

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

Complaint no. : 6170 of 2019
Date of filing complaint : 27.12.2019
First date of hearing : 24.01.2020
Date of decision : 27.05.2021

1. Shri Yogesh Sharma 2. Smt. Shilpa Maheshwari Both R/O: - A-203, Concept Unnathi, CHS Limited, Plot No. 69, ABEF, Sector -21, Kharghar, Raigad, Maharashtra-410210	Complainants
Versus	
M/s BPTP Limited Regd. Office at: - M-11, Middle Circle, Connaught Circus, New Delhi -110001	Respondent

CORAM:	
Dr. K.K. Khandelwal	Chairman
Shri Vijay Kumar Goyal	Member
APPEARANCE:	
Sh. Abhijeet Gupta	Advocate for the complainants
Sh. Venket Rao	Advocate for the respondent

ORDER

1. The present complaint has been filed by the complainants/allottees 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 under the provision of the Act or the rules and regulations made there under or to the allottees as per the agreement for sale executed inter se.

A. Unit and project related details

2. The particulars of unit details, 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	'Park Generations', Sector 37-D, Gurugram, Haryana.
2.	Project area	43.558 acres
3.	Nature of the project	Group Housing Complex
4.	a) DTCP license no.	83 of 2008 dated 05.04.2008
	b) License valid up to	04.04.2025
	c) Name of the licensee	Super Belts Pvt. Ltd. and 4 others.
	d) DTCP license no.	94 of 2011 dated 24.10.2011
	e) License valid up to	23.10.2019
	f) Name of the licensee	Countrywide Promoters Pvt. Ltd. and 6 others.
5.	a) RERA registered/not registered	Registered
	b) Registration certificate no.	Registered for present tower T-4 (marketing name T-15 as per the respondent's affidavit

		dated 05.03.2021) vide registration no. 07 of 2018 dated 03.01.2018 valid up to 30.11.2018 (Valid up to 30.04.2018 for towers T-16,17, and 19) (Valid up to 30.11.2018 for towers T-14, 15 and 18)
	c) Extension no.	93 of 2018 dated 12.06.2019 valid up to 31.08.2019
6.	Unit no.	901, 9th floor, tower-T4 (annexure R-7 on page no. 80 of reply)
7.	Unit admeasuring	1470 sq. ft. (annexure R-7 on page no. 80 of reply)
8.	Revised Unit area (as per offer of possession)	1521 sq. ft. (vide statement of accounts on page no. 156 of reply)
9.	Date of execution of the flat buyer's agreement	03.12.2012 (annexure R-7 on page no. 74 of reply)
10.	Payment plan	Construction linked payment plan (annexure R-8 on page no. 106 of reply)
11.	Total consideration	Rs. 76,04,502.95/- (vide statement of accounts on page no. 156 of reply)
12.	Total amount paid by the complainants	Rs. 64,66,462.72/- (vide statement of accounts on page no. 156 of reply)
13.	Possession clause	3. Possession 3.1: Subject to force majeure, as defined in clause 10 and further subject to the

		<p>purchaser(s) having complied with all its obligations under the terms and conditions of this Agreement and the Purchaser(s) not being in default under any part of this Agreement including but not limited to the timely payment of each and every instalment of the total sale consideration including DC, Stamp Duty and other charges and also subject to the Purchaser(s) having complied with all the formalities or documentation as prescribed by the seller/confirming Party, the seller/confirming party proposes to hand over the physical possession of the said unit to the purchaser(s) within as period of 36 months from the date of execution of Flat Buyers Agreement ("Committed Period"). The purchaser(s) further agrees and understands that the seller/confirming party shall additionally be entitled to a period of 180 days (Grace Period) after the expiry of the said commitment period to allow for finishing work and filing and pursuing the Occupancy Certificate etc. from DTCP under the Act in respect of the project "Park Generations" (Emphasis supplied).</p>
14.	Due date of delivery of possession	03.12.2015
15.	Occupation certificate	20.09.2019



		(annexure R-19 on page no. 151 of reply)
16.	Offer of possession	15.10.2019 (annexure R-20 on page no. 153 of reply)
17.	Grace period utilization	Grace period is not allowed in the present complaint.
Note: - The respondent has filed an affidavit (nomenclature) which states that the sanctioned name for T15 (marketing name) is T-4, for which the OC has been granted on 20.09.2019.		

B. Facts of the complaint

3. That in the year 2012, the complainants believing the representations of the respondent of timely completion and standardized construction of the project booked a flat bearing no. T4-901, 9th floor, tower T-4, (hereinafter referred as the said 'unit') in the project "Park Generations" situated in sector-37-D, Gurugram, Haryana (hereinafter referred as the said 'project') with an approximate super area of 1,470 sq. ft. at basic sale price of Rs. 53,80,200/- less discount of Rs. 1,07,604/-.
4. That the complainants entered into a flat buyer's agreement (hereinafter referred as the 'FBA') dated 03.12.2012 with the respondent. The payment plan was agreed to be a construction linked payment plan.
5. That the FBA provided possession of the said unit to the complainants within a period of 36 months from the date of execution of the FBA, with a grace period of 180 days for filling and pursuing the occupancy certificate in respect of the said project. That failing to deliver the said unit to the



complainants within the stipulated period of time, they were entitled to payment of Rs.5/- per square ft. for every month of delay. The aforesaid conditions were clearly laid down in clause 3.1 and 3.3 of the FBA.

6. That despite the aforesaid stipulations, the respondent has failed to deliver the possession of the aforesaid unit to the complainants and more so when they have paid Rs. 51,95,511.71/- towards the basic sale price of Rs. 52,72,596/- and in total, a sum of Rs. 67,46,035/-.
7. That in terms of thereof, the 36-months period expired on 31.12.2015 and a further grace period of 180 days expired on 30.06.2016. On this account, inter alia, a sum of Rs. 2,42,550/- is due till March 2019 (Rs.1470x5+ Rs. 7530 per month for 33 months).
8. That in order to purchase the subject unit, the complainants have taken a loan from ICICI Bank at the interest of 9.75% per annum. The said sums were paid directly to the respondent by the bank. The complainants were compelled to pay the EMI's to the bank without the benefit of enjoying/living in the said unit, which was promised to be delivered to them, latest by 30.06.2016. A sum of Rs. 6,45,955/- has been paid by the complainants towards the EMI from the period 01.07.2016 till 10.03.2019.
9. The respondent was bound to deliver the possession of the apartment by 30.06.2016. It is submitted that the complainants cannot be expected to wait endlessly for possession.

10. That the complainants have suffered immense mental, physical, and financial agony at the hands of the respondent. It is further submitted that the complainants have requested the respondent several times for the redressal of their grievances, but it has never responded to their requests to deliver the possession of the unit.

C. Relief sought by the complainants.

11. The complainants have sought following relief:
- (i) Direct the respondent to pay interest for delay of every month @18% p.a. and to handover the possession of the subject unit.
 - (ii) Direct the respondent to pay Rs. 2,42,550/- in term of contractual obligation casted upon the respondent from the period 01.07.2016 till the date of filling of the petition along with future payment of Rs. 7350/- per month from the date of filling of petition till the date of possession of flat

D. Reply by the respondent.

12. That the complainants themselves are defaulters under section 19 (6), 19 (7) and 19 (10) of the Real Estate (Regulation and Development) Act, 2016 and not in compliance of these sections. The complainants cannot seek any relief under the provision of the Act of 2016 or rules frame thereunder.
13. That upon completion of construction and upon getting/securing occupancy certificate from the competent



authority, the respondent has issued the offer of possession letter cum final notice on 15.10.2019. The delay in completion of project, if any, does not give any entitlement to the complainants to hold the due payments and seek refund of the unit where construction is complete, and OC has been granted by the competent authority.

14. That the complainants have approached this authority for redressal of their alleged grievances with unclean hands, i.e., by not disclosing material facts pertaining to the case at hand and, by distorting and/or misrepresenting the actual factual situation with regard to several aspects. It is further submitted that the hon'ble apex court in plethora of decisions has laid down strictly, that a party approaching the court for any relief, must come with clean hands, without concealment and/or misrepresentation of material facts, as the same amounts to fraud not only against the respondent but also against the court and in such situation, the complaint is liable to be dismissed at the threshold without any further adjudication. The respondent has contented on the following grounds: -

- That the complainants in the complaint have concealed the material fact that possession along with compensation has already been offered to them on 15.10.2019. So, instead of clearing the outstanding dues and taking possession of the unit and getting the conveyance deed executed, they have filed this frivolous complaint.

- That the complainants having made the payment on 25.07.2012 vide 3 cheques qua the demand dated 04.07.2012 raised by the respondent. however, the cheque bearing no. 930961 drawn for Rs. 277,998.00/- was dishonoured as the branch location on the cheque was not specified by the complainants. Hence, the respondent was constrained to issue a reminder letter dated 21.09.2012 for payment of the outstanding amount.
- That with the motive to encourage the complainants to make payment of the dues within the stipulated time, the respondent also gave additional incentive in the form of timely payment discount to them and in fact, till date, they have availed timely payment discount of Rs. 2,06,016.53/-. It is further submitted that at the stage of booking, the respondent offered an inaugural discount on basic sale price (BSP) amounting to Rs. 107,604.00/-. Thus, the net BSP charged from the complainants is less than the original amount of the unit.
- That the respondent vide demand letters as well as numerous emails has kept updated and informed the complainants about the milestone achieved and progress in the developmental aspects of the project. The respondent vide various emails has shared photographs of the project in question. The respondent has always acted bonafidely towards its customers including the complainants; and thus, has always

maintained a transparency with regard project progress. In addition to updating the complainants, the respondent on numerous occasions, on each and every issue/s and/or query/s upraised in respect of the unit in question has always provided steady and efficient assistance. The several efforts were made by the respondent to attend to the queries of the complainants to their complete satisfaction.

15. That from the above, it is very well established, that the complainants have approached this authority with unclean hands by distorting/ concealing/ misrepresenting the relevant facts pertaining to the case at hand. It is further submitted that the sole intention of the complainants is to unjustly enrich themselves at the expense of the respondent by filing this frivolous complaint which is nothing but gross abuse of the due process of law. The present complaint warrants dismissal without any further adjudication.
16. That agreements which were executed prior to implementation of the Act of 2016 and the rules shall be binding on the parties and cannot be reopened. Thus, both the parties being signatory to a duly documented FBA executed by the complainants out of their own free will and without any undue influence or coercion are bound by the terms and conditions so agreed between them.
17. That the relief(s) sought by the complainants is unjustified, baseless and beyond the scop/ambit of the agreement duly executed between the parties, which forms a basis for the



subsisting relationship between the parties. It is submitted that the complainants entered into the said agreement with the respondent with open eyes and are bound by the same. The relief(s) sought by the complainants travel beyond the four walls of the agreement duly executed between the parties. The complainants while entering into the agreement have accepted and are bound by each and every clause of the said agreement, including clause-3.3 which provides for delayed penalty in case of delay in delivery of possession of the said unit by the respondent. It is further submitted the detailed relief claimed by the complainants goes beyond the jurisdiction of this authority under the Real Estate (Regulation and Development) Act, 2016 and therefore, the present complaint is not maintainable qua the reliefs claimed by them.

18. That at the stage of entering into the agreement and raising vague allegations and seeking baseless reliefs beyond the ambit of the agreement, the complainants are blowing hot and cold at the same time which is not permissible under law as the same is in violation of the '*Doctrine of Aprobate & Reprobate*'. Therefore, in light of the settled law, the relief sought by the complainants in the complaint under reply cannot be granted by this authority.
19. The parties had agreed under the flat buyer's agreement to attempt at amicably settling the matter and if the matter is not settled amicably, to refer the matter for arbitration.



Admittedly, the complainants have raised the dispute but did not take any steps to invoke arbitration.

20. That the complainants duly executed FBA on 03.12.2012 wherein they agreed. that subject to force majeure, the possession of the flat to them would be handed over within 36 months from the date of the execution of the FBA along with a further grace period of 180 days. The remedy in case of delay in offering possession of the unit was also agreed to between the parties as also extension of time for offering possession of the flat. It is pertinent to point out that the said understanding had been achieved between the parties at the stage of entering into the transaction in as much as similar clauses, being clause no. 18 (proposed timelines for possession), clause 19 (penalty for delay in offering possession), clause 42 (force majeure) had been agreed upon between the parties under the application form also.
21. That the project "Park Generations" had been marred with serious defaults in timely payment of instalments by majority of customers, due to which, on the one hand, the respondent has to encourage additional incentives like TPD while on the other hand, delays in payment caused major setback to the development works. Hence, the proposed timelines for possession stood diluted.
22. That the possession of the unit in question had been delayed on account of reasons beyond the control of the respondent. It is submitted that the construction was affected on account of the NGT order prohibiting construction (structural)

activity of any kind in the entire NCR by any person, private or government authority. It was submitted that vide its order, NGT placed sudden ban on the entry of diesel trucks more than ten years old and said that no vehicle from outside or within Delhi would be permitted to transport any construction material. Since the construction activity was suddenly stopped, after the lifting of the ban, it took some time for mobilization of the work by various agencies employed with the respondent.

23. That the construction has been completed and the occupation certificate for the same has been received where after, the respondent has already offered possession to the complainants. However, the complainants, being an investor do not wish to take possession as the real estate market is down and there are no sales in secondary market and thus has initiated the present frivolous litigation.
24. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submission made by the parties.
25. Written arguments on behalf of the complainants were also filed reiterating their version as stated in the complaint and contravening the pleas of the respondent/builder.

E. Jurisdiction of the authority

The respondent has raised an objection regarding jurisdiction of authority to entertain the present complaint. The authority observes that it has territorial as well as



subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana the jurisdiction of Haryana Real Estate Regulatory Authority, Gurugram shall be entire Gurugram district for all purposes. 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

Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottees as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

Section 11(4)(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.

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

26. The contention of the respondent is that authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the apartment 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 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. The 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) decided on 06.12.2017 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."

27. Further, 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."

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

F. II Objection regarding untimely payments done by the complainants.

29. The respondent has contended that the complainants have made default in making payments as a result thereof, it had to issue reminder letters dated 21.09.2012 and 21.11.2019. Clause 11.1 of the buyer's agreement provides that timely payment of instalment is the essence of the transaction, and the relevant clause is reproduced below:

"11. TIMELY PAYMENT IS THE ESSENCE OF THIS AGREEMENT, TERMINATION, AND FORFEITURE"

11.1 (a) (i) Timely Payments of each instalment of the total sale consideration i.e., basic sale price and other charges as stated herein is the essence of this transaction /agreement. In case payment of any

instalment as demanded by the Seller/Confirming party is delayed on any account whatsoever or partial payment of the instalment is made, then the Purchaser (s) shall pay interest on the amount due @ 18% p.a. compounded quarterly. However, if the Purchaser(s) fails to make complete payment of any of the instalments with interest within 3 months from the due date if the outstanding amount, the seller/confirming party may at its sole discretion forfeit the amount of Earnest money, interest accrued (weather paid or not) on all delayed payments till the date of termination and any other amount of non-refundable nature including brokerage charges paid by the Seller/Confirming Party to the broker in case the booking is done through a broker and in such an event the Allotment shall stand cancelled and the Purchaser(s) shall be left with no right, lien or interest on the said Flat and the Seller/ Confirming Party shall have the right to sell the said flat to any other person

(a) (ii) The Seller/ Confirming Party shall also be entitled to terminate/ cancel the allotment in the event of default of any of the terms and conditions of this application/agreement."

30. At the outset, it is relevant to comment on the said clause of the agreement i.e., "11. *TIMELY PAYMENT IS THE ESSENCE OF AGREEMENT, TERMINATION, AND FORFEITURE*" wherein the payments to be made by the complainants have been subjected to all kinds of terms and conditions. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favor of the promoter and against the allottee that even a single default by the allottee in making timely payment as per the payment plan may result in termination of the said agreement and forfeiture of the earnest money. Moreover, the authority has observed that despite complainants being in default in making timely payments, the respondent has not exercised his discretion to terminate the

buyer's agreement. The attention of authority was also drawn towards clause 11.3 of the flat buyer's agreement whereby the complainants are be liable to pay the outstanding dues together with interest @ 18% p.a. compounded quarterly or such higher rate as may be mentioned in the notice for the period of delay in making payments. In fact, the respondent has charged delay payment interest as per clause 11.3 of the buyer's agreement and has not terminated the agreement in terms of clause 11.1 of the buyer's agreement. In other words, the respondent has already charged penal interest from the complainants on account of delay in making payments as per the payment schedule. However, after the enactment of the Act of 2016, the position has changed. Section 2(z) 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 complainants shall be charged at the prescribed rate i.e., 9.50% by the respondent which is the same as is being granted to the complainants in case of delay possession charges.

F. III Objection regarding complainants are in breach of agreement for non-invocation of arbitration.

31. The respondent has raised an objection for not invoking arbitration proceedings as per the provisions of flat buyer's agreement which contains a provision regarding initiation of arbitration proceedings in case of breach of agreement. The

following clause has been incorporated w.r.t arbitration in the buyer's agreement:

"33. Dispute Resolution by Arbitration

All or any disputes arising out of or touching upon or in relation to the terms of this Agreement including the interpretation and validity of the terms thereof and the respective rights and obligations of the Parties shall be settled amicably by mutual discussion failing which the same shall be settled through arbitration. The arbitration shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory amendments/modifications thereto for the time being force. The arbitration proceedings shall be held at an appropriate location in New Delhi by a Sole Arbitrator who shall be appointed by the Managing Director of the seller and whose decision shall be final and binding upon the parties. The Purchaser(s) hereby confirms that he shall have no objection to this appointment of the Sole Arbitrator by the Managing Director of the Seller, even if the person so appointed, as a Sole Arbitrator, is an employee or advocate of the Seller/Confirming Party or is otherwise connected to the Seller/ Confirming Party and the Purchaser(s) confirms that notwithstanding such relationship/connection, the Purchaser(s) shall have no doubts as to the independence or impartially of the said Sole Arbitrator. The Courts at New Delhi and Delhi high Court at New Delhi alone shall have the jurisdiction."

32. The authority is of the opinion that the jurisdiction of the authority cannot be fettered by the existence of an arbitration clause in the buyer's agreement as it may be noted that section 79 of the Act bars the jurisdiction of civil courts about any matter which falls within the purview of this authority, or the Real Estate Appellate Tribunal. Thus, the intention to render such disputes as non-arbitrable seems to be clear. Section 88 of the Act also says that the provisions of this Act shall be in addition to and not in derogation of the provisions of any other



law for the time being in force. Further, the authority puts reliance on catena of judgments of the Hon'ble Supreme Court, particularly in *National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506* and followed in case of *Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017*, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, consequently the authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause. Therefore, by applying same analogy the presence of arbitration clause could not be construed to take away the jurisdiction of the authority.

33. While considering the issue of maintainability of a complaint before a consumer forum/commission in the fact of an existing arbitration clause in the builder buyer agreement, the hon'ble Supreme Court **in case titled as *M/s Emaar MGF Land Ltd. V. Aftab Singh in revision petition no. 2629-30/2018 in civil appeal no. 23512-23513 of 2017 decided on 10.12.2018*** has upheld the aforesaid judgement of NCDRC and as provided in Article 141 of the Constitution of India, the law declared by the Supreme Court shall be binding on all courts within the territory of India and accordingly, the authority is bound by the aforesaid view.
34. Therefore, in view of the above judgements and considering the provision of the Act, the authority is of the view that

complainants are well within their rights to seek a special remedy available in a beneficial Act such as the Consumer Protection Act, 1986 and Act of 2016 instead of going in for an arbitration. Hence, we have no hesitation in holding that this authority has the requisite jurisdiction to entertain the complaint and that the dispute does not require to be referred to arbitration necessarily.

G. Findings on the relief sought by the complainants.

Reliefs sought by the complainants: The complainants have sought following relief(s):

- i. Direct the respondent to pay interest for the delay of every month @18% p.a. and to handover the possession of the subject unit.
- ii. Direct the respondent to pay Rs. 2,42,550/- in term of contractual obligation casted upon it from the period 01.07.2016 till the date of filling of the petition along with future payment of Rs. 7350/- per month from the date of filling of petition till the date of possession of flat.

35. 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."

36. Clause 3.1 of the flat buyer's agreement provides for handing over of possession and is reproduced below:

"3.1 Subject to Force Majeure, as defined in clause 10 and further subject to the purchaser(s) having complied with all its obligations under the terms and conditions of this Agreement and the Purchaser(s) not being in default under any part of this Agreement including but not limited to the timely payment of each and every instalment of the total sale consideration including DC, Stamp Duty and other charges and also subject to the Purchaser(s) having complied with all formalities or documentation as prescribed by the Seller/Confirming Party, the Seller/Confirming Party proposes to hand over the physical possession of the said unit to the purchaser(s) within a period of 36 months from the date of execution of the Flat Buyers Agreement (Commitment Period). The Purchaser(s) further agrees and understands that the Seller/Confirming Party shall additionally be entitled to a period of 180 days (Grace Period) after the expiry of the said commitment period to allow for finishing work and filing and pursuing the Occupancy Certificate etc from DTCP under the Act in respect of the Project "Park Generations".

37. At the inception, it is relevant to comment on the pre-set possession clause of the flat buyer's agreement wherein the possession has been subjected to innumerable terms and conditions, force majeure circumstances and innumerable terms and conditions. The drafting of this clause is not only vague but so heavily loaded in favour of the promoters that



even a single default by the allottee in fulfilling obligations, formalities and documentations etc. as prescribed by the promoters may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoters 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.

38. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within period of 36 months from the date of execution of agreement. In the present complaint, the date of execution of agreement is 03.12.2012. Therefore, the due date of handing over possession comes out to be 03.12.2015. It is further provided in agreement that promoter shall be entitled additionally to a grace period of 180 days for finishing work and filing and obtaining the occupancy certificate etc. from DTCP. As a matter of fact, from the perusal of occupation certificate dated 20.09.2019, it is implied that the promoter applied for occupation certificate only on 28.06.2019 which is later than 180 days from the due date of possession i.e., 03.12.2015. The clause clearly implies that the grace period was meant for filing and obtaining occupation certificate. Therefore, as

the promoter applied for the occupation certificate much later than the statutory period of 180 days, it does not fulfil the criteria for grant of the grace period., As per the settled law, one cannot be allowed to take advantage of his own wrongs. Accordingly, this grace period of 180 days cannot be allowed to the promoter. Relevant clause regarding grace period is reproduced below: -

"Clause 3.1The Purchaser(s) agrees and understands that the Seller/Confirming Party shall additionally be entitled to a grace period of 180 days, after expiry of the said commitment period to allow for finishing work and filing and obtaining the Occupation Certificate etc. from DTCP under the Act in respect of the project 'Park Generations'

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

Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]

- (1) *For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.*

Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.

40. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.
41. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., 27.05.2022 is 7.50%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.50%.
42. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

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

*Explanation. —For the purpose of this clause—
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 interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount

or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"

43. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 9.50% by the respondent/promoter which is the same as is being granted to the complainants in case of delayed possession charges.
44. On consideration of the documents available on record and submissions made by both the parties, 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 3.1 of the flat buyer's agreement executed between the parties on 03.12.2012, the possession of the subject unit was to be delivered within 36 months from the date of execution of agreement i.e., 03.12.2015. Therefore, the due date of handing over possession was 03.12.2015. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over possession was 03.12.2015. The occupation certificate of the project has been received by the respondent on 20.09.2019 and the possession of the subject unit was offered to the complainants on 15.10.2019. The authority is of the considered view that there is delay on the part of the respondent to offer possession of the allotted unit to the complainants as per the terms and conditions of the flat buyer's agreement dated 03.12.2012

executed between the parties. It is the failure on part of the promoter to fulfil its obligations and responsibilities as per the flat buyer's agreement to hand over the possession within the stipulated period.

45. 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 20.09.2019. The respondent offered the possession of the unit in question to the complainants only on 15.10.2019. So, it can be said that the complainants came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the complainants should be given 2 months' time from the date of offer of possession. This 2 month of reasonable time is being given to the complainants keeping in mind that even after intimation of possession, practically they have to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit, but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e., 03.12.2015 till the expiry of 2 months from the date of offer of possession (15.10.2019) which comes out to be 15.12.2019.
46. 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 delay possession at prescribed rate of interest i.e., 9.50% p.a. w.e.f. 03.12.2015 till 15.12.2019 as per provisions of section 18(1) of the Act read with rule 15 of the rules and section 19 (10) of the Act.

H. Directions of the authority

47. 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 of 9.50% p.a. for every month of delay from the due date of possession i.e., 03.12.2015 till the date of offer of possession i.e., 15.10.2019 + 2 months i.e., 15.12.2019 to the complainants as per section 19(10) of the Act.
- ii. The arrears of such interest accrued from 03.12.2015 till 15.12.2019 shall be paid by the promoter to the allottees within a period of 90 days from date of this order as per rule 16(2) of the rules.
- iii. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
- iv. The rate of interest chargeable from the allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.50% by the respondent/promoter

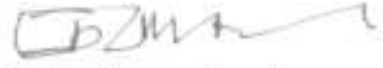
which is the same rate of interest which the promoter shall be liable to pay the allottees, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

- v. The respondent shall not charge anything from the complainants which is not the part of the agreement. However, holding charges shall also not be charged by the promoter at any point of time even after being part of agreement as per law settled by the Hon'ble Supreme Court in civil appeal no. 3864-3889/2020 dated 14.12.2020.

48. Complaint stands disposed of.

49. File be consigned to registry.


(Vijay Kumar Goyal)
Member


(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 27.05.2022