

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

**Complaint no. : 1743 of 2018**  
**First date of hearing: 12.03.2019**  
**Date of decision : 12.03.2019**

1. Mrs. Sadhna Singh
2. Mr. Ashok Kumar Singh  
R/o: C-69, Defence Colony, New Delhi –  
110024  
Also at: 4124, Prestige South Ridge,  
Hoskerehalli Cross, B.S.K 3<sup>rd</sup> stage,  
Bengaluru - 560085

... Complainants

Versus

M/s Pioneer Urban Land and Infrastructure  
Ltd. (through its Director)  
Address: Paras downtown centre, 7<sup>th</sup> floor, Golf  
course road, sector 53, Gurugram.

... Respondent

**CORAM:**

Shri Samir Kumar  
Shri Subhash Chander Kush

Member  
Member

**APPEARANCE:**

Shi Kailash Pandey  
Shri Ishan Dang

Advocate for the complainant.  
Advocate for the respondent.

**ORDER**

1. A complaint dated 13.11.2018 was filed under section 31 of the Real Estate (Regulation and Development) Act, 2016 read with rule 28 of the Haryana Real Estate (Regulation and Development) rules, 2017 by the complainants, Mrs. Sadhna Singh and Mr. Ashok Kumar Singh, against the promoters, M/s



Pioneer Urban Land and Infrastructure Ltd., in respect of the termination of allotment of the apartment no. ~~3002~~<sup>1002,</sup> tower ~~C~~<sup>A</sup>, project Araya, sector 62, golf course extension road, Gurugram by the respondent vide letter dated 17.10.2018 on account of non-execution of buyer's agreement within stipulated by the complainant for the same.

2. Since the buyer's agreement dated 25.05.2012 was executed prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, so the penal proceedings cannot be initiated retrospectively, therefore, the authority has decided to treat this complaint as an application for non-compliance of obligation on the part of the respondents/ complainant, as the case may be under section 34(f) of the Act ibid.
3. The particulars of the complaint are as under: -

1.	Name and location of the Project	"Araya" at sector 62, golf course extension road, Gurugram.
2.	Nature of real estate project	Group housing colony.
3.	Total area of the project	24.606 acres
4.	DTCP license no.	268 of 2007 dated 03.12.2007
5.	Date of buyer's agreement	25.05.2012 (Annexure - C1)
6.	Unit no.	A-1002, 10 <sup>th</sup> floor, A-tower
7.	Unit area	4279 sq. ft'
8.	RERA Registered / not registered	<b>101 of 2017</b>
9.	RERA registration valid upto	<b>31.12.2019</b>



*Corrected vide order dated 31/05/19.*



10.	Total consideration	Rs. 4,72,66,187.33/- (Annexure C-3, page 118))
11.	Total amount paid by the complainant till date	Rs. 4,59,00,159.97/- (Annexure C-3, page 118)
12.	Due date of delivery of possession clause 11.2 and 11.3 - developer shall apply for OC within 39 months from the date of excavation subject to government approvals and sanctions + 180 days grace period	04.03.2016 ( <b>calculated from start of excavation i.e. 04.06.2012</b> ) (Annexure C-3, page 116)
13.	Possession offered on	28.08.2018
14.	Delay in offering possession i.e. till 28.08.2018	2 years 5 months 24 days
15.	Penalty clause	Clause 11.5(i) - Rs. 10/- per sq. ft' of super area

4. The details provided above have been checked on the basis of record available in the case file which has been provided by the complainant and the respondent. A buyer's agreement dated 25.05.2012 is available on record for the aforesaid apartment according to which the possession of the said unit was to be delivered to the complainant by 04.03.2016.
5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance. The reply has been filed by the respondent which has been perused by the authority.



#### Facts of the complaint

6. Brief facts leading to the present complaint are that the complainants have booked an apartment bearing No. A-1002

on 10th floor in tower 'A' having tentative super area of 4279 sq. ft. usage rights for 03 car parking space vide application No. 85 dated 27/02/2012.

7. That subsequently, Apartment Buyer's Agreement was executed between the complainants and the respondent on 25/05/2012. Terms of agreement are self-explanatory.
8. The complainants submitted that as per para 3.1 of the agreement, total agreed sale consideration of the above apartment was Rs.4,41,69,244/- (Rupees four crore forty one lakh sixty nine thousand two hundred forty four only). Out of the above agreed sale consideration, the Complainants have paid Rs.4,46,62,751/- (Rupees Four crore Forty Six Lakh Sixty Two Thousand Seven Hundred Fifty one only). The above payments are duly received by the Respondent against receipts.
9. The complainants submitted that vide intimation for possession dated 28/08/2018, the respondent informed the complainants that they are in process of giving possession of the apartment and asked to remit the remaining amount alongwith certain other charges within 60 days. It is respectfully submitted before this hon'ble authority that in the aforementioned intimation of possession, the respondent neither stated anywhere that they obtained occupancy





certificate and completion certificate from the competent authority nor shared with the complainants. The respondent also did not disclose that they have completed the project as per agreement. The respondent also did not pay compensation towards delay in delivery of possession as per provisions of RERA. From the site inspection, the complainants came to know that the construction work is still going on in the project and the respondent has not made all facilities of the project upto mark. The complainants respectfully further submit that the apartment is not fit for human rehabilitation as the construction work is already going on. It is also not safe in health point of view. Completing the entire project and making it fit for human rehabilitation will take considerable time and the complainants are having no hope to get their apartment with all facilities in near future.

10. The complainants submitted that the complainants have written various mails to the respondent requesting to provide detail of development but the respondent never gave satisfactory reply.
11. The complainants are senior citizens. The Complainant No.2 is 66 years old and complainant no.1 is 62 years old. At the time of booking of the apartment the complainants were desirous to settle in Gurgaon (Now Gurugram) but seeing inordinate





delay in construction of the project, the complainants have settled down in Bangalore. It is necessary to submit before this hon'ble authority that there are 38 months delay. The project is still not complete. The construction work in the project is not yet complete as work is going on in the tower itself apart from on the surrounding towers. The project is unhealthy and unsafe, especially for senior citizens like us. The amenities like club, green area etc. promised in the brochure are yet to be completed. In these circumstances specially seeing the delay in completion of project, lacks of amenities promised and unhealthy environment, the complainants are not willing to continue with the project and seeking refund of their entire deposited amount with interest.

12. The complainants submitted that the respondent has not completed the construction work at site and the apartment booked by the complainants are still not complete. seeing the development work in the project, the complainants have no hope that the respondent will able to handover possession of the booked apartment to the complainants in near future. There is already delay of more than 38 months in delivery of booked apartment. Under these circumstances the complainants are filing the present complaint before this



hon'ble authority seeking refund of entire deposited amount with interest @ 18% per annum as per provisions of RERA.

13. The complainants submitted that the complainants have not filed any other or similar complaint before any other court/forum/authority seeking identical relief(ves).
14. That the project is situated within territorial jurisdiction of this hon'ble authority hence this hon'ble authority is competent to try and adjudicate the present complaint.

#### Issues to be determined

- I. Whether the complainants are entitled for refund of their entire deposited amount of Rs.4,46,62,751/- as per provisions of section 18(i) of Real Estate (Regulation and Development) Act, 2016 ?
- II. Whether the complainants are entitled for interest @ 18% per annum on the deposited amount as per provisions of section 18 of Real Estate (Regulation and Development) Act, 2016?
- III. Whether the respondent is entitled for holding charges or any other charges on the face of fact that the entire project is not complete ?



### Reliefs sought

- I. Direct the respondent to refund the entire deposited amount of Rs.4,46,62,751/- to the complainants, in the interest of justice.
- II. Direct the respondent to pay interest to the complainants @ 18% per annum on the deposited amount from date of making payment till its realization on prorata basis, in the interest of justice.
- III. Direct the respondent to pay litigation cost to the complainants.
- IV. Restrain the respondent not to raise any kind of demand towards holding charges or any other charges till completion of entire project ?
- V. Pass such other or further order or orders as this hon'ble authority may deem fit and proper under the facts and in the circumstances of the present case.

### Respondent's reply

15. The present complaint is not maintainable and the provisions of RERA Act are not applicable to the project in question. The plea of compensation by the complainant are to be decided by the adjudicating officer under section 71 of the Act read with rule 29.





16. The application for issuance of OC in respect to the said unit was made on 04.04.2018 and the OC was issued on 23.07.2018. OC of tower A of Araya was received on 23.07.2018 vide memo no. ZP-338-C-VOL-I/SD(BS)/2018/21712. The project is registered under RERA Act and rules vide registration no. 101 of 2017 dated 24.08.2017.
17. The complainant booked apartment bearing no. A-1002 on 10<sup>th</sup> floor of tower-A in the project araya at Sector 62 having super area of 4279 sq. ft' along with 3 car parking spaces and buyer's agreement was executed on 25.05.2012.
18. The complainants were offered possession on 28.08.2018 and were called to remit the balance payment including delay payment charges and to complete necessary formalities for handing over of the said unit to the complainants. However, the complainants did not take necessary steps to complete the necessary formalities.
19. The complainants were irregular in making payments from the beginning and the allottees who complied with all the terms of buyer's agreement including timely payments are





entitled to receive compensation under the agreement. In spite of the same, in good faith, the respondent credited the account of the complainants to the tune of Rs. 13,01,938/- as per the penalty in clause 11.5 of the buyer's agreement i.e. Rs. 10/- per sq. ft' per month.

20. It is pertinent to note that an offer for possession marks termination of the period of delay, if any. The complainants are not entitled to contend that the period of delay continued even after receipt of offer for possession. The complainants have consciously refrained from obtaining possession of the unit in question. The complainants are therefore liable for holding charges as provided in buyer's agreement for not taking possession.

21. All the demands raised by the respondent are strictly in accordance with terms and conditions of the buyer's agreement between the parties. The complainants have assailed clauses of the buyer's agreement almost after 6 years and it is grossly barred by limitation. The Supreme Court in a ruling dated 08.05.2009 suspended all mining activities in the aravali range in Haryana which led to scarcity of sand and





other materials. The respondent was in acute shortage of labour, water and other raw materials, permits, licenses, sanctions by different departments and these reasons were beyond the control of respondent.

22. The application form contemplated a dispute resolution mechanism under clause 54 as per which any dispute inter-se the parties was to be referred to arbitration which shall be held in Gurugram. Further, as per clause 51 of the buyer's agreement, the settlement of disputes will be done by the way of arbitration only.

### Determination of Issues

23. With respect to the **first and second issue**, the authority came across clause 11.2 and 11.3 which are reproduced hereunder

*"clause 11.2 and 11.3 - developer shall apply for OC within 39 months from the date of excavation subject to government approvals and sanctions + 180 days grace period"*

Therefore, the due date of possession comes out to be 04.03.2016 and the possession has been offered by the respondent on 28.08.2018 so there has been a delay of 2 years 5 months 24 days in handing over of possession. The complainants cannot be entitled to refund as they have already





been offered possession and it will affect the interest of other allottees who wish to continue with the project. The complainants are however entitled to delay possession charges from the due date of possession till the offer of possession at the prescribed rate i.e. 10.75% p.a.

24. With respect to the **third issue**, the authority came across clause 11.4(ii) of the buyer's agreement which is reproduced hereunder:

*"if the allottee fails to take over the said apartment within the time limit prescribed by the developer in its notice, then the said apartment shall lie at the risk of cost of the intending allottee and the developer shall have no liability or concern thereof. Further, the developer shall have the option to cancel the allotment of the said apartment under this agreement and avail the remedies under clause 23 of this agreement and alternatively the developer may decide to condone the delay by the intending allottee on the condition that the allottee shall pay the developer compensation @Rs.10/- per sq. ft' of the super area of the said apartment per month for the entire period of such delay."*

As per this clause the respondent has the discretion to either cancel the allotment or condone the delay by levying a penalty upon the complainant. As the contract was signed before the coming of RERA, the Act shall apply retrospectively.



### Findings of the authority-

25. The authority has complete jurisdiction to decide the complaint in regard to non-compliance of obligations by the promoter as held in *Simmi Sikka V/s M/s Emaar MGF Land Ltd.* leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, 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.

26. The amendment of Section 8 of the Arbitration and conciliation act does not have the effect of nullifying the ratio of catena of judgments of the hon'ble Supreme Court, particularly in *National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506*, 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.

27. Further, in *Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015*, it was held that the arbitration clause in agreements between the complainants and builders could not circumscribe jurisdiction of a consumer.

**Decision and directions of the authority -**

28. After taking into consideration all the material facts produced by the parties, the authority exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issue the following directions:-

- (i) Counsel for the respondent has raised an issue that the respondent has offered possession letter dated 28.8.2018. Occupation certificate dated 23.7.2018 has been received by the respondent. A buyer's agreement dated 25.5.2012 was executed inter-se the parties. A flat unit A-1002, 10<sup>th</sup> floor, tower A had been booked by the complainant in ARAYA, in Sector 62, Golf Course Extension Road, Gurugram, the possession of which was to be handed over to the complainant within a period of 39 months + 6



months as grace period as per buyer's agreement executed inter-se the parties on 25.5.2012 or from the date of start of excavation work i.e. 04.06.2012 and the due date of possession comes out to be 04.03.2016. Project is registered with the authority vide no. 101/2017. The RERA registration is valid upto 31.12.2019. Since the possession has been offered on 28.08.2018 for which buyer is entitled for delayed possession charges.

(ii) However, counsel for respondent stated that as per clause 11.5(i) of buyer's agreement dated 25.05.2012, the delayed possession charges @ of Rs.10/- per square feet to the extent of Rs.13,01,938/- have already been given to the complainant as per terms and conditions of agreement. Since the inception of RERA Act, 2016 the provisions of delayed possession charges are admissible at the prescribed rate of 10.75% per annum w.e.f. 04.03.2016.

(iii) In view of all facts and circumstances of case, complainant is not entitled to refund in any manner. However, he is eligible for delayed possession charges at the rate of 10.75% per annum w.e.f



4.3.2016. Respondent is directed to refund the due amount accrued on account of grant of delayed possession charges after deducting the amount already adjusted/given to the complainant.

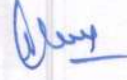
- (iv) Counsel for the respondent has raised a pertinent issue w.r.t. clause 51 of agreement, which is an arbitration clause. Section 8 (1) of the said Act was amended in the year 2015. However, since the HRERA authority is not discussing or deciding the matter with regard to arbitration, respondent is at liberty to challenge the matter before the appellate tribunal. Complainant is directed to take over possession within one month.

29. The order is pronounced.

30. Case file be consigned to the registry.

  
(Samir Kumar)

Member

  
(Subhash Chander Kush)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 12.03.2019

Corrected judgement uploaded on 10.06.2019





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

**Complaint no. : 1743 of 2018**  
**First date of hearing: 12.03.2019**  
**Date of decision : 12.03.2019**

1. Mrs. Sadhna Singh
2. Mr. Ashok Kumar Singh  
R/o: C-69, Defence Colony, New Delhi –  
110024  
Also at: 4124, Prestige South Ridge,  
Hoskerehalli Cross, B.S.K 3<sup>rd</sup> stage,  
Bengaluru - 560085

**... Complainants**

**Versus**

M/s Pioneer Urban Land and Infrastructure  
Ltd. (through its Director)  
Address: Paras downtown centre, 7<sup>th</sup> floor, Golf  
course road, sector 53, Gurugram.

**... Respondent**

**CORAM:**

Shri Samir Kumar  
Shri Subhash Chander Kush

**Member**  
**Member**

**APPEARANCE:**

Shi Kailash Pandey Advocate for the complainant.  
Shri Ishan Dang Advocate for the respondent.

**ORDER**

1. A complaint dated 13.11.2018 was filed under section 31 of the Real Estate (Regulation and Development) Act, 2016 read with rule 28 of the Haryana Real Estate (Regulation and Development) rules, 2017 by the complainants, Mrs. Sadhna Singh and Mr. Ashok Kumar Singh, against the promoters, M/s



Pioneer Urban Land and Infrastructure Ltd., in respect of the termination of allotment of the apartment no. 3002, tower C, project Araya, sector 62, golf course extension road, Gurugram by the respondent vide letter dated 17.10.2018 on account of non-execution of buyer's agreement within stipulated by the complainant for the same.

2. Since the buyer's agreement dated 25.05.2012 was executed prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, so the penal proceedings cannot be initiated retrospectively, therefore, the authority has decided to treat this complaint as an application for non-compliance of obligation on the part of the respondents/ complainant, as the case may be under section 34(f) of the Act *ibid*.
3. The particulars of the complaint are as under: -

1.	Name and location of the Project	"Araya" at sector 62, golf course extension road, Gurugram.
2.	Nature of real estate project	Group housing colony.
3.	Total area of the project	24.606 acres
4.	DTCP license no.	268 of 2007 dated 03.12.2007
5.	Date of buyer's agreement	25.05.2012 (Annexure - C1)
6.	Unit no.	A-1002, 10 <sup>th</sup> floor, A-tower
7.	Unit area	4279 sq. ft'
8.	RERA Registered / not registered	<b>101 of 2017</b>
9.	RERA registration valid upto	<b>31.12.2019</b>



10.	Total consideration	Rs. 4,72,66,187.33/- (Annexure C-3, page 118))
11.	Total amount paid by the complainant till date	Rs. 4,59,00,159.97/- (Annexure C-3, page 118)
12.	Due date of delivery of possession clause 11.2 and 11.3 – developer shall apply for OC within 39 months from the date of excavation subject to government approvals and sanctions + 180 days grace period	04.03.2016 ( <b>calculated from start of excavation i.e. 04.06.2012</b> ) (Annexure C-3, page 116)
13.	Possession offered on	28.08.2018
14.	Delay in offering possession i.e. till 28.08.2018	2 years 5 months 24 days
15.	Penalty clause	Clause 11.5(i) – Rs. 10/- per sq. ft' of super area

4. The details provided above have been checked on the basis of record available in the case file which has been provided by the complainant and the respondent. A buyer's agreement dated 25.05.2012 is available on record for the aforesaid apartment according to which the possession of the said unit was to be delivered to the complainant by 04.03.2016.

5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance. The reply has been filed by the respondent which has been perused by the authority.

### **Facts of the complaint**

6. Brief facts leading to the present complaint are that the complainants have booked an apartment bearing No. A-1002



on 10th floor in tower 'A' having tentative super area of 4279 sq. ft. usage rights for 03 car parking space vide application No. 85 dated 27/02/2012.

7. That subsequently, Apartment Buyer's Agreement was executed between the complainants and the respondent on 25/05/2012. Terms of agreement are self-explanatory.

8. The complainants submitted that as per para 3.1 of the agreement, total agreed sale consideration of the above apartment was Rs.4,41,69,244/- (Rupees four crore forty one lakh sixty nine thousand two hundred forty four only). Out of the above agreed sale consideration, the Complainants have paid Rs.4,46,62,751/- (Rupees Four crore Forty Six Lakh Sixty Two Thousand Seven Hundred Fifty one only). The above payments are duly received by the Respondent against receipts.

9. The complainants submitted that vide intimation for possession dated 28/08/2018, the respondent informed the complainants that they are in process of giving possession of the apartment and asked to remit the remaining amount alongwith certain other charges within 60 days. It is respectfully submitted before this hon'ble authority that in the aforementioned intimation of possession, the respondent neither stated anywhere that they obtained occupancy



certificate and completion certificate from the competent authority nor shared with the complainants. The respondent also did not disclose that they have completed the project as per agreement. The respondent also did not pay compensation towards delay in delivery of possession as per provisions of RERA. From the site inspection, the complainants came to know that the construction work is still going on in the project and the respondent has not made all facilities of the project upto mark. The complainants respectfully further submit that the apartment is not fit for human rehabilitation as the construction work is already going on. It is also not safe in health point of view. Completing the entire project and making it fit for human rehabilitation will take considerable time and the complainants are having no hope to get their apartment with all facilities in near future.

10. The complainants submitted that the complainants have written various mails to the respondent requesting to provide detail of development but the respondent never gave satisfactory reply.

11. The complainants are senior citizens. The Complainant No.2 is 66 years old and complainant no.1 is 62 years old. At the time of booking of the apartment the complainants were desirous to settle in Gurgaon (Now Gurugram) but seeing inordinate



delay in construction of the project, the complainants have settled down in Bangalore. It is necessary to submit before this hon'ble authority that there are 38 months delay. The project is still not complete. The construction work in the project is not yet complete as work is going on in the tower itself apart from on the surrounding towers. The project is unhealthy and unsafe, especially for senior citizens like us. The amenities like club, green area etc. promised in the brochure are yet to be completed. In these circumstances specially seeing the delay in completion of project, lacks of amenities promised and unhealthy environment, the complainants are not willing to continue with the project and seeking refund of their entire deposited amount with interest.

12. The complainants submitted that the respondent has not completed the construction work at site and the apartment booked by the complainants are still not complete. seeing the development work in the project, the complainants have no hope that the respondent will able to handover possession of the booked apartment to the complainants in near future. There is already delay of more than 38 months in delivery of booked apartment. Under these circumstances the complainants are filing the present complaint before this



hon'ble authority seeking refund of entire deposited amount with interest @ 18% per annum as per provisions of RERA.

13. The complainants submitted that the complainants have not filed any other or similar complaint before any other court/forum/authority seeking identical relief(ves).
14. That the project is situated within territorial jurisdiction of this hon'ble authority hence this hon'ble authority is competent to try and adjudicate the present complaint.

#### **Issues to be determined**

- I. Whether the complainants are entitled for refund of their entire deposited amount of Rs.4,46,62,751/- as per provisions of section 18(i) of Real Estate (Regulation and Development) Act, 2016 ?
- II. Whether the complainants are entitled for interest @ 18% per annum on the deposited amount as per provisions of section 18 of Real Estate (Regulation and Development) Act, 2016?
- III. Whether the respondent is entitled for holding charges or any other charges on the face of fact that the entire project is not complete ?



### Reliefs sought

- I. Direct the respondent to refund the entire deposited amount of Rs.4,46,62,751/- to the complainants, in the interest of justice.
- II. Direct the respondent to pay interest to the complainants @ 18% per annum on the deposited amount from date of making payment till its realization on prorata basis, in the interest of justice.
- III. Direct the respondent to pay litigation cost to the complainants.
- IV. Restrain the respondent not to raise any kind of demand towards holding charges or any other charges till completion of entire project ?
- V. Pass such other or further order or orders as this hon'ble authority may deem fit and proper under the facts and in the circumstances of the present case.

### Respondent's reply

15. The present complaint is not maintainable and the provisions of RERA Act are not applicable to the project in question. The plea of compensation by the complainant are to be decided by the adjudicating officer under section 71 of the Act read with rule 29.





16. The application for issuance of OC in respect to the said unit was made on 04.04.2018 and the OC was issued on 23.07.2018. OC of tower A of Araya was received on 23.07.2018 vide memo no. ZP-338-C-VOL-I/SD(BS)/2018/21712. The project is registered under RERA Act and rules vide registration no. 101 of 2017 dated 24.08.2017.
17. The complainant booked apartment bearing no. A-1002 on 10<sup>th</sup> floor of tower-A in the project araya at Sector 62 having super area of 4279 sq. ft' along with 3 car parking spaces and buyer's agreement was executed on 25.05.2012.
18. The complainants were offered possession on 28.08.2018 and were called to remit the balance payment including delay payment charges and to complete necessary formalities for handing over of the said unit to the complainants. However, the complainants did not take necessary steps to complete the necessary formalities.
19. The complainants were irregular in making payments from the beginning and the allottees who complied with all the terms of buyer's agreement including timely payments are



entitled to receive compensation under the agreement. In spite of the same, in good faith, the respondent credited the account of the complainants to the tune of Rs. 13,01,938/- as per the penalty in clause 11.5 of the buyer's agreement i.e. Rs. 10/- per sq. ft' per month.

20. It is pertinent to note that an offer for possession marks termination of the period of delay, if any. The complainants are not entitled to contend that the period of delay continued even after receipt of offer for possession. The complainants have consciously refrained from obtaining possession of the unit in question. The complainants are therefore liable for holding charges as provided in buyer's agreement for not taking possession.

21. All the demands raised by the respondent are strictly in accordance with terms and conditions of the buyer's agreement between the parties. The complainants have assailed clauses of the buyer's agreement almost after 6 years and it is grossly barred by limitation. The Supreme Court in a ruling dated 08.05.2009 suspended all mining activities in the aravali range in Haryana which led to scarcity of sand and



other materials. The respondent was in acute shortage of labour, water and other raw materials, permits, licenses, sanctions by different departments and these reasons were beyond the control of respondent.

22. The application form contemplated a dispute resolution mechanism under clause 54 as per which any dispute inter-se the parties was to be referred to arbitration which shall be held in Gurugram. Further, as per clause 51 of the buyer's agreement, the settlement of disputes will be done by the way of arbitration only.

### Determination of Issues

23. With respect to the **first and second issue**, the authority came across clause 11.2 and 11.3 which are reproduced hereunder

*“clause 11.2 and 11.3 – developer shall apply for OC within 39 months from the date of excavation subject to government approvals and sanctions + 180 days grace period”*

Therefore, the due date of possession comes out to be 04.03.2016 and the possession has been offered by the respondent on 28.08.2018 so there has been a delay of 2 years 5 months 24 days in handing over of possession. The complainants cannot be entitled to refund as they have already



been offered possession and it will affect the interest of other allottees who wish to continue with the project. The complainants are however entitled to delay possession charges from the due date of possession till the offer of possession at the prescribed rate i.e. 10.75% p.a.

24. With respect to the **third issue**, the authority came across clause 11.4(ii) of the buyer's agreement which is reproduced hereunder:

*"if the allottee fails to take over the said apartment within the time limit prescribed by the developer in its notice, then the said apartment shall lie at the risk of cost of the intending allottee and the developer shall have no liability or concern thereof. Further, the developer shall have the option to cancel the allotment of the said apartment under this agreement and avail the remedies under clause 23 of this agreement and alternatively the developer may decide to condone the delay by the intending allottee on the condition that the allottee shall pay the developer compensation @Rs.10/- per sq. ft' of the super area of the said apartment per month for the entire period of such delay."*

As per this clause the respondent has the discretion to either cancel the allotment or condone the delay by levying a penalty upon the complainant. As the contract was signed before the coming of RERA, the Act shall apply retrospectively.



### Findings of the authority-

25. The authority has complete jurisdiction to decide the complaint in regard to non-compliance of obligations by the promoter as held in ***Simmi Sikka V/s M/s Emaar MGF Land Ltd.*** leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, 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.

26. The amendment of Section 8 of the Arbitration and conciliation act does not have the effect of nullifying the ratio of catena of judgments of the hon'ble Supreme Court, particularly in ***National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506***, 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.

27. Further, in ***Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015***, it was held that the arbitration clause in agreements between the complainants and builders could not circumscribe jurisdiction of a consumer.

**Decision and directions of the authority -**

28. After taking into consideration all the material facts produced by the parties, the authority exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issue the following directions:-

- (i) Counsel for the respondent has raised an issue that the respondent has offered possession letter dated 28.8.2018. Occupation certificate dated 23.7.2018 has been received by the respondent. A buyer's agreement dated 25.5.2012 was executed inter-se the parties. A flat unit A-1002, 10<sup>th</sup> floor, tower A had been booked by the complainant in ARAYA, in Sector 62, Golf Course Extension Road, Gurugram, the possession of which was to be handed over to the complainant within a period of 39 months + 6



months as grace period as per buyer's agreement executed inter-se the parties on 25.5.2012 or from the date of start of excavation work i.e. 04.06.2012 and the due date of possession comes out to be 04.03.2016. Project is registered with the authority vide no. 101/2017. The RERA registration is valid upto 31.12.2019. Since the possession has been offered on 28.08.2018 for which buyer is entitled for delayed possession charges.

(ii) However, counsel for respondent stated that as per clause 11.5(i) of buyer's agreement dated 25.05.2012, the delayed possession charges @ of Rs.10/- per square feet to the extent of Rs.13,01,938/- have already been given to the complainant as per terms and conditions of agreement. Since the inception of RERA Act, 2016 the provisions of delayed possession charges are admissible at the prescribed rate of 10.75% per annum w.e.f. 04.03.2016.

(iii) In view of all facts and circumstances of case, complainant is not entitled to refund in any manner. However, he is eligible for delayed possession charges at the rate of 10.75% per annum w.e.f



4.3.2016. Respondent is directed to refund the due amount accrued on account of grant of delayed possession charges after deducting the amount already adjusted/given to the complainant.

- (iv) Counsel for the respondent has raised a pertinent issue w.r.t. clause 51 of agreement, which is an arbitration clause. Section 8 (1) of the said Act was amended in the year 2015. However, since the HRERA authority is not discussing or deciding the matter with regard to arbitration, respondent is at liberty to challenge the matter before the appellate tribunal. Complainant is directed to take over possession within one month.

29. The order is pronounced.

30. Case file be consigned to the registry.

**(Samir Kumar)**

Member

**(Subhash Chander Kush)**

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 12.03.2019

Judgement uploaded on 12.04.2019

