenty seven) months from the date of execution of this Agreement, the Company shall be liable to pay to the Allottee(s), a penalty of the sum of Rs. 50/- (Rupees Fifty only) per sq. yd. per month for such period of delay beyond 27 months from the date of execution of this Agreement. It is made clear to the Allottee(s) and understood by the Allottee(s) that under no circumstances the Possession of the Plot will be handed over to the Allottee(s) prior to the execution of the Sale Deed/ Conveyance Deed.* |
| 17. | Due date of delivery of possession as per clause 8 of the said agreement | 27.11.2014 |

| | | |
|---|---|---|
| 18. | Date of offer of possession to the complainant | 19.07.2016<br>(Page 138 of reply) |

## B. Facts of the complaint

7. The complainant has made the following submissions in the complaint:

i. That the complainant on 16.11.2012 was allotted plot bearing no. EVP-A-T-169 admeasuring 633.78 sq. meters (758 sq. yds.) (hereinafter referred to as the "said plot") in Emerald Villa- Plot at Emerald Hills project of the respondent.

ii. That in this regard, the respondent issued provisional allotment letter dated 16.11.2012, thereby allotting the said plot in favour of the complainant. The allotment in favour of the complainant being fully paid, it was mentioned thereby in the schedule of payment alongwith the said provisional allotment letter that Rs. 28,46,292/- remained to be paid at the time of registry or possession whichever earlier.

iii. That in respect of the said allotment, the complainant formally entered into a plot buyer's agreement dated 27.11.2012 with the respondent. As per clause 8 of the plot buyer's agreement, the possession for the said plot was supposed to be delivered within 24 months from the date of execution of the plot buyer's agreement i.e. on 27.11.2014.

iv. That in November, 2019, the complainant on coming to know that the respondent had initiated delivery of possession of the plots to the other plot buyers, approached the respondent for possession of the said plot, but the respondent started dillydallying on the issue of possession of the said plot.

v. That in spite of the fact that the allotment of the said plot in favour of the complainant is fully paid, the plot of the complainant still remains undeveloped due to the negligence of the respondent whereas the other plots in vicinity have been fully developed. There has been a huge delay in handing over the possession of the plot. The respondent despite continuous follow-ups on the part of the complainant, is yet to deliver the possession of the said plot to the complainant.

## C. Relief sought by the complainant

8. The complainant is seeking the following relief:

   i. Direct the respondent to provide possession of plot no. EVP-A-T-169 in its project Emerald Villa Plots at Emerald Hills, Sector-65 Gurugram.

   ii. Direct the respondent company to pay interest on the delay in handing over the possession with effect from 27.11.2014 till realization of the same in view of the violation of section 18 of the Act.

   iii. Direct the respondent to pay an amount of Rs.2,50,000/- as litigation expenses.

## D. Reply filed by the respondent

9. The respondent had contested the complaint on the following grounds:

i. That the complainant has filed the present complaint seeking possession, interest on delay of possession, and costs in respect of plot no. EVP-A-T-169 admeasuring 757.78 sq. yds. ("Subject Plot") allotted by the respondent in favour of the complainant in its Emerald Floors project located at Sector 65, Gurugram, Haryana.

ii. That the complainant is not a genuine consumer/allottee and seeks to mislead this Hon'ble Authority. The complainant company is a related entity of MGF Developments Limited ("**MGFD**") which acts as the controlling mind of the complainant. All actions and steps undertaking undertaken by the complainant company are at the behest and instruction of MGFD. The directors of the complainant are Mr. Bishnu Kumar Singh and Mr. Martand Sawarnik, both of whom are also directors in several companies that are also fully controlled by MGFD. These companies are moreover disclosed in MGFD's financial statements ended 31.03.2019 as entities over which MGFD (or through its holding/ subsidiary) is able to exercise a significant influence.

iii. That the respondent and MGFD are currently engaged in disputes across several fora and accordingly, this complaint is merely a cog in the wheel of MGFD's mala fide campaign to browbeat the respondent into conceding to its unlawful and illegal demands in those disputes. To that end, the complainant has filed the present complaint with oblique purposes in manifest abuse of the process of this Hon'ble Authority. Further, when the subject plot was allotted to the complainant, MGFD exercised control over both the respondent and the complainant. It is thus evident that the entire transaction was actually undertaken not between distinct entities but between different arms of the same entity, i.e., MGFD. In that light, the complainant cannot be said to be a genuine buyer or consumer having the locus to avail the remedy under the Act.

iv. That the present complaint is not maintainable in view of the proceedings before Hon'ble National Company Law Tribunal, New Delhi. One of the disputes between the respondent and MGFD arises out of fraudulent related-party transactions (such as the one in the present case) undertaken by MGFD while in control of the respondent company.

v. That this dispute is pending adjudication before Hon'ble NCLT where the respondent has prayed for an investigation into the affairs of MGFD and its related entities (such as the complainant herein). As such, it is likely that the allotment of the subject plot, being an illegal related-party transaction, will be a subject of the investigation directed by Hon'ble NCLT. In fact, the Hon'ble NCLT may also order for cancellation of the allotment of inter alia the subject plot. Therefore, the subject-matter of the complaint is substantially linked with and contingent on the subject-matter in issue in the NCLT proceedings. Allowing the present complaint would have the effect of defeating the matters awaiting adjudication by the NCLT and amount to condonation of the unlawful transactions undertaken by the complainant and MGFD. These events are elaborated ahead. Therefore, until the Hon'ble NCLT's proceedings are concluded, the present complaint is not maintainable and ought not to be entertained.

vi. That the complaint is not maintainable under the Act. The complaint is not maintainable because: (i) there is no violation of section 18 of the Act; and (ii) the complainant has failed to fulfil its duties under section 19 of the Act. As admitted in the complaint itself, the complainant is required to pay an amount of INR 28,46,292/- for the subject plot. However, this obligation has not been discharged by the complainant. As elaborated further ahead, since the possession of the subject plot has been offered in July 2016, amounts in respect of the principal payment and delayed payment charges are outstanding and due to be paid by the complainant. In view of the amount of consideration still remaining to be paid, the complainant's averment that "the allotment of the said plot in favour of the complainant is fully paid." is entirely untrue. In the present case, there is no violation or contravention of the Act and as such complaint is liable to be dismissed.

vii. That the complaint has been made to circumvent contractual obligations. In any case, it is submitted that the plot buyer's agreement ("PBA") dated 27.11.2012 in respect of the subject plot is to be read with and subject to a settlement agreement in the form of a Memorandum of Understanding executed between the complainant's parent company - MGFD and its associate companies ("Complainant Entities") and the respondent and its associate companies ("Respondent Entities") on 21.08.2017 (the "MOU"). As such, it is the MOU, not the PBA alone, that governs the relationship between the complainant and the respondent in respect of the subject plot.

viii. That under this MOU, the allotment of the subject plot in favour of the complainant is contingent on the performance of certain prior obligations by the Complainant Entities. Unless these prior obligations are performed, the complainant does not have any interest or claim over the subject plot, and accordingly, cannot claim possession (or any interest for delay) thereof. As a consequence, the present complaint is merely an attempt to circumvent the contractual obligations undertaken by the Complainant Entities. Alternatively, if it is considered that the MOU does not apply to the subject plot, the complainant is still not entitled to maintain the present complaint in terms of the PBA. As set out in precise terms ahead, as of date, the complainant is liable to pay amounts outstanding on account of inter alia balance of principal amount due and DPC. Unless such amounts are paid, the complainant is not entitled to the reliefs claimed in the complaint.

ix. That the existence of the MOU and the aforementioned events and facts, concealed and withheld from this Hon'ble Authority. These clearly demonstrate that the complainant has initiated the present proceedings with oblique and ulterior motives of circumventing its contractual obligations. It is submitted that the complainant is not entitled to the reliefs claimed in the complaint as: (i) the PBA must be read with the MOU, in terms of which, prior obligations forming the consideration for allotment of the subject plot have not been fulfilled; and (i) even in the alternative that the MOU does not apply to the PBA, requisite payments for the subject plot under the PBA are outstanding and remaining to be paid. As such, in either event, the complainant must fulfil its contractual obligations before claiming the reliefs raised in the present complaint.

x. That the respondent was initially incorporated as Emaar MGF Land Limited having its registered office at MGE House, 17B, Asaf Ali Road, New Delhi - 110002, as a joint venture company pursuant to a Joint Venture Agreement executed between Emaar Properties PISC, MGFD and one other party on 18.12.2004 ("Original JVA'). Under the terms of the Original JVA, and in all practical terms, MGFD (through its promoter Mr. Shravan Gupta, acting as Managing Director) ran and operated the respondent company since its incorporation until 23.05.2016 ('MGF Control Period"). In 2016, a decision was taken to restructure the respondent's business through a demerger by filing a scheme of arrangement. Various agreements were also agreed and executed between the respondent, MGFD and Mr. Gupta (amongst others) on 13.04.2016 to record the terms of restructuring. The parties are currently engaged in proceedings before the Hon'ble National Company Law Tribunal, Principal Bench, New Delhi ('NCLT') (Company Application Nos. 1811 of 2019, 128 of 2020 and 159 of 2020 in Company Petition 689 of 2016) and in arbitration proceedings (ICC Case No. 25000/HTG) for disputes that have arisen in relation to the restructuring of the respondent company.

xi. That there was change in control and discovery of unlawful transactions. As per the terms of restructuring, the management and control of the respondent and its day-to-day affairs were transferred by MGFD and Mr. Shravan Gupta in favour of the "Emaar Group" (namely, Emaar Properties PJSC through Emaar Holding II) on 23.05.2016. Following the change of control, the Emaar Group discovered that during the MGF Control Period, the respondent had been party to several questionable transactions, including related-party transactions. These transactions were to the detriment of the respondent and had resulted in unlawful gains to MGFD and Mr. Gupta. The allotment and sale of the subject plot was one among many such transactions.

xii. That some of these unlawful transactions are a subject matter of proceedings before the Hon'ble NCLT under section 241 and 242 of the Companies Act, 2013 (Company Petition (ND) 173 of 2019), where adjudication is awaited ("NCLT Proceedings"). The allotment of inter alia the subject plot itself cannot be said to be final and crystallised until such adjudication is completed. In the NCLT Proceedings, the respondent has prayed for an investigation into the affairs of MGFD and its related entities (such as the complainant herein). As such, it is likely that the allotment of the subject plot, being an unlawful related-party transaction, will be a subject of the investigation directed by Hon'ble NCLT. In fact, the Hon'ble NCLT may also order for cancellation of the allotment of inter alia the subject plot. The MOU imposes certain prior obligations on the Complainant Entities, failing which the allotment of inter alia the subject plot does not subsist. Those obligations have not been complied with and accordingly, the claims of the complainant are wholly untenable.

xiii. That the subject plot was allotted to the complainant, who executed the PBA dated 27.11.2012. A letter of offer of possession was also issued by the respondent on 19.07.2016. On account of delay in taking possession of the subject plot and paying necessary amount thereon, the complainant is further liable to pay delay payment charges and holding charges as accrued on the subject plot. As on date, the following outstanding amounts remain to be paid under the PBA in respect of the subject plot.

| S.No. | Particulars | Amount |
|---|---|---|
| 1. | Balance of Principal Amount | Rs. 24,11,744/- |
| 2. | DPC | Rs.12,97,096/- |
| 3. | Holding charges (including GST) | Rs.23,00,371 |
| 4. | **Total outstanding** | **Rs.60,09,211/-** |

Accordingly, since all amounts due and payable under the PBA have not been paid in time to the respondent, the complainant is not entitled to the reliefs claimed in the present complaint.

xiv. That considering the fact that MGFD exercised control over the respondent as well as the complainant at the time of allotment, the complainant cannot be said to be a genuine buyer or consumer having the locus to avail the remedy under the Act. Allowing the same would constitute a manifest abuse of process of this Hon'ble Authority. The entire transaction of the subject plot was given effect during the MGF Control Period. The allotment letter was issued in favour of MGFD's related entity while MGFD controlled the respondent company. As such, the Companies Act, 1956/ 2013 required this transaction to be: (i) duly disclosed to and approved by the board of directors of the respondent; and (ii) conducted fairly at an arms' length basis. However, none of these requirements were satisfied. Neither was this transaction disclosed to the board of directors, nor was it conducted at an arms' length basis. In fact, the subject plot was allotted at grossly undervalued consideration, the same being acquired by the complainant at the negligible amount of Rs. 1/- (Rupees One Only). Though this fact has been suppressed in the complaint, the same is admitted by the PBA and the allotment letter placed on record by the complainant itself. The allotment of the subject plot was merely one such unlawful transaction discovered after the control of the respondent was transferred to the Emaar Group after the MGF Control Period. Accordingly, Emaar Properties PJSC highlighted these issues in a communication to Mr. Gupta, the promoter of MGFD, on 22.11.2016. The allotment of the subject plot finds clear mention in S. No. 73 of Annexure A of the communication. These were the issues (among others) that were sought to be settled by the Complainant Entities and the Respondent Entities through the execution of the aforementioned MOU.

xv. That in addition to the plots/ units allotted to MGFD-related entities at enormous discounts illegally and without requisite approvals (that included the subject plot), certain other allotments were made to the Complainant Entities *completely free of cost* for entering into the agreements identified as Collaboration Agreements I, Landowners Agreements I, Collaboration Agreements II, and Landowners Agreements II in the MOU ("Initial Agreements"). It is submitted that having the Complainant Entities enter into these initial agreements was an unnecessary and unlawful business activity. As was revealed to the respondent later, the execution of the initial agreements and the gratuitous allotment of plots pursuant thereto were elements of an elaborate scheme designed by MGFD to divert assets and funds away from the respondent to itself and the Complainant Entities. Pertinently, similar to the lapses in the allotment of the subject plot, these too were related-party transactions that were concealed from the board of the respondent, whose requisite approval was not taken. Thirty-nine (39) plots were allotted to Complainant Entities pursuant to Collaboration Agreements- I and Landowners Agreements- I. They are listed under S. Nos. 33-71 of Annexure A of the communication. Thirty-seven (37) plots were allotted to Complainant Entities pursuant to Collaboration Agreements- II and Landowners Agreements- II. These are listed under S. Nos. 1-32, 72, and 75-78 of Annexure A of the communication. Collectively, these plots/ units are hereinafter referred to as the "Free Plots". To resolve the issues arising out of their multiple illegal related-party transactions as described above, that included the allotment of the free plots and inter alia the subject plot, the Complainant Entities agreed to surrender and assign the rights acquired under the Initial

Agreements (including those over the Free Plots) through MGFD in favour of the Respondent Entities under the MOU.

xvi. That the MOU required the Complainant Entities to assign their rights under the Initial Agreements (including rights over the free plots) in favour of the Respondent Entities through execution of various additional agreements, deeds and documents ("Supplementary Agreements). In consideration thereof, the respondent agreed to not to further pursue the foregoing issues arising out of MGFD's misfeasance. The parties agreed that subject to the execution of the Supplementary Agreements, the complainant would have the liberty to deal with the subject plot. However, since the Supplementary Agreements have not been executed, said liberty of the complainant does not exist. The execution of the Supplementary Agreements formed the consideration for the respondent agreeing to bear the massive loss on the allotment of inter alia the subject plot. The complainant's rights over the subject plot and the freedom to deal with it were contingent on the Complainant Entities fulfilling their obligation to execute the Supplementary Agreements. It is only thereafter that the MOU could be given complete effect in settlement of the issues raised in the communication. Further, clause 2 of the MOU provided that "all concerns, claims and grievances raised stand redressed to entire satisfaction of MGF entities and nothing stands pending against Emaar entities in any manner whatsoever subject to fulfilment of the terms and conditions of this MoU". Therefore, (i) the terms of the PBA applicable to the complainant were made subject to and have to be read with the MOU on 21.08.2017, i.e., the date of execution of the MOU; and (ii) the MOU imposed certain preconditions for the allotment of inter alia the subject plot, that remain unfulfilled. Since the execution of the Supplementary Agreements is still pending, in terms of the MOU, obligations of the Complainant Entities remain unfulfilled. Consequently, the allotment of the subject plot to the complainant remains in abeyance. As a result, the complainant is not entitled to raise any claim for interest or possession in lieu thereof.

10. On 28.10.2021, the complainant has filed rejoinder to the reply filed by the respondent wherein the complainant has refuted the assertions of the respondent stating that as the respondent has failed to deliver the possession of subject unit hence the complaint deserves to be allowed and the reliefs under the provision of the Act cannot be denied to the complainant merely because the respondent is in litigation with a Company MGF Development Ltd. over some disputes between them and MGF Development Limited is related to the complainant. The complainant also provided reason of allotment in favour of the subject villa plot @ Rs.1/-. Besides stating the above facts, the complainant also averred in its rejoinder that the list of disputed properties filed by the respondent along with its petition before NCLT includes the subject unit much less there is any stay of any court/tribunal pertaining to the subject unit.

## E. Written arguments by complainant

11. The written arguments were filed by the complainant on 18.02.2022 wherein it is submitted as follows:

i. That the complainant being an allottee is entitled to possession as there is no stay / legal embargo from any court of law and is also entitled for payment of delayed possession charges as the possession of the subject plot/unit has deliberately not been given by the respondent to the complainant. As such the allotment of the present unit is of more than 10 years and the same were allotted on the price agreed in line with the plots/units sold to any other parties of the project. The completion certificate has not been received.

ii. That the respondent argued that the allotment is fraudulent transaction and is not a genuine allotment as the subject villa plot was allotted at a grossly undervalued rate of Rs. 1/- per sq. yards does not hold water as the respondent is well aware that the allotment at above rate in favour of the complainant was in consideration of a court settlement, whereby the complainant has taken effective steps in the settlement of disputes arising out of collaboration agreement between the respondent entities and one land owner Ishwar Das Bajaj. It is further submitted that the respondent is blowing hot and cold at the same time, as on one side they alleged the allotment to be not genuine and a fraudulent one as allotment was @ Rs. 1/- per sq. yards and on the other hand says that there is an outstanding of amount against the allotted plot/unit, in terms of the buyer's agreement. The above fact proves that the transaction and consequently the allotment in favour of the complainant is genuine having no iota of illegality.

iii. That the existence of arbitration clause and pendency of alleged litigation before NCLT and other Forums are not binding upon the complainant as complainant is not a party to the same nor the said proceeding have any consequence upon the right/entitlement of the complainant to the subject plot. Further it is relevant to bring into the notice of this Hon'ble Authority that there is no stay operating in any form on the present proceedings, which prevents the respondent to handover the possession of the unit/plot in terms of buyer's agreement. Since, the NCLT proceeding have been filed with incorrect facts, so, the same are liable to be dismissed.

iv. That the respondent's contention that complainant is not entitled to possession as it defaulted in making the payment of outstanding dues is also misconceived as the respondent neither issued any such alleged letter of intimation of possession nor the complainant received the same. The above fact stands proved as neither any postal receipt nor any acknowledgment of receipt has been placed on record. Further the balance amount was to be paid at the time of registry or possession, whichever is earlier, and the complainant is still ready to pay the same and same be adjusted in the delay possession charges under section 18 of the Act assessed by this Hon'ble Court while allowing the present complaint.

v. That the respondent's argument that the complainant is not a genuine buyer and subject plot is subject to fulfilment of MOU, is also wrong and without any basis and is liable to be discarded from the fact that neither the complainant is a party to the said MOU nor the allotment of subject plot is the subject matter in the NCLT Petition filed in year 2019. Also the buyer agreement executed, account ledger/statement maintained, letters/correspondence issued by the respondent proves the relation of the complainant with the respondent as of allottee with the promoter as per the Act and as such the genuine allottee of the subject property. The MOU is not relevant in the present matter as the same is a separate independent document between the parties and has its own resolution mechanism and as such have no concern with regard to the present complainant.

vi. That as regard the respondent's argument regarding the issuance of letter of possession dated 19.07.2016, it is submitted that the same has neither been received by the complainant nor any proof of dispatch or receipt has been placed on record by the respondent from which it can safely be presumed that the said letter is fabricated and has been created falsely to the effect that the complainant defaulted in taking possession. The said fact can be fortified from the fact that no reminder letter has been attached by the respondent, though in every such case, the developer issues repeated reminder letters.

vii. That in view of the above, it is prayed that the respondent deliberately did not handover the possession of the unit to the complainant, no unconscionable "holding charges" and/or any other charges on the misconceived pretext of delay in taking over possession by the complainant, be imposed on the complainant, as sought for by the respondent.

## F. Written arguments by respondent

12. The written arguments were filed by the respondent on 18.02.2022 wherein besides reiterating facts of the complaint and reply already filed by the respondent, it is submitted as follows:

i. That the transaction of allotment of the said plot setup by the complainant is obviously fraudulent. It is a matter of record that the basic sale price of the said plot measuring 758 square yards is indicated to be only Rs.1/-. It has also been mentioned in allotment letter dated 16.11.2012 that no amount whatsoever has been paid by the complainant to the respondent. Such kind of transactions constitute "Corporate Loot" and the same can never acquire legitimacy. It has been repeatedly held by court of law that contract without consideration is void. Reliance in this regard has been placed on section 25 of the Indian Contract Act, 1872 and the following citations: 1997 (9) SCC 651; AIR 2001 SC 1197; (2018) 2 LW 930. In regard to the plea of 'Lack of Consideration', it must be proved by an individual who alleges it as decided in Ranganayakamma Vs. K.S/ Prakash, AIR 2009 SC (Supp) 1218. Apart from that, a consideration is to be real and not illusory one, although the adequacy of consideration being an issue for the respective contracting parties to agree in this regard. In Law, when the respective consenting parties had entered into an agreement, the efficacy of the same can be gone into by a Court of Law with a view to find out as to whether the consideration was a real and not an illusory one, yet, want of consideration is to be established by a person, who alleges the same. Therefore, the question whether a particular agreement is a 'Gratuitous one' or there is 'Lack of Consideration' can very well be enquired/gone into by a Court of Law and especially when the agreement in issue is claimed to be an unenforceable one for want of consideration'.

ii. That the complainant has not denied that Memorandum of Understanding dated 21.08.2017 had been executed between the respondent and MGFD and others. As highlighted earlier, aforesaid Memorandum of Understanding dated 21.08.2017 required the Complainant Entities to assign their rights under the Initial Agreements (including rights over the Free Plots) in favour of the Respondent Entities through execution of various additional agreements, deeds and documents ("Supplementary Agreements"). The threadbare examination of Memorandum of Understanding dated 21.08.2017 makes it evident that the complainant's rights over the said plot and the freedom to deal with it were contingent on the Complainant Entities fulfilling their obligation to execute the Supplementary Agreements. It has been comprehensively established by the respondent that between September and December 2017, drafts of the supplementary agreements were negotiated between MGFD and the respondent.

iii. That at no point did MGFD deny or object to: (1) its obligation of executing the Supplementary Agreements; and (ii) the understanding that the execution of the Supplementary Agreements formed a necessary condition for the settlement of all the plots in the said MOU. Therefore, it would be just, fair, proper and legitimate on the part of respondent to contend that since, in terms of MOU 21.08.2017, the execution of the supplementary agreements is still pending it stands completely established that the obligations of the Complainant Entities remain unfulfilled. On this account the respondent has fairly and legally claimed that the allotment of the said plot in favour of the complainant should be kept in abeyance. Thus as a result, the complainant is not entitled to raise any claim for compensation, damages or possession in lieu thereof.

iv. That in fact, on account of execution of MOU dated 21.08.2017, the terms and conditions incorporated in plot buyer's agreement dated 27.11.2012 were altered. The to and fro exchange of contracts between the respondent and MGFD cannot be disregarded even though it did not culminate in execution thereof. The aforesaid exchange establishes that MGFD had accepted that supplementary agreements would be executed. The said plot figures at serial number 41 on page 103 of Annexure D forming part of MOU dated 21.08.2017. In this regard, the respondent place reliance on section 62 and 63 of Indian Contract Act, 1872 as acceptance of modification of terms of contract has been construed under law to constitute novation of contract. Moreover, the terms and conditions contained in subsequent MOU dated 21.08.2017 modify the terms and conditions incorporated in plot buyer's agreement dated 27.11.2012. It is settled proposition of law that such modified terms and conditions incorporated in a subsequent contract become a part of the original contract itself.

v. That the transaction is in violation of joint-venture agreement. The respondent has produced copy of Joint Venture agreement between MGF Development, Emaar India Ltd. and Emaar Properties PJSC as Annexure R/3. Clause 7.1.19 of the aforesaid Joint-Venture Agreement (Page 121) clearly provides that the Joint-Venture Company shall not take any action on the following matters:

*"7.1.19 enter into any contract which is not on arm's length basis and not a normal commercial terms;*

*7.1.20 enter into any transaction outside the ordinary course of business;"*

Thus, even in terms of Joint-Venture Agreement the transaction as has been set up by the complainant was prohibited. Thus, the transaction is bad both on account of being violative of contractual covenants and also being in infringement of applicable statutory provisions. A transaction which is bad in the eye of law should not be permitted to be enforced especially when illegalities relating thereto are brought to the attention of the honourable court.

vi. That in order to establish the dishonesty and misconduct of the complainant, the respondent has produced copy of operation and mis-management petition (without annexures) filed before the Hon'ble

National Company Law Tribunal, Principal Bench New Delhi as Annexure R/10 at page 178. In the said petition, the respondent had been impleaded as respondent number 1, M/s MGF Developments Ltd. as respondent number 2, Mr. Shravan Gupta as respondent number 3 and Emaar Properties PJSC as respondent number 9. It had been emphasised in the petition referred to above that based on the representations of respondent number 2 (MGF Developments Limited) and respondent number 3 (Mr. Shravan Gupta) respondent number 9 through the petitioner had between the year 2005 and 2009 invested by way of equity share capital and amount of Rs. 4,137,09,71,125/-. That the irregularities, illegalities and malpractices relating to the complainant have been set out in the petition.

vii. That it is settled proposition of law that whenever the contract which is the outcome of cheating/fraud is brought before the honorable court for enforcement, the same shall not be done at the instance of the erring party. Reliance in this regard is placed on the following citation:

> *"2010(1) CIVIL COURT CASES 0785-- Agreement to sell -- Oral - Suit for specific performance - Part of consideration paid by way of black money - Trial Judge rightly not passed money decree against defendant Nos.1 to 3 as it was in violation of provision of S.23 of Contract Act - Court do not assist the person whose acts are not in consonance with the provisions of Law. (Specific Relief Act, 1963, S. 14, Contract Act, 1872, S.23). (Para 9)"*

That in light of legal and factual position submitted hereinbefore, it is manifest that the complaint preferred by the complainant is legally and factually unsustainable and warrants dismissal.

## G. Jurisdiction of the authority

13. The authority observed that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

### G.I Territorial jurisdiction

14. 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.

### G.II Subject-matter jurisdiction

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

> ***Section 11***
>
> *.....*
>
> *(4) The promoter shall-*
>
> *(a) be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;*

***Section 34-Functions of the Authority:***

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

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

**H. Affidavit filed by the respondent**

17. The authority, vide order dated 18.11.2021, had directed the respondent to clarify certain issues w.r.t allotment/BBA, receipt of CC/part CC, balance amount to be paid by the complainant, and the matter being sub-judice before any authority, if any. In pursuance of the directions of the authority, the respondent filed an affidavit dated 06.12.2021 clarifying those issues being discussed as under:

    i. **Whether the unit was allotted to the complainant and an allotment letter/BBA was signed/issued.**
    ii. **Whether the unit still stands in the name of the complainant.**

18. With respect to the aforesaid clarification, the respondent submitted that the unit in question is subject matter of the MOU dated 21.08.2017 and was allotted to the complainant, who executed the buyer's agreement on 27.11.2012. The allotment was made during the MGF Control Period, i.e., the period since incorporation and till 23 May 2016 (when MGFD through its promoter was in control of Emaar MGF Land Limited). Also, it is submitted that despite issuance of the allotment

letter, the complainant does not qualify to be an allottee as comprehended under the RERA Act, 2016.

19. A letter of offer of possession was also issued by the Respondent on 19 July 2016. Considering the fact that MGFD exercised control over the respondent as well as the complainant at the time of allotment, the complainant cannot be said to be a genuine buyer or consumer having the *locus* to avail the remedy under RERA.

20. The authority is of the view that the plea of the respondent that the complainant does not qualify to be an allottee as per the Act is not maintainable. The authority observes that the term "allottee" has been defined under section 2(d) of the Act and the same is reproduced as under:

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

21. From a bare perusal of the definition, it becomes evidently clear that the person to whom an apartment, plot or building, as the case may be, has been allotted, sold or otherwise transfer is an allottee and this issue has been comprehensively dealt with by the authority in complaint bearing no. 4031 of 2019 titled as ***Varun Gupta Versus Emaar MGF Land Ltd. (CR/4031/2019).***

22. From a bare perusal of the definition of the term 'allottee', it becomes evidently clear that the complainant very well falls within the definition of the term "allottee" as defined in section 2(d) of the Act. The subject unit was allotted to the complainant vide allotment letter dated 16.11.2012 and thereafter, a buyer's agreement has been executed inter se parties on 27.11.2012. Even, if the complainant is an arm to MGF, it does not make him a less allottee. Therefore, the complainant is an allottee as per section 2(d) of the Act and the rights and obligation of the complainant and the respondent will be governed by the said buyer's agreement.

**iii. Whether CC/part CC/OC of the project/part of the project has been received.**

23. With respect to the aforesaid clarification, the respondent submitted that for the subject unit, the occupation certificate has been duly applied for and received on 08 January 2018. In addition, the project in respect of the subject unit is fully complete.

**iv. Whether there is any balance amount as per BBA required to be paid by the complainant**

24. The respondent submitted that as of August/September 2021, the complainant is liable to pay Rs.60,09,212 under the PBA in respect of the subject unit, in the following manner:

| S. No. | Particulars | Amount (INR/-) |
|---|---|---|
| 1. | Balance of Principal Amount | 24,11,745 |
| 2. | DPC | 12,97,096 |
| 3. | Holding Charges | 23,00,371 |
| | **Total Outstanding** | **60,09,212** |

25. With respect to the above, the complainant is directed to pay outstanding dues as per provisions of section 19(6) & (7) of the Act and

the rate of interest chargeable from the complainant/allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 10.75% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delay possession charges as per section 2(za) of the Act. Also, the respondent is not entitled to claim holding charges from the complainant/allottee at any point of time even after being part of the buyer's agreement as per law settled by Hon'ble Supreme Court in Civil appeal nos. 3864-3889/2020 decided on 14.12.2020.

v. **Whether there is any legal embargo or stay order of any court in giving possession of these units to the complainant and also payment of delayed possession charges as per stator provisions of proviso to section 18(1) of the Act, 2016.**

26. The respondent submitted that there are several disputes between MGFD and the respondent which are pending before the hon'ble NCLT, where the respondent has sought an investigation into transactions such as the allotment of the subject unit. That on 30.11.2021, the NCLT New Delhi has initiated the Corporate Insolvency Resolution Process of MGFD and thereby declared a moratorium.

27. The authority is of the view that this submission of the respondent has no legs to stand. It is a matter of fact that the jurisdiction of NCLT and this authority are independent in nature. Moreover, the complainant is not a party to those proceedings which are pending adjudication before Hon'ble NCLT. Also, it is of grave importance to mention over here that no order has been passed by any competent court which prevents this

authority to proceed with the complaint under the provisions of the Act. The respondent has not shown any provision or law under any statute which requires the present proceedings to be deferred or stayed since the proceedings before the hon'ble NCLT is pending at the instance of another company and the present proceedings are under the Act of 2016. The issues which are raised here cannot be part of the proceedings before the Hon'ble NCLT. The authority is of the view that it is a delaying tactics followed by the respondent. Further, under the guise of the pendency of the Hon'ble NCLT proceedings, the respondent cannot run away from its liability under this Act. As noted, the complainant and MGFD are independent legal entities with their own independent right to seek remedy under the law. The complainant has approached this authority under the Act seeking to enforce its statutory rights. The proceedings under the Act are not subject to proceedings pending before the Hon'ble NCLT. The authority holds that it cannot opine on the issues pending consideration before the Hon'ble NCLT. The authority is exercising its jurisdiction exclusively within the four corners of the Act. In view of the above-mentioned reasoning, the submission of the respondent, stands rejected.

28. The respondent further alleged that the buyer's agreement in question is a fraudulent transaction and therefore, needs to be ignored. In this regard, the authority observes that the respondent has chosen to file voluminous records, however, there is not a single piece of paper showing that the respondent has ever disputed the existence of the

buyer's agreement. Further, the respondent has not brought on record anything to show that a police complaint was filed alleging fraud being played with respect to the execution of the buyer's agreement. A contract between the parties is sacrosanct and cannot be washed away by a party at their whims and fancies. It is undisputed that the respondent has received the entire consideration amount, except EDC & IDC which are payable at the time of offer of possession, as agreed upon in the buyer's agreement. The respondent is, therefore, estopped from denying the existence, veracity and enforceability of the contract. It appears for the first time, when the complainant chose to enforce its right before this authority under the provisions of the Act, that the respondent raised the issue of fraudulent transaction to defeat the right of the complainant. The authority has to proceed within the realm of the Act. Once a complaint has been filed and the execution of the buyer's agreement is not disputed and payment of the entire consideration also remains admitted, the authority would be failing in its statutory duty if it does not proceed with the matter under the provisions of the Act. The authority after considering the relevant documents on record and after hearing both the parties is of the opinion that the submission of the respondent is liable to be rejected.

## I. Findings of the authority

### I.I Delay possession charges

29. **Relief sought by the complainant:** In the following complaints, the complainant is seeking possession of the subject unit/plot along with delay possession charges for the delay in handing over possession of the subject unit as per proviso to section 18(1) of the Act.

| Sr. No | Complaint No./Title/Date of filing | Date of execution of buyer's agreement | Due date of possession | Offer of possession | Relief sought | Period for which the complainant is entitled to DPC |
|---|---|---|---|---|---|---|
| 1 | CR/3188/2021<br><br>Padampur Nirman Pvt. Ltd. Vs. Emaar India Limited<br><br>D.O.F-<br>13.08.2021 | 27.11.2012<br><br>[Page 25 of complaint] | 27.11.2014 | 19.07.2016<br>[Page 138 of reply]<br><br>BSP- Rs1/-<br><br>TC- Rs. 24,11,744<br><br>AP- Rs. 1/- | 1. Possession<br>2. DPC | W.e.f. 27.11.2014 till the receipt of OC + 2 months i.e., 08.03.2018 |
| 2 | CR/3189/2021<br><br>Padampur Nirman Pvt. Ltd. Vs. Emaar India Limited<br><br>D.O.F-<br>13.08.2021 | 27.11.2012<br><br>[Page 21 of complaint] | 27.11.2014 | 19.07.2016<br><br>[Page 138 of reply]<br>BSP- Rs1/-<br><br>TC- Rs. 24,11,744<br><br>AP- Rs. 1/- | 1. Possession<br>2. DPC | W.e.f. 27.11.2014 till the receipt of OC + 2 months i.e., 08.03.2018 |

30. In the present complaint, the complainant intends to continue with the project and is 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."*

31. Clause 8 of the buyer's agreement provides time period for handing over the possession and the same is reproduced below:

*"**8.** The Subject to force majeure conditions and reasons beyond the control of the Company, the Company shall make every endeavour to deliver possession of the Plot to the Allottee(s) within a period of **24 (twenty four) months from the date of execution of this Buyer's Agreement.** In the event that the possession of the Plot is likely to be delayed for reason of any force majeure event or any other reason beyond the control of the Company including government strike or due to civil commotion or by reason of war or enemy action or earthquake or any act of God or if non delivery Is as a result of any act, notice, order, rule or notification of the Government and any other public or Competent Authority or for any reason beyond the control of the Company, then in any of the aforesaid events, the Company shall upon notice claiming force majeure to the Allottee(s) be entitled to such extension of time till the force majeure event persists or the reason beyond the control of the Company exists. In the event that the Company fails to deliver possession of the Plot without existence of any force majeure event or reason beyond the control of the Company within 27 (twenty seven) months from the date of execution of this Agreement, the Company shall be liable to pay to the Allottee(s), a penalty of the sum of Rs. 50/- (Rupees Fifty only) per sq. yd. per month for such period of delay beyond 27 months from the date of execution of this Agreement. It is made clear to the Allottee(s) and understood by the Allottee(s) that under no circumstances the Possession of the Plot will be handed over to the Allottee(s) prior to the execution of the Sale Deed/ Conveyance Deed." (Emphasis supplied)*

32. **Due date of handing over possession and admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within a period of 24 months from the date of execution of the buyer's agreement, and it is further provided in the said clause of the agreement that the said time period is subject to the force majeure conditions. In the present complaint, the buyer's agreement was

executed on 27.11.2012. Hence, the due date of handing over possession comes out to be 27.11.2014 as per the clause 8 of the buyer's agreement.

33. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is 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.*

34. The legislature in its wisdom in the subordinate legislation under rule 15 of the rules has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases. 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., 10.10.2023 is 8.75%. Accordingly, the prescribed rate of interest will be MCLR + 2% i.e., 10.75%.

35. **Rate of interest to be paid by the complainant in case of delay in making payments-** The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 10.75% by the respondent/promoter which is the same as is being granted to the complainant in case of delay possession charges.

36. During the course of hearing on 25.04.2023 and 04.07.2023, following issues have emerged for the adjudication of this authority:

    i. Whether amount of Rs. 1/- has been paid by the complainant?
    ii. Whether the respondent has offered possession of the subject plot to the complainant vide letter dated 19.07.2016?
    iii. If such offer of possession was inadvertently made by the respondent, whether the respondent has withdrawn the same, till date.

37. In the reply of the above mentioned issues, the respondent has submitted an affidavit on 08.08.2023 stating as under :-

    i. No amount has ever been paid by the complainant in respect of plots.
    ii. Possession of the subject plot was offered to the complainant inadvertently on 19.07.2016. However, the said offer of possession has since been rendered inconsequential and infructuous and stood superseded upon the execution of the MoU dated 21.08.2017 hence the complainant has no right or interest in the subject plot.
    iii. The offer of possession of the plot had not been withdrawn. However, as stated above, it had in any event been rendered inconsequential and infructuous upon the execution of MoU dated 21.08.2017. Without prejudice to the position that the offer of

possession was made inadvertently and that it has been rendered inconsequential, the said offer of possession is hereby withdrawn.

38. On the other hand, the counsel for the complainant has also filed the information w.r.t. issue no.1 and states that as per BBA dated 27.11.2012, a sum of Rs. 1/- out of the total sale price has been paid by the allottee with the application as booking amount, at the time of registration for allotment of the plot. He further has also given a reference to an order dated 31.12.2016 in an appeal to the Commissioner of Income Tax (Appeals). Moreover, he has also made a reference to the account statement filed by the respondent along with its reply at page 176 as Annexure R/9 wherein it is categorically admitted that an amount of Rs. 1/- has been paid and is received by the respondent.

39. The authority observes that it is a matter of fact that the subject unit was allotted by the respondent in favour of the complainant vide letter dated 16.11.2012. Subsequently, a buyer's agreement was executed between both the parties on 27.11.2012 by virtue of which the complainant was allotted a plot bearing no. EVP-A-T-169 having a super area of 757.78 sq. yards for a basic sale consideration of Rs.1/- (exclusive of EDC and IDC). The authority observes that the buyer agreement in the present matter is a specific agreement which also makes the present matter a peculiar one wherein the subject unit was allotted to the complainant for a miniscule basic sale consideration of Rs.1/-. However, this Authority also cannot ignore this fact that there is

a contractual relationship amongst the parties as both the parties have signed the same and have never disputed their signatures on the buyer's agreement which makes it binding on both of them. Also, the clause 1(b) of the buyer's agreement makes it amply clear wherein it has been acknowledged by the respondent that sum of Rs.1/- out of the total sale price has been paid by the complainant. Moreover, it is also a matter of record that as per clause 3 of memorandum of understanding dated 21.08.2017, the Emaar entities have allotted the subject plot to the complainant as part of court settlement whereby the complainant has helped in the settlement of disputes arising out of collaboration agreement between Emaar entities and one land owner Ishwar Das Bajaj. Details of the subject plot has also been mentioned at S.no. 41 and 42 of Annexure D of the said MOU. Though the respondent is alleging that the said transaction is related party transaction and not on arm's length basis, the respondent may challenge the same before the appropriate forum challenging the opaqueness in the said transaction as the same does not fall within the realm of this authority. As discussed earlier, the respondent has failed to challenge the veracity and existence of the buyer's agreement before the appropriate forum till date and in absence of documents regarding the same, the authority is proceeding with the documents placed on record.

40. 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. Further, by virtue of clause 8 of the buyer's agreement, the possession of the subject unit/plot was to be delivered within a period of 24 months from the date of execution of the buyer's agreement and hence, the due date of handing over possession comes out to be 27.11.2014.

41. It is a matter of record that the respondent has put forth a letter dated 19.07.2016 and has alleged that it has offered the possession of the subject unit to the complainant vide this letter itself. Thereafter, the respondent vide an affidavit dated 06.12.2021, has also submitted on oath before this authority that *'For the Subject Unit, The Occupation Certificate has been duly applied for and received on 08 January 2018. In addition, the project in respect of the subject unit is fully complete.'* However, the complainant vide written arguments filed on 18.02.2022 has submitted that the complainant has neither received any letter of possession as alleged by the respondent nor any proof of dispatch or receipt has been placed on record by the respondent thus no reliance can be placed on the same. Further, no reminder letter has been attached by the respondent, though in every such case the developer issues repeated reminder letters.

42. The authority is of the considered view that there is a delay on the part of the respondent to offer physical possession of the subject unit to the complainant as per the terms and conditions of the buyer's agreement

dated 27.11.2012 executed between the parties. The authority in plethora of its judgements have given its view regarding validity offer of possession. It is reasserted that completion certificate/occupation certificate is pre-requisite for valid offer of possession. In the present case, even if it is presumed that the respondent had made an offer of possession vide letter dated 19.07.2016 to the complainant, the same cannot be termed as valid/lawful as the respondent itself in view of the affidavit dated 06.12.2021 wherein it is stated that it has received the occupation certificate on 08.01.2018. It is the failure on part of the promoter to fulfil its obligations and responsibilities as per the buyer's agreement dated 27.11.2012 to hand over the possession within the stipulated time frame.

43. 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 complainant is entitled to delayed possession at prescribed rate of interest i.e. 10.75 % p.a. w.e.f. the due date of handing over the possession as per the buyer's agreement i.e. 27.11.2014 till the receipt of occupation certificate (08.01.2018) plus 2 months i.e., 08.03.2018 as per provisions of sections 18(1) and 19(10) of the Act read with rule 15 of the rules. Further, the respondent is directed to handover the possession of the allotted unit to the complainant complete in all aspects as per specifications of buyer's agreement within one month from date of this order.

## J. Directions of the authority

44. 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 interest at the prescribed rate i.e., 10.75% p.a. for every month of delay from the due date of possession i.e., 27.11.2014 till the date of receipt of occupation certificate plus 2 months i.e., up to 08.03.2018.

   ii. The respondent is directed to handover the physical possession of the unit to the complainant on payment of outstanding dues if any, after adjustment of delay possession charges.

   iii. The arrears of such interest accrued from due date of possession till its admissibility as per direction (i) above shall be paid by the respondent to the complainant within a period of 90 days from the date of this order.

   iv. The rate of interest chargeable from the allottees by the promoter, in case of default in making payment shall be charged at the prescribed rate i.e., 10.75 % by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottees, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

v. The respondent shall not charge anything from the complainant which is not part of the buyer's agreement. The respondent is not entitled to claim holding charges from the complainant/ allottee at any point of time even after being part of the buyer's agreement as per law settled by Hon'ble Supreme Court in civil appeal nos. 3864-3889/2020 decided on 14.12.2020.

46. This decision shall *mutatis mutandis* apply to complaint bearing no. CR/3189/2021 titled as Padampur Nirman Pvt. Ltd. Vs. Emaar India Limited.

47. Both the complaints stand disposed of. True certified copy of this order shall also be placed in complaint file bearing no. CR/3189/2021.

48. File be consigned to registry.

V.l —

**(Sanjeev Kumar Arora)** Member | **(Ashok Sangwan)** Member | **(Vijay Kumar Goyal)** Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 10.10.2023